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. III.

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MDCCLXVIII.

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 that of the Defendant.

A Table of the Names of the Caſes.

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ERRATA in the Body of the Work.

Page 783. laſt Line, inſtead of *Nelthorpe* read *Nelthorpe's.*
Page 784. Line 21. inſtead of *attained* read *now ſhe has attained.*

CASES

Argued and Determined in the TIME of

Lord Chancellor HARDWICKE.

Johnſon verſus *Brown*, *November* 7, 1743. Caſe 1.

A Bill was brought for an account by a creditor of a bankrupt againſt the aſſignees.

Where the defendants denied all the equity of a bill, and the plaintiff brings the cauſe to a hearing on bill and anſwer only, in order to get off with 40 *s.* coſts; the court on diſmiſſing the bill upon the merits, gave coſts to be taxed.

The aſſignees put in an anſwer denying all the equity of the bill, and the plaintiff brought the cauſe to a hearing, on bill and anſwer only.

Lord *Hardwicke* upon the merits diſmiſſed the bill with coſts to be taxed; for he ſaid the plaintiff in this caſe avoided replying, in hopes of ſaving coſts, and that he would not encourage a practice which was done merely to get off with forty ſhillings coſts; for if a motion had been made to diſmiſs the bill for want of proſecution, the plaintiff knew the defendant would have been entitled to full coſts.

Lacon verſus *Mertins*, *November* 9, 1743. Caſe 2.

JOHN *Hay* and *Elizabeth* his wife, the heir and deviſee of *Simon Degge* deceaſed, being ſeiſed in right of *Elizabeth* of divers lands in *Derbyſhire*, held by leaſe from the dean of *Lincoln* to the ſaid *Simon Degge* and his heirs for three lives, *viz.* the life of *Simon Degge*, *Elizabeth* his wife, and the ſaid *Elizabeth Hay*, and alſo ſeiſed of the inheritance in fee expectant on the death of Dame *Elizabeth Saunderſon*, grandmother to *Elizabeth Hay*, and of her mother, in the manor of *Boothby*, and divers lands in *Lincolnſhire*: they borrowed on the 10*th* of *July* 1735. 1000 *l.* of *Thomas Moſely*, and for ſecuring thereof by leaſe and releaſe and fine conveyed to *Moſely* and his heirs the ſaid manor and lands in *Derbyſhire*, and on

Lord *Hardwicke* on the circumſtances of this caſe decreed an agreement to be carried into execution in favour of the adminiſtrator of *H.* againſt the heir at law of *H.*

borrowing the further ſum of 800 *l.* they conveyed to *Moſely* the lands in *Lincolnſhire*, and on *Moſely*'s advancing 200 *l.* more, they ſubjected both eſtates with the payment of the ſeveral ſums of 1000 *l.* 800 *l.* and 200 *l.* but before any part of the principal and intereſt was paid *John Hay* died without iſſue, and his wife became ſolely ſeiſed, and in *November* 1737. borrowed of *Moſely* the further ſum of 240 *l.* 0*s.* 6*d.* which with 159 *l.* 19*s.* 6*d.* due for intereſt, made 2400 *l.* and by indorſement on the ſecond mortgage deed ſubjected both eſtates with payment of the 2400 *l.* and *Elizabeth* being deſirous of diſpoſing of her intereſt in the *Lincolnſhire* eſtate, and to add a third life to the leaſe of the *Derbyſhire* eſtate, in order to raiſe a fund for the payment of her debts, employed one *Forſter* to treat with *the defendant Mertins*, when after divers meetings *Forſter* on behalf and with the conſent of *Elizabeth Hay* came to the following parol agreement, that *Elizabeth* in conſideration of 2260 *l.* 10*s.* to be paid by *Mertins* ſhould convey the eſtate in *Lincolnſhire* to him and his heirs, ſubject to the eſtates for lives of Lady *Saunderſon* and *Elizabeth Degge*, and the purchaſe money to be applied towards the diſcharge of *Moſely*'s mortgage; and it was alſo agreed that the leaſe of the *Derbyſhire* eſtate ſhould be renewed and a third life added, *viz.* the ſon of the defendant *Mertins*, and that thereupon he ſhould lend to *Elizabeth* by way of mortgage and on the ſecurity of the *Derbyſhire* eſtate 1600 *l.* in order to raiſe a fund for payment of her debts and the reſt of *Moſely*'s mortgage, and alſo to enable her to pay 375 *l.* fine for the ſaid renewal, and *Mertins* in part of the agreement paid *Elizabeth* 100 *l.* for which he took her note, and on the death of Lady *Saunderſon*, he in conſideration thereof farther agreed to add 140 *l.* to the 2260 *l.* 10*s.* making together 2400 *l.* 10*s.* and in further execution of the agreement paid *Elizabeth* another 100 *l.* for which he took her note, and afterwards another 100 *l.* and alſo 400 *l.* to enable her to pay the fine to the dean of *Lincoln*, and to add a third life in the *Derbyſhire* eſtate, for which he took a bond till the agreement could be compleated, out of which ſum ſhe paid 375 *l.* and a new leaſe was taken of the *Derbyſhire* eſtate, wherein the life of *Mertins* the ſon was inſerted with the approbation of *Mertins* the father, according to the parol agreement: before the ſame was perfected *Elizabeth Hay* died inteſtate, leaving the defendant *Degge* her heir at law.

The plaintiff being a large creditor of *Elizabeth Hays*, by ſimple contract having procured letters of adminiſtration in truſt for himſelf and the reſt of the creditors, brings his bill praying an account of the inteſtate's real and perſonal aſſets and of her debts, and to receive a ſatisfaction out of the real for ſo much of the perſonal as had been exhauſted in diſcharge of the ſpecialty creditors, *and that the agreement entered into with the defendant Mertins may be ſpecifically carried into execution*, and that he may be compelled to take a conveyance of the *Lincolnſhire* eſtate, and advance the 1600 *l.* on the

Derbyſhire eſtate as a fund for the payment of the inteſtate's debts, and that *the defendant Degge, the heir at law*, might convey to *Mertins* as the court ſhall direct, or in caſe he does not, that *Mertins* may hold the eſtates to him and his heirs.

The defendant *John Mertins* by his anſwer admitted all the facts and circumſtances relating to the parol agreement, as charged by the bill, and offered to perform it, and compleat his purchaſe of the *Lincolnſhire* eſtate, and advance the 1600 *l.* on the ſecurity of the *Derbyſhire* eſtate, provided he be allowed the ſeveral ſums advanced on the foot of the agreement out of ſuch purchaſe and mortgage money, and be permitted to hold the eſtate in *Lincolnſhire* to him and his heirs, and ſo as the leaſe of the *Derbyſhire* eſtate be renewed, and the lives fallen therein ſince making the agreement be filled up.

The council for the defendant *Degge*, the heir at law, inſiſted he was an intire ſtranger to all the tranſactions between *Mertins* and *Elizabeth Hay*, but if any ſuch *parol agreement* was made, he was not, nor could be bound, or any ways affected thereby, in regard the ſame, or any part thereof, did not appear to have been reduced into writing, nor in any ſort performed by *Elizabeth Hay* in her life-time.

LORD CHANCELLOR.

The firſt queſtion is, whether the agreement inſiſted on by the bill, and admitted by the anſwer of the defendant *Mertins*, ought, upon theſe circumſtances, to be carried into execution; what makes this particular, is, if the bill had been brought by Mrs. *Hayes* in her life-time, and the defendant *Mertins* had admitted the agreement, though he had inſiſted on not performing it, the court would have decreed it; becauſe the admiſſion takes it out of the ſtatute of frauds and perjuries.

The ſecond queſtion is, whether as between the repreſentative of Mrs. *Hayes*'s perſonal eſtate, and the defendant *Mertins* and Mrs. *Hayes*'s heir at law, it ought to be performed?

It has been objected by the council for the heir at law, that the agreement is not in writing, nor concluded; and if it was reduced to a certainty, yet there has not been a ſufficient part performance.

Now it is clear to me that there was a certain agreement, with a variation afterwards from an accident, by which the eſtate became more valuable; for it does not appear that Mrs. *Hayes* had the leaſt intention of breaking off the agreement, but inſiſted only on an advanced price, as it was natural and reaſonable for her to do: And it is likewiſe in evidence, that the defendant *Mertins* agreed to give more, and that Mrs. *Hayes* deſired him to pay the third ſum.

There

There are ſeveral ways of part executing an agreement.

Delivery of poſſeſſion, or payment of money, is a part performance of an agreement not reduced into writing.

If poſſeſſion is delivered, that is a ſtrong evidence of the part-execution of an agreement.

The ſtatute of frauds and perjuries goes equally againſt making a mortgage of a real eſtate without being in writing, as againſt a purchaſe if not in writing, for as the laſt can be no lien, neither can the other be a ſecurity.

Paying of money has been always held in this court as a part performance.

It is ſworn poſitively in this caſe that the money was applied for, and paid abſolutely upon the foot of the agreement.

As to Mrs. *Hayes*'s taking notes of the defendant *Mertins* inſtead of the money, the evidence being, that they were given on account of the purchaſe money, will take off the force of the objection.

It is ſaid it muſt be ſuch an act done as appears to the court would not have been done, unleſs on account of the agreement; and to be ſure this is right.

But as to the other objection, that it much be certain at all events that the agreement ſhould be performed even independant of the title, whether it can be made out or not, is carrying it too far, and would hold equally had the agreement been in writing, for whatever the title may be, ſtill Mr. *Mertins* would have had a lien upon the eſtate by virtue of the agreement.

Where the mortgagor of a leaſehold eſtate has not covenanted, that he will procure the lives to be filled up, the mortgagee may do it, and on adding the expence of renewal to the principal of the mortage, it ſhall carry intereſt.

If there is a leaſehold eſtate that is mortgaged, and no covenant on the part of the mortgagor that he will procure the lives to be filled up, the mortgagee cannot compel him to do it, but muſt pay the expence of renewing, and then reimburſe himſelf by adding it to the principal of the mortgage, and it ſhall carry intereſt.

Upon the whole I am of opinion that, upon all the circumſtances appearing in this caſe, the agreement entred into between *Elizabeth Hay* in her life-time, and the defendant *Mertins* for the purchaſe of the reverſion of her eſtate in *Lincolnſhire*, for the ſum of 2400*l.* 10*s.* and for the mortgage of the leaſehold eſtate for lives in *Derbyſhire*, for the ſum of 1600*l.* ought to be performed, and carried into execution, and do order and decree the ſame accordingly; "and do "direct the Maſter to compute intereſt on the 700*l.* paid by *Mer-* "*tins* to *Elizabeth Hay* at different times, towards his purchaſe and "mortgage money, at the rate of 4*l. per cent. per ann.* from the "reſpective times of payment thereof, and the Maſter alſo to take

" an account of the principal and intereſt due to the defendant Mrs. " *Harris*, the executrix of Mrs. *Dormer*, the repreſentative of *Kirk* " the aſſignee of the mortgage to *Moſely*, and to tax her and Lady " *Biſhop*'s coſts, the heir at law of Mrs. *Dormer*, and decreed that " *Mertins* ſhall pay Mrs. *Harris* what ſhall be ſo found due for prin- " cipal, intereſt and coſts, and on ſuch payment, and to Lady *Bi-* " *ſhop* her coſts, do order Lady *Biſhop* to convey to *Mertins* the " eſtate in *Lincolnſhire*; and further order that the defendant *Mer-* " *tins* do pay to the plaintiff, the adminiſtrator of *Elizabeth Hay*, " the reſidue of the 1600 *l.* after deducting what ſhall be due to him " for the 700 *l.* and intereſt; and thereupon order Mrs. *Harris* to " convey to *Mertins* the leaſehold eſtate in *Derbyſhire* by way of " mortgage; for ſecuring the repayment of the ſum of 1600 *l.* with " intereſt at 4 *l. per cent.* ſubject to a redemption by *Degge*, the heir " at law of *Elizabeth Hay*, and after ſuch conveyance made of the " *Lincolnſhire* eſtate, do order the poſſeſſion thereof be delivered to " *Mertins*, and that he and his heirs do hold the ſame againſt *Degge* " and his heirs; and it being admitted that there are but two lives " now ſubſiſting on the leaſehold eſtate, I order that *Mertins* be at " liberty to renew the leaſe thereof by adding a new life, and that " what ſhall be paid by him for the fine and charges of ſuch re- " newal be added to the principal money advanced by him on the " ſecurity of the ſaid eſtate, and be included in his mortgage to car- " ry intereſt in the like manner.

Ex parte Roberts in November 1743. *amongſt the lunatic petitions.* Caſe 3.

LORD CHANCELLOR.

THIS is a complaint upon theſe grounds:

Firſt, Miſbehaviour of the commiſſioners.

Secondly, Miſbehaviour of the jury.

Thirdly, The finding of the verdict.

As to the firſt part of the complaint againſt the commiſſioners, it appears to be groundleſs and vexatious.

As to any miſbehaviour in the jury the evidence is very ſlight, and is entirely anſwered, for it appears that Mr. *Robert*'s council deſired he might dine again with them.

The other part of the petition deſerves more conſideration.

It is objected to as a verdict againſt evidence, but I think there is nothing ſatisfactory in the affidavits to induce me to be of that opinion.

If it is not againſt evidence, then the next queſtion is, in what method it muſt be gone into.

Where there is any miſbehaviour in the execution of an inquiſition of lunacy, the court upon examining into it may, if they ſee cauſe, quaſh it, and direct a new commiſſion.

There can be no *melius inquirendum*, for that is only grantable on the part of the crown; but where there is any miſbehaviour in the execution of an inquiſition, it muſt be examined into, and if the court ſee cauſe they may quaſh it, and direct a new commiſſion; but a *melius inquirendum* is for the crown, who cannot traverſe as the ſubject can.

But what ground is there for me to quaſh the preſent inquiſition? The commiſſion was very ſolemnly granted upon inſpection, and what would be the conſequence if I ſhould quaſh it? it is impoſſible to have an inquiſition more ſolemnly taken, and at laſt no body would be bound by it; this would be only putting the parties to an uſeleſs expence.

The queſtion therefore is, whether there is any ground to do any thing, and what?

As to the grounds, I do not ſee ſufficient from the affidavits, but from the ſecond inſpection I think there is; he has certainly appeared much better than he did at a former inſpection, and his appearance now does not prove him to be either a fool or madman, and it is not put upon his being an ideot.

Fitzherbert's Natura brevium proves, that it is a common method to inquire by inſpection after an inquiſition returned, and there have been many caſes of that ſort: but if upon inſpection the Chancellor is at all doubtful, there ought to be ſome better method of determining it; and the *St.* of 2 *Ed.* 6. *ch.* 8. *ſec.* 6. ſeems to be made for that purpoſe.

" If any perſon be or ſhall be untruly founden lunatick, *&c.* be it " enacted, that every perſon and perſons grieved or to be grieved by " any office or inquiſition ſhall and may have his or their traverſe to " the ſame immediately, or after, at his or their pleaſure, and pro- " ceed to trial therein, and have like remedy and advantage as in " other caſes of traverſe upon untrue inquiſitions or offices founden.

But it was objected, that if the party is by law intitled to a traverſe, he had no need to apply to this court; and that was my apprehenſion when firſt it was opened; but Sir *John Cutt*'s caſe in *Ley* 86. 87. makes it more doubtful, whether he has ſuch a right; however, without

ithout the leave of this court the cuſtody could not be ſuſpended; nd that ſeems to be the reaſon of the orders by Lord *King* in the caſe of Mrs. *Smithie*, upon the making of the ſecond of which ſhe appeared in court.

The queſtion therefore is, whether I ſhall grant leave for the lunatic to traverſe or not.

The perſon againſt whom the commiſſion of lunacy iſſued, on the different appearance he made upon a ſecond inſpection, was allowed to traverſe the inquiſition, and the grant of the cuſtody ſuſpended till further order.

Upon reaſonable terms I am willing to put it in ſome method of inquiry, and it will be for the advantage of all parties; for if I grant the cuſtody, the committees muſt bring a bill to ſet aſide the ſettlement which he has made of his eſtate; and Doctor *Finney* would have a right to inſiſt upon the validity of it, ſo that an iſſue muſt be directed to try it, and ſuch an iſſue would be a greater expence to the parties than a traverſe, and therefore I aſked whether Doctor *Finney* would ſubmit to be bound by the traverſe; for though it would be binding againſt Mr. *Roberts*, it would not be ſo againſt Doctor *Finney* as to the grant of the cuſtody of the land, who claims as a purchaſer.

It has been objected, that great miſchief would ariſe in caſe the grant of the cuſtody ſhould be ſuſpended, and it is ſaid that then there would be a traverſe taken in every caſe; and to be ſure great miſchief would ariſe if it ſhould be lightly come into by the court, yet there are many caſes where notwithſtanding the finding the court has ſuſpended the cuſtody; and there was a caſe before me lately of that ſort; and here can be no great inconvenience from ſuſpending it in the preſent caſe, for if any thing is done in regard to the eſtate, it will abide the event of the traverſe; however, leſt any ill uſe ſhould be made of it, I ſhall ſuſpend it only till further order.

Mr. Attorney General has cited Sir *John Napper*'s caſe, *Trin. term* 10 *Ann.* in which there was a traverſe, and *Smithie*'s caſe in 1728. which was a motion for leave to traverſe *by attorney*, which was oppoſed; but he ſaid it was there agreed that a traverſe was given by 2 *Ed.* 6. but that it muſt be *in propriâ perſonâ*; and Lord Chancellor ordered to be attended with precedents, which he ſaid was only to ſhew in what way the traverſe was to be; and afterwards many precedents were ſhewn, but there was no caſe where an ideot had traverſed by attorney, though many where a lunatic had: therefore Lord Chancellor in that caſe thought that it being the caſe of an ideot, ſhe muſt appear in perſon, which ſhe did accordingly, and leave was given her to traverſe. *Vide Stone*'s caſe in *Tremaine's Pleas of the Crown* 653. a precedent of a traverſe; and for the doctrine of traverſing an inquiſition, *vide* 4 *Co.* the caſe of *The Commonalty of the Sadlers*; and 8 *Co.* 168. *Paris Stoughter*'s caſe. Sir *T. Jones* 198. *Shower* 199. S. C. *Skinner* 45. S. C.

Vide

Vide 18 *H.* 6. by which there ought to be a month's time between the return of the inquiſition, and the grant of the cuſtody, and land, in order for the parties to come in and tender ſuch traverſe.

Caſe 4. *Tinney* verſus *Tinney*, *November* 15, 1743.

A huband in his life-time gave a bond in the penalty of 1000 *l.* in truſt to ſecure to his wife 500 *l.* in caſe ſhe ſurvived;

A Bill was brought for dower, the defendant the heir at law inſiſts that the huſband in his life-time gave a bond in the penalty of 1000 *l.* in truſt to ſecure to his wife 500 *l.* in caſe ſhe ſurvived, and that it was intended at the time in lieu of dower, and that ſhe acknowledged it to be ſo, and offered to read evidence of her acknowledgment.

parol evidence, to ſhew it was intended at the time in lieu of dower, and that the wife acknowledged it to be ſo cannot be allowed, being within the ſtatute of frauds and perjuries.

LORD CHANCELLOR.

A general proviſion for a wife, is not a bar of dower, unleſs expreſſed to be ſo; but the words in a bond to ſecure a ſum of money for her livelihood and maintenance have been determined to be a bar of dower.

I am of opinion that parol evidence cannot be allowed in this caſe, being within the ſtatute of frauds and perjuries, and that a general proviſion for a wife, was not a bar of dower, unleſs expreſſed to be ſo: In the caſe of *Lawrence* verſus *Lawrence*, Lord *Somers* held a deviſe of lands generally to the wife to be in bar of dower; it went up afterwards to the houſe of lords, and the decree was reverſed: In the caſe of *Vizard* verſus *Longdale*, 5 *Geo.* 1. Sir *Joſeph Jekyll* held the words in a bond to ſecure a ſum of money for her livelihood and maintenance was no bar of dower; Lord Chancellor *King* was of opinion that it was a bar of dower, and ſaid it was within the equity of the *St.* of *Hen.* 7. of jointures, and therefore reverſed Sir *Joſeph Jekyll*'s decree.

Caſe 5. *Gaſcoigne and others* verſus *Barker*, *December* 15, 1743. *on a Rehearing.*

An heir is not to be diſinherited unleſs by expreſs words, or a neceſſary implication; and the rule holds equally where he is an heir of *cuſtomary lands.*

A Queſtion was made in this cauſe on the will of *Scorey Barker*, which was as follows:

"I give to my ſon *Henry* all my lands, tenements and hereditaments, in poſſeſſion and reverſion, freehold and copyhold in the pariſh of *Chiſwicke*, or elſewhere in the county of *Middleſex*, (which copyhold lands I have ſurrendered to the uſe of my will) to him and his heirs.

A parentheſis is not to be rejected in legal caſes, though according to the rules of grammar a ſentence may be compleat without it.

Mr. Attorney General inſiſted, that *all the copyhold lands* paſſed, and that the words in the parentheſis are ſuperfluous, and that it is

an abſolute deviſe; and the ſubſequent words may be rejected, according to the maxim in law, *utile per inutile non vitiatur:* and in ſupport of this doctrine cited *Hob.* 171. *Marſh's Rep.* 31, 41. *Dyer* 376. or if the court ſhould be of opinion not to reject theſe words, then he inſiſts that they are large enough to extend to all the teſtator's copyhold lands, and ought not to be reſtrained to a part only.

LORD CHANCELLOR.

The firſt queſtion is, whether the words in the parentheſis, are to be taken as reſtrictive of the firſt words of the deviſe, and I can take them no otherwiſe.

This is the caſe of lands deviſed by general words: if inſtead of this the teſtator had ſaid, I give my meſſuages with the appurtenances called *the King of Bohemia's head*, that would have been a different caſe, and I ſhould have thought the ſubſequent words a miſtake only in the deſcription.

But when a man does not make a certain definitive deſcription, it is very difficult for courts of juſtice not to conſtrue the ſubſequent reſtrictive words, as explanatory of the former.

As to the caſe in *Marſh's Rep.* of tithes, it is not ſimilar to this, for if they had conſtrued it otherwiſe, the will muſt have been abſolutely void: ſo likewiſe in the caſe in *Dyer*, where a man deviſes his meſſuages, late *Richard Cotton's*, *&c.* if the court had ſuffered the miſtake to prevail, it would have made the deviſe void.

But here the conſtruction I make will have an affect as to part of the copyhold lands, which are actually ſurrendered, though not as to the whole.

The caſe in *Cro. Car. Chamberlaine* verſus *Turner* 129. does not come up to this: "I deviſe the houſe or tenement wherein *William* "*Nicholls* dwelleth, called the *White Swan* in *Old Street*, to *Henry* "*Gallant*, my daughter's ſon, for ever; and the queſtion was, "whether all the houſe paſſed or the entry, and thoſe three rooms "which were in *William Michell*'s poſſeſſion only; and three judges "were of opinion that the whole houſe paſſed.

I wonder how it held ſo much debate, for the previous part of the deſcription being true, it was of no conſequence if there were twenty other lodgers, as *William Nicholls* lodged there likewiſe.

An obſervation has been made on it's being in a parentheſis, that the ſentence for this reaſon is independent and compleat without it, and therefore this may be rejected as ſuperfluous.

It is true with regard to the niceties of grammar, the obſervation may be right in ſome inſtances.

But in legal caſes a parentheſis is not to be rejected: beſides, there are many inſtances in the common kind of writing where commas only are uſed inſtead of a parentheſis, therefore this may be laid out of the caſe.

But what makes it ſtill ſtronger, there is a plain reaſon here for a parentheſis.

Becauſe in the former part of the deviſe the teſtator had coupled the words copyhold and freehold together, and therefore he was under a neceſſity of throwing it into a parentheſis with the repetition of the word copyhold.

So that the authorities do not come up to the caſe made by Mr. *Henry Barker* the deviſee, for thoſe caſes are all in grants.

I have a doubt whether in the caſe of grants the conſtruction is more ſtrict than in wills, for if a man grants to another ſuch and ſuch houſes in the occupation of *A. B.* and *C.* and afterwards excepts the houſe in the occupation of *B.* the exception is void, becauſe they will rather reject the ſubſequent exception entirely, than the grant itſelf ſhould be void.

This is a queſtion between an heir and deviſee, and an heir is not to be diſinherited unleſs by expreſs words, or a neceſſary implication: And I know no diſtinction from this rule where the heir is, *an heir of cuſtomary lands*, any more than where he is of freehold.

The great objection, and which has ſome weight, is, that there is part of the ſame inn or houſe which has been ſurrendered: And if the teſtator had deſcribed it by name, I ſhould have been of opinion the whole would have paſſed though part only had been ſurrendered.

But it appears by the ſurrenders themſelves, which were at different times, that part of the inn was not bought till ſome time after the firſt ſurrender, and therefore this fact clears up and explains the intention of the teſtator.

So that the court muſt make ſo many ſtretches here, in order to diſinherit the cuſtomary heir, that it is much better to let the words have their plain and obvious meaning, though the defendants are younger children, and claim it as a proviſion.

The decree muſt be affirmed.

Lovell

Lovell verſus *Lovell*, *November* 23, 1743. Caſe 6.

JOHN Lovell ſurrendered to *William Lovell*, brother of *John Lovell*, the copyhold premiſſes in queſtion, until *Thomas Lovell*, ſon of *Ralph Lovell*, and brother alſo of *John Lovell*, ſhall attain twenty-one, and after ſuch age to the ſaid *Thomas Lovell*, his heirs and aſſigns for ever. Signed *John Lovell.*

The ſurrender of copyhold eſtates muſt have the ſame conſtruction with feoffments at law, and other conveyances, and not as a will; and if the limitations of a copyhold are ſo framed, as by the rules of law they are void, they muſt take their fate, and no intention can make them good.

Indorſed, by agreement between *John* and *William Lovell*, that the ſaid *William Lovell* is to receive the rents, *&c.* until *Thomas* attains twenty-one, and then to account to him for the ſame, but not before. *J. Lovell.* *Wm. Lovell.*

John died the 19*th of November* 1715. without iſſue, leaving *William* his eldeſt brother and heir, who enjoyed the ſaid premiſſes till the 16*th* of *January* 1734. when he died; *Thomas*, the ſon of *Ralph*, and brother of the plaintiff, died an infant the 12*th* of *March* 1715. without iſſue before the plaintiff was born, ſo that the ſaid *Thomas Lovell* deceaſed having no brother or ſiſter born at his death, and being then about nine months old, *William Lovell* deceaſed was his heir at law likewiſe.

Thomas Lovell the ſurrenderee dying before he attained twenty-one, the queſtion, is, whether the plaintiff as brother of *Thomas* is entitled under the ſurrender of *John Lovell* to an account of the rents, *&c.* ſuch contingency as in the ſurrender never happening; or whether the defendant *William Lovell* deceaſed, as heir to the ſurrenderor, is not entitled to both; or whether the eſtate is not liable to an account for the profits, and to whom.

Mr. Attorney General for the plaintiff cited *Boraſton*'s caſe, 3 *Co.* 20. and *Taylor* verſus *Biddall*, 2 *Mod.* 289.

Mr. *Brown* for the defendant cited 1 *Leon.* 101. and Mr. *Ford* of the ſame ſide cited *Idle* verſus *Coke*, *Salk.* 620. and *Cro. Jac.* 376.

LORD CHANCELLOR.

As this is the caſe of a copyhold, no other conſtruction can be made, but what ariſes on that kind of conveyance.

As to the real intention of the ſurrenderor, it is pretty difficult to maintain what the plaintiff's council contend for, that though *Thomas* the infant was but four months old, the ſurrenderor intended to deveſt himſelf of the whole eſtate, and give it in ſuch a manner,

that notwithſtanding the infant died the next day, it would go to his heir though ever ſo remotely related to the ſurrenderor.

The ſurrender was never perfected, for in one reſpect the bill is brought for that purpoſe, and upon the circumſtances of this caſe, there is no occaſion to make a ſtrain in favour of the plaintiff.

But be this as it will, the words as they now ſtand, and the legal effect of thoſe words, muſt have their avail.

I will take it firſt upon the words abſtracted from the memorandum.

It has been inſiſted on, that though *Thomas* the infant died at nine months old, yet the eſtate veſted in him, and that it was a diſpoſition of the inheritance to him immediately, and only a chattel intereſt in the uncle, till the infant might attain his age of twenty-one, though he died at nine months old.

As to the caſes cited, *Boraſton*'s, and *Taylor* verſus *Biddall*, they were both upon wills, in which there is great latitude of conſtruction, to comply with the intention of a teſtator; and in *Boraſton*'s the principal point (for it was not merely an auxiliary argument) was it's being a computation by the teſtator for payment of debts, and *Taylor* verſus *Biddall* is upon an executory deviſe; for I had a very particular reaſon to look into this caſe in *Stephens* verſus *Stephens*, and therefore ſent for the record out of the treaſury: Not truly ſtated in the report of the caſe, for the other point mentioned in the book could not ariſe, being determined merely upon an executory deviſe.

Surrenders of copyhold eſtates are to be conſtrued as deeds and conveyances at common law, and not as a will; and as Mr. *Ford* ſaid, *a ſpringing uſe* in a copyhold eſtate would be conſtrued as a ſpringing uſe in a freehold.

If this had been a limitation by deed of an eſtate at common law, as *Thomas* died before twenty-one, it cannot be ſupported, that the eſtate to *William* ſhould continue till *Thomas* might have attained his age of twenty-one.

If limitations are ſo framed, as by the rules of law they are void, they muſt take their fate, and no intention can make them good.

To ſupport a contingent remainder in a freehold, there muſt be a tenant of the freehold againſt whom a *præcipe* may be brought; otherwiſe as to a copyhold, for there no *præcipe* can be brought, being parcel of the manor only, and the freehold in the Lord.

To be ſure there is a difference between requiring an eſtate to ſupport a contingent remainder in a freehold, and a copyhold, be-

cauſe

cauſe in the former there muſt be a tenant of the freehold againſt whom a *præcipe* may be brought, but copyhold lands are not held of the manor, but are parcel of the manor, and the freehold is in the Lord, therefore no *præcipe* can be brought againſt the tenant of a copyhold.

But I know of no caſe, where there is a limitation of a copyhold in the manner it is here, that it has been conſtrued to be good.

As to the indorſement.

This is no more than the declaration of the truſt of the profits to *William* for *Thomas*, and not for payment of debts, or any other purpoſe.

I think this rather turns againſt the plaintiff, becauſe it takes it out of the reaſon of *Boraſton*'s caſe: For there the teſtator had made a computation that the profits would clear his debts by the time his ſon attained the age of twenty-one, and therefore notwithſtanding he died before twenty-one, the court was of opinion, it ought to continue till he might have attained his age of twenty-one.

But here *William Lovell* could not be accountable to any heir of *Thomas Lovell*, for *William* by the memorandum is expreſſly directed to be accountable to *Thomas* only.

Therefore, as this differs from *Boraſton*'s caſe, and as it is not upon the conſtruction of a will, and as the ſurrender of copyhold eſtates is to have the ſame conſtruction with feoffments at law, and other conveyances, therefore I muſt decree for the defendant, the heir at law of *William Lovell*, and diſmiſs the bill of the plaintiff, who is the brother and heir at law of *Thomas*, but without coſts.

Lawton verſus *Lawton*, *December* 14, 1743. Caſe 7.

THE material queſtion in the cauſe was, whether a fire engine ſet up for the benefit of a *colliery* by a tenant for life, ſhall be conſidered as perſonal eſtate, and go to his executor, or fixed to the freehold, and go to a remainder man.

A fire engine ſet up for the benefit of a colliery by a tenant for life, ſhall be conſidered as part of his perſonal eſtate, and go to the executor, for the increaſe of aſſets in favour of creditors.

There was evidence read for the plaintiff, a creditor of the tenant for life, to prove that the fire engine was worth, to be ſold, three hundred and fifty pounds; and that it is cuſtomary to remove them; and that in building of ſheds for ſecuring the engine, they leave holes for the ends of timber, to make it more commodious for removal, and that they are very capable of being carried from one place to another.

That the teſtator, the council for the plaintiff ſaid, was dead, greatly indebted, and it would be hard, when he has been laying out his creditors money in erecting this engine, that they ſhould not have the benefit of it, but that the ſtrict rule of law ſhould take place.

Mr. *Wilbraham* compared it to the caſe of a cyder mill which is let in very deep into the ground, and is certainly fixed to the freehold; and yet Lord Chief Baron *Comyns*, at the aſſizes at *Worceſter*, upon an action of trover brought by the executor againſt the heir, was of opinion that it was perſonal eſtate, and directed the jury to find for the executor.

Evidence was produced on the part of the defendant, to ſhew that the engine cannot be removed without tearing up the ſoil, and deſtroying the brick work.

Mr. *Clark* of council for the defendant cited *Finch, fol.* 135. under the head of *diſtreſs:* and the caſe of *Wortley Mountague* verſ. *Sir James Clavering*, about two years ago before Lord *Hardwicke*.

LORD CHANCELLOR.

This is a demand by a creditor of Mr. *Lawton*, who ſet up the fire engine, to have the fund for payment of debts extended as much as poſſible.

It is true the court cannot conſtrue the fund for aſſets, further than the law allows, but they will do it to the utmoſt they can in favour of creditors.

This brings on the queſtion of the fire engine, whether it ſhall be conſidered as perſonal eſtate, and conſequently applied to the increaſe of aſſets for payment of debts.

Now it does appear in evidence, that in its own nature it is a perſonal moveable chattle, taken either in part, or in groſs, before it is put up.

But then it has been inſiſted, that fixing it in order to make it work, is properly *an annexation* to the freehold.

The old caſes go a great way upon the *annexation* to the freehold; but courts of late have relaxed this ſtrict conſtruction of law, to encourage tenants for life to do what is advantageous to the eſtate during their term.

To be ſure, in the old caſes, they go a great way upon *the annexation* to the freehold, and ſo long ago as *Henry* the Seventh's time, the courts of law conſtrued even a copper and furnaces to be part of the freehold.

Since

Since that time, the general ground the courts have gone upon of relaxing this ſtrict conſtruction of law is, that it is for the benefit of the publick to encourage tenants for life, to do what is advantageous to the eſtate during their term.

What would have been held to be waſte in *Henry* the Seventh's time, as removing wainſcoat fixed only by ſcrues, and marble chimney pieces, is now allowed to be done.

To remove wainſcoat fixed only by ſcrews, and marble chimney pieces is not waſte.

Coppers, and all ſorts of brewing veſſels, cannot poſſibly be uſed without being as much fixed as *fire engines*, and in brewhouſes eſpecially, pipes muſt be laid through the walls, and ſupported by walls; and yet, notwithſtanding this, as they are laid for the convenience of trade, landlords will not be allowed to retain them.

Landlords have no right to retain coppers and brewing veſſels againſt a tenant, as they were laid for the convenience of trade.

This being the general rule, conſider how the caſe ſtands as to the engine, which is now in queſtion.

It is ſaid, there are two maxims which are ſtrong for the remainder-man: *Firſt*, That you ſhall not deſtroy the principal thing, by taking away the acceſſory to it.

This is very true in general, but does not hold in the preſent caſe, for the walls are not the principal thing, as they are only ſheds to prevent any injury that might otherwiſe happen to it.

Secondly, It has been ſaid, that it muſt be deemed part of the eſtate, becauſe it cannot ſubſiſt without it.

Now *collieries* formerly might be enjoyed before the invention of engines, and therefore this is only a queſtion of *majus* and *minus*, whether it is more or leſs convenient for the colliery.

There is no doubt but the caſe would be very clear as between landlord and tenant.

It is true, the old rules of law have indeed been relaxed chiefly between landlord and tenant, and not ſo frequently between an anceſtor and heir at law, or tenant for life and remainder-man.

But even in theſe caſes, it does admit the conſideration of publick conveniency for determining the queſtion.

I think, even between anceſtor and heir, it would be very hard that ſuch things ſhould go in every inſtance to the heir.

One

One reaſon that weighs with me is, its being a mixed caſe between enjoying the profits of the land, and carrying on a ſpecies of trade; and, conſidering it in this light, it comes very near the inſtances in brewhouſes, &c. of furnaces and coppers.

Though cyder is part of the profits of the real eſtate, it has been held that a cyder mill is perſonal notwithſtanding, and ſhall go to the executor, and not the heir.

The caſe too of a cyder mill, between the executor and the heir, mentioned by Mr. *Wilbraham*, is extremely ſtrong; for though cyder is part of the profits of the real eſtate, yet it was held by Lord Chief Baron *Comyns*, a very able common lawyer, that the cyder mill was perſonal eſtate notwithſtanding, and that it ſhould go to the executor.

It does not differ it in my opinion, whether a ſhed over ſuch an engine be made of brick or wood, for it is only intended to cover it from the weather and other inconveniences.

This is not the caſe between an anceſtor and an heir, but an *intermediate* caſe, as Lord *Hobart* calls it, between a tenant for life and remainder-man.

Emblements ſhall go to the executor, and not the remainder-man, the publick being intereſted in the produce of corn and other grain.

Which way does the reaſon of the thing weigh moſt, between a tenant for life and a remainder-man, and the perſonal repreſentative of tenant for life, or between an anceſtor and his heir, and the perſonal repreſentative of the anceſtor? Why, no doubt, in favour of the former, and comes near the caſe of a common tenant, where the good of the publick is the material conſideration, which determines the court to conſtrue theſe things perſonal eſtate; and is like the caſe of *emblements*, which ſhall go to the executor, and not to the heir or remainder-man, it being for the benefit of the kingdom, which is intereſted in the produce of corn, and other grain, and will not ſuffer them to go to the heir.

It is very well known, that little profit can be made of coal-mines without this engine; and tenants for lives would be diſcouraged in erecting them, if they muſt go from their repreſentatives to a remote remainder-man, when the tenant for life might poſſibly die the next day after the engine is ſet up.

Reaſons of publick benefit and convenience have great weight.

Theſe reaſons of publick benefit and convenience weigh greatly with me, and are a principal ingredient in my preſent opinion.

Upon the whole, I think this fire engine ought to be conſidered as part of the perſonal eſtate of Mr. *Lawton*, and go to the executor for the increaſe of aſſets; and decreed accordingly.

December 17, 1743. *Pleas and Demurrers.* Caſe 8.

A Bill was brought to ſet aſide a will for fraud, on ſuggeſtion the teſtator was incapable of making it, by being perpetually in liquor, and particularly when he executed the will, and likewiſe for a receiver to be appointed.

A plea to a bill brought to ſet aſide a will for fraud, and for appointing a receiver, allowed as to the firſt part, and diſallowed as to the latter.

The defendant pleads the will was duly executed, and that it ought to prevail, till upon an iſſue at law it ſhould be found to be otherwiſe, and that, as he was in poſſeſſion under the will, a receiver ought not to be appointed till the validity of the will was determined.

LORD CHANCELLOR.

The plea muſt be allowed, for you cannot in this court ſet aſide a will for fraud; but as to a receiver, I muſt diſallow it, for I will not tie up the hands of the court, if in the progreſs of the cauſe it ſhould be neceſſary to appoint a receiver.

This court cannot ſet aſide a will for fraud, for the due execution of it is triable at law only.

December 17, 1743. *Anonymous.* Caſe 9.

A Bill was brought for diſcovery of title deeds, and relief prayed likewiſe.

Where a bill prays relief as well as diſcovery, an affidavit muſt be annexed that the plaintiff has not the deeds in his cuſtody.

The defendant demurred that upon the plaintiff's own ſhewing none of his anceſtors have been in poſſeſſion for the laſt 40 years, that it was a matter triable at law, and that there was no affidavit annexed, that the plaintiff had not the deeds in his cuſtody.

The Chancellor allowed it on the laſt cauſe upon the common courſe of the court, that where a bill prays relief, as well as diſcovery, an affidavit muſt be annexed that the plaintiff has not the deeds in his cuſtody.

Talbot verſus *May*, *December* 17, 1743. Caſe 10.

THE bill was brought for tithes of a mill, and a plea of a *modus* of 6 *s.* 8 *d.* for the mill, when it was part a corn-mill, and part a fulling-mill.

Where the owner of an ancient mill under the ſame roof

thinks proper to erect two new wheels, they are to be conſidered as two mills, and to a bill brought for the tithe, he cannot cover them with the ſame *modus*.

In 1719. the fulling wheels were taken away, and a pair of mill ſtones put in the room, and has been ever ſince a corn-mill.

Mr. Attorney General for the plaintiff.

It was anciently a fulling-mill, and the corn-mill and the fulling-mill is now under the ſame roof, and the *modus* cannot extend to cover a new erected mill, for as it is altered to a corn-mill it muſt pay tithe in kind.

Mr. *Hamet* of the ſame ſide cited 1 *Rolls Abr.* 662. 3 *Bulſtr.* 312. 1 *Brownl.* 32. *Cro. Jac.* 523. and the caſe of *Nut* verſus *Chamberlain*, heard firſt in the Exchequer, and afterwards in the houſe of Lords, where it was determined that every water-corn-mill, muſt pay corn as a perſonal tithe.

Mr. *Talbot* of the ſame ſide cited 1 *Rolls Abr.* 656.

The council for the defendant inſiſted that the *modus* covers the mill, let the engine of the inſide conſiſt of wheels or of ſtones, and therefore changing the working part makes no variation, but the *modus* will ſtill cover it as it is a mill, though of a different kind.

They cited 1 *Rolls Abr.* 641. and 2 *Inſt.* 490. That adding new ſtones to ancient mills will not alter the *modus*, nor deſtroy it, where the ſtones are under the ſame roof: they cited *Carth.* 215.

LORD CHANCELLOR.

The plea in this caſe muſt be conſidered both in reſpect to the form and ſubſtance, and upon either it cannot ſtand, for as it is not *ad idem*, it is impoſſible to know to what it is applicable.

Here are three mills charged by the bill to be working mills: The defendant pleads a *modus* to one only called *Birdlep* mill.

All of them at preſent are uſed as corn-mills, and therefore the plea is quite uncertain, if this point could be laid aſide, which I cannot do, conſider it next upon the ſubſtance.

I will conſider them as two new corn-mills, but under the ſame roof.

Suppoſe firſt an ancient mill under a building worked with one wheel, and the owner under the ſame roof thinks proper to erect two new wheels, and two new ſtones, I am of opinion this is to all intents and purpoſes two mills, and he cannot cover them with the ſame *modus*; you might as well ſay he might erect another mill upon the ſame ſtream, and call it one mill.

Suppoſe two ancient mills in the ſame pariſh which paid tithes in kind, and another miller who had a fulling-mill covered with a *modus* ſhould turn it into a corn-mill, it would prejudice the parſon in the other mills, as the new erected one would diminiſh the trade of thoſe mills, and the parſon ſuffering by thoſe means ought to be recompenſed by the payment of tithe for the mill ſo converted.

Where there are two ancient corn-mills in the ſame pariſh which paid tithes, and another miller who had a fulling mill covered with a *modus*, turned it into a corn-mill, the mill ſo converted ſhall pay tithe.

The reaſon the caſes go upon, why a *modus* is deſtroyed where two ſtones are erected inſtead of one, is, becauſe the miller can grind a double quantity.

Conſider it in another light, formerly there were two fulling-mills, and a corn-mill under the ſame roof, and the fulling mills now turned into two new corn-mills, this is juſt the ſame thing as if he had erected two new mills.

Where two fulling mills and a corn-mill were under the ſame roof, and the fulling-mills are turned into two new corn-mills, they are become two new mills.

The fulling-mills can only pay a perſonal tithe, becauſe it is only in the nature of a trade, but where there are corn-mills, each is to pay a tenth diſh.

A fulling mill being in the nature of a trade, pays only a perſonal tithe.

In this caſe, thus much muſt be ſhewn, that there was a cuſtom in this pariſh for fulling-mills to pay tithes, or otherwiſe they do not properly pay them.

The only colourable thing is, it was an ancient *modus* for the land, and that the mill is but an accidental quality.

But it is not pleaded for the land only, but as a conjunct *modus* both for land and mill too, and therefore let the plea be over-ruled.

The laſt Seal before Chriſtmas 1743. Caſe 11.

WITH regard to taking exceptions to anſwers, I have laid down this rule to myſelf, that if an anſwer comes in, in *Michaelmas* term, and the plaintiff does not take exceptions within eight days of *Hillary* term, upon applying to the court, he is of courſe entitled to take exceptions, provided he does it within two terms, the term in which he moves it incluſive; and if he neglects to do it then, the court will not give leave but upon particular circumſtances.

If in *Michaelmas* term an anſwer comes in, and the plaintiff does not take exceptions within eight days of *Hillary* term after, yet on applying to the court, he is entitled to take exceptions, provided he does it within two terms, the term in which he moves incluſive.

Bond

Caſe 12. *Bond* verſus *Simmons*, *January* 21, 1743. *among the petitions in cauſes.*

So much of a former order as directed the payment of the ſum of 122*l.* 15*s.* 7*d.* to the executor of the huſband muſt be diſcharged, and the ſame ought to be paid to the petitioner.

THE defendant was executor under the will of a perſon, who had left a legacy of five hundred pounds to Mrs. *Bond* before her marriage with the plaintiff, the huſband notwithſtanding he had received at different times at leaſt two thouſand pounds from other parts of his wife's fortune, never could be prevailed upon to make any ſettlement or proviſion for the wife; upon which the defendant, the uncle of Mrs. *Bond*, refuſed to pay the legacy into his hands, and the huſband about the year 1734. brought a bill for the legacy: The court referred it to a Maſter to receive propoſals from the huſband for a proviſion for the wife; the Maſter certified the huſband had never laid any propoſals before him; upon which on the petition of the defendant to be eaſed of the burden of this demand, the court on his offering to pay in the money, directed the Accountant General to lay it out in *South-ſea* annuities for the benefit of the huſband and wife, ſubject to the further directions of the court.

The dividends and produce of the annuities amounting now to 122*l.* 15*s.* 7*d.* the huſband being dead, his executor inſiſted, that though it was a *choſe in action* of the wife's, yet by the decree, and the order on the Accountant General to lay it out as aforeſaid, the property veſted in the huſband, and he was entitled to the principal, and likewiſe to the intereſt made of the annuities, in conſideration of his maintaining his wife in the mean time.

Upon a petition to the *Maſter of the Rolls*, he was of opinion for the wife as to the principal, but thought the repreſentative of the huſband intitled to the dividends, and ordered it accordingly.

It came on now before the Chancellor in nature of an appeal from the order of the *Maſter of the Rolls*, in which the plaintiff *Margaret Bond* preferred her petition to the Lord Chancellor, praying that ſo much of the order of the 29*th* of *November* 1743. as directs the payment of the ſum of 122*l.* 15*s.* 7*d.* to *John Bond* may be diſcharged, and that the ſame may be paid to the petitioner.

LORD CHANCELLOR.

Had the legacy been the only portion of the wife, the huſband would have been entitled to the intereſt for the maintenance.

If this five hundred pounds had been the only portion of the wife, I ſhould have been of opinion the huſband in his life-time would have been intitled to the intereſt for her maintenance, but the wife has brought him a conſiderable portion beſides, no leſs than two thouſand pounds, as appears by affidavits.

The

The huſband has uſed her ſo hardly, that he has left her nothing but only her own freehold eſtate, which he could not debar her of.

Where a huſband recovers a judgment for the wife's debt, and dies before execution, ſhe is entitled, and not his executor.

Suppoſe at law a huſband had recovered a judgment for a debt of the wife, and had died before execution, the wife would have been entitled, and not the huſband's executor.

Here the huſband was ſo obſtinate he would not perform the terms of the decree by making a ſettlement, ſo that upon application to the court they ordered the money to be put out by the truſtees for the benefit of the huſband and wife, ſubject to the further order of the court, without ſaying any thing of the application of this money.

Where a huſband has received a great part of a wife's portion, and refuſes to make a ſettlement, the court will not only ſtop the payment of the reſidue of her fortune to him, but will prevent his receiving the intereſt of that reſidue, that it may accumulate for her benefit.

Suppoſe where a huſband has received a great part of a wife's portion, and only a ſmall part remains, and the huſband is ſo perverſe he will not make a competent ſettlement on the wife, the court will not only ſtop the payment of the reſidue of her fortune to the huſband, but will even prevent his receiving the intereſt of that reſidue, that it may accumulate for the benefit of the wife, unleſs he is ſtarving for want of maintenance.

The direction here was not for the benefit of the huſband, or to alter the right and property of the parties, but only to eaſe the executor of the burden, and ordering the Accountant General to lay it out in this manner was to ſecure it againſt the huſband, ſubject to the further order of the court.

Lord *Chancellor* directed that ſo much of the order of the 29*th* of *November*, as directs the payment of the ſum of 122 *l.* 15 *s.* 7 *d.* to *John Bond*, may be diſcharged, and the ſame be paid to the petitioner.

Coulſon verſus *White*, *January* 26, 1743. Caſe 13.

LORD CHANCELLOR.

This court will not grant an injunction to reſtrain a perſon from committing a treſpaſs, where it is temporary only; otherwiſe, where it has continued ſo long as to become a nuſance.

EVERY common treſpaſs is not a foundation for an injunction in this court, where it is only contingent, and temporary; but if it continues ſo long as to become a nuſance, in ſuch a caſe the court will interfere and grant an injunction to reſtrain the perſon from committing it.

Caſe 14. *Woodhouſe* verſus *Hoſkins*, *January* 31, 1743.

Lord *Hardwicke* of opinion this was not ſuch a caſe as would induce the court to decree a truſtee to join in a recovery, and diſmiſſed the bill brought by the creditors againſt the heir at law of the ſurviving truſtee to compel her to join.

SIR *John Hoſkins* by will dated the 3d of *September* 1697. deviſed his lands after the death of his wife, and a truſt-term of 1000 years, to his ſon *Bennet Hoſkins* for 99 years, if he ſhould ſo long live, without impeachment of waſte, remainder to two truſtees and their heirs during the life of his ſon *Bennet*, to preſerve contingent remainders, remainder to the firſt and other ſons of *Bennet* in tail-male, remainder to *Hungerford Hoſkins* his ſecond ſon for 99 years, if he ſhould ſo long live, remainder to the ſame truſtees and their heirs during the life of *Hungerford Hoſkins* to preſerve the contingent remainders, remainder to his firſt and every other ſons, remainder to his other ſons in like manner, remainder to Sir *John Hoſkins*'s daughters, remainder to the teſtator's heirs.

There was a power for the ſons, when in poſſeſſion, to make jointures and leaſes, except as to particular lands, and another power for *Bennet* and the other ſons within two years after being in poſſeſſion, and having a ſon of the age of eighteen, to revoke all and every the former uſes, and to limit new uſes, ſo that the premiſſes be limited to the heirs male of the ſons in the ſame manner as theſe limitations, and to ſettle ſuch like power of revocation.

Sir John Hoſkins died.

Bennet Hoſkins his eldeſt ſon died without iſſue.

Hungerford Hoſkins the ſecond ſon, now Sir *Hungerford Hoſkins*, married, and has a ſon *Chandos Hoſkins*, now above twenty-one.

Sir *Hungerford* and his ſon became indebted by bonds to creditors, and made aſſignments of the ſettled eſtate in truſt for creditors, and agreed to ſuffer a common recovery to make the aſſignment and proviſion for the creditors effectual.

The bill is brought by the creditors againſt Sir *Hungerford Hoſkins* and his ſon *Chandos*, and againſt *Thomas Hoſkins* (the 5th ſon of Sir *John Hoſkins*) all the other ſons, who had intermediate remainders as before, being dead without iſſue, and againſt the defendant Mrs. *Ann Berrington* the heir of the ſurviving truſtee, to preſerve contingent remainders, in order to compel her to join in a common recovery, and that the plaintiffs might have an effectual ſecurity, and ſatisfaction for their debts.

Mr.

Mr. Attorney General for the plaintiffs.

There are two general queſtions; The firſt as to the compelling the defendant Mrs. *Berrington* the truſtee, to join in a conveyance to make a tenant to the *præcipe*, in order to ſuffer a recovery.

Secondly, as to the power of revocation, whether that be not a perpetuity, and void?

Mrs. *Berrington* is a truſtee for the ſon of Sir *Hungerford Hoſkins*, who is tenant in tail veſted, and if ſhe had joined voluntarily it would not have been a breach of truſt; and for this purpoſe cited 2 *Vern.* 754.

Mr. *Wilbraham* of the ſame ſide cited 1 *Wms.* 358. *Eq. Caſ. Abr.* 386. *Foley* verſus *Winnington*, decreed by Lord *Macclesfield*, that the truſtees to preſerve contingent remainders ſhould join.

Lord *Chancellor* ſaid he was of council in the caſe, and it was to make a marriage ſettlement, and ſo to continue the uſes in effect of the old ſettlement, and after the uſes of the new married ſettlement were ſerved, it went to the old uſes.

Mr. *Biddulph* for Mr. *Thomas Hoſkins* the remainder-man, ſaid, there was no precedent where a court of equity have decreed *the truſtees to preſerve contingent remainders* to join in deſtroying remainders, unleſs to make a new ſettlement, as in *Winnington*'s caſe, but here the prayer is to ſell and alienate the eſtate, and the debts are recited in the articles to be the debts of the father, and for which the ſon is only ſecurity.

Mr. Attorney General in reply ſaid, the ſon is ſo far owner of the eſtate as that he may levy a fine, which will create a baſe fee, and bind ſo long as iſſue of him ſhall exiſt, and may raiſe money though not ſo conveniently, and upon ſuch eaſy terms, as if the whole were in his power.

As to the debts being the father's, the ſon is equally bound, and in reſpect to the obligee he is as much a debtor as the father, and cited 1 *P. Wms.* 536.

LORD CHANCELLOR.

Where the intent of the owner of an eſtate appears to preſerve the limitations he has made of it as far as poſſible, the court will effectuate this intent, where the uſes are executory.

If this had turned upon the power, I ſhould not have determined it now, but in a more ſolemn manner; but as there is a previous queſtion as to compelling the truſtees to join in a common recovery, the other point is not now neceſſary to determine, yet ſo much may be drawn from the power, as may ſhew the intent of Sir *John Hoſkins* to preſerve the limitation he had made as far as poſſible, and this intent the court effectuates where the uſes are executory, as where Lord *Cowper* directed truſtees to preſerve contingent remainders to be inſerted in the caſe of Sir *John Maynard*'s will.

It is agreed there is no precedent where the court have decreed in ſuch caſes the truſtees to join; and I am of opinion, this is not ſuch a caſe, where the court ought to decree it.

The court would not declare, whether the truſtees joining would have been liable to make ſatisfaction for ſuch a breach of truſt.

Truſtees of this kind are called Honorary Truſtees, and intruſted by parties to preſerve the contingent remainders; but I will not ſay, if the truſtee who is appointed ſhould join, it would be ſuch a breach of truſt, as this court would decree a ſatisfaction.

Making the father tenant for 99 years, inſtead of giving him the freehold, is to prevent his having ſuch an influence over the ſon when of age, as to draw him in to deſtroy the ſettlement.

The reaſon of making the father a tenant for 99 years, is, in order to preſerve the eſtate; it may likewiſe be the deſign of ſuch ſettlements to prevent the father's influence over the ſon when of age, if the father was ſeiſed of the freehold, to get the ſon to deſtroy the ſettlement.

Here the intention is to pay the debts of the father.

The objection is, the truſtee is truſtee for the firſt tenant in tail, and that when the tenant in tail is ſeiſed of the freehold, then he has a power to bar, and not before.

As to the caſes, there are but few; Mr. *Winnington*'s went upon the reaſons before mentioned, for the letting in the jointure, and a proviſion for younger children, which was ſtill carrying it on in the family

The argument made uſe of by the plaintiff's council was, that here it is prayed to execute the truſt of articles, and to be ſure, it is true, but this court is not to decree every truſt created by the parties; and though, as has been ſaid before, the court might not condemn the truſtee if he conſented; yet it does not follow that the court will compel the truſtee, and I think *this* the very caſe which was intended to be prevented by the truſt, wherefore the bill

muſt be diſmiſſed. *Townſhend* verſus *Lawton*, 2 *P. Wms.* 379. mentioned by Lord *Hardwicke* in ſupport of his opinion.*

Webb verſus *Litcot*, *February* 7, 1743. Caſe 15.

A Bill was brought againſt ſeveral perſons, and the heir at law, to eſtabliſh a will; the heir at law makes a default.

On a bill brought to eſtabliſh a will againſt an heir at law, the court, notwithſtanding he made default, ordered the proofs of it to be read, and ſaid the will could not be otherwiſe well proved.

LORD CHANCELLOR.

I have ſome doubt, whether I ought not to hear proofs of the will's being duly proved, before I can declare it well proved, notwithſtanding the defendant, *the heir*, has made default; though in common caſes the plaintiffs are intitled to a decree according to the prayer of their bill, without reading any evidence, yet he thought he could not regularly declare the will well proved, unleſs he read to the proof of it.

The regiſter could not recollect any caſe where this was the practice of the court, but Lord Chancellor thinking it neceſſary, ordered the proofs of the will to be read.

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* On marriage, lands are ſettled to *A.* for 99 years, if he ſo long live, remainder to *B.* and his heirs during the life of *A.* to ſupport contingent remainders, remainder to the firſt and every other ſon of *A.* *A.* has two ſons, *C.* and *D.* *A.* the father having mortgaged the premiſſes, he and his ſon covenant to ſuffer a recovery, and to procure *B.* the truſtee to join: *B.* the truſtee by anſwer, ſubmits to the court: The court will not compel the truſtee to join, unleſs *D.* the ſecond ſon of the marriage will conſent. *Townſhend* verſus *Lawton*, 2 *P. Wms.* 379.

Caſe 16. *February* 8, 1743, *John Norris an infant, Ann Norris, John Monk, Elizabeth Le Neve, and others,* — } Plaintiffs.

Iſabella Le Neve, Spinſter, Edward Le Neve, Eſq; Peter Le Neve, Gent. ſon and heir of Henrietta Le Neve, deceaſed, Edward Matthew Grave, Gent. and Ann his wife, the daughter and heir of Ann Rogers deceaſed, formerly Ann Le Neve, which ſaid Iſabella, Henrietta, and Ann Rogers, were the daughters and co-heirs of Oliver Neve, otherwiſe Le Neve, Eſq; deceaſed, —— } Defendants.

Lord *Bacon*'s rules in reſpect to bills of review, having never been departed from ſince the making of them, the court was of opinion that the parties who now applied for leave to bring ſuch a bill, had not brought themſelves within thoſe rules, and diſmiſſed the petition.

OLIVER *Le Neve*, of *Great Witchingham*, in the county of *Norfolk*, Eſq; being ſeiſed in fee of divers manors, lands, *&c.* in *Norfolk*, *Surry*, *Middleſex*, and *London*, of the yearly value of 1500*l.* and having no child, and a great deſire to continue his eſtate in his name and blood, did propoſe to ſettle the ſame upon *Oliver Le Neve*, then an infant of ten years of age (father of the defendant *Iſabella*, and grandfather of the defendant *Peter Le Neve*, and *Ann Grave*) and upon *Peter Le Neve* his brother, alſo an infant of twelve years of age, and *Francis Le Neve*, and their iſſue.

Old *Oliver Le Neve* had been long acquainted with one *John Norris* a bariſter at law, reſiding in the county of *Norfolk*, (great grandfather of the plaintiff *John Norris*) who had been his ſtanding council for many years, and had the ſole direction of his affairs, and *Oliver* intirely relied on his ſkill and integrity in preparing ſuch ſettlement.

On the 7th and 8th of *February* 1674, old *Oliver Le Neve* did by leaſe and releaſe (in conſideration of the natural love and affection he bore to *Oliver Neve*, *Peter Neve*, and *Francis Neve*, being his couſins and of his name and blood, and for making proviſion for payment of his debts and legacies, as he ſhould by his laſt will appoint) convey and limit the ſaid manors, lands, *&c.*

To the uſe of himſelf for life, without impeachment of waſte.

To the uſe of *Elizabeth* his wife for life, as to part.

Remainder

Remainder, as to the whole, to his couſin *Oliver Neve* for 99 years, if he ſo long live.

Remainder to truſtees to preſerve contingent remainders, remainder to his firſt and other ſons in tail male, remainder in like manner to *Peter Neve*, and *Francis Neve*, and to their firſt and other ſons in tail male.

Remainder *to the right heirs of the ſaid Oliver the grantor.*

In the indenture was a proviſo that it ſhould be lawful for *old Oliver* by his will, to limit all the ſaid eſtates, after his own death, to any perſon for any term of years, in order to raiſe money for the payment of his debts and legacies.

And on the 9th of *February* 1674. he made his will, and thereby in purſuance of the ſaid power deviſed unto *John Norris* all the ſaid eſtate for the term of ten years, to commence after the death of the teſtator, upon truſt, that the rents and profits thereof ſhould be applied in payment of his debts, legacies, and funeral expences, and after payment thereof, the ſurplus to *Oliver Neve* the infant, if then living, or in caſe of his death to *Peter*, if then living; and in caſe of his death to *Francis*, if then living, his executors, adminiſtrators and aſſigns, and made *John Norris* executor of his will, and gave him a legacy of 300*l.*

Old *Oliver Le Neve* by a codicil dated the 17th of *January* 1678. willed that all houſes and lands purchaſed by him ſince the making his will, ſhould go to the ſame uſes, and for the ſame eſtate, as were limited by his will.

Some few days after making the codicil, old *Oliver* died without iſſue, and *John Norris* proved the will, and entered upon eſtates deviſed to him, in truſt as aforeſaid.

On the 3d of *April* 1679. old *John Norris* wrote a letter to *Francis Neve*, father of *Oliver* the infant, " Declaring a great con-
" cern for the ſafety of the will, and that he would not truſt the
" ſame out of his hands, till he came to *London*, which he intended
" ſoon to do for the proving it in Chancery, and that he ſhould be
" aſſiſtful to do therein for its beſt ſecurity to all intents, and aſ-
" ſured the ſaid *Francis*, he ſhould to his beſt judgment, endea-
" vour to have the intent of his teſtator performed for all it's pur-
" poſes, ſo far as laid in him: the truſt thereof being committed to
" him ſo wholly, which he ſaid obliged all his care and ſkill there-
" in, which he declared he was not a little ſolicitous to effect to his
" utmoſt, and in which he was ready to comply, with the beſt ad-
" vice

" vice he could take, to ſecure the ends the teſtator deſigned by " his will."

On the 2d of *Auguſt* 1679. old *John Norris* agrees with *John Neve* of *London*, blackſmith, the heir of the teſtator, for the purchaſe of the reverſion in fee, after all the intermediate eſtates were ſpent, for thirty pounds, and by leaſe and releaſe of the 1ſt and 2d of *Auguſt* 1679. the blackſmith conveys to *John Norris* and his heirs all the ſaid eſtate, late belonging to the ſaid teſtator.

On the 23d of *October* 1679. a bill in Chancery was exhibited by the ſaid *Oliver Neve* an infant by his guardian, and old *John Norris* againſt *Elizabeth Neve* (the teſtator's widow) and the blackſmith as heir at law to the teſtator, ſetting forth the ſettlement, bill and codicil, praying that the defendants might ſet forth what right they claimed in the ſaid premiſſes, and that the plaintiffs might examine witneſſes, and that their teſtimony might be preſerved.

In *December* following the blackſmith's anſwer was put in, by which he inſiſted he was heir at law of *Oliver* the teſtator, and ſaid that he had been informed that the ſaid *Oliver* had intailed part of his eſtate, but that he had never ſeen the ſaid ſettlement or will, and in the anſwer he neither took notice of old *John Norris*, having purchaſed the reverſion of him, nor did he claim the ſaid reverſion.

Elizabeth Neve (the widow of *Oliver*) in *January* following put in her anſwer, inſiſted on her eſtate for life, and ſaid ſhe had no knowledge whatever of *John Neve* the blackſmith.

In the month of *January* 1679. the witneſſes to prove the ſettlement were examined, to preſerve their teſtimony.

The father of young *Oliver* died in *November* 1681.

And in *June* 1683. young *Oliver* having attained his age of 21. old *John Norris* ſettled all accounts with him, and at his requeſt agreed to aſſign to him the remainder of the 10 years term (of which five years were then to come) and to put him into poſſeſſion of the eſtate upon a releaſe of the rents, *&c.* and of the truſts wherewith old *John Norris* ſtood charged by the ſettlement, and will, and ſuch aſſignment and releaſe were executed accordingly on the 2d of *October* 1683.

Soon after this a diſpute aroſe between young *Oliver Neve*, and old *John Norris*, about the teſtator's leaſehold eſtate; and in *Eaſter* term 1684. young *Oliver Neve* files a bill againſt old *John Norris*, and therein charges that the ſaid *John Norris* had renewed ſeveral leaſes, and that he had poſſeſſed all the deeds, *&c.* relating to teſtator's

tator's real and perſonal eſtate, and prayed that the ſaid *John Norris* might convey to him the ſaid *Oliver*, all the ſaid freehold eſtate, as alſo the ſeveral terms, *&c.* of old *Oliver Le Neve*, of, or in any manor, lands, *&c.* wherein he was any ways intitled to at the time of his death, *and ſince come in any manner or by any means to the ſaid* John Norris, *or to his uſe or benefit.*

Old *John Norris* put in an anſwer the 22d of *July* 1684. and thereby admitted that he drew and adviſed the ſettlement, will, and codicil, and that *Oliver* the maker thereof was governed by his advice in the conduct of this affair, and that he had been executor of all the wills by him made for twenty years before his death, ſaid that he had delivered up all the deeds and writings, belonging to the teſtator's eſtates, but yet took no notice of the purchaſe he had made of the blackſmith, *although he was required by the ſaid bill to ſet forth all intereſt which had come to him in any manner, as well leaſehold as freehold, in order to aſſign the ſame, to young* Oliver Neve the plaintiff.

No further proceedings were had on that bill, but *Oliver Neve* and *John Norris* compromiſed the matter between them, and fourteen years afterwards on the 10th of *Auguſt* 1698. old *John Norris* aſſigned the ſaid leaſehold premiſſes to two perſons for the remainder of the term, which perſons declared themſelves truſtees for *Oliver Neve* the younger.

May the 1ſt 1688. In purſuance of an agreement with *Peter Le Neve* (the elder brother of *Oliver*, and who was next in remainder after him, with a limitation to the iſſue male of his body) the blackſmith for ten pounds conveyed his reverſionary intereſt to the ſaid *Peter Neve*, and his heirs, and died in *Auguſt* following.

On the 1ſt of *Auguſt* 1701. old *John Norris* died, having firſt made his will, whereby he deviſed the reverſion he purchaſed of the blackſmith to his eldeſt ſon *John* (the preſent plaintiff's grandfather) for life, with remainder to his firſt and other ſons in tail male, with remainders over.

On the 7th of *December* 1708. *Francis Neve*, the third and laſt perſon in the entail under old *Oliver Neve*'s ſettlement, died without iſſue.

In 1709. young *Oliver Neve* being in poſſeſſion of the eſtates, and having but one ſon living, an infant of ſo infirm a ſtate of health, that it was apprehended he could not live to be twenty-one; and *Oliver* being not likely to have any more children, and *Peter* having no child, applied himſelf to the plaintiff's grandfather who was in great want of money, and offered him 2000*l.* and afterwards

3000*l.* to deliver up the conveyance to his father from the blackſmith, but the reverſion being deviſed to him only for his life, he could not diſpoſe of it.

Young *Oliver Neve*'s ſon being between twenty and twenty-one, and very infirm, and his father not being able to purchaſe the reverſion, they came up to *London* in order to get a privy ſeal to enable the ſon notwithſtanding his minority to ſuffer a recovery, but the plaintiff's grandfather entered a caveat at the proper office, which put a ſtop to it.

Soon after their return into the country the ſon died before the age of twenty-one.

On the 26th of *November* 1711. young *Oliver Neve* died without iſſue male, and his brother *Peter Neve* entered into poſſeſſion, and applied to Mrs. *Earl* (a friend of the *Norris's*) and told her, he was deſirous of purchaſing Mr. *Norris*'s reverſion in this eſtate, and would give 5000*l.* for it, and upon her ſaying ſhe thought it not a valuable conſideration; he ſaid he would give more, and deſired her to ſpeak to him, which ſhe did; and *Norris*'s anſwer was, he had not power to ſell it.

On the 11th of *January* 1716. *John Norris*, the plaintiff's grandfather died, leaving *John Norris* his only ſon and heir at law.

In 1725. *Peter Neve* (being 64 years old) pretended he had ſome claim to the reverſion, and to accommodate diſputes, propoſed to marry a ſiſter of the plaintiff's father, and on theſe terms, would yield up his claim to the reverſion in fee: A meeting was had; but the proviſion he offered for the young lady being thought not ſufficient, the matter broke off.

On the 1ſt of *October* 1729. *Peter Neve* died without iſſue, having firſt made his will, and deviſed the eſtate in queſtion, the reverſion of which he had purchaſed of the blackſmith, to the three daughters of his late brother *Oliver Neeve*; namely, *Iſabella Le Neve*, *Ann Rogers*, and *Henrietta Neve*, and their heirs and aſſigns.

All the limitations in the firſt ſettlement being ſpent, upon the death of *Peter Neve* without iſſue, the reverſion in fee became veſted in *John Norris* the plaintiff's father, who being then an infant brought his bill *April* the 15th 1730. againſt *Iſabella Neve*, *Edward Neve*, and *Henrietta* his then wife, and *John Rogers* and *Ann* his wife, praying they might ſet forth what right they claimed to the eſtate, and to deliver up poſſeſſion, *&c.* no anſwer was put in to this bill.

In *Eaſter* term 1731. the plaintiff's father brought ejectments for the lands in *Norfolk*, to which the defendants to the laſt mentioned bill appeared, and upon a long trial by a ſpecial jury at the ſummer aſſizes 1731. and full defence made, a verdict was given for the plaintiff's father for all the freehold lands in *Norfolk*, and judgment being entered, the defendants brought a writ of error.

On the 29th of *November* 1731. the defendants brought a croſs bill againſt the preſent plaintiff's father, and among other things charged that *Peter Neve* did not ſuſpect that *Norris* had purchaſed the reverſion, and that *Norris*, who was privy to *Peter*'s purchaſe, never intimated that any conveyance had been made to him, but always declared himſelf to be no other than executor in truſt, without ſetting up any claim to the reverſion, and therefore prayed a diſcovery of all the deeds and writings, and that they might be delivered up, and the conveyance to *Peter Neve* from the blackſmith be eſtabliſhed, and that to *Norris* cancelled, and that the proceedings on the ejectment might be ſtayed.

In *Michaelmas* term 1731. the plaintiff's father delivered ejectments for the *London* and *Southwark* eſtates, but on the ſecond of *March* 1731. the parties came to an agreement, that the copyhold and leaſehold which lie intermixed with the freehold ſhould be diſtinguiſhed, that the plaintiff's father ſhould without trial be let into poſſeſſion of all the freeholds in *London*, *Southwark*, and *Norfolk*, compriſed in the blackſmith's title.

John Rogers and *Ann* his wife died ſoon after, leaving iſſue the defendant *Ann*, now wife of *Matthew Grave*, and *Henrietta* wife of the defendant *Edward Neve* died, leaving iſſue the defendant *Peter*, and the plaintiff *Elizabeth*.

The ſeventh of *October* 1735. *John Norris* the plaintiff's father died leaving the plaintiff his only ſon and heir, who in *November* 1740. filed his bill of ſupplement and revivor againſt the defendants, praying they might ſet forth whether they inſiſted on any and what title to the eſtate in queſtion, that there might be a commiſſion of partition of copyhold from freehold, that the plaintiff might be let into poſſeſſion of the freehold, that he might have the benefit of the agreement in the former cauſe; and all deeds and writings to be delivered, and to be quieted in poſſeſſion.

On the ſecond of *July* 1741. the defendants put in their anſwer, and inſiſted that old *John Norris* concealed his conveyance from the *Neves*; that his taking it was a breach of truſt, and that he ought to be deemed a truſtee for *Peter* and his heirs; admit the agreement in the former cauſe, but ſay it was not intended to bind the intereſt of any of the parties, that they ought not to account for the rents, &c.

&c. of the eſtate, but that the plaintiff's great grandfather, old *John Norris*, ſhould be decreed a truſtee for them, and the plaintiff obliged to account with them for rents and profits.

The plaintiff replied to the anſwer, and iſſue being joined, examined divers witneſſes, but the defendants (who had made the abovementioned defence agreeable to what they had collected from the common report in the family) did not examine any, being unable to prove the matter by them put in iſſue.

On the 17*th* of *July* 1742. Lord Chancellor decreed an account of the profits of the freehold premiſſes ſince the death of *Peter Neve*, and declared the plaintiff entitled thereto, and directed a commiſſion for dividing copyholds from freehold lands, and that after the execution of ſuch commiſſion, the writings belonging to the freeholds ſhould be delivered up for the plaintiff's benefit.

On the 24*th* of *Auguſt* 1742. the eſtates were diſtinguiſhed and ſet out by metes and bounds.

On the 7*th* of *February* the cauſe was ſet down for further directions; but before the ſame came on, the defendant *Ann*, (late *Rogers*) married the defendant *Matthew Grave* an attorney.

On the 21*ſt* of *May* 1743. the defendants petitioned for leave to file a bill of review, upon a ſuggeſtion that the petitioners had ſince the decree diſcovered, that they were the heirs at law to the blackſmith, which they had never heard before, and that he was dead without iſſue.

On the 22*d* of *October* 1743. the petition ſtood in the paper, but the defendants did not think proper to ſupport that petition, but ſuffered it to be diſmiſſed with coſts.

On the 27th of *October* the defendants preferred a ſecond petition for liberty to bring a bill in the nature of a bill of review, and to rehear the cauſe, on a ſuggeſtion that ſince the decree was pronounced, they had diſcovered ſeveral facts by which the real truth of the caſe appeared, ſufficient to ſhew that the purchaſe of the reverſion by old *John Norris* a truſtee for *Oliver*, and during his infancy, ought to be eſteemed a truſt for him, and that they had diſcovered ſeveral deeds witneſſed by old *Norris* relating to purchaſes by old *Oliver*, and ſeveral letters manifeſting the confidence old *Oliver* placed in him, and likewiſe the letter of the third of *April* 1679. and the record of the bill in Chancery on the 23d of *October* 1679. brought by old *John Norris* and young *Oliver Neve* againſt the widow of old *Oliver Neve*, and the backſmith, and likewiſe the records of the bill brought by *Oliver Neve* the younger, againſt

againſt old *John Norris* in *May* 1684. and ſeveral deeds before mentioned.

In ſupport of the petition *William Havers* ſwore, he was the ſolicitor for the defendants *Iſabella Neve*, *&c.* and that he did not know till after the 17th of *July* 1742. the day on which the cauſe was heard, that the defendants could prove that old *John Norris* was the council uſually employed by old *Oliver Neve*, in his affairs; or that he had been his executor under many wills before his death.

Or that old *John Norris* did adviſe or draw the ſettlement and will of 1674.

Or that the eſtate in queſtion was purchaſed by old *John Norris*, whilſt he was in poſſeſſion of the ſaid eſtate in truſt for young *Oliver Neve*.

Or that old *John Norris* had ſurrendered a leaſe of the perſonal eſtate, or that there had been any controverſy about it, or that old *John Norris* had aſſigned the ſame in conſideration thereof.

Or that old *John Norris* was a witneſs to any deeds wherein old *Oliver Neve* was a party.

The defendant *Matthew Grave* by his affidavit ſwore, that ſince the ſaid cauſe was heard, *Thomas Martin*, executor of *Peter Neve*, delivered the ſettlement of 1674. to him, and that obſerving a cauſe indorſed on the ſettlement, he ſearched for the ſame, and found two cauſes in the Six Clerks Office, *Neve* verſus *Neve*, and *Neve* verſus *Norris*, in the records in the *Tower*: that he found the latter of the third of *April* 1679. in *Thomas Martin*'s cuſtody the 10th of *July* laſt, and the leaſe granted to old *Norris*, and the aſſignment thereof in *Holden*'s cuſtody, and alſo found the deeds atteſted by *Norris* in *Martin*'s cuſtody.

The defendants *Iſabella Neve*, *Edward Neve*, *Peter Neve*, and *Ann Grave*, in their affidavits ſwore, that they knew none of theſe facts till informed thereof by the defendant *Matthew Grave*, and that they examined no witneſſes, nor read any evidence in the cauſe, becauſe they did not then know any of the facts.

Thomas Martin in his affidavit ſwore, that he is one of the executors of *Peter Neve*, who died in 1729. and that upon his death he found in his ſtudy the ſettlement and copy of old *Oliver Neve*'s will, and the indenture of *October* 1683. and that the deeds and writings remained in his cuſtody from 1729. till the delivery thereof to *Matthew Grave*, *&c.* on the 27th of *May* laſt.

That he was concerned in the country as attorney for the defendants, at the trial of the ejectment in 1731. but was not concerned as ſolicitor upon the defence for them in equity, and to his knowledge did never ſee the bill of revivor in this cauſe, nor the defendant's anſwers, but that he hath had meetings with the plaintiff's father, and may have talked with or acted for *Iſabella Neve*, *Edward Neve* and his wife, and *John Rogers* and his wife, under the direction of the parties, or with Mr. *Havers* or Mr. *Bowyer*, the clerk in court, which *Havers* and *Bowyer* he believes had the ſole conduct of the cauſe for the defendants: but he was not concerned for them as ſolicitor other than as aforeſaid.

This petition was heard before Lord *Chancellor* on the 28th of *January*, and on *February* the 4th and 8th 1743. and in anſwer to this evidence, which was produced by the defendants in ſupport of their petition, it was inſiſted on the part of the plaintiff, that the matters now pretended to be new diſcoveries by the defendants, are not ſo; for that at the trial of the ejectment in 1731. copies of the bill and anſwer in the cauſe of *Oliver Neve* and *John Norris* plaintiffs, *verſus John Neve* and *Elizabeth Neve* defendants, were produced and read at that trial, and that *Thomas Martin* was the attorney employed by the defendants in that cauſe, and acted as ſuch at the trial: and, as agent for the defendants, he wrote letters touching the executing the commiſſion for examining witneſſes in *May* 1732.

That the defendants exhibited their croſs bill in 1731. againſt the plantiff's father, and therein ſtated " the ſettlement and will of old " *Oliver Neve*, and of old *John Norris*'s having inſtructions to " purchaſe the reverſion for *Peter Neve*, and that inſtead thereof " he had purchaſed it fraudulently for himſelf, and concealed ſuch " purchaſe, and that therefore he ought in equity to be deemed a " truſtee for the plaintiffs in the croſs bill."

It was likewiſe inſiſted, that the letter of the 3d of *April* 1679. or the deeds atteſted by old *John Norris*, are no new diſcoveries, becauſe they came out of the hands of *Martin*, the defendants attorney in the ejectment, and employed in the commiſſion that iſſued in the cauſe out of Chancery.

After reading the ſettlement and will in 1674. the blackſmith's conveyance, and the bill, anſwers and depoſitions in 1679. and 1684. and ſeveral purchaſe deeds of old *Neve* atteſted by *Norris*, and three days hearing of council, Lord *Hardwicke* delivered his opinion as follows, the 8th of *February* 1743.

I have been deſirous to examine very particularly into the new evidence, in order to prevent any more litigation and expence.

The preſent application is, for leave to bring a bill, in nature of a bill of review; and this is ſaid to be founded upon new matter, not at all in iſſue in the former cauſe, or upon matter which was in iſſue, but diſcovered ſince the hearing of the cauſe.

Upon theſe rules, I do allow bills of review have been granted: for though it has been ſaid that theſe were varied by the order that was made in the cauſe of *Montgomery* verſus *Clark*, yet I ſee no alteration, and therefore the rules I ſhall judge by in the preſent caſe, muſt be the ancient ones.

Lord *Bacon*'s rules have never been departed from ſince the making of them.

By the eſtabliſhed practice of the court, there are two ſorts of bills of review, one founded *on ſuppoſed error appearing in the decree itſelf*, the other *on new matter which muſt ariſe after the decree, or upon new proof which could not have been uſed at the time when the decree paſſed.*

The queſtion is, whether in this caſe the defendants have brought themſelves within the rule, and whether there is new matter not exiſting at the time of the decree, or new proofs that could not poſſibly be made uſe of at the former hearing.

The conſtruction as to the latter has not been ſo ſtrict, that the new proof muſt not come to the parties knowledge till after the cauſe has been heard; it is very ſufficient if it did not come to their knowledge till after publication, or when by the rules of the court the party could not make uſe of it.

It is ſufficient to intitle a party to a bill of review, if the new proof did not come to his knowledge till after publication, or when by the rules of the court he could not make uſe of it.

But if it came to the knowledge of the parties attorney, ſolicitor, or agent, before the cauſe was heard, it is conſidered as notice to themſelves, and is the ſame thing as coming to the parties knowledge.

Coming to the knowledge of the party's attorney, &c. before the cauſe was heard, is notice to the party himſelf.

The ſecond queſtion is, ſuppoſing it did come to the knowledge of the parties, after the cauſe was heard, whether it is relevant to the matters in queſtion.

It has been inſiſted for the defendants in the original and plaintiffs in the croſs cauſe, that the equity to which the new facts are pointed was not in iſſue at the hearing of the former cauſe.

Now as to this I am clear of opinion, that the equity was as full before the court, in the former hearing, as it can be now.

For

For it appeared there, that old *Oliver Neve* was the maker of the ſettlement, that young *Oliver* was an infant, that *old John Norris* was truſtee under the ſettlement during ten years, for the payment of debts; and in that time took a conveyance from the blackſmith, the laſt remainder-man under the ſettlement in 1679.

The equity inſiſted on in the croſs bill is, that old *John Norris* ought to be conſidered as a truſtee only, for the parties intereſted in the truſt eſtate, and that the purchaſing the reverſion from the blackſmith was a breach of truſt in *him*, and that the conveyance to *Peter Neve* from the blackſmith ought to be eſtabliſhed, and that to *Norris* cancelled, and the proceedings at law ſtayed.

If facts are put in iſſue, the party is not obliged to point out what will be the effect of them, for the court are to make the inference of law from them as *ex facto oritur jus*.

All the charges relating to the truſt, and the execution of it, were made out then, and if facts were put in iſſue, there is no neceſſity for the party to point out what will be the effect and conſequence of ſuch facts, for the court are to make the inference of law from it, as *ex facto oritur jus*.

The defendants then do not want a bill of review to come at this equity, for all the facts which are now ſaid to be diſcovered, are corroboratives only of the former equity, and therefore there is no ground to grant it upon this head.

Which brings me to the other point, whether they are ſo many *new proofs*, and that by the rules of publication the defendants were precluded from making uſe of them at the former hearing.

The firſt queſtion is, whether they are new diſcoveries.

Secondly, whether they are relevant, and would avail the defendants, if ſuch a bill was allowed to be brought.

Now it does not appear to me, that theſe are new diſcoveries, ſo as to entitle the defendants to a review.

For if they were known to the parties council, or to their attorney, and ſolicitor, or agents, it is ſufficient to rebut ſuch an application, or there would be no end of ſuits.

How many parties are there, that know not the merits of their own cauſe, but rely on the ſkill of their council, or ſolicitor, and therefore what council or ſolicitors know, muſt be allowed to be the knowledge of the parties?

It is ſworn by *Martin*, who was attorney for the defendants in the ejectments, that he had the ſeveral deeds and writings even at the time of the trial, and that upon the death of *Peter Neve*, he found them in his ſtudy among other papers, but ſays he was concerned only as attorney in this trial, but not as ſolicitor in the cauſe in Chancery.

Though a country attorney acts by an agent in cauſes in this court, yet he is to be conſidered as the ſolicitor likewiſe, though he reſides in the country, and what is known to him is conſtructive notice to his clients.

But I will conſider him as ſolicitor likewiſe, notwithſtanding he lives in the country, for every body knows that country attornies act by agents in cauſes here.

The letter of the 3*d* of *April* 1679. comes too out of the hands of Mr. *Martin*, but I do not ſee what inference can be drawn from it, any more than that old *John Norris* was a truſtee.

The next thing to be conſidered is the bill brought by young *Oliver Neve* and old *Norris*, againſt Mrs. *Neve* and the blackſmith.

Now this very bill was produced on the trial in ejectment, and though by an adverſary there, yet it is the ſame as if produced by the defendants, and is a clear notification of the fact.

This trial was eleven years before the cauſe in equity was heard, ſo that there was time enough for the defendants to have conſidered it, and whether the judge did right in admitting it to be read, is not material.

The next is the deed of aſſignment in 1683, which was likewiſe known to Mr. *Martin*, and found among *Peter Neve*'s papers, and was therefore conſtructive notice to his clients.

Suppoſe then theſe are not new diſcoveries, it is a final and concluſive anſwer to this application for a bill of review, that they exiſted at the former hearing, and were known to the parties or their attorney, and therefore are not within the rule laid down by Lord *Bacon*.

But ſuppoſe them to be new diſcoveries, and relevant to the caſe, they can amount to no more than corroboratives only of the former point in equity.

The equity inſiſted on is this, that old *John Norris* (truſtee for a term of 10 years under old *Oliver Neve*'s ſettlement, antecedent to all the limitations of the eſtate in the ſettlement) before the end of the term, and during the infancy of young *Oliver Neve*, takes a conveyance to himſelf of the reverſion from the blackſmith the heir at law of old *Oliver Neve*, for 30 *l.* only, the eſtate being at leaſt 1500 *l. per annum*, as it is now fallen into poſſeſſion.

It is extremely wrong for a council or agent to take a conveyance from the right heir, for his own benefit, which he diſcovered by being a truſtee.

This is a tranſaction indeed extremely to be diſapproved, and I muſt ſay that a council or agent taking a conveyance from the right heir, for his own benefit, and which he diſcovered by his being a truſtee, does a very wrong thing.

But this is a caſe *primæ impreſſionis*, for it would be difficult to ſay for whom he is a truſtee, and yet I ſhould be extreamly deſirous of conſidering him as a truſtee only, if I could be warranted in ſo doing.

The caſe which has been cited of *Rumford* market, and other caſes of leaſes, are different from this, for there tenant-right of renewals are rather a curteſy from the landlord, and *Cæteris paribus* the relations of the ſame family who took the original leaſe of biſhops, deans and chapters, *&c.* are generally preferred, and they have a natural expectation of it.

Old *John Norris* was equally a truſtee in the ten years term, for *Peter Neve*, or *Francis*, as for *Oliver Neve*, for they were all tenants for life under old *Oliver*'s ſettlement, for it was a truſt to pay debts, and attendant on the ſeveral limitations and eſtates created by the ſettlement.

So that a perſon equally a truſtee for all buys in this reverſion, and it is impoſſible to make the conveyance from the blackſmith to old *John Norris* a truſt for *Oliver Neve*, for the maker of the ſettlement did not intend to give the firſt tenant for life any intereſt in the reverſion.

Since, as I ſaid before, this is *primæ impreſſionis*, and no caſe has been cited in point, but only argued by way of analogy to caſes of leaſes, which I have ſhewn are very different; it would be too much for me to break into rules for bills of review, for the ſake of one particular caſe only.

For as it is a new point, and no ground to ſtand upon, the making old *Norris* a truſtee for perſons who were only tenants for life, and took nothing in the inheritance, would be going too far.

Where the perſons, under whom the petitioners for the bill of review claim, were fully acquainted with the matter now complained of 35 years ago, ſuch an effluxion of time, and knowledge of the anceſtor of the whole tranſaction, will have great weight with the court on ſuch applications.

But there is ſtill another circumſtance, and that is the great length of time, and the certain knowledge the perſons under whom the plaintiffs in the croſs cauſe claim had of *John Norris*'s purchaſing of this reverſion, and this will make it a queſtion whether it is not ſuch a laches in theſe perſons who are anceſtors of the plaintiff's in the croſs cauſe, as will affect them, and be a bar to their claim: For as long ago as the year 1709. it was in the knowledge of theſe

perſons, and particularly of *Oliver Neve*, that old *John Norris* had purchaſed the reverſion; and as this is no leſs than 35 years ago, it muſt have great weight with the court not only from the length or effluxion of time, but from the knowledge the perſons had of this tranſaction, for *Oliver Neve*'s bidding 3000 *l.* and *Peter Neve* 5000 *l.* for the reverſion, is a ſtrong circumſtance to ſhew that they were acquainted with old *Norris*'s purchaſe.

Oliver Neve not ſucceeding in his offer, and having a weakly ſon between 20 and 21 years old, came to town in order to get a privy ſeal, to enable his ſon to join with him in a recovery; and as he could not obtain it, can it be ſuppoſed, as he muſt be exaſperated againſt old *John Norris*'s ſon for his refuſal to join in the application, that he would have reſiſted ſo great a temptation, as bringing a bill to be relieved, if there had been any grounds on the head of fraud?

Therefore the diſtance of time is a ſtrong objection, becauſe when the matter was recent, there might have been ſome circumſtances, and perhaps too ſome papers which would have been ſtrong in favour of thoſe who claim under old *John Norris*, that may very probably be loſt now, and what makes it likely, is *Peter Neve*'s bidding ſo large a ſum as five thouſand pounds for the reverſion, which ſhews that he thought it a very valuable thing.

The granting ſuch a petition at this diſtance of time would be a very great hardſhip on the defendants in the croſs bill, who may be deprived of ſome circumſtances, and may have loſt papers, they might have availed themſelves of when the matter was recent.

This is the ſtrong point which weighs with me, that after ſuch a length of time, and ſuch great offers made and refuſed by the perſons who claimed under *old John Norris*, that no bill was thereupon brought to ſet aſide the purchaſe for fraud.

And, as it will be of very bad conſequence to let parties enter into the diſcuſſion of this matter now, at ſuch a diſtance, the petition muſt therefore be diſmiſſed but without coſts.

The plaintiffs in the croſs cauſe appealed from this order of diſmiſſion to the houſe of Lords, where after a hearing of three days, the order of Lord *Hardwicke* in a very full houſe, was affirmed by a great majority, on the 12*th* of *April* 1744.

The order of diſmiſſion was appealed from to the houſe of Lords, and after a hearing of three days affirmed.

Stevens verſus *Dethick*, *February* 11, 1743. Caſe 17.

A Queſtion aroſe upon the ſettlement made on the marriage of the defendant, the firſt limitation of which was to the defendant for life without impeachment of waſte, then to truſtees to preſerve

The truſt of a term here was for raiſing portions for a daughter in

default of iſſue male, payable at 21 or marriage; the mother died leaving no ſon, and only one daughter the plaintiff's wife, who with her huſband brought their bill againſt the father and the truſtees to raiſe the portion immediately; *the court was of opinion ſhe was not intitled to have it raiſed in the father's life-time.*

contingent

contingent uſes, to his wife for life, remainder to his firſt and every other ſons of the body of the defendant, and in default of iſſue male, then remainder to truſtees for a term of 500 years, upon truſt, that if there ſhall be one or more daughters, the truſtees, their executors or adminiſtrators ſhall out of the yearly or other rents, iſſues and profits, or by ſale, leaſe, or mortgage of the ſaid manors, meſſuages, lands, *&c.* or any part thereof comprized within the ſaid term, raiſe and pay unto ſuch daughter or daughters the ſum of 2000 *l.* for her or their portion or portions, to be paid to ſuch only daughter (if there be but one) at her age of twenty-one or day of marriage, which ſhall firſt happen; and if they all die before their portions become due, then the ſaid payments to ceaſe as to their executors and adminiſtrators, and to ſink into the eſtate for the benefit of the perſon to whom the reverſion ſhall belong: And alſo that ſuch daughter or daughters ſhall have, out of the premiſſes comprized in the term of 500 years, ſuch yearly maintenance as is ſuitable to their degree and quality, and that the reſidue of the rents, iſſues and profits above ſuch yearly maintenance ſhall, *in the mean time* till the portions become payable, be received by ſuch perſons as ſhall be entitled to the reverſion, immediately expectant, upon the determination of the ſaid term.

The mother is dead, and has left no other iſſue but a daughter who is married, the bill is brought by the huſband and the daughter againſt the father and the truſtees, to raiſe the portion immediately.

Mr. Attorney General council for the plaintiffs, ſaid, if the parties who were owners of the eſtate have declared, that the portion of the daughter on the failure of iſſue male ſhall be raiſed for her benefit at twenty-one, or day of marriage, a court of juſtice will not think that it is inconvenient, if the parties to the ſettlement did not think ſo themſelves.

He cited *Corbet* verſus *Maidwell*, 2 *Vern* 640, 655. and *Eq. Caſ. Ab.* 337. to ſhew that a reverſionary term when the time of payment comes, notwithſtanding it is not fallen into poſſeſſion, ſhall be ſold.

He mentioned an authority likewiſe at common law, *Greaves* verſus *Maddiſon*, 2 *Jones* 201. where three judges were of opinion, that the raiſing the portion ſhould not wait the death of the father.

And *Hall* verſus *Carter*, heard the 19*th* of *July* 1742. before Lord *Hardwicke*.

He argued that, if the power of raiſing the portion ſhould be taken away from her, the daughter might have nothing till ſhe was ſo old, as not to anſwer the end for which the portion was given, *the advancing her in marriage*.

It

It would be very hard, he ſaid, if the daughter here ſhould neither have maintenance or portion, though the time of payment is come, till by the death of the father the term comes into poſſeſſion.

Mr. *Clark* of the ſame ſide cited *Sandys* verſus *Sandys*, 1 *P. Wms.* 707. and *Butler* verſus *Duncomb*, 1 *P. Wms.* 448.

Mr. Solicitor General, council for the defendant, the father, ſaid the general intention of marriage ſettlements is to put children under the power of the father, and not, as has been argued on the other ſide, that the daughter in the life-time of the father ſhall be out of the dependance of the father, and may diſpoſe of herſelf without his conſent, as ſhe has done in this caſe.

A great inconvenience would reſult from this conſtruction, for the tearing eſtates to pieces, and ruining the eldeſt ſons of families, muſt be the natural conſequence; he cited *Rereſby* verſus *Newland*, 2 *P. Wms.* 93.

Maintenance, in the nature of it, is precedent to the raiſing of the portion; and as it is moſt clear that the maintenance here was not intended to commence in the life-time of the father, it is a key to explain his intention as to the portion, that this likewiſe ſhould not be raiſed till after the death of the father.

In the caſe of *Hall* verſus *Carter*, the maintenance was to precede the portion, and given them expreſſly for their ſupport till the portion was raiſed.

LORD CHANCELLOR.

It is a great while ſince any of theſe caſes have come before the court.

My own general principle has been always againſt raiſing portions in the father's life-time.

All the old caſes are plainly determined againſt the intention of all fathers: In ſome very hard caſes indeed, where the father has been rigorous and cruel, courts of equity have gone beyond the ſtrict rules of law, and raiſed it in their life-time.

The firſt caſes of this kind were *Greaves* and *Maddiſon*, and *Gerrard* and *Gerrard*, 2 *Vern.* 458. and which were followed by ſome others, but in the caſe of *Corbet* verſus *Maidwell*, 1 *Salk.* 159. * and

* A term limited in remainder after the father's death, in truſt for raiſing daughters portions at ſuch an age, or marriage, when either happens, the portions may be raiſed in the father's life-time; ſo if on contingency, and the contingency happens in the life of the father, but not before the contingency happened. 1 *Salk.* 160.

2 *Vern.* 685. Lord *Cowper* made a ſtand, and upon what foundation did he ſtop? why, the general principle he went upon was, that he would lay hold of any words to prevent his being bound by the former caſes, rather than introduce the inconvenience of ruining eſtates; and it is the ſame ground courts of equity have gone upon in ſubſequent caſes; for if they could find any words or word that were different from former caſes, they have laid hold of them to avoid determining like thoſe caſes which had introduced ſuch plain inconveniences. *Vide* 2 *P. Wms.* 452. *ſec.* 2. the caſe of *Butler* verſus *Duncomb.*

In a converſation between Lord *Macclesfield* and Lord *Trevor* upon this very ſubject, the former ſaid, he would not carry it further than the caſes had already done; ſays Lord *Trevor*, I hope you will not carry it quite ſo far.

As inſtances of clandeſtine marriages were never more frequent, arguments of publick inconvenience ought to have great weight.

The eldeſt ſon is abſolutely left in the power of the father during his life, and it is the conſtant courſe of moſt ſettlements; and yet it is ſaid that younger children, *daughters*, ſhall ſoon after twelve years old, perhaps without the leave of the father, demand her portion in his life-time, though ſhe married his footman, or ever ſo meanly, for there is no difference in the marriage ſhe contracts, if this doctrine ſhould prevail: And while I am upon this head, I muſt obſerve, that arguments from publick inconvenience ought to have great weight in this age, as inſtances of clandeſtine marriages were never more frequent.

In *Butler* verſus *Duncomb*, Lord *Maccesfield* took a middle way; he refuſed to raiſe the portion before the term came into poſſeſſion, but then he made the reverſionary term a ſecurity for the principal ſum.

If *Brome* verſus *Berkley*, *Eq. Caſ. Ab.* 340. is an authority, from the very terms of it, it holds more ſtrongly here, becauſe the bill there was to raiſe a portion in the life-time of the mother only; there the father was dead, and no iſſue male, only one daughter; that daughter was married, and conſiderably advanced in years, and the bill brought for ſale of the reverſionary term; but refuſed both here and in the houſe of Lords; what were the grounds of the refuſal? why, that maintenance being given, and by the very terms of the truſt to precede the portion, and not to be raiſed till the term took effect in poſſeſſion, *a fortiori* the portion was not due and payable till then.

Apply it to the preſent caſe.

The truſtees of the term are, in default of iſſue male, *&c. vide* the ſettlement.

And

And alſo that ſuch daughter or daughters, *&c. vide* the clauſe of maintenance.

The plaintiff's caſe here the ſame, only there it was prayed to be raiſed in the life-time of the mother, here in the life even of the father, which, if any thing, is more unfavourable.

The maintenance there was to be raiſed out of the rents and profits after the firſt quarter-day when the term ſhall take effect *in poſſeſſion.*

Here the words *in the mean time* are words of relation, and refer not only to a time that is to begin, but to a time which is alſo to end.

Out of what rents, iſſues and profits can the truſtees then receive any thing, can they bring ejectments? No, for they cannot enter to raiſe money out of the profits till after the death of the father.

I am of opinion that the father might have ſold the reverſion, ſubject to this term, which ſhews that the whole truſt of the term was to take effect after the death of the father.

By the ſame arguments as have been made uſe of for raiſing the portion now, the maintenance might be raiſed in the life-time of the father as well as the portion; but it is the ſubſequent words that confine it to the time of the term's taking effect in poſſeſſion.

It is ſaid that in the caſe of *Brome* verſus *Berkley*, there are theſe words, *take effect in poſſeſſion*, and no ſuch words here, but made uſe of there only to ſhew that maintenance could not be raiſed in the life-time of the mother.

The ſame argument will hold full as ſtrong here, for though the words are not exactly the ſame, yet there are words of equal force, *viz. Expectant upon the determination of the term.*

There are no grounds to decree this otherwiſe than the caſe of *Brome* verſus *Berkley*, which went through ſuch a ſolemn determination.

Therefore I think it right, to lay hold of words to ſupport the parental authority, rather than to give licence to daughters to marry improvidently; for which is moſt likely, that a father ſhould be ſo unnatural to ſuffer a daughter to ſtarve who has done nothing to merit ſuch uſage, or that a child who has little or no experience ſhould be drawn in to marry imprudently, who is entirely out of the controul of the father, and may raiſe her portion upon his eſtate in his life-time?

The

The caſe of *Hall* verſus *Carter* was very different in many reſpects, nor was it on a marriage ſettlement.

The determination that I have *now* given, is rather nearer to the intention of the parties, and at the ſame time will prevent very great inconveniences, which are the natural conſequence of decreeing portions to be raiſed in the life of the father; and therefore let the bill be diſmiſſed, but *without coſts*.

The following caſe ſeems to be a material one in regard to property, and may very probably be often cited in a court of equity as well as in courts of law; and as I happen to have a fuller note of it than any which has yet appeared in print, flatter myſelf the utility of it will be an excuſe for its appearing here.

Caſe 18. *Hartop* verſus *Hoare & al'*, *Eaſter term* 16 *Geo.* 2. *B.R.*

Sir *John Hartop* in 1729. lodged jewels for ſafe cuſtody in the hands of *Seamer* a jeweller, incloſed in a paper that was ſealed, and put in a bag, which was alſo ſealed with the plaintiff's ſeal, and depoſited at *Seamer*'s houſe, and the ſame day his clerk gave a receipt for them in theſe words, Which bag ſo ſealed, I promiſe to take care of for Sir *John Hartop*, for my maſter *James Seamer*; ſigned *Michael Hull*; and in the receipt all the jewels were ſpecified. In *February* 1735. *Seamer* broke both the ſeals, took out the jewels, and carried them to Mr. *Hoare*'s the banker's ſhop, borrowed 300 *l.* of the defendant, and depoſited the jewels as his own proper goods and as a ſecurity for the 300 *l.* and gave his promiſſory note for the ſame ſum; on Mr. *Hoare*'s refuſing to deliver the jewels to Sir *John Hartop*, he brought an action of trover and converſion againſt him; and the jury having a doubt whether the defendant was guilty of a converſion or not, they referred it to the opinion of the court of King's Bench, by finding a ſpecial verdict, who this day gave judgment for the plaintiff unanimouſly.

JUDGMENT in this caſe was given for the plaintiff by *Lee* Ch. Juſt. who delivered the opinion of the court to this effect.

This is an action of trover and converſion, wherein the plaintiff declared that he was poſſeſſed of a pair of ſingle ſtone brilliant diamond ear-rings, *&c.* as of his own proper goods, and that he loſt them, and they came to the hands of the defendants, who converted them to their own uſe; to this the defendants have pleaded not guilty, and the cauſe was tried at *Guildhall*, and the jury found a ſpecial verdict to this effect.

" That the plaintiff, being owner of the jewels mentioned in the " declaration, on the 12*th* of *January* 1729. lodged them with " other jewels for ſafe cuſtody only in the hands of *James Seamer*, " jeweller and banker, incloſed in a paper, which paper was ſealed, " and put in a bag, which was alſo ſealed with the plaintiff's ſeal, " and depoſited them at *Seamer*'s houſe in *Fleetſtreet*, *London*, and " took a receipt for them in the words and figures following.

" *Jan.* 12, 1729. Received of Sir *John Hartop*, Bart. the follow- " ing jewels, *viz.* a pair of diamond ear-rings, *&c.* (mentioning " and

" and deſcribing the jewels for which the preſent action is brought)
" all which are ſealed up in a bag ſealed with Sir *John Hartop*'s ſeal,
" which bag ſo ſealed, I promiſe to take care of for him, for my
" maſter *James Seamer*. Signed *Michael Hull.*

" On the 3*d* of *February* 1735. *Seamer* broke both the ſeals, and
" took out the jewels, and carried them to the defendants ſhop,
" which is a public open ſhop in *Fleetſtreet* in the city of *London*,
" where the defendants carried on the buſineſs of bankers, and
" alſo traded in jewels, and frequently lent money on the ſecurity
" of jewels, and then and there the ſaid *James Seamer* borrowed
" the ſum of 300 *l.* of the defendant, and depoſited the jewels
" in the declaration mentioned, as his own proper goods, and as
" a ſecurity for the ſaid ſum of 300 *l.* then paid him by the defen-
" dants in their ſaid public and open ſhop, and the ſaid *Seamer* then
" gave the defendants his promiſſory note for the ſame ſum ſo bor-
" rowed.

" And they further find that the ſaid *James Seamer* had no au-
" thority from the plaintiff, to ſell, pawn, or diſpoſe of the ſaid
" jewels, and that the defendants not having been paid this ſum of
" 300 *l.* ſo lent by them, they had been requeſted and refuſed to
" deliver the aforeſaid jewels to the plaintiff, and have kept them to
" their own uſe.

" That the ſaid *Seamer* continued in poſſeſſion of the ſaid jewels
" until he pledged them to the defendants; that in *January* 1736.
" the ſaid *Seamer* became a bankrupt, and that a commiſſion of
" bankruptcy was taken out againſt him (*but that is not material,*
" *becauſe the bankruptcy was after the depoſiting the jewels*).

" Then the jury find the value of the jewels to be 750 *l.* and up-
" on the whole matter conclude with a doubt, whether the defen-
" dants are guilty of a converſion or not, which they refer to the
" court.

The general queſtion is, whether by any part here found, Sir *John Hartop* the plaintiff, and owner of theſe goods, is barred from having the goods delivered to him, on the demand that is found in this ſpecial verdict to have been made, or in the preſent action is entitled to a ſatisfaction in damages for them.

On this queſtion it will be proper to conſider, firſt, on the tranſactions found by the verdict, in what relation *Seamer* ſtands to Sir *John Hartop* the plaintiff.

Secondly, to conſider the acts of *Seamer*, and how far Sir *John Hartop* is affected by them.

The matter to be determined is, whether any thing done by *Seamer* has deveſted the property of Sir *John Hartop*, and hath given ſuch a right to the defendants to detain theſe jewels, as ſhall make their detainer and their keeping them to their own uſe to be no converſion.

Sir *J. H.*'s delivery of the jewels to *Seamer*, a bare naked *bailment* of them for the uſe of the bailor.

As to the firſt point, I think it is clear that Sir *John Hartop*'s delivery of the jewels to *Seamer* was a bare naked *bailment* of them for the uſe of the bailor.

It is expreſſly found that they were lodged for ſafe cuſtody only, ſealed up in a paper put into a bag, which was alſo ſealed, and that *Seamer* had no authority from the plaintiff to ſell or diſpoſe of them.

The difference between bailing and pledging of goods is, that *a pawnee* hath a ſpecial property, and *a bailee* the cuſtody only.

This is therefore what Lord Chief juſtice *Holt*, in his enumeration of the ſeveral ſorts of intereſts that a man may have in goods, in the caſe of *Cogs* verſus *Bernard*, *Salk.* 26. calls a depoſit of goods. In 5 *Co.* 80, 84. *Southcote*'s caſe, a difference is taken between bailing and pledging of goods, for a pawnee hath a ſpecial property, and is not conſidered as one who hath the cuſtody only, as appears to be the caſe of *Seamer*, to whom theſe jewels were delivered to keep for the uſe of the bailor only.

Seamer's breaking the ſeal, taking the jewels out, and diſpoſing of them, made him a treſpaſſer to Sir *J. H.*

As *Seamer* had theſe goods by the delivery of Sir *John Hartop*, in this particular manner, *Seamer*'s breaking the ſeal and taking the jewels out of the bag, and diſpoſing of them, made him a treſpaſſer to Sir *John Hartop*, according to the opinion of *Anderſon* in *Moore* 248.

Though trover will not lie againſt a carrier for negligence, yet if he breaks open a box, and takes the goods, treſpaſs will.

In all caſes where a perſon to whom goods are delivered hath neither a general nor a ſpecial property, if he converts them to his own uſe, treſpaſs will lie; *Anderſon* there ſays, that it is otherwiſe of a bailee; but he muſt mean ſuch a bailee as hath a ſpecial property, and that *Seamer* had not; and with this opinion of *Anderſon* the opinion of Lord Chief Juſtice *Trevor* agrees in *Salk.* 605. that though trover will not lie againſt a carrier for negligence, yet if he breaks open a box, and takes the goods, treſpaſs will lie againſt him.

The next thing to be conſidered is, how far Sir *John Hartop*, the true owner of theſe jewels, is affected by any thing that is found to be done by *Seamer*, who was only entruſted with the cuſtody of them under very ſpecial circumſtances, in reſpect to their being ſealed up in a paper and bag in the manner that has been mentioned, and whether Sir *John*'s property be deveſted thereby.

Seamer had no kind of property either general or ſpecial; he came to the poſſeſſion of the jewels by right originally, but when he broke the ſeal, and took the jewels out of the bag, and by that enabled himſelf

himſelf to deliver them openly to the defendants, he was poſſeſſor *Malæ fidei*, and went to the defendants as ſuch.

But it was objected that *Seamer* was the poſſeſſor of the jewels, and that is ſufficient for the defendants who were not privy to *Seamer*'s wrong, (and I dare ſay they were not) and that the defendants dealt with *Seamer* in the way of their trade, and honeſtly advanced their money on the ſecurity of theſe jewels, of which *Seamer* appeared to be the viſible owner.

And to be ſure, as it is hard on the plaintiff to have his jewels diſpoſed of diſhoneſtly, ſo it is hard on the defendants to loſe their money; and it was urged for them, as the plaintiff truſted *Seamer*, and the defendants were ſtrangers to him, it was more reaſonable the loſs ſhould fall on the plaintiff, than on the defendants.

And on this head was cited *Salk.* 289. *Hen* verſus *Nicholls*, before Lord Chief Juſtice *Holt* at *Niſi prius*, that was an action on the caſe for ſelling the plaintiff one kind of ſilk, pretending it to be of a different kind, and on trial upon not guilty it appeared, that there was no actual deceit in the defendant who was the merchant, but in his factor who was beyond ſea, and the doubt was if this deceit could charge the merchant; and *Holt* was of opinion that the merchant was anſwerable for the deceit of his factor, though not *criminaliter* yet *civiliter* (*and then comes that part of the caſe for which it was cited*); for ſeeing ſomebody muſt be a loſer by this deceit, it is more reaſonable that he, who employs and puts a truſt and confidence in the deceiver, ſhould be a loſer, than a ſtranger, and upon this opinion the plaintiff had a verdict.

And there is no doubt but the verdict was right in that caſe, for the defendant employed his factor in the act of ſelling, in which the deceit was committed, and by employing him as a factor, he created a credit in him.

But that is not the preſent caſe, for the plaintiff here gave no power to *Seamer* to do the act in which the deceit was, but on the contrary hath uſed a prudent method to prevent it; the preſent caſe therefore is like the caſe in 1 *Inſt.* 89. where *A.* leaves a cheſt locked with *B.* and taketh away the key, there *A.* does not intruſt *B.* with the goods.

The preſent caſe falls within the rule laid down by Lord *Coke*, that where *A.* leaves a cheſt locked with *B.* and taketh away the key, there *A.* does not intruſt *B.* with the goods, but is a depoſit for ſafe cuſtody only.

As here does not ſeem to be any fault either in the plaintiff or defendant, let us now ſee what the common law pronounces on theſe tranſactions excluſive of the cuſtom of *London*.

The caſes, in which ſales in market overt have been pleaded and diſallowed, are extremely ſtrong to prove, that this diſpoſition by *Seamer* does not affect the property of the plaintiff.

In *More* 624. In an action of trover for jewels, one pleaded the cuſtom of *Briſtol*, that every ſhop there is a market overt every day except *Sunday*, and that the jewels were ſold to him in his ſhop in *Briſtol*, he being a goldſmith; and on demurrer, the plea was held to be ill, becauſe he did not aver that it was his ſhop in which he uſed to exerciſe the trade of a goldſmith, which he ought to have done, for if the jewels were ſold in another ſhop, it would not toll the property of the owner.

In *Cro. Jac.* 68, 69. where to an action of trover the defendant pleaded the cuſtom of *London*, *&c.* and that he being a mercer, bought their wares in his ſhop wherein he uſed to by ſuch wares; and on demurrer to the plea it was held to be ill, becauſe the wares were not agreeable to his trade; and there it was ſaid, that the cuſtom was too general, that every freeman might buy all manner of wares in every ſhop, *&c.* for then a ſcrivener might buy plate in his ſhop, and the like, *&c.* which is not reaſonable.

Theſe caſes ſhew, that though the ſeller was a ſtranger to the party, and though he bought for a valuable conſideration, yet ſuch ſale did not bind the true owner, nor juſtify the converſion, unleſs he brought himſelf within the cuſtom of market overt, in which caſe the ſale binds, by reaſon of the default in the owner, and is compared to the caſe of a fine and non-claim. 35 *H.* 6. *fol.* 29. and in *Bacon's Treatiſe, concerning the Uſe of the Law, fol. ed.* 80. Property of goods by theft, or taken in jeſt, where the ſale is in a market overt, or fair, ſhall bind the owner being not the ſeller of the property, it muſt be in a market or fair where uſually things of that nature are ſold.

In the caſe in 15 *H.* 7. 15. an action of treſpaſs was brought for taking ſo many ſlippers; the defendant pleaded that he was himſelf poſſeſſed of ſo many pieces of leather, and bailed them to one *J. S.* who delivered them to the plaintiff, and afterward the plaintiff made of them ſlippers, ſhoes, and boots, and juſtifies the ſeizing of them as his property, and the plaintiff took exception that the colour was not good: And the firſt queſtion was, whether the plea did not amount to the general iſſue; and ſecondly, whether the ſale did give the plaintiff ſo much as a colour to take them; and the opinion of the court was, that the plea was good, and that it was a good colour, becauſe the bailee had a lawful poſſeſſion; in which caſe, when he gives them, it is a good colour for the vendee (the plaintiff is called the vendee) to take them, in which caſe the plaintiff hath colour, by the gift of him who had the lawful poſſeſſion, to puniſh any ſtranger to him who took the goods; but it was held to be colour only, and judgment was given for the defendant: On the ſecond point, whether the property of the leather was changed by being made into ſhoes? It was held, that it was not.

By this caſe it is very apparent, that the true owner of goods does not loſe his property by the ſale made by the poſſeſſor of them, unleſs it were in market-overt; and in the caſes ſtated, no regard is had to the vendee's ignorance of the vendor's want of title; no regard to the vendee's coming rightfully to them as a purchaſor without notice; no regard to the vendor's having the lawful poſſeſſion of them.

The true owner of goods does not loſe his property by a ſale made by the poſſeſſor of them, unleſs it were in market overt.

Theſe caſes are all grounded on what is mentioned in 2 *Inſt.* 714. *Caveat Emptor, & Spoliatus debet ante omnia reſtitui.*

But to impugn this doctrine, ſome caſes have been cited, *Huſſey* verſus *Jacob*, *Mich.* 8 *W.* 3. *B. R. Salk.* 344. The Lord *Chandos* loſt money at play to *Huſſey*, and gave him a bill for it on *Jacob*, who accepted, and afterwards refuſed to pay, and an aſſumpſit was brought againſt *Jacob*, and he pleaded the 16 *Car.* 2. *c.* 7. An act againſt deceitful, diſorderly and exceſſive gaming; to which it was demurred; and the court held, that though this is a kind of new contract, yet all is founded on the illegal and tortious winning, and only ſecures the payment of that money, and therefore it is within the ſtatute, the plaintiff being privy to the firſt wrong; but if *Huſſey* the plaintiff had aſſigned this to a ſtranger, *bona fide*, upon good conſideration, he had not been within the ſtatute, for he was not privy to the tort, but an honeſt creditor. This caſe is alſo reported in *Carthew* 357. and there it was ſaid by the court, that as to the inconveniency concerning trade, there can be none in this particular caſe, becauſe the bill is gone no further than to the firſt hands, (*viz.*) to the hands of the plaintiff *Huſſey*, who won the money, and ſo no damage could here accrue to any perſon, but to him who is certainly within the ſtatute; but if this bill had been negotiated, and indorſed to any other perſon for value received, then it might have another conſideration.

This ſeems to be very reaſonable, for the acceptance made a new contract: In the caſe of *Huſſey* verſus *Jacob*, the judgment was for the defendant, becauſe the acceptance was not conſidered as diſtinct from the conſideration, the action being brought by the winner, yet in that caſe it is ſaid, that the acceptance makes a new contract; if, therefore, it was between ſtrangers to the gaming, as between the acceptor and the aſſignee, I ſhould think the ſtatute of gaming might be quite out of the caſe.

In *Salk.* 126. *Mich.* 10 *W.* 3. Lord Chief Juſtice *Holt* mentioned this caſe; if a bank note be payable to *A.* or bearer, any perſon who finds it, is ſo far conſidered as the bearer, that a payment to him will diſcharge the Bank. And ſo *Salk.* 125. *Hodges* verſus *Steward*, *Paſch.* 3 *W. & M. B. R.* If a bill of exchange be payable to *J. S.* or bearer, if the drawee pays it to the bearer, though he comes to

it by trover, theft, or otherwiſe, it will diſcharge him; but yet, Lord Chief Juſtice *Holt*, in *Salk.* 126. ſays, that the finder of ſuch a bill hath no property againſt the true owner; if a third perſon purchaſes a bank bill of the finder without fraud, he hath gained a title to it in the uſual manner, by making himſelf the bearer of it, for a valuable conſideration; and on this, is the opinion of Lord Chief Juſtice *Holt* founded, that a property is created in the bearer, in reſpect to the uſual courſe of buſineſs and tranſactions of this ſort, in which the trading with bank notes hath been looked on as changing money for money, or gold for ſilver; where a bank note is payable to the bearer it is conſidered as caſh, and the delivery of the note, by the courſe of buſineſs, does create a property in the perſon who becomes the bearer of it for ready money, but there is no ſuch courſe of trade in reſpect to the gaining of property in goods.

Property, by the rule of law, does not follow the poſſeſſion, unleſs in caſes where the true owner hath no marks to aſcertain his property, as in money, *vide Cro. Eliz.* 746. *Higgs* verſus *Holiday*, where it was held, that if a man delivers money to another, the property thereof is in the bailee, becauſe it cannot be known.

Ford verſus *Hopkins*, *Salk.* 283. Trover for million lottery tickets, upon evidence it appeared, that the plaintiff had given the tickets in queſtion to a goldſmith, to receive the money due on them; that ſome payments were due, and ſome were not; that this goldſmith had received tickets of the defendant, and given him a note to pay him ſo many million lottery tickets; that the plaintiff's tickets were delivered to the defendant by the goldſmith upon this note; and it was held by Lord Chief Juſtice *Holt*, that if money is ſtolen, and paid to another, the owner of the money can have no remedy againſt him that received it. But if bank notes, exchequer notes, or million tickets, or the like, are ſtolen or loſt, the owner has ſuch an intereſt or property in them, as to bring an action into whatſoever hands they are come.

This muſt mean, that the owner can bring an action for them, into whatſoever hands they come without a *valuable conſideration* paid for them; for if it be not thus underſtood, what *Holt* ſays here, will not agree with his former opinion, *fol.* 126. and *Holt* ſaid further, that money or caſh is not to be diſtinguiſhed, but theſe notes or bills are diſtinguiſhable, and cannot be reckoned as caſh, and they have diſtinct marks and numbers on them; but if they had been ſold for a valuable conſideration before the money had become due, he doubted whether it would have transferred the property; and he held, that by the delivery of the plaintiff's tickets to the defendant, the property of them was not changed.

In the caſe at bar, the owner is found to have given no power to *Seamer* to ſell theſe jewels, and no caſe has been cited in which a diſpoſition made by the mere poſſeſſor of goods, hath been held to change the property of the owner, in a caſe of goods that have marks whereby they may be known; and thoſe caſes relating to the transfer of bank notes, depend on the particular circumſtances in reſpect to theſe bank notes being conſidered as caſh.

No inſtance where a diſpoſition made by a mere poſſeſſor of goods, hath been held to change the property of the owner, where they have marks by which they may be known.

The caſe that warrants this diſtinction, is the caſe of *The Bank of England* verſus *Newman*, determined by Lord Chief Juſtice *Holt*, *Paſch.* 11 *W.* 3. aſſumpſit for 60*l.* on the general iſſue; the evidence was that *John Bellamy* had given a note to the defendant for 60*l.* payable to him or bearer ſix months after date; the defendant went to the bank, and negotiated it with the bank, diſcounting intereſt for the ſame, but did not indorſe the bill; *Bellamy* broke, not having paid this bill; and the bank brought this action againſt *Newman*, and the jury found for the plaintiff; but the court granted a new trial, and held this to be a verdict againſt law; and *Holt* ſaid, if a bill or note be payable to a man or order, and he delivers it for ready money, and not for money antecedently due, or lent upon it, it is a ſelling of the bill like a ſelling of tallies in bank bills, and if no indorſement be made thereon, the vendee is without remedy againſt the vendor, but if there be an indorſement, he may have remedy againſt the indorſor, provided he demanded the money of the drawer in convenient time, and therefore the bank had no remedy againſt *Newman*, though they had advanced the money, and the court looked on it as a ſale of the note.

This caſe ſhews, that the tranferring theſe notes is conſidered in the ſame light as the changing money for money.

Taking it then that the property of Sir *John Hartop* was not changed by the diſpoſition of theſe jewels made by *Seamer*, as conſidered at common law, the next matter to be conſidered will be, whether the place where the pawn is found to be made will entitle the defendants to detain them.

It is found that *Seamer* after he had broke open the bag, and taken out the jewels, carried them to the defendants ſhop, which was an open public ſhop in *Fleetſtreet* in the city of *London*, where the defendants carried on the trade of bankers, and alſo traded in jewels, and frequently lent money on the ſecurity of jewels, and in the public ſhop of the defendants the ſaid *Seamer* borrowed of the defendants 300*l.* and depoſited the jewels as a ſecurity for the ſame.

On this finding, the cuſtom of *London* as to ſales in market overts hath been inſiſted on for the defendants, and that pawning comes within that cuſtom.

As

As to this it was anſwered by Sir *John Strange*, that no cuſtom is found by this ſpecial verdict, and therefore the court cannot judicially take notice of this cuſtom.

And we are of opinion, that the court cannot judicially take notice of it on this ſpecial verdict.

The cuſtom of *London* as to ſales in *market overt* being not found by the ſpecial verdict, the court held that they could not judicially take notice of it, but taking it as ſtated, they were of opinion it does not extend to pawning.

In the caſe of *Arguile* verſus *Hunt* in this court, *Trin.* 5 *Geo.* 1. a prohibition was moved for to the ſpiritual court for a ſuit there, for calling a woman whore in *London*, and the want of juriſdiction appeared on the face of the libel; but becauſe the cuſtom of *London* to cart whores was not ſet forth in the libel, the prohibition was denied, and it was determined that the court could not judicially take notice of the cuſtom of *London*, and the ſame thing is alſo determined in *Carthew* 75. but it was ſaid for the defendant that this cuſtom need not be found by the jury, becauſe it cannot be proved by witneſſes, but muſt be certified by the recorder of *London*; but I think this no ſufficient anſwer to the objection ariſing from the want of finding the cuſtom.

In the caſe of *Day* verſus *Savage*, *Hob.* 87. it is cited to have been adjudged that the cuſtom of *London*, that every day there except *Sunday*, is a market overt, ought to be tried by the jury, and not by the certificate of their recorder; but that hath been ſince determined to be otherwiſe in the caſe of *Appleſton* verſus *Stowton*, *Cro. Car.* 516. Sir *William Jones* 412. but in all the caſes the cuſtom is either pleaded ſpecially, as in *Cro. Jac.* 68. or elſe it is found by the jury; and if this be ſo, that the court cannot judicially determine of the cuſtoms of *London*, but they ought to be pleaded or found; then what was inſiſted on as to pawning being to be taken to be equal to a ſale, will be quite out of the queſtion.

But however we are of opinion that taking the cuſtom of *London* to be as ſtated in 5 *Co.* 83. *b.* this cuſtom does not extend to pawning. It is a conſtant rule that cuſtoms are to be taken ſtrictly. *Perkins*, *Sec.* 435. *Noy's Max.* 78. 2 *Sid.* 139. *Lamb.* 619.

The diſpoſition of a pawn is quite variant from a ſale, for a vendee can transfer the thing to any other, and trade is thereby promoted; otherwiſe in pawns, for they ſtop the change of the property in the things pledged.

Then ſince the cuſtoms are to have a literal and ſtreight interpretation, as the cuſtom is only for a ſale in open ſhop to bind the property of a ſtranger, that cuſtom cannot extend to a pawn, which is a diſpoſition quite variant from a ſale; by a ſale the vendee can transfer the thing to any other, and trade and traffick is promoted thereby; but it is quite otherwiſe in the caſe of pawns, for they tend to ſtop the change of the property of the things that are pledged, and therefore if there is any difference between a ſale and a pawn, that is a ſufficient reaſon why the cuſtom which is affixed to the one, ſhould not extend to the other; and therefore the queſtion is not, whether it be a reaſonable cuſtom, that a pawn in an open ſhop

in *London* ſhould bind the property of a ſtranger; but the true queſtion is, whether a pawn and ſale be the ſame, for if they be not the ſame, then pawning will not fall within the cuſtom, that a ſale in market overt in an open ſhop in *London* binds the property of a ſtranger.

To ſhew that pawning goods in *London* will not bind the property of a ſtranger, I will mention the caſe in the *Year-book*, 35 *H.* 6. *p.* 25. and is in point; it was an information in the Exchequer for the King's jewels; the defendant pleads the cuſtom of *London*, that if any goods be pawned there, the pawnee may detain them until the money lent upon them be paid; and pleads further, that he did not know that they were the King's jewels, and that they had not the King's arms or marks upon them; and to this plea there was a demurrer and judgment for the King, becauſe it is not a good cuſtom that a pawn ſhould bind the property of a ſtranger, and though it was ſaid at the bar the judgment in that caſe was given on another point, that the cuſtom ſhould not bind the King by reaſon of his prerogative, yet it is not ſo, for both points were reſolved, and judgment was given upon both; and *Jenkins* in abridging the caſe, *fol.* 83. ſays, that the cuſtom of *London* doth no where extend to the King's goods, nor to a pawn of them.

As there is no cuſtom found by the verdict, and as there is no inſtance that the cuſtom of *London* hath ever been allowed in caſe of a pawn, but a reſolution in the *Year-book*, and the opinion of judge *Jenkins* are to the contrary, I think the defendants cannot have any title to retain theſe goods.

As there is no inſtance the cuſtom of *London* hath ever been allowed in the caſe of a pawn, the pawnee has not any title to retain the goods againſt the true owner.

On the foundation of ſuch a cuſtom much was ſaid at the bar upon the act againſt brokers 1 *James* 1. *ch.* 21. which in the preamble of it, is ſaid to be made "for the defence of honeſt and true mens "property, and intereſt in their goods.

What was ſaid upon it was very material; but as the conſtruction of this act is of great conſequence to the trade of *London*, we have avoided giving any opinion about it, being unanimous for the plaintiff without the aid of this ſtatute, as my brother *Chapple* before he went out of town declared, he agreed with us intirely.

The firſt of *James* againſt brokers being of great conſequence to the trade of *London*, the court declined giving any opinion on the conſtruction of it, as the preſent caſe did not make it neceſſary for them to do it.

Caſe 9. *Seamer and others* verſus *Bingham and others*; *and Strode and others* verſus *Strode*, *June* 11, 1743.

THE father of archbiſhop *Wake*, by a deed on the marriage of the archbiſhop, ſettles the eſtate now in queſtion upon the iſſue male of the archbiſhop, and if no iſſue male, then he directs the eſtate to be ſold, and to be divided equally among the archbiſhop's daughters.

By a deed of the 29th of *April* 1702. the archbiſhop directs his eſtate to be ſold, and the money ariſing from it to be divided equally among his ſix daughters, provided he ſhould have no ſon.

After the marriage of *Eſther*, one of the daughters to *Richard Brodripp*, he, " by deed dated the 7th of *October* 1714. made be-
" tween him and *Eſther* his wife of the one part, Doctor *Wake*,
" afterwards archbiſhop of *Canterbury*, of the other, reciting the
" deed of the 29th of *April* 1702. did covenant, that all ſuch
" right either in land or money as ſhould at any time accrue to
" *Heſter* in her life, or to *Richard* in her right, by virtue of the re-
" cited deed, ſhould be veſted in the three perſons, who were like-
" wiſe parties to the indenture in 1714. in truſt that they and the
" ſurvivor, *&c.* ſhould put out ſuch ſhare of the money raiſed by
" the ſale of the manors, *&c.* as belonged to *Heſter* at intereſt on
" a good ſecurity, and the rents and profits of her ſhare of the ſaid
" eſtate, and the intereſt of the money raiſed by ſale of her ſhare,
" ſhould pay to *Richard Brodripp* during his life, and after his
" death to *Heſter* during her life, and after the death of the ſurvivor
" of them ſhould pay all the principal money to the iſſue of *Richard*
" *Brodripp* and *Heſter* (other than and beſides ſuch iſſue male of
" *Richard* by *Heſter*, who for the time being ſhould be immediately
" inheritable to the manors, lands, *&c.*) equally between them
" ſhare and ſhare alike, to ſons at 21, and daughters at 21, or
" marriage; and if any of the children ſhould die before their
" ſhares ſhould become payable, to go to the ſurvivors; but in caſe
" all ſhould die, then the money to be paid to ſuch ſon who ſhould
" be inheritable as aforeſaid; and if no ſuch ſon, then to be paid
" to the ſurvivor of *Richard Brodripp* and *Heſter*, and the execu-
" tors, adminiſtrators or aſſigns of ſuch ſurvivor.

George Brodripp, the only child born of this marriage, ſurvived his father, and afterwards arrived at his age of twenty-one, but is now dead in the life-time of his mother, who is married to a ſecond huſband the defendant *Strode*.

Thomas Brodripp heir at law of *George*, inſiſts that the intereſt of *Eſther* ought to be deemed real eſtate, and that it veſted in *George*, *Eſther*'s ſon, in nature of a remainder after her death, and that it is now deſcended on him.

The plaintiffs, who are the children of *Richard Brodripp* by a firſt venter, and half ſiſters of *George Brodripp*, inſiſt that this ſhare muſt be conſidered as money, and that it veſted in *George Brodripp*, and conſequently was tranſmiſſible to his perſonal repreſentatives.

The defendant *Thomas Strode* and his wife inſiſt, that if there was ſuch indenture or deed of 1714. and the defendant *Eſther* named, or made a party thereto, that ſhe never executed the ſame, and was not, nor could be bound thereby, and that ſhe was not only at the time a feme court, but an infant of 16 years of age, and ſuch deed being made and executed after her marriage with *Richard Brodripp*, the ſame was merely voluntary as to her.

LORD CHANCELLOR.

In the firſt place this is a pretty harſh demand in the plaintiffs, who claim two thirds of this contingent intereſt, though at the ſame time they are no relations at all of *Eſther Strode*, or of *archbiſhop Wake*, but only half ſiſters of *George Brodripp*, and daughters of *Richard Brodripp* by a firſt venter.

Therefore if a reaſonable conſtruction can be put, which will prevent theſe conſequences from happening, it is what a court of equity would incline to do, as the parties to the deed themſelves would have guarded againſt them.

The caſe has been properly divided into three queſtions:

Firſt, Whether by the deed of the ſeventh of *October* 1714. executed the day after the marriage by *Richard Brodripp* the huſband, and archbiſhop *Wake*, the property of *Eſther Strode* is bound as to her ſhare of her grandfather's eſtate.

The ſecond queſtion, if it did not bind her, whether the act ſhe did by executing a deed on her marriage with *Strode* in 1738. is an acquieſcence and binds her, (for there the deed of 1714. is recited, and that *Eſther* was a party, and that ſhe ſecures her intereſt in that deed as a proviſion for her children, and herſelf if ſhe ſurvives).

Thirdly, If it did not bind her, then what is the conſtruction of the truſts of the deed of the 7th of *October* 1714.

As

As to the two firſt queſtions, whether ſhe was bound by the execution of the deed of the 7th of *October*, or by the ſubſequent act, I ſhall give no opinion: but I ſhould think ſhe was not bound.

If it was real eſtate, all theſe queſtions would be out of the caſe.

But I muſt conſider it as money, it being directed to be ſold.

The rule of this court is, that land to be turned into money is conſidered as money.

But it has been truly ſaid, that there are caſes where perſons may inſiſt in this court upon the land itſelf; that is, where the parties all agree that it ſhall not be turned into money, but if any of them oppoſe it, the court will direct it to be ſold.

There is another reaſon in this caſe, becauſe here one of the daughters had the pre-emption given her.

I do not take the deed in 1714. to be a ſettlement for a valuable conſideration.

I agree there are caſes where a father contracting for an infant child ſhall bind the child, eſpecially if the child claim any thing under the ſettlement; but then it muſt be before marriage, and in conſideration of the marriage; for the court will not ſuffer her to claim benefit one way, and not to be bound the other.

But this being after marriage is voluntary, and being the next day after the marriage does not differ the caſe, for whether two days or ſix, or ſix years, it is the ſame thing.

No recital of the father will bind the property of the daughter, but there muſt be ſome proof of the father's intention to do it.

There is no ſuch proof in this caſe. It might be a reaſonable caution in the huſband to ſecure ſome proviſion for the children, but yet I am of opinion it could not bind the mother.

The deed is by way of covenant, that all the intereſt which ſhe ſhould claim under the deed in 1702. ſhould be conveyed to *Bennet*, *&c.*

When is the time the principal money is to be paid? why, after the death of the ſurvivor of father and mother, for till then it was to veſt in truſtees.

But

But it is ſaid the time of payment there, is to be conſidered at the age of twenty-one or marriage. I am of a different opinion, for this is only a circumſtance or qualification of the perſon receiving, and the words at their age of twenty-one, or marriage, is not to accelarate the payment, or to veſt it in the children; but the plain meaning of the words, is, that if the father and mother had died during the infancy of the children, that it ſhould not be paid before their marriage or twenty-one.

It has been ſaid that it ſhall veſt at twenty-one, and be tranſmiſſible to the repreſentatives, though not payable till after the death of the ſurvivor of father and mother.

Suppoſe *A.* by will directs a ſum to be paid at twenty-one, or marriage, and there are no words of gift, or intereſt to be paid, it ſhall not veſt before that time.

The direction of the payment here is the gift, and therefore will not veſt till the time of payment comes; and beſides, there is no intereſt given, which makes the caſe ſtill ſtronger.

The meaning of the clauſe of proviſo was plainly this, that if any of the younger children died before the time of payment came, that it ſhould not go to their repreſentatives, but to the ſurvivor of the brothers and ſiſters.

It is ſaid this is a ſevere conſtruction, becauſe ſome of the younger children might live to twenty-one, or might want the money to advance them in marriage; and it would be hard if they died in the life-time of the father and mother, that their ſhare ſhould go to their ſurviving brothers and ſiſters rather than to their own children, if they ſhould leave any at their deaths.

But whatever hardſhips there may be in this caſe, I am to govern myſelf by the words of the deed; and moſt clearly on the conſtruction of this deed, their ſhare would ſurvive to the other younger children.

I take the words *for the time being* to relate to the time of payment, the death of the ſurvivor of father and mother.

Or otherwiſe a great abſurdity would follow; for ſuppoſe at the death of the father there were two ſons and two daughters, and the eldeſt ſon arrived at the age of twenty-one, but dies without iſſue in the life-time of his mother: and afterwards at her death, the next ſon ſhould become inheritable, would he be entitled? I am of opinion he would not, for it was the intention of the deed to exclude ſuch ſon as ſhould be inheritable *at the time being*, the death of the ſurvivor of father and mother.

" And in caſe there ſhall be no ſuch ſon, *&c.*

That is *no ſon* who at the time of the death of the ſurvivor of father and mother ſhall be inheritable: which ſhews that the whole deed is connected to the time of payment, the death of the ſurvivor of father and mother.

Though it is very true there is no time of payment taken from the condition or circumſtances of ſuch ſon who is inheritable, yet there is a time of payment equally applicable, which is the death of the ſurvivor of father and mother.

I think the meaning of the parties to be, that if there ſhould be no child at the death of the father and mother, that it ſhould be in the power of the ſurvivor to diſpoſe of it abſolutely.

Lord *Hardwicke* decreed the eſtate in queſtion compriſed in the deed of the 29*th* of *April* 1702. to be ſold, and the money ariſing by ſuch ſale to be divided into ſix equal parts, and ſuch ſix parts to be conſidered as the ſeveral ſhares of the ſix daughters of Doctor *Wake*, late archbiſhop of *Canterbury*, *Elizabeth* the ſeventh daughter having died unmarried and without iſſue; and a queſtion being made in theſe cauſes, whether the ſixth part, which was the ſhare of the plaintiff *Heſter* firſt married to *Brodripp*, and now to *Strode*, belong ſolely to *Heſter* as having ſurvived her huſband *Brodripp*, and all the children of that marriage, or ought to be diſtributed as part of the perſonal eſtate of *Brodripp* her ſon; his Lordſhip declared, that he was of opinion that the ſaid ſhare belongs ſolely to the plaintiff *Heſter*.

Caſe 20. *Butler an infant by his guardian* plaintiff, *and Freeman and John Butler* defendants, *June* 22, 1743.

B. gives all the reſt and reſidue of his perſonal eſtate to *his grandſon* at 21, and if he die before that age, then to *F.* whom he makes his executor; the grandſon is not intitled to the intereſt ariſing from this reſidue, but muſt accumulate till he arrives at 21.

THE grandfather of the plaintiff, by will, after directing his debts and legacies to be paid, *gives all the reſt and reſidue of his perſonal eſtate to his grandſon the plaintiff at his age of twenty-one, and if he die before that age, then to the defendant* Freeman, *whom he makes his executor.*

The plaintiff has brought his bill for the intereſt of the reſidue to be paid to him during his infancy.

The defendant *Freeman* by his anſwer inſiſted, that the plaintiff is not entitled to it, unleſs he attains his age of twenty-one, but that it ought to accumulate, and if the plaintiff dies before twenty-one, that it will equally belong to the defendant with the reſidue.

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The defendant *John Butler*, the father of the infant, inſiſted, that *the reſidue* muſt be confined to what the teſtator left at the time of his death, and that the intereſt made after his death, ought to be conſidered as an undiſpoſed part, and go to him as the next of kin to the teſtator, according to the ſtatute of diſtributions; or if the court ſhould be againſt him in this point, that then he is entitled to receive it for the maintenance of the plaintiff.

The plaintiff's council argued, that the intereſt ought to follow the principal, as the ſhadow does the ſubſtance, and therefore that the deviſe of the reſidue will carry it; and cited the caſe of *Green* verſus *Ekins*, *December* 6, 1742. *

* *Vide ante, Vol.* 2.

The council for the defendant *Freeman* inſiſted, this was a contingent deviſe to the plaintiff, and as it does not veſt till his age of twenty-one, he cannot be entitled to the intereſt, but that it ought to be received by a truſtee in the mean time, and placed out in real or government ſecurities for the benefit of the plaintiff, if he comes of age, if not, for the benefit of the defendant *Freeman* the remainder-man.

The council for *Butler* the father inſiſted on the ſame points as are already ſtated by the anſwer of the defendant.

LORD CHANCELLOR.

I am of opinion that the plaintiff is not entitled to the intereſt that ariſes from this reſidue, and though the words *reſt and reſidue* muſt be confined to what ſhall be found at the death of the teſtator, after his debts, funeral expences and legacies are paid, yet that the intereſt ought to accumulate till the plaintiff arrives at his age of twenty-one, and as often as it amounts to a competent ſum, to be placed out by a truſtee appointed by the Maſter.

The court doubtful how the intereſt would go if the grandſon died before 21. whether to his repreſentative or to *F.*

I am not quite ſo clear how this intereſt would go, if the accident ſhould happen of the plaintiff's dying before twenty-one, whether to the repreſentative of the plaintiff, or to the defendant *Freeman*, and if there had been occaſion, ſhould have been glad the caſes had been looked into and argued over again; but as this queſtion may never ariſe ſince the plaintiff may live to be twenty-one, there is no neceſſity for another argument at preſent.

The reſidue being given by a grandfather to a grandſon on a contingency of his attaining 21. and nothing ſaid of the application of the produce, he is not entitled to be maintained out of it.

As to the defendant *John Butler*'s claims, I am of opinion he has no right to the intereſt, becauſe the teſtator has given all *the reſt and reſidue* of his perſonal eſtate, ſo that he cannot be ſaid to have left any part undiſpoſed, and conſequently can have no title to it as next

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of kin under the ſtatute of diſtributions; for as the deviſe of the reſidue is contingent, it not veſting till the grandſon's age of twenty-one, the intereſt is ſo likewiſe, and muſt accumulate in the mean time; nor can the defendant *Butler*, by the rules of this court, entitle himſelf to it as maintenance for the infant, becauſe it is given by a grandfather to a grandſon upon a contingency of attaining his age of twenty-one; and as nothing is ſaid how the produce of it ſhall be applied, he is not entitled as a grandſon to be maintained out of the produce.

The court will not direct the intereſt of a contingent legacy to be applied for the child's maintenance, unleſs from the poverty of his parent he is in danger of periſhing for want.

The law of nature obliges only fathers to maintain their children, and unleſs the child from the mean circumſtances of the parent is in danger of periſhing for want, the court will not direct the intereſt that ſhall be made of a contingent legacy to be applied for that purpoſe; ſo that unleſs the parent is totally incapable, or under particular circumſtances, as having a numerous family of children, and is bordering upon neceſſity, the law of the land, and of nature, make it incumbent upon the parent to maintain his child.

A parent muſt maintain his child unleſs totally incapable, or by having many children borders upon neceſſity.

I was council in the cauſe of *Atcherly* verſus *Vernon*, 1 *P. Wms.* 783. where the teſtator Mr. *Vernon* had left 6000 *l.* to the plaintiff his niece to be paid her at her age of twenty-one, and ſhe inſiſted that the intereſt of this money ought to be allowed for her maintenance; and Lord *Macclesfield*, who directed this cauſe to be argued only by one council of each ſide, was of opinion, that the intereſt in this caſe ought to follow the principal, for it was a veſted legacy, and payable at twenty-one.

But there it was a ſum of money ſeparated and detached from the reſt of the eſtate, and a veſted legacy; here it is a contingent one, and not a ſpecific ſum, but *of the reſidue of his perſonal eſtate*, which makes a difference between the caſes; and the father likewiſe in the preſent caſe poſſeſſed of a good eſtate, and in conſiderable circumſtances.

Therefore his Lordſhip decreed the intereſt which has ariſen upon the reſidue of teſtator's perſonal eſtate ſince his death, or which may ariſe, to be paid into the hands of a truſtee, to be laid out in real or government ſecurities as often as it ſhall amount to a competent ſum.

Crichton verſus *Symes*, *June* 22, 1743. Caſe 21.

THE queſtion in this caſe aroſe upon the will of *Dorothy Colby*. A teſtatrix ſays, I give to *B.* &c. all my goods, wearing apparel of what nature and kind ſoever, except my gold watch. *All her wearing apparel and ornaments of her perſon, except her gold watch, paſſed to the deviſees, and any houſhold goods and furniture, but no other part of her eſtate.*

The plaintiffs have brought their bill for the reſidue of the teſtatrix's perſonal eſtate, and found their claim upon theſe words in the will, *I give and bequeath to the plaintiffs all my goods, wearing apparel of what nature and kind ſoever, except my gold watch.*

Mr. *Brown* for the plaintiffs cited the caſe of the *Duke and Dutcheſs of Bolton*, and *Newſtead* verſus *Johnſon*, before Lord *Hardwicke*, *July* 15, 1740. * * *Vide ante.*

The general preſumption he ſaid was with the plaintiff, for it is not to be preſumed that the teſtator died inteſtate.

That it is a general deviſe, and carries the whole reſidue, for there is nothing more known than that the word *omnia bona* will convey every thing in the civil law.

Mr. *Browning* of the ſame ſide cited *Moor* 352. *Portman* verſus *Willis*, and 1 *P. Wms.* 267. *Anon.* both as to the general doctrine of *omnia bona.*

That wearing apparel is only intended for the ſake of the exception of the gold watch, and is no revocation of the reſidue.

Mr. *Noel*, council for the defendants, the executor, and *Elizabeth Clark*, the only ſurviving ſiſter of the teſtatrix, ſaid, there is no general introductory clauſe that ſhews her intention of diſpoſing of her reſidue, *as all my wordly goods I intend to diſpoſe of*, or any ſuch general expreſſion.

It is difficult to find caſes which correſpond exactly with odd uncertain clauſes in wills, yet there are ſome where it has been held, *that all my chattels of what nature or kind ſoever* will not carry the reſidue. *Pratt* verſus *Jackſon*, 2 *P. Wms.* 102. *Eq. Caſ. Abr.* 200, 201.

It being a woman's will makes it a ſtronger caſe for the defendants, for the teſtatrix conſidered all ornaments as wearing apparel, ſince it is not goods and wearing apparel, *but all my goods, wearing*

apparel of what nature or kind ſoever, which ſhews that ſhe meant only to give *wearing apparel*, and ornaments of the perſon, ſuch as jewels, *&c.*

Mr. *Brown* on the reply ſaid, as to the obſervation that there are no general words which ſhew her intention to diſpoſe of the reſidue, it may have weight in the determination of thoſe caſes, where there are ſuch words, but the law ſuppoſes that every perſon in making a will intends to diſpoſe of every thing.

It has been ſaid, the teſtatrix does not mean perſonal eſtate in general, but ſome ſpecies of goods.

But the words *goods of what nature or kind ſoever* in common parlance means every thing.

That the plaintiffs are the teſtatrix's near relations, and that the natural conſtruction of the words is all my goods, except my watch.

LORD CHANCELLOR.

Caſes of this kind are ſeldom very clear.

The reaſoning and arguments to ſhew the intention, ſeem to preponderate in favour of the defendants.

It has been ſaid the teſtatrix has not ſet out with general words of diſpoſition.

I lay no weight upon that, becauſe all teſtators intend to diſpoſe of the whole; ſhe ſeems to have made an exact calculation of what her perſonal eſtate would amount to, for here is a lapſed legacy of 50 *l.* which taken out of the reſidue nothing remains, but only 16 *l.* ſo that ſhe imagined ſhe had diſpoſed of the whole.

There is no doubt as to the obſervation upon *omnia bona ſua*, that both by the civil law and law of *England* it will paſs the whole.

If a man gives a legacy, and then ſays, I give all my goods, it will paſs the reſidue.

But what do theſe caſes amount to in general, only, that if a man gives a legacy, and then ſays, I give all my goods, it will paſs the reſidue. But there are inſtances where goods have been taken in a more reſtrained ſenſe.

The word *goods* in common parlance, mean goods only, and not the whole perſonal eſtate.

As to what Mr. *Brown* ſays, that in common parlance it means every thing, I take it to be the direct contrary, that they mean goods only, and not the whole perſonal eſtate.

This was not intended to be a reſiduary clauſe, for ſhe afterwards gives a legacy of 50 *l.* to the executor.

Indeed if there had been the word *reſidue*, I ſhould have thought it ſtrong for the plaintiff.

It has been inſiſted for the defendants, that the words *wearing apparel* explain the teſtator's meaning, as if ſhe had ſaid all my goods, to wit, my wearing apparel.

All my goods, *wearing apparel*, not to be confined to wearing apparel only, but conſtrued the ſame as *and* wearing apparel.

But *wearing apparel* muſt be conſtrued the ſame as *and wearing apparel*, and cannot be ſtrained to this ſenſe; for there was no occaſion to introduce wearing apparel in order to except *the gold watch*, for if ſhe had ſaid all my goods, except *my gold watch*, it would have done as well.

Therefore I am of opinion, as theſe words ſtand in the will, ſhe intended to give only her *wearing apparel*, ornaments of her perſon, houſehold goods and furniture, but no other part of her perſonal eſtate.

The houſe of Lords were never clearer than in the caſe of *Pratt* verſus *Jackſon*, (*vide* 2 *P. Wms.* 202.) that the words goods related only to the teſtator's houſhold goods and furniture, and did not extend to goods in the way of his trade, or his goods as a contractor for the government. *

The teſtatrix meant here to give not only what was properly clothes, but the ornaments of her perſon, and the exception of the gold watch ſhews the latitude of the expreſſion; and what makes this plain is, it being agreed by the parties that 50 *l.* which is now the reſidue, is a lapſed legacy.

His Lordſhip decreed that all teſtator's wearing apparel and ornaments of her perſon except her gold watch paſſed to the plaintiff, and any houſhold goods and furniture that ſhe had, but not any part of her eſtate.

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* One has a houſe in which he lives, and houſhold goods, and has alſo a houſe at *Goſport* near *Portſmouth* for invalid ſeamen, with a vaſt number of beds, ſheets, and houſhold ſtuff, and by marriage articles it was agreed, that his wife ſhould on his death have no claim upon his perſonal eſtate except his houſhold goods and houſhold ſtuff: this exception to extend only to the goods which he had in the houſe in which he lived, and not to ſuch as were in the hoſpital, and made uſe of by the government. *Pratt* verſus *Jackſon.*

Caſe 22. *Brookſbank* verſus *Sir William Wentworth*, *June* 23, 1743.

W. deviſed all his houſhold goods, cattle, corn, hay, and implements of huſbandry and ſtock belonging to *his houſe, meſſuage, farm and premiſſes*, he held by leaſe, to his wife for life, a malt-houſe being included in the leaſe, the ſtock of that, as well as the ſtock in huſbandry, will paſs by this bequeſt.

ONE *Wentworth*, who had 17 years to come in a leaſe of a farm, malt-houſe, *&c.* at 40 *l. per ann.* rent, gives to the plaintiff all his houſhold goods, cattle, corn, hay, and implements of huſbandry and ſtock belonging to *his houſe, meſſuage, farm and premiſſes* in the ſaid leaſe, to her for life, if ſhe ſo long live; but if ſhe ſhould die before the term in it expires, then he ſurrendered the ſaid leaſe to the defendant, and makes him his executor.

The plaintiff brings her bill for the ſtock in huſbandry, and likewiſe the ſtock in the malt trade.

The defendant inſiſts, that nothing paſſed by the will but the ſtock in huſbandry only.

LORD CHANCELLOR.

The rent received by the defendant who was the landlord, muſt certainly be increaſed on account of the malt-houſe, malt-kiln, *&c.* for the repairs are increaſed by it.

This farm is given by the teſtator to the plaintiff during her life, and ſhe to pay the whole rent of 40 *l.*

It is very unnatural to ſuppoſe that this woman was to carry on the buſineſs of the farm and to pay the whole rent, and yet not give her the benefit of the malt-houſe, *&c.* though included in the leaſe.

But whether natural or unnatural, the words muſt have their effect.

It is very difficult to find what ſtock in huſbandry the teſtator had which would not paſs by theſe words, houſhold goods, cattle, *&c.* corn, hay, and all implements of huſbandry.

Then follows the word *ſtock*.

Poſſibly, if teſtator had ſtopped here, it would not have done.

But it goes on and ſays, belonging to my meſſuage and dwelling houſe, farm and premiſſes in the ſaid leaſe.

Therefore it is very abſurd to confine the deviſe to his ſtock in huſbandry, when he has given her all his ſtock in the houſe, and meſſuage, farm and premiſſes compriſed in the ſaid leaſe, and the malt-houſe is actually part of the premiſſes.

I am of opinion that both of them were intended to be included in this will.

I think it anſwers even to the depoſitions on the part of the defendant.

For they ſwear, when a farmer ſpeaks of his ſtock, he means only what belongs to huſbandry; but what would they have ſaid, if they had been aſked what they thought he meant by ſtock in the houſe and meſſuage, farm and premiſſes held of the defendant?

Theſe words are certainly explanatory of both ſtocks.

His Lordſhip decreed the whole therefore to the plaintiffs.

Richardſon, adminiſtratrix of the will annexed of Mrs. Weſtbrook, verſus *Greeſe*, *March* 7, 1743. Caſe 23.

THE bill was brought to ſtay execution upon a bond for 260 *l.* and to have it delivered up.

Mrs. *Weſtbrook* in her will ſays, " *Item*, I give to my ſervant *Jane* " *Greeſe* 500 *l.* to be paid her within three months after my death.

W. by will gives to her ſervant *G.* 500 *l.* to be paid her within *three months* after *W.*'s death; and in another part ſays, I give 5 *l.* apiece to the reſt of my ſervants, *but not to G. becauſe I have done very well for her before.* And by a latter clauſe gives her lands in truſt to pay her debts and legacies. *W.* at her death owed *G.* 260 *l.* on bond. *On the circumſtances of this will there is ſufficient to take away the preſumption, that the legacy was given in ſatisfaction of the debt.*

In another part ſhe ſays, " I give five pounds apiece to the reſt " of my ſervants, but I do not give five pounds to the ſaid *Jane* " *Greeſe*, becauſe I have done very well for her before.

By another clauſe " ſhe gives her lands lying in different pariſhes " in truſt by mortgage, or ſale, or otherwiſe, to pay her debts and " legacies, and after debts and legacies are paid, then, *&c.*

Mr. Attorney General, council for the plaintiff, laid it down as a rule of this court, that where the legacy exceeds, or is equal to the debt, it has been held to be an ademption.

Mrs. *Weſtbrook* died in *January* 1735. and the legacy was paid to *Jane Greeſe*, the 18th of *April* 1737. who lived two years after, but never thought of bringing an action upon the bond. He cited *Fowler* verſus *Fowler*, the 18*th* of *May* 1735. before Lord *Talbot*, who ſaid there that no particular affection ſhould be a ground to alter the general rule of the court.

Mrs. *Greeſe* was only a ſervant in the family of Mrs. *Weſtbrooke*, and there are ſeveral caſes much ſtronger, where legacies have been given to a wife or children who were creditors upon the eſtate of the teſtator, and yet held to be a ſatisfaction.

LORD CHANCELLOR.

The rule is to be ſure as laid down by Mr. Attorney General, and therefore incumbent on the other ſide to ſhew, how this caſe is diſtinguiſhable from it.

Mr. *Brown* for the defendant ſtated, that Mrs. *Weſtbrooke* being ill of the ſmall pox, Mrs. *Greeſe* who had never had it, attended her during that illneſs at the hazard of her own life, and was upon this account in ſuch eſteem with the teſtatrix, that ſhe conſtantly dined with her afterwards, and was treated in every reſpect as a friend and companion.

Lord Chancellor prevented the defendant from going into evidence of this fact, becauſe he thought it ought to have no weight with the court.

Mr. *Brown* laid a ſtreſs upon intereſt being paid by the repreſentative of Mrs. *Weſtbrooke* on the bond to Mrs. *Greeſe*, and on the legacy's being given juſt before the death of the legatee.

He inſiſted that the legacy was given entirely as independent of the bond, and as a reward for her extraordinary ſervices.

But excluſive of theſe circumſtances, he ſubmitted on the face of the will the defendant was entitled both to the bond and legacy.

He allowed the generality of the rule as laid down by the Attorney General, but ſaid if it was to be examined into, arguments might be uſed to ſhew it's abſurdity; for it ſounds a little oddly that if the teſtator owes 100 *l.* to *A.* and gives *A.* a legacy of 100 *l.* *A.* ſhall have nothing, and yet if he leaves 100 *l.* to *B.* to whom he owes nothing, *B.* ſhall have the legacy of 100 *l.*

After debts and funeral expences paid, then I give, *&c.*

Seems calculated to ſhew that ſhe intended both debts and legacies ſhould be paid, which is ſomething particular, and different from the common form of wills.

A precaution taken that debts and legacies ſhould be paid, and likewiſe a precaution that no more than the legacy of 500 *l.* ſhould be paid, for the teſtatrix precludes her from the 5 *l.* given to the reſt of the ſervants.

He cited *Chauncy*'s caſe, 1 *P. Wms.* 408. which comes very near the preſent.

To conſtrue it a ſatisfaction of the legacy would be to reject very material words, *viz. after the payment of my debts, &c. Atkinſon* verſus *Webb*, 2 *Vern.* 478.

It is a rule, where a legacy is given chargeable upon land, it is not due unleſs the perſon lives to the time it becomes payable.

Urged this as an argument to ſhew that this legacy was ſubject to an accident, and a contingency, and therefore could not be in ſatisfaction of a debt, unleſs it had been certain, and a legacy veſted, and abſolutely in the legatee upon the death of the teſtator.

Mr. *Mariot* of the ſame ſide cited *Graves* verſus *Boyle*, *July* 27, 1739. before Lord *Hardwicke* on Sir *Samuel Garth*'s will, where his Lordſhip ſaid he would not extend the rule of ſatisfaction farther than it has gone before, and that an intention of a teſtator ſhould co-operate with the rule, * and 2 *Vern.* 270. in Lord *Somers*'s time, and *Salk.* 508. *Cranmore*'s caſe in Lord *Harcourt*'s time; and *Crompton* verſus *Sale*, 2 *P. Wms.* 553. *Eq. Caſ. Abr.* 206.

* *Vide* 1 *Tr. Atk.* 509.

Mrs. *Greeſe* lived a ſervant between 20 and 30 years with the teſtatrix, ſo that her wages upon a reaſonable allowance muſt amount to 260 *l.* the ſum for which the bond was given.

The teſtatrix does not give Mrs. *Greeſe* 5 *l.* becauſe ſhe had already done very well for her, which is a circumſtance at leaſt to ſhew, that ſhe intended her the 500 *l.* excluſive of the bond.

The bond beſides, was executed but a month before the making of the will, ſo that ſhe could not poſſibly be thought to have forgotten the bond.

Mr. Attorney General in reply ſaid, there muſt be ſome reaſonable, ſolid rule in theſe caſes, or elſe nothing would be ſo precarious as this kind of property.

As to teſtatrix's expreſſion *after debts and funeral expences*, it will not weigh with your Lordſhip, for where the law would have done it if not expreſſed, *nihil operatur*.

As to the obſervation, upon the exception of the 5 *l.* legacy, it was a ſhorter way of doing it than to have named every one of her ſervants, and was merely to ſave time and trouble.

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As to the latter words, *becauſe I have done very well for her before*, means no more than that ſhe had been bountiful to her already, which ſhe might be very well ſaid to be even after the 260 *l.* was deducted.

LORD CHANCELLOR.

The rule of ademption, by length of time, is become the fixed rule of property, and too well eſtabliſhed, to be diſputed now; but if the maxim *debitor non præſumitur donare* was to be reconſidered, it would not hold.

The general rule of ademption is too well eſtabliſhed to be diſputed, and it is admitted that where a legacy either exceeds the debt, or is equal to it, that is, where there is a debt due in the teſtator's life-time, and nothing but a plain general legacy given to the creditor, it ſhall prevail.

Length of time will not ſuffer it to be ſhaken now, as it is become the fixed rule of property, and yet the maxim *debitor non præſumitur donare* would not hold if it was to be reconſidered, for the court have always ſhewn ſome diſſatisfaction at the rule, and endeavour, if there is any room to do it, to diſtinguiſh caſes out of it.

The court, though they will not break the rule, have frequently ſaid, they will not go one jot further.

They have ſaid indeed they would not break the rule, but at the ſame time have ſaid, they would not go one jot further, and have been fond of diſtinguiſhing caſes ſince, if poſſible.

Diſtinctions from the rule muſt ariſe from the circumſtances in the will, and not of the legatee.

But then theſe diſtinctions are not to be taken from particular circumſtances of the legatee *debors* the will, ſuch as relationſhip, affection, ſervices, *&c.* unleſs they are to be found in the will itſelf.

This brings it to the queſtion, whether there are ſuch circumſtances in the preſent will.

I am of opinion there are ſufficient here, to take away the preſumption that the legacy was given in ſatisfaction of the debt.

The words here *after debts and legacies are paid, then I give, &c.* are much ſtronger than in *Chancey*'s caſe, before Lord Chancellor *King*, " that all his debts and legacies ſhould be paid." 1 *P. Wms.* 408, 410.

As for the worldly goods and eſtate wherewith it hath pleaſed God to bleſs me, after my debts and funeral expences are diſcharged, I give, *&c.*

What does this import? why, that after her debts, *&c.* were paid, ſhe intended to diſpoſe of the whole real and perſonal eſtate.

Here the legacy given to *Jane Greeſe* is at ſome diſtance after other legacies; but ſuppoſe it had immediately followed, or ſuppoſe it had been the only legacy, would any body have ſaid this was a ſatisfaction? there is no difference whether it is placed firſt or laſt in the will, whether it is the only legacy, or in company with other legacies.

The words, *becauſe I have done very well for her before*, imply, what ſhe had given her before was meant a bounty, and not a ſatisfaction.

But I think there is a ſtronger diſtinction ſtill from the common caſes. The teſtatrix ſays, *Jane Greeſe* ſhall not have 5 *l.* becauſe I have done very well for her before; theſe words appear to me to be a declaration, that what ſhe had given her before, ſhe intended her as a bounty merely, and not as a ſatisfaction.

It would be too much for a court of juſtice to make thoſe nice diſtinctions as to the *quantum* of the bounty of the teſtator, which Mr. Attorney General has attempted, by ſaying the teſtatrix intended no further bounty then 240 *l.* after the 260 *l.* paid.

The 500 *l.* to *G.* equally a reward for her ſervices as the 5 *l.* to the other ſervants, and legacies to ſervants have never been conſtrued a ſatisfaction for debts.

I do not reſt it upon this foot only, but look upon theſe words to intimate the teſtator meant the five hundred pounds to be equally a reward for *Jane Greeſe*'s ſervices, as the five pounds was for the other ſervants; and legacies to ſervants have never been held to be in ſatisfaction of debts.

She excludes *Jane Greeſe* from the five pounds legacy, becauſe ſhe has done very well for her before.

Neither is the argument, that it is not to be paid in three months, to be thrown intirely out of the caſe, and if it had been charged upon real eſtate only, and not at all chargeable upon the perſonal eſtate, I ſhould have thought it of greater weight; for would not the poſſibility and contingency of legatees dying before the legacy became payable have been taken into conſideration, as the legacy might not have been payable at all if the legatee had died before the three months; and held ſo in ſeveral caſes, one to this purpoſe was in Lord *Somers*'s time. *Yates* verſus *Fettiplace*, 2 *Vern.* 416.

A legacy chargeable on a mixed fund, if perſonal aſſets are ſufficient, is payable though the legatee die before the day of payment, otherwiſe on real eſtate only.

Where a legacy is charged upon a mixed fund of perſonal and real eſtate, if the perſonal aſſets are ſufficient the legacy is payable, though the legatee die before the day of payment, otherwiſe if the legacy was out of a real eſtate only.

Upon all theſe circumſtances I am of opinion here is enough to take it out of the common rule, and that this legacy is not to go in ſatisfaction of the debt.

His Lordſhip decreed that the defendant ſhould pay the plaintiff the principal and intereſt due on the bond in ſix weeks, and to be without coſts; but if the defendant ſhould not pay it in that time, the plaintiff was to be left at liberty to apply for coſts.

Caſe 24. *Pleas and Demurrers, March* 14, 1743.

THE bill was brought for an account.

The defendant put in a plea of a ſtated account as to all matters herein *before accounted for.*

LORD CHANCELLOR.

A plea of a ſtated account as to all matters *before accounted for*, is bad, it ſhould aver, that it is juſt and true to the beſt of the defendant's knowledge and belief.

It is bad, becauſe the defendant as to any errors charged in the account, might by ſuch a plea effectually defend himſelf againſt the diſcovery of any error, by ſaying only it was *before accounted for.*

Pleading to all except ſuch parts of the bill *as are not herein after anſwered*, is too general.

He muſt aver that the ſtated account is juſt and true to the beſt of his knowledge and belief. So where a defendant pleads generally to all except ſuch parts of the bill as are not *herein after anſwered*, is likewiſe bad, becauſe it is too general; you muſt be more explicit as to what you plead to the bill.

Caſe 25. *March* 14, 1743.

A bill brought by a creditor of an inteſtate for 100 *l.* on note, charging that the adminiſtratrix promiſed to pay it as ſoon as ſhe could get in effects, to which ſhe pleaded the ſtatute of limitations, and that ſhe made no promiſe to pay the note, *too general, for ſhe ſhould have pleaded ſhe made no promiſe to pay out of aſſets.*

A Plea of the ſtatute of limitations by an adminiſtratrix to a note for 100 *l.* The bill charges that ſince the death of the inteſtate who gave this note, the adminiſtratrix promiſed to pay it as ſoon as ſhe could get in effects of the inteſtate to diſcharge it.

The plea is general, that the defendant made no promiſe to pay the note.

LORD CHANCELLOR.

As there is a particular and ſpecial promiſe charged, the plea here is too general; the defendant ſhould have pleaded that ſhe made no promiſe to pay out of aſſets, and therefore it muſt ſtand for an anſwer, with liberty to except.

If the principal is barred, the intereſt is ſo likewiſe.

If principal be barred, ſo is intereſt.

Where a note is given for the payment of an annuity of ſix pounds *per annum* during the life of the annuitant, the defendant pleading that he did not promiſe to pay within ſix years is bad, he ſhould have pleaded the cauſe of action hath not accrued within the ſix years.

A plea of the ſtatute of limitations muſt ſay, *the cauſe of action hath not accrued within the ſix years*, that the defendant hath not promiſed to pay within ſix years, is bad.

So where a note is given for payment of money three years from the date, and an action is brought.

That the defendant has not promiſed to pay is bad, becauſe it is executory, and therefore it ſhould have been that the cauſe of action hath not accrued.

So where a note is given to pay 100*l.* by inſtallments.

That defendant hath not promiſed to pay is bad, becauſe the ſtatute of limitations bars only what was actually due, ſix years before the action brought.

Pearſon verſus *Brereton*, *March* 16, 1743.

Caſe 26.

A Petition was preferred in behalf of *Pearſon* and *Mary* his wife, that 860*l.* left under a will to perſons in truſt *for Mary and her heirs, to be laid out in the purchaſe of lands*, might be paid to the huſband, inſtead of being inveſted in land.

860*l.* left by will in truſt for *M.* and her heirs, *to be laid out in the purchaſe of lands*. *M.* conſenting in court, Lord *Hardwicke* directed the money ſhould be paid to the huſband.

LORD CHANCELLOR.

I doubt whether I can direct the money to be paid to the huſband notwithſtanding the wife's conſent, becauſe the heir would have a chance, if the wife died before the money was inveſted in land.

But upon the authority of a caſe at the *Rolls* directed (the wife conſenting in court) that the money ſhould be paid to the huſband.

Nota; Mr. *Brown*, the King's council, told me, that in a petition this time twelvemonth upon the very ſame queſtion, Lord *Hardwicke* would not direct the money to be paid to the huſband, but diſmiſſed the petition.

N. B. A petition on the very ſame queſtion a twelvemonth ago, was diſmiſſed.

Beard

Caſe 27. *Beard* verſus *Beard*, *April* 5, 1744.

B. by a will in 1739. gives all his eſtate real and perſonal to his brother, and makes him executor; in 1740. *by a deed poll* he grants to his wife all his ſubſtance *which he now has, or hereafter may have. The will was revoked as to all the perſonal eſtate by the deed poll; but as it cannot operate as a grant of it to the wife, the perſonal eſtate muſt be diſtributed.*

THE plaintiff's huſband, a freeman of *London*, being at variance with his wife, in *January* 1739. by his will executed at a tavern, gives all his eſtate real and perſonal to his brother, and makes him his executor.

In *November* 1740. by *a deed poll*, he gives and grants unto his wife all his ſubſtance which he now has, or may hereafter have.

The bill was brought by the wife who inſiſts upon *the deed poll*, and that the will is revoked by this ſubſequent act of the huſband in his life-time.

The council for the plaintiff cited *Boughton* verſus *Boughton*, the 5*th* of *December* 1739. 1 *T. Atk.* 625. and *Harvey* verſus *Harvey*, *November* the 12*th* 1739. *Vide* 1 *T. Atk.* 561.

LORD CHANCELLOR.

A man here has done two very unreaſonable acts; if it ſhould happen one trips up the heels of the other, it is a very fortunate thing to ſet every thing right again.

A wife appears here to be unprovided for, both before and after marriage.

A will is made at a tavern, probably in a paſſion, for the huſband was parted from his wife at that time, by which he gives his whole eſtate to his brother.

Afterwards he is guilty of another unreaſonable act, a gift to his wife by *deed poll* of all his ſubſtance.

The queſtion is which is to take effect.

A man cannot make a grant to the wife in his life time, being contrary to law, nor will this court ſuffer her to have the whole of his eſtate whilſt he is living.

The latter cannot take effect as a grant or deed of gift to the wife, becauſe the law will not permit a man to make a grant or conveyance to the wife in his life-time, neither will this court ſuffer the wife to have the whole of the huſband's eſtate while he is living, for it is not in the nature of a proviſion, which is all the wife is intitled to.

But then another conſideration remains, that though it cannot take effect as a grant to the wife, yet whether this is not an act ſo inconſiſtent and repugnant to the will, that it may amount to a revocation, though an act not ſtrictly legal.

There are ſeveral inſtances in this court where an incompleat act, and void at law, has been held here to be a revocation of a will notwithſtanding, as a *feoffment without livery*, &c.

An incompleat act, and void at law, has in this court been held a revocation of a will.

It has been ſaid this will is proved and eſtabliſhed in the eccleſiaſtical court, and therefore muſt be conſidered as a will.

To be ſure the eccleſiaſtical court could not do otherwiſe, for though this deed is a revocation of the legacies under the will, yet the executor continuing, it muſt be proved in the commons. But by this alteration in the diſpoſition of the perſonal eſtate, the executor becomes a truſtee for the next of kin.

Though the deed poll was a revocation of the legacies, yet the executor continuing, the will muſt be proved, but is become a truſtee for the next of kin.

The next queſtion is upon the conſtruction of the 11 *Geo.* 1. *ſec.* 17, 18. in reſpect to the cuſtom of *London*.

If this is an inteſtacy, it is admitted by the defendant's council, it muſt be diſtributed; but they have inſiſted here is a will, which as it is proved, muſt ſtand, and therefore there is no inteſtacy at leaſt of the perſonal eſtate; but if there is an inteſtacy at all, there is no difference in point of law between an abſolute, and a qualified inteſtacy.

Where there is an inteſtacy, the law knows no difference between an abſolute and a qualified one.

This being the rule; the executor, who from this qualified inteſtacy is now become a truſtee, muſt diſtribute in this caſe according to the cuſtom of the city of *London*; and his Lordſhip decreed accordingly.

The executor muſt in this caſe diſtribute according to the cuſtom of *London* as the teſtator was a freeman.

He declared likewiſe that the will was revoked as to all the perſonal eſtate by *the deed poll*, and yet it cannot take effect as a gift or grant of ſuch perſonal eſtate to the plaintiff, but the ſaid perſonal eſtate muſt be diſtributed.

Car verſus *Elliſon*, *April* 6, 1744. Caſe 28.

WILLIAM Car, by will dated in *July* 1732. ſays, "I order all my debts to be paid and payable out of all my real eſtate as here- "after mentioned, and I hereby charge the ſame with payment "thereof, and my mind and will is, that all my perſonal eſtate "ſhall be freed and diſcharged from my debts, *and I give and de- "viſe all my meſſuages, lands, tenements and hereditaments in St. He- "len's, Aukland and elſewhere in the county of Durham, and all other*

C. gives all his meſſuages, lands, tenements and hereditaments in *St Helen's*, *Auckland* and elſewhere in the county of *Durham*, and

all other his real eſtate to truſtees, &c. for 500 years for particular purpoſes, and after the determination of the term, *gives all the premiſſes* to his wife for her life without impeachment of waſte. *All the eſtates coming originally from the wife, the teſtator could not mean to ſever the copyhold from the freehold, therefore by the general words of the will the copyhold lands paſſed.*

" *my real eſtate*, unto Sir *Ralph Millbank* and———*Hedworth*, and " to their executors and adminiſtrators, for and during the term of " five hundred years, upon truſts hereafter mentioned; and after " the determination of the ſaid term, *I give all the premiſſes unto my* " *dearly beloved wife for and during her natural life, without im-* " *peachment of waſte.*

Mr. Solicitor General for the widow of Mr. *Car*, the plaintiff in the cauſe, ſubmitted that a deviſe of a copyhold eſtate without a ſurrender, where the deviſor had only the equitable intereſt, and the legal in truſtees, is ſufficient to paſs the copyhold.

And alſo, that the teſtator in this caſe could deviſe the copyhold to whomſoever he pleaſed, without any ſurrender, and that there is ſuch a conſideration, as this court thinks a valuable one, and ſufficient to ſupply the want of the ſurrender.

To ſhew that the copyhold paſſed by theſe general words, he cited 2 *Vern. Greenhill* verſus *Greenhill* 679.

He ſtated, that under the ſettlement on the marriage of the teſtator with the plaintiff, the uſes of the real eſtate paſſed by the fine that was afterwards levied: that there was likewiſe a ſurrender of the copyhold eſtate in five different ſurrenders, but all annexed together; and that there was no declaration of the uſes in the court roll, but indorſed only on the back of the laſt, and that they were ſurrendered and ſigned by the ſteward of the court, without any of the parties names to it.

A doubt, he ſaid, had been made whether this was regular.

A ſteward's indorſing on a ſurrender of a copyhold the uſes of it, ſufficient without ſpecifying them in the court rolls.

Lord Chancellor held this was ſufficient, and that there is no occaſion to ſpecify the uſes in the court rolls, but the ſurrender generally would do, without being more explicit, than by this indorſement of the uſes by the ſteward.

Mr. *Brown* council of the ſame ſide ſaid, that the words are ſo comprehenſive they muſt take in copyhold, or elſe after he had uſed ſuch words as would undoubtedly have paſſed his freehold eſtate, why ſhould he ſuperadd *all other my real eſtate*, but with an intention to paſs the copyhold likewiſe.

He ſtated the caſe more at large of *Greenhill* verſus *Greenhill* out of *Preced. in Eq.* 320.

Lord Chancellor aſked whether Mr. *Car* had any other real eſtate beſides what he had in *Durham* and *Newcaſtle*, and it was admitted he had in other counties.

Mr. *Craſter* of the ſame ſide cited *Andrews* and *Waller*, *Hill.* 6 *Geo.* 2. 1733. *Vide Viner's Abr.* title *Copyhold*, *p.* 237. *ſec.* 12.

Mr. Attorney General for the defendant, the heir at law, cited the caſe of *Harwood* verſus *Child*, *Auguſt* 13, 1734. and *Elwell* verſus *Polhill*, heard before Lord *Hardwicke June* 10, 1738.

The words there were *all other his lands, tenements and hereditaments* in *Somerſetſhire*; and yet it was held that theſe words would not paſs the copyhold; and upon a reference to a Maſter to ſee whether the teſtator had lands in any other county, he reported the teſtator had no other eſtate; and the court notwithſtanding determined that the copyhold lands would not paſs.

Mr. *Owen* of the ſame ſide argued; that the teſtator by giving each tenant for life an eſtate without impeachment of waſte, and a power of leaſing for twenty-one years, ſhews he meant only freehold, for he could not give the deviſees ſuch privilege over copyhold eſtates, for it would be a detriment to the lord of the manor of whom the copyhold lands are holden.

And inſiſted that there was no inſtance of deviſing a copyhold upon a term of five hundred years for paying debts by mortgaging, or otherwiſe, for a copyhold upon a mortgage muſt be ſurrendered, which is the only method of conveying a copyhold; and therefore this likewiſe is a circumſtance to ſhew he meant only freehold lands, to which theſe powers and privileges can only be annexed.

LORD CHANCELLOR.

I am of opinion the truſt of theſe copyhold eſtates will paſs without a ſurrender to the uſes of the will; there have been ſeveral caſes ſo determined, but particularly *Tuffnal* verſus *Page*, *Eaſter* term 1740. *

A perſon who has the beneficial intereſt only in copyhold eſtates may deviſe them, and they paſs by his will as well as any other lands, for he could not ſurrender them without having the legal eſtate.

Becauſe the ſurrender muſt be by the perſon who has the legal eſtate; and when there is no legal eſtate in the party who has the beneficial intereſt, it may paſs by a will as well as any other lands.

This being out of the caſe, the next queſtion is, whether here is a ſufficient indication of the teſtator's intention that the truſtees ſhould have the copyhold as well as the real eſtate.

As to this the words of the will and the nature of the caſe muſt determine.

There is no diſpute but the words are large enough to paſs the copyhold lands; there cannot poſſibly be larger to paſs any real intereſt a teſtator had in lands, than *all other my real eſtate*.

The

* *Vide ante.*

The words then being large enough, the next queſtion is, whether it appears to be the intention of the teſtator they ſhould paſs.

The real eſtate was originally the inheritance of the wife, conſiſting of part freehold and part copyhold.

Upon the marriage the freehold lands were by ſettlement conveyed, and by the fine of the huſband and wife to Sir *Ralph Milbank* and———*Hedworth*, in truſt for the huſband and wife during their joint lives, and the ſurvivor, with remainder to the heirs of their two bodies, remainder in fee to the huſband and his heirs.

Mr. *Car* and his wife likewiſe make a ſurrender of the copyhold lands to the ſame truſtees, and for the ſame purpoſes with the freehold lands.

After this the huſband makes his will.

What appears to be the intention?

Why as the wife had been ſo generous as to give the remainder in fee to him, he was willing to return the compliment to her, but *ſub modo*, and qualified with a charge for payment of debts, and ſo limited that all her children by any future huſband might take in ſtrict ſettlement.

It cannot be preſumed that the teſtator intended to ſever the copyhold which came at the ſame time with the freehold, and therefore this is a ſtrong circumſtance to indicate the teſtator's intention; and to conſtrue it otherwiſe would be to diſmember the eſtate, which could never be meant, when he deviſes them to the ſame truſtees as were under the ſettlement.

The objections deſerve to be conſidered.

That giving each tenant for life an eſtate without impeachment of waſte is not applicable to copyhold.

But in ſuch a comprehenſive will as this is, it is not neceſſary to lay ſuch ſtreſs upon the words *without impeachment of waſte*, and they may be looked upon as ſurpluſage with regard to the copyhold eſtates.

For in ſettlements of great family eſtates it frequently happens that real and copyhold eſtates lie blended, and intermingled together.

The Lord is not bound indeed to admit a tenant according to the expreſs terms of the truſt, where contrary to the form of a legal conveyance.

veyance. But the ſecurity of the Lord is admitting a truſtee to the inheritance, by which the fines, heriots, eſcheats, *&c.* are fully ſecured to him.

Caſes have been mentioned on both ſides.

But it is very difficult to make caſes tally exactly, becauſe circumſtances are material in theſe caſes.

The court will ſupply a ſurrender of a copyhold, where there is a charge upon it for payment of debts.

It has been determined in this court that where there is a charge for payment of debts on copyholds, and no ſurrender, yet the court will ſupply it. The caſe of *Elwell* verſus *Polhill* was only a copyhold for three lives, and not of inheritance, which was the reaſon of the decree there.

The material circumſtance here, is the intention of the teſtator to reſtore the eſtates to the wife, from whom they originally came, and therefore he could not mean to diſmember and ſever the copyhold eſtate from the freehold. His Lordſhip decreed the copyhold land paſſed to the truſtees by the general words of the will.

Roſewell verſus *Bennet*, *April* 17, 1744. Caſe 29.

B. by his will gives all his real and perſonal eſtate equally among his children; and, at the concluſion of it, directs his executor to lay out a ſum not exceeding 300*l.* in putting out the defendant, his ſon, apprentice.

B. in his life-time lays out 200*l.* in putting out the defendant *Clerk* to a perſon in the navy office, and dies without revoking his will. Evidence allowed to be read of the teſtator's declarations that this advancement ſhould be an ademption of the legacy.

THE defendant's father by his will, "deviſes all his real and "perſonal eſtate equally among his children; and in the "concluſion of his will, directs his executor to lay out a ſum not "exceeding 300*l.* in putting out the defendant apprentice."

The teſtator in his life-time lays out 200*l.* in putting out the defendant clerk to a perſon in the navy office, and dies without revoking his will.

It was inſiſted for the plaintiff, this muſt be conſidered as an ademption of the legacy, and offered to read evidence of the teſtator's declarations to this purpoſe.

It was oppoſed by the defendant's council, as being contrary to the ſtatute of frauds and perjuries, and that no weight ought to be laid upon it, being parol declarations only; and beſides, the father's ſuffering his will to ſtand unaltered, is a favourable circumſtance for the defendant.

LORD CHANCELLOR.

I am of opinion this evidence ought to be read, and ſhall judge of the weight of it afterwards.

The putting out a ſon clerk in any of the offices, is as much an advancement, as putting him apprentice to a trade; and as this act of the teſtator after making his will, is not a revocation of the will, but an ademption only of the defendant's legacy; I am of opinion the plaintiff ought to be let into this evidence, to ſhew the teſtator's intention, and it has been done in ſeveral caſes; one before Lord *King*, one before Sir *Joſeph Jekyll*, and another before Me, upon an appeal from a decree of Sir *Thomas Abney*'s at the *Rolls*.

Caſe 30. *Pain* verſus *Benſon and Palmer*, *April* 23, 1744.

T. B. by his will, appoints the intereſt that ſhall be made of his perſonal eſtate to be paid to his father during his life, and after his deceaſe, to his mother for her life, and after their deceaſe, gives the reſidue of his perſonal eſtate to his brother and ſiſters, and to the ſiſters of his late wife, *Martha* and *Rebecca Pain*, ſhare and ſhare alike; and then ſays, in caſe of the death of my brother, or any of my ſiſters, or wife's ſiſters, *before me, or the ſurvivor of my father and mother*, I appoint his, her, or their ſhares to be divided among the ſurvivors.

THOMAS Bellaſis, *September* 14, 1721, made his will as follows: I appoint all ſuch intereſt as ſhall be made upon my perſonal eſtate ſhall be paid to my father *Thomas Bellaſis*, during his life, and to my mother Mrs. *Elizabeth Bellaſis* after his deceaſe, in caſe he ſhall ſurvive him, during her life, for their reſpective uſes; and after the deceaſe of my father and mother, I give all the reſidue of my ſaid perſonal eſtate and effects to my brother and ſiſters *Charles*, *Mary*, and *Elizabeth Bellaſis*, and the ſiſters of my dear beloved wife deceaſed, *Martha Pain*, and *Rebecca Pain* (the plaintiffs) to be equally divided amongſt them, ſhare and ſhare alike; *and in caſe of the death of my brother, or any of my ſiſters, or wife's ſiſters, before me, or the ſurvivor of my father and mother, I do appoint his, hers, or their ſhares to be divided amongſt the ſurvivors of them.*

The brother died in the teſtator's life-time, but after the will was made, and his ſiſters in the life-time of the teſtator's mother, who ſurvived her huſband, but is ſince dead. *Martha* and *Rebecca Pain* claim the reſidue of *T. B.*'s perſonal eſtate. *They are intitled as the only ſurviving legatees at the death of the ſurvivor of the teſtator's father and mother, to the whole reſidue of T. B.'s eſtate, to the accumulated ſhare of the perſons who are dead, as well as their original fifth.*

The teſtator died in 1722, without revoking his will.

Charles Bellaſis died in the teſtator's life-time, but after the making of the will; *Mary* and *Elizabeth*, the teſtator's ſiſters, died in the life-time of the teſtator's mother, who ſurvived her huſband, but is dead ſince.

The

The bill is brought by *Martha* and *Rebecca Pain*, againſt the defendant *Benſon* (the conſignee of the money ariſing from the teſtator's perſonal eſtate) for the reſidue of the ſaid eſtate, and that the ſame may be paid to them.

It was inſiſted by the Attorney General for the plaintiffs, that as they were the only ſurviving legatees at the death of the ſurvivor of teſtator's father and mother, that they are the only perſons intitled to the whole reſidue of the teſtator's eſtate, as well the original, as accumulated ſhare.

The council for the defendant *Charles Palmer* inſiſted, that on the death of *Charles Bellaſis*, *Mary Bellaſis*, and his late wife *Elizabeth Bellaſis*, became intitled by virtue of, and under the ſaid will, each of them to one fourth part or ſhare of the ſaid *Charles Bellaſis*, of and in the balance remaining in *Benſon*'s hands; and that on the deceaſe of *Mary*, who died inteſtate in the life-time of the defendant's late wife; the ſaid *Elizabeth* became intitled under the ſaid will to one third part of the original part or ſhare of her ſaid ſiſter *Mary*, of the ſaid perſonal eſtate; and that, on the ſaid *Mary*'s death, the defendants ſaid wife, and the teſtator's mother, as only ſiſter and mother of *Mary*, became alſo intitled by the ſtatute of diſtributions of inteſtate's eſtates, each of them to a moiety of *Mary*'s fourth part, or ſhare of the original fifth part or ſhare of the ſaid *Charles*, of the ſaid teſtator's perſonal eſtate: That he having taken out adminiſtration to his wife, is intitled to the ſeveral parts or ſhares of teſtator's perſonal eſtate whereto his wife *Elizabeth* became intitled, on the reſpective deceaſes of *Charles* and *Mary*.

For the defendant were cited *Barns* verſus *Ballard*, 1 *Geo.* 1. 1728. on the firſt of *June*, before Lord *King*; " there was a deviſe to " four children of 500 a-piece at eighteen, or day of marriage; and " in caſe any of the children die before the age of eighteen, or mar- " riage, then to the ſurvivors, or ſurvivor of ſuch ſurvivors; one of " children died a minor, and then it ſurvived to three; another af- " terwards died a minor; and the queſtion was, whether the ſhare " that came by ſurvivorſhip to the laſt deceaſed minor, ſhould, up- " on the minor's death, ſurvive again; and held, it ſhould not; it " came before Lord *Hardwicke* in 1740, and this point ac- " quieſced in. *Perkins* verſus *Micklethwait*, 1 *P. Wms.* 274. 2 *Ch. Rep.* 131. *Rudge* verſus *Barker*, *Tr. Term* 1735, before Sir *Joſeph Jekyl. Caſ. in the time of Lord Talbot* 124.

It ſtood over till the laſt day of cauſes in the term, and then, being *May* the 5th, 1744, his Lordſhip gave judgment.

LORD CHANCELLOR.

A bill is brought to have an account of the reſidue of the perſonal eſtate of *Thomas Bellaſis*, and that it may be paid to the plaintiffs.

The principal defendant is *Charles Palmer*, who married *Elizabeth Bellaſis*, one of the teſtator's ſiſters.

The queſtion is, whether the whole accumulated ſhare of the perſons who are dead, as well as the original fifth, doth go over to the ſurvivors at the death of the ſurvivor of father and mother of the teſtator.

I am of opinion, that not only the original ſhare in the *reſiduum* of the perſonal eſtate does ſurvive, but the accumulated ſhare ſurvives likewiſe; and I found my opinion on the particular penning of this will.

It has been inſiſted, that it is not ſubject to any new ſurvivorſhip; and I do agree this is the general rule.

A. gives 1000*l.* amongſt four perſons as tenants in common, and directs, if one of them die before 21, or marriage, it ſhall ſurvive to the other; if one dies, his ſhare will ſurvive to the other three; but if a ſecond dies, nothing will ſurvive but his *original* ſhare, for the accruing ſhare was as a new legacy.

As where a man gives a ſum, ſuppoſe of 1000*l.* to be divided amongſt four perſons, as tenants in common; and that if one of them die before twenty-one, or marriage, that it ſhall ſurvive to the other: If one dies, and three are living, the ſhare of that one ſo dying, will ſurvive to the other three; but if a ſecond dies, nothing will ſurvive to the remainders but the ſecond's original ſhare, for the accruing ſhare is as a new legacy, and there is no further ſurvivorſhip.

Barnes verſus *Ballard*, and the reſt of the caſes cited for the defendant, are all of this general kind.

If this had been like thoſe caſes, and the penning of the will had warranted it, I ſhould have been of the ſame opinion.

By the will he ſays, "and in caſe of the death of my brother, or any of my ſiſters, or wife's ſiſters, before me, or the ſurvivor of my father and mother, I do appoint his, her, or their ſhares, to be divided amongſt the ſurvivors of them.

What is the effect of this clauſe?

Here is an expreſs direction, that if any ſhould die before the teſtator, it ſhould ſurvive to the others.

One

One of them died, and therefore his ſhare did go to the ſurvivors.

And if it had not been for this clauſe of ſurvivorſhip, to take place before the death of the teſtator, this would not have ſurvived at all, but muſt have been conſidered as an undiſpoſed part of the teſtator's perſonal eſtate.

Then I will ſuppoſe another had died in the teſtator's life-time.

Would the original fifth of him, who died ſecond in the life-time of the teſtator, have gone over, and the ſhare which ſurvived to him upon the death of the firſt, have gone over likewiſe?

Undoubtedly, both.

Then what is the conſequence ariſing from this? Why, that the teſtator meant, not only the original, but likewiſe the accumulated ſhare ſhould go over.

Then the queſtion is, Whether I can put a different conſtruction on the word *ſhare* in one caſe than the other?

There is no doubt, but a man may make his will ſo, that whatever he gives originally to tenants in common, and what ſhall likewiſe accrue to them by the death of others, ſhall go to the ſurvivors.

A will may be ſo made, that what is originally given, and what accrues by others deaths, ſhall go to the ſurvivors.

Then the queſtion is, Whether the teſtator here has not expreſſed ſuch intention?

I am of opinion he has plainly done ſo: And, indeed, the meaning of this teſtator was, that the reſidue of his perſonal eſtate ſhould go amongſt ſuch perſons as ſhould be living at the death of his father and mother.

I am more inclinable to make this conſtruction, becauſe I much queſtion, whether the determination of former caſes has not been contrary to the intention of the teſtator, though conſiſtent with rules of law: For the intention of teſtators is, to prevent any part from going to ſtrangers, for whom they had no kindneſs, and could not be ſuppoſed to have in their view at the time.

The intention of teſtators in theſe caſes is to prevent any thing going to ſtrangers, ſo that former determinations are contrary to their intention, though conſiſtent with rules of law.

But the rule is now ſettled, and I do not vary it in the preſent caſe, becauſe I am of opinion, that here are expreſs words which ſhew the teſtator meant not only the original gift to the legatees,

but what accrued likewiſe by the deaths of thoſe perſons, ſhould go to the ſurvivors.

And therefore his Lordſhip decreed an account of the reſidue, and that the whole ſhould be paid to the plaintiffs.

Caſe 31. *Norris* verſus *Le Neve*, *April* 28, 1744.

A nominal manor will paſs under the general words meſſuages, lands, tenements, and hereditaments.

THE commiſſioners who had been appointed to ſettle the boundaries between the parties, and for ſeparating freehold and copyhold, certified to the chancellor a doubt they had, whether a manor was included under the words *lands*, *tenements*, *and hereditaments*, in the conveyances of old *Oliver Le Neve*.

LORD CHANCELLOR.

There is no queſtion, but a manor may paſs by the word *hereditaments*.

The queſtion then will be, Whether it will paſs as it is placed in theſe two conveyances?

In the firſt deed are theſe words, "alſo all thoſe meſſuages, lands, "tenements, and hereditaments, of the ſaid *Oliver Le Neve*, ſituate, "lying and being in the towns, *&c.*"

This is large enough to take in any of the lands in the places before mentioned.

Now, where a man is making a general ſettlement of his eſtate, I am of opinion, that a nominal manor will paſs under theſe general words, though there is a ſort of heraldry in the law in ſome caſes; as for inſtance, in the acts of parliament relating to the clergy.

As to comprized, or *nient comprized*, in the law, upon this head, enjoyment will determine whether it is comprized or not.

The commiſſioners had nothing to do, in ſetting out boundaries, to conſider it as a manor, but only to diſtinguiſh freehold from copyhold: For manors do not properly conſiſt of meets and bounds, therefore I will quaſh the certificate of the commiſſioners.

As to the queſtion, whether the expence of the commiſſion ſhall fall upon the plaintiff only?

There does not ſeem to have been any default either in the plaintiff or defendant, that theſe lands are mixed and confounded; and therefore it would be hard to throw the whole upon the plaintiff.

But then the difficulty will be, whether, as the defendant's intereſt is much more inconſiderable than the plaintiff's, he ſhould bear the expence equally with the plaintiff.

I do not know any inſtance where the court have taken this into their conſideration, where the value of the eſtate belonging to both parties is conſiderable, though not equal.

For it is poſſible, nay, even probable, that the confuſion might ariſe from the eſtate of leſs value: And if I was of opinion that the eſtate of leſs value, ſhould bear the proportion, according to its value, I muſt direct an account before a Maſter, which would be attended with a much greater expence to both ſides, and therefore I had better keep to one uniform method, than lay down a new rule of this kind, for it would be moſt miſchievous to the parties themſelves.

Though the intereſt of one party is more inconſiderable than the intereſt of another, yet they ſhall bear equally the expence of a commiſſion ſettling boundaries, and ſeparating freehold and copyhold.

Furnival verſus *Crew*, *May* 1, 1744. Caſe 32.

IN 1682. the defendant's grandfather, Mr. *John Crew*, being ſeiſed in fee, "made a leaſe the 24th of *October* 1682, to "*Thomas Moor*, in conſideration of his ſurrendring of a former leaſe "of the premiſſes in queſtion, whereof there were two lives in be- "ing; and in conſideration of one hundred and thirty-ſix pounds "in hand, paid by the ſaid *Thomas Moor*, Mr. *John Crew* demiſed "to *Thomas Moor* and his aſſigns, a meſſuage in *Elton*, with the ap- "purtenances, to hold to the ſaid *Thomas Moor*, and his aſſigns, "for the lives of him the ſaid *Thomas Moor*, *Margaret* his wife, and "*John* his ſon, and the life of the longeſt liver of them, under the "yearly rent of forty-three ſhillings and eight pence; and in the "ſaid leaſe *Thomas Moor* covenants for himſelf, his executors, ad- "miniſtrators, and aſſigns, and doth agree to and with the ſaid *John* "*Crew*, his heirs and aſſigns, that *Thomas Moor*, his executors, *&c.* "at the death of any of the lives aforementioned, which ſhall firſt "happen, ſhall pay to *John Crew*, his heirs or aſſigns, within "twelve months next enſuing ſuch death, the ſum of ſixty-eight "pounds in the name of a fine, for every life added or renewed, "from time to time, according to the true intent and meaning of "theſe preſents; and the ſaid *John Crew* for himſelf, his heirs, "executors, and aſſigns, doth covenant and agree, to and with the "ſaid *Thomas Moor*, his executors and adminiſtrators, that the ſaid "*John Crew*, his heirs, executors, and aſſigns, *ſhall and will* (for "the conſideration of the ſaid ſum of 68*l.* to be paid to the ſaid

Lord Hardwicke, on the circumſtances of this caſe, was of opinion, the plaintiff was intitled to a new leaſe, with a covenant of renewal to be inſerted in it, as well upon the death of the additional lives, as upon the death of the old.

"*John*

" *John Crew*, his heirs, *&c.* at *Crew-Hall*, or at the place where " the ſaid hall now ſtands, in the name of a fine, for adding one " life to the remaining lives aforementioned) *execute one or more* " *leaſe or leaſes*, under the ſame rents and covenants as are ex- " preſſed in theſe preſents, *and ſo to continue the renewing of ſuch* " *leaſe or leaſes to Thomas Moor*, or his aſſigns, paying as aforeſaid " to the ſaid *John Crew*, his heirs or aſſigns, the ſum of 68*l.* for " every life ſo added or renewed as aforeſaid, from time to time, " according to the true intent and meaning of the ſaid inden- " ture."

The bill was brought by *Furnival*, one of the aſſigns of *Thomas Moor*, that his leaſe may be completed by filling up the lives, and that the ſame covenant of renewal may be again inſerted upon the dropping of any of the additional lives.

The defendant inſiſts, that after the lives had been once filled up, there ought to be no new clauſe of renewal.

Mr. Attorney General for the plaintiff, cited *Hyde* verſus *Skinner*, 2 *P. Wms.* 196. and *Bridges* verſus *Hitchcock*, *June* 15, 1715.

Mr. Solicitor General for the defendant, cited the caſe of *Doctors Commons* verſus *The Dean and Chapter of St. Paul's*, before the Houſe of Lords, in 1727.

LORD CHANCELLOR.

The original bill was brought by the plaintiff againſt the defendant Mr. *Crew*, to have the benefit of a covenant in two leaſes made by the grandfather of the defendant, and to have a ſpecific performance of the covenants.

The firſt leaſe was made in 1681, for three lives.

The ſecond leaſe in 1682, for three lives alſo.

In each of theſe leaſes the covenants are penned in the ſame words.

The fines are different, and the rents are different, according to the particular value of the eſtates: The fines are no more than 10*l.*

There is one circumſtance wherein they differ.

The leaſe of the *Samborne* eſtate was made when the grandfather was ſeiſed *in fee* of the eſtate.

The ſecond leaſe, when the grandfather, by a ſettlement, had made himſelf only a tenant for life, with remainder to daughters, *&c.*

But that does not make any difference in the equity of the plaintiff, becauſe the ſettlement was admitted to be voluntary, and therefore will not prevail againſt the plaintiff, who is a purchaſer for a valuable conſideration.

No lives dropped during the life of Mr. *Crew* the leſſor.

After his death two lives dropped, and a new life was added by the defendant's father and mother jointly, and another by her ſingly after the death of her huſband.

On the renewal the ſame covenants were inſerted *verbatim.*

A *Ceſtui que vie*, who was a new life in one of the leaſes, is dead, and the renewal is aſked upon his death.

In the other, the renewal is aſked upon the death of the laſt of the old *Ceſtui que vies* under the *firſt* leaſe.

I do not find that the renewal is much diſputed, but the principal queſtion is upon what terms.

The firſt conſideration is, what ſhould be the true conſtruction of theſe two covenants; and this indeed will determine the whole, for the reſt will be conſequential.

Upon theſe the queſtion is, whether the obligation on the part of the plaintiff to tender the fine, and the obligation on the landlord to renew, are only upon the death of the firſt *Ceſtuy que vies*, or whether the tenant, upon tendring a fine, would have a right to demand a renewal upon the death of any of the new added lives.

I am of opinion that the plaintiff is entitled to have the like covenants inſerted upon every renewal, as well upon the death of the new lives, as upon the death of the old.

It has been inſiſted on the part of the defendant, that this branch of the covenant was confined only to the firſt of the three lives that ſhould drop in the leaſe; and to be ſure their obſervation is right: but then come the following words, *and ſo to continue the renewing of ſuch leaſe or leaſes to Thomas Moore or his aſſigns, paying as aforeſaid.*

What is the meaning of theſe words *ſo to continue*?

It has been urged for the defendant, that theſe words mean only to continue the leaſe, by adding a new life on the death of the *firſt* leſſees only.

But I am of opinion the words do not mean barely continuing *a new life*, but continuing and filling up the eſtate from time to time.

But there is more force in the words ſtill, for it is continuing *the leaſe or leaſes*.

The word *or* there muſt be conſtrued as *and*, for it muſt be admitted on the part of the defendant that it means and comprehends new leaſes.

If it comprehends ſome new leaſes, where will you ſtop? Why will it not comprehend the renewal of *the leaſe* that will be granted upon the dropping of the laſt ſurvivor of the old lives, as well as any of the prior leaſes; I am now on the leſſee's covenants.

The next conſideration is on the conſtruction in the covenants on the part of the leſſor.

That he the ſaid John Crew, &c. for the conſideration of the ſaid ſum of 68 *l. &c. ſhall or will execute one or more leaſe or leaſes, under the ſame rents and covenants.*

So that here is a covenant to grant a new leaſe under the ſame *rents and covenants*, which includes and takes in the covenant for renewal as well as any other covenant.

For every life ſo added as aforeſaid, &c.

It is contended on the part of the defendant, that it means only the firſt lives.

But I am of opinion that it means any of the lives in the future leaſes; for the words are general, that he will grant it for ſuch life as aforeſaid, which will comprehend the whole within this form of expreſſion.

Thus much for the conſtruction of the words.

There are two circumſtances.

The 68 *l.* is *to be paid at Crew-Hall*, or at the place where the ſaid hall now ſtands.

I do not imagine that the leſſor thought that *Crew-Hall* would be pulled down before the expiration of three lives; but ſtill, as Lord *Hale* ſaid in the caſe of *King* verſus *Melling*, 1 *Vent.* 232. the meaning is to be ſpelled out by little hints.

There

There is no inſtance of ſuch a contract, as the defendant's council would make this tenant contract for; for it is moſt probable that a man ſhould contract for either two leaſes for three lives, or for perpetuating the renewal.

It is not a natural way of contracting to have had the ſecond leaſe for new lives, to have determined upon the death of the laſt life in *the old leaſe*.

It has been aſked, whether any breach could be aſſigned at law, upon an action of covenant againſt the heir at law, or executor of the grandfather: And I am of opinion even at law, a breach might be aſſigned.

I agree that the two covenants, one on the part of the leſſor, and the other of the leſſee, muſt be commenſurate with one another, and that upon theſe words *to continue the renewing*, *&c.* an action might be ſupported.

And therefore, if a breach might be aſſigned at law either againſt leſſor or leſſee, the queſtion is, whether this is a proper caſe for relief in equity; and there is no doubt but it is.

Firſt, from the nature of the covenant.

It is a covenant to make an eſtate in land; and if my conſtruction is right, the ſuit here is moſt proper, becauſe this court can give the thing itſelf, which is a higher and more adequate remedy than damages only, which is all the law gives.

A proper caſe for relief in equity, for this court can give the thing itſelf, a more adequate remedy than damages, which is all the law could give on an action for breach of covenant.

Secondly, as to the condition of the perſon who is called upon to renew.

This is a covenant which binds the lands in a court of equity, and therefore gives the relief againſt the proper perſon who is in poſſeſſion of the land, as it has a lien upon it.

But againſt this, ſome objections have been made on the part of the defendant.

Firſt, that theſe covenants for perpetual renewals ought to be diſcouraged, for it is taking ſo much of the inheritance from the owner. And indeed it is true, but ſtill agreements for a valuable conſideration ought to be performed, for the grandfather had *the fee*, and might have ſold it if he pleaſed, or charged it, and therefore ſhould be ſupported here.

There was another objection, that the conſideration is not adequate.

But as to that, I lay no great weight, for there is nothing exceſſive as to the advantages or diſadvantages of one ſide or the other.

As to the caſes of *Bridges* verſus *Hitchcock*, and *Hine* verſus *Skinner in the Exchequer*, which went up afterwards into the houſe of Lords, there were no fines to be paid in either of thoſe caſes; and therefore where the leſſor has taken care, as he has done here, that his ſucceſſors ſhall have a conſideration paid, it makes a much more favourable caſe for the plaintiff.

A third objection was, the plaintiff's demanding a renewal with the like covenants, which perhaps it is not in the power of the defendant to comply with.

But I am of opinion as to the leaſe of 1681. no objection of this kind could ariſe, for the grandfather was tenant *in fee*.

The right of renewal with the like covenants ariſes out of the original covenants, and runs along with the land.

But I do not ſay that the defendant is to inſert the covenants *verbatim*, for in framing the decree, he may be directed to covenant as far as his intereſt in the eſtate will go, ſo as to bind himſelf, and all parties claiming under him.

Though I do agree that the defendant is not bound by what his father or mother did, yet it ſhews what their apprehenſion was, *that this was a leaſe to be renewed for ever*.

As to the authorities, in the caſe of *Doctors Commons*, cited on the part of the defendants;

The houſe of Lords there decreed a new leaſe to be made for the term of 40 years, but without a covenant for renewing again: But this was founded upon one of the reſtraining ſtatutes, which was endeavoured to be evaded by giving bonds.

The caſe of *Hinde* verſus *Skinner* cannot be applied as an authority in the preſent caſe, nor can hardly be an authority in any, the decree there looked ſomething more like an award, and a compromiſe, than a decree.

But the caſe of *Bridges* verſus *Hitchcock*, cited on the part of the plaintiff is much more applicable: "There a leaſe was made for "21 years of a corn-mill to be repaired by the tenant, and there was "no covenant on the part of the leſſee to pay a fine, but a covenant "on the part of the leſſor, that he would ſix months before the ex- "piration of the leaſe grant another at the election of leſſee without "any fine *upon the ſame rents and covenants*.

The

The queſtion was, whether there muſt be a covenant for renewal again in the ſecond leaſe.

The court of Exchequer were of opinion that under the words *the ſame rents and covenants*, the covenant for renewal ought to be inſerted; and on appeal to the houſe of Lords the decree was affirmed. It was mentioned there that 1800 *l.* had been laid out by the tenant, in turning the corn-mill into a wire-mill, and therefore he was intitled to a building leaſe.

Under the words *the ſame rents and covenants*, the court of Exchequer was of opinion in *Hine* verſus *Skinner*, the covenant for renewal ought to be inſerted, and this decree afterwards affirmed in the houſe of Lords.

Suppoſe the court had decreed him another term only of twenty-one years, it might appear to be a ſatisfaction for the ſum ſo expended; but the court of Exchequer were of opinion to decree him a leaſe with the ſame covenant of renewal from time to time.

I am of opinion upon the whole, that in the preſent caſe the plaintiff is intitled to a new leaſe, with a covenant of renewal to be inſerted in it; his Lordſhip diſmiſſed the croſs bill.

Wiltſhire verſus *Smith*, *May* 28, 1744. Caſe 33.

A Bill was brought to redeem a mortgage on the 8*th* of *May* 1742. in which the plaintiff inſiſts upon a redemption on paying the principal money only, for that the intereſt ought to end the 20*th* of *February* 1741. becauſe the plaintiff had given ſix months notice to pay off the mortgage, and *on that day tendred the principal and intereſt, and a deed of aſſignment, but the defendant abſolutely refuſed to take the money.*

Where there are covenants in a deed of aſſignment on the part of a mortgagee, he may refuſe to take the principal and intereſt, though tendered, till he has had an opportunity of adviſing with his attorney whether he may ſafely execute.

The defendant ſwears that he offered to take the money, provided he might have time to conſider of it, and to adviſe upon the deed of aſſignment, as there are covenants in it on his part, upon which, as he is not of the profeſſion of the law himſelf, it is reaſonable he ſhould aſk the opinion of ſome attorney, whether they were ſuch as he might ſafely execute.

LORD CHANCELLOR.

There is not one caſe in twenty upon the fact of an abſolute refuſal after a tender, that is ever made out: for they are generally attended with circumſtances that explain the refuſal, and are nothing more than cauſes cooked up by country attornies, to make themſelves buſineſs. The plaintiff did not, as he ought to have done, ſend a draught of the aſſignment to the defendant, any time before the money was tendered.

The plaintiff inſiſts that the defendant abſolutely refuſed to take his money, or execute the deed of aſſignment; if this had been the fact, it would have been unconſcionable and unreaſonable in the defendant.

But the perſon, who was to take an aſſignment of the mortgage ſwears, that the defendant deſired further time, or to that effect.

The queſtion is, who was in the wrong?

The plaintiff certainly was.

For where there are covenants on the part of the mortgagee, it is very reaſonable that he ſhould have ſome time to look them over: And the plaintiff's attorney ought to have left the deed for a week with the defendant, that he might have an opportunity to adviſe upon it, and the plaintiff's attorney ſhould have appointed a time to pay the money after the defendant had been allowed a ſufficient time to adviſe: or, as I ſaid before, he ſhould have ſent a copy, or the ingroſſment of the aſſignment.

But the ſubſequent tranſaction, and what paſſed before the filing of the bill, explains it.

Did ever a mortgagor, as is the caſe here, after he was put under this difficulty, lie by a year and quarter without bringing a bill to redeem.

What could be the reaſon?

Why the plaintiff, the mortgagor's attorney, told him you have made a tender of your mortgage money, and the defendant's refuſal has forfeited his intereſt, ſo that you may keep the money, and by a bill compel the defendant to take the principal without intereſt from the time of the tender.

Lord *Hardwicke* ordered, that it be referred to a Maſter to take an account of what was due to the defendant for principal, intereſt and coſts on the mortgage, and on the plaintiff's paying to the defendant what the Maſter ſhall certify to be due within ſix months after he has made his report, it was decreed the defendant ſhould aſſign the mortgaged premiſſes, as the Maſter ſhould direct; but in default of the plaintiff's paying as above directed, it was ordered the plaintiff's bill do ſtand diſmiſſed.

Skip verſus *Huey*, *Wilcox and Edwards*, *May* 28, 1744. Caſe 34.

THE defendants were jointly and ſeverally bound to the plaintiff in the penal ſum of 4000 *l.* on the fifth of *December* 1739, conditioned for the payment of 2000 *l.* on the 5*th* of *March* enſuing, which money come to the hands of *Huey* and *Wilcox*, who were the principals in the bond.

H. and *W.* were principals in a bond, and *E.* a ſurety only, the obligee agrees with *H.* to take *four* notes drawn by different perſons, and payable at future days, in lieu of the bond, but compelled *H.* to ſign an agreement in his own name, and in the names of *W.* and *E.* to pay the deficiency, if the notes ſhould not produce the whole principal and intereſt on the bond; before the notes became due *H. and W.* were bankrupts; the obligee having received only 500 *l.* on the notes, brings his bill for the reſidue of the principal and intereſt againſt *E.* as a co-obligor. *Lord Hardwicke had ſome doubt at firſt, but on all the circumſtances of this caſe declared himſelf fully ſatisfied that the plaintiff was not entitled to relief againſt E.*

Huey comes to the plaintiff, and deſires he will take four notes given by different perſons, and payable at future days in lieu of the bond, and that if he would give up the bond, though the notes ſhould not produce the whole 2000 *l.* and intereſt, he would ſee him paid the deficiency, and ſigned an agreement to this effect in his own name, and in the names of *Wilcox* and *Edwards*: *Huey* likewiſe gave the plaintiff a draught on *Martin* the banker.

But *Huey* coming to the plaintiff on a *Saturday* after ſix o'clock, deſired the plaintiff would give him leave to date the draught on *Martin* of the *Monday*.

Huey had taken out of *Martin*'s ſhop all the money due to himſelf and *Wilcox* and *Edwards* on the very ſame *Saturday*.

The plaintiff afterwards went to *Martin*'s ſhop, where he found no money in the name of *Huey* and Company. And before the notes became due *Huey* and *Wilcox* were bankrupts, but *Edwrads* ſtill remains a ſolvent perſon.

The plaintiff, who has received about five hundred pounds on the notes, (the reſt remaining unreceived to this day,) brings his bill againſt *Edwards* the co-obligor, for the reſidue of the principal and intereſt due on the bond, inſiſting this was a fraud of *Huey*'s upon him, and that though he has been drawn in to deliver up the bond, yet he is entitled to be relieved againſt *Edwards* as a co-obligor.

The defendant *Edwards* inſiſted, that he was no party to the agreement between the plaintiff and *Huey*, and that he ought not to be affected by it; and as the bond is delivered up in conſideration of the notes, that it is *novated*, and this defendant, who is one of the ſureties only in the bond, is releaſed, and no longer liable as a ſurety.

Mr. *Chute*, of council for the plaintiff, cited 1 *Salk.* 124. *Clark* verſus *Mundall.*

Mr. Attorney General for the defendant inſiſted, that at law the bond being cancelled, the plaintiff had no remedy there: and the defendant *Edwards* being a mere ſurety, a court of equity will not ſtrain to aſſiſt the obligee againſt a ſurety, but will leave him to his remedy at law. And if the obligee has come to a new agreement to take other ſecurity in lieu of the bond, equity will not compel a ſurety to pay, upon a bond which is by the plaintiff's own conſent cancelled, and where on the back of it is acknowledged that he has received in full ſatisfaction for it.

The words of the agreement are, "That if any of the ſums of "money on theſe notes, or intereſt, ſhould not be paid, we pro- "miſe to make it good". Signed by *Huey* for himſelf, and for *Wilcox* and *Edwards*.

He argued, that this was in nature of a forgery, to ſign the names of other perſons without their authority, and ſuch a fraud in the plaintiff, to oblige *Huey* to ſign an agreement in this clandeſtine manner, that he does not come into a court of equity ſo free from imputation himſelf, as to be entitled to relief.

That *Huey* and *Wilcox* were the *bonâ fide* proprietors of theſe notes, and gave a full conſideration for them.

That the plaintiff, though ſome of the drawers of theſe notes did not become bankrupts till two months after the notes were aſſigned over to him, yet did not apply to them once for acceptance, and if he had immediately done it, he might have received all the money upon them; and therefore as his not receiving is intirely owing to his own laches, he is not entitled to come upon the defendant to make it good, who is only *a ſurety* in the bond.

The evidence for the defendant *Edwards* is, that there was in *Martin*'s hands a balance of 300 *l.* and upwards in favour of *Huey* and *Wilcox* on the *Monday*, and if the plaintiff had not deferred it two days longer, *Martin* would have paid this money to him.

That it being plainly the intention of the plaintiff to give up this bond abſolutely, and the ſecurity he took in lieu of the bond becoming defective by his own laches, Mr. Attorney General inſiſted the plaintiff ſhall not be allowed to reſort to the defendant to make up the deficiency.

Mr. Solicitor General of the ſame ſide ſaid, *Edwards* before *Huey* applied to the plaintiff, was uneaſy at being *a ſurety*, and at his impor-

importunity, this application to the plaintiff was made; for it appears by the plaintiff's own bill that he aſked *Edwards* why he was ſo uneaſy at being a co-obligor, and that he anſwered he had very good reaſons.

After this the plaintiff agrees with his eyes open to accept of the notes, and to ſatisfy *Edwards*, *puts the bond into Edwards's hands with a receipt on the back in full for principal and intereſt.*

What could be the meaning of this tranſaction, why plainly to remove *Edwards*'s uneaſineſs, and to let him looſe entirely from being liable any longer as a co-obligor in this bond.

LORD CHANCELLOR.

I have had ſome doubt during the courſe of this cauſe, but am now fully ſatisfied that the plaintiff is not entitled to relief.

Mr. *Edwards* has not been guilty of any fraud.

Where a bond is burnt or cancelled by accident or miſtake, or where a principal procures it to be delivered up by fraud, this court will ſet it up againſt a ſurety, though extinguiſhed at law.

There are many caſes where equity will ſet up debts extinguiſhed at law againſt a ſurety, as well as againſt a principal; as where a bond is burnt or cancelled by accident or miſtake, and much ſtronger, if a principal procure the bond to be delivered up by fraud, in ſuch a caſe the court would certainly ſet it up, becauſe he ſhall not avail himſelf of the fraud of any of the debtors.

But this is not one of thoſe caſes, for the whole tranſaction was in order to diſcharge *Edwards*; Mr. *Skip* was told ſo, and *Huey* informed him that *Edwards* and he had quarrelled about it, and *Skip* himſelf aſked *Edwards* how he came to be ſo preſſing to have the bond delivered up, ſo that he was fully appriſed it was ſolicited at the importunity of *Edwards*.

Skip was a competent judge of what he ſhould do, and might have declined it, but inſtead of that, accepts the notes from *Huey*, and a draught on *Martin* the banker for the *Monday* following, which ſhews the confidence and reliance *Skip* had in *Huey*, for it is very unuſual to take ſuch a draught.

It is plain from hence that *Skip* diſcharged *Edwards*, for he knew *Edwards* would not truſt *Huey* any longer.

What is the rule? He who truſts moſt ſhall loſe moſt; if *Skip* had refuſed, *Edwards* might have arreſted *Huey* upon the note which he had given *Edwards* by way of indemnity againſt the bond.

It is ſaid there is a fraud in part of the caſe relating to the draught on *Martin*; perhaps it may be ſo, but this is not clear; and what has been done by *Skip* preponderates, and rebuts the fraud; for it was not right in him after he had delivered up the bond, to make *Huey* ſign ſuch an agreement in the names of *Wilcox* and *Edwards*.

What was the original ſcope and intention of the application, but that the bond might be delivered up, and *Edwards* abſolutely diſcharged.

Inſtead of this what does *Skip* do? Why he takes a note, and makes *Edwards* liable by another inſtrument, and was a plain deceit upon *Edwards*; whereas the intention was clearly to diſcharge him, and therefore the bill muſt be diſmiſſed, but without coſts.

Caſe 35. *Perrot* verſus *Perrot*, *the ſecond general ſeal after Trinity term*, *June* 30, 1744.

A limitation to *A.* for life, to truſtees to preſerve, &c. to the firſt, &c. ſons of *A.* in tail, remainder to *B.* for life, remainder to his firſt, &c. ſons in tail, reverſion in fee to *A.* who cuts down timber, againſt whom *B.* brought his bill for an injunction to ſtay waſte: though *B.* has no right to the timber, yet as he has an intereſt in the maſt and ſhade, if *A.* ſhould die without ſons, and as *B.* could not maintain an action, not having the immediate remainder, the court continued the injunction.

THERE was a limitation in a ſettlement to the defendant for life, to truſtees to preſerve contingent remainders, to his firſt and every other ſon in tail, remainder to *A.* for life, with remainder to his firſt and every ſon in tail, reverſion in fee to the defendant.

The firſt tenant for life cuts down timber, the plaintiff, who is the ſecond tenant for life, brings his bill for an injunction to ſtay waſte.

Mr. Attorney General for the plaintiff ſhewed cauſe why the injunction for reſtraining the defendant from committing any further waſte ſhould not be diſſolved.

It was inſiſted by Mr. Solicitor General, for the defendants, that the timber which he has cut down, are decayed trees, and will be the worſe for ſtanding, and that it is of ſervice to the publick, that they ſhould be cut down; and that it is very notorious that timber, eſpecially oak, when it is come to perfection, decays much faſter in the next twenty years, than it improves in goodneſs the twenty years immediately preceding.

That as the defendant has exerciſed this power in ſuch a reſtrained manner, and confined himſelf merely to decayed timber, which grows worſe every day, that this court will not interpoſe, eſpecially as the plaintiff is not intitled to come into this court, as he has not the immediate remainder, and beſides has no remedy at law.

LORD CHANCELLOR.

The queſtion here does not concern the intereſt of the publick, unleſs it had been in the caſe of the King's foreſts and chaſes; for this is merely a private intereſt between the parties; and it is by accident that no action at law can be maintained againſt the defendant, becauſe no perſon can bring it, but who has the immediate remainder.

Conſider too in how many caſes this court has interpoſed to prevent waſte.

Suppoſe here the truſtees to preſerve contingent remainders had brought a bill againſt the defendant to ſtay waſte for the benefit of the contingent remainders.

The truſtees to preſerve contingent remainders may bring a bill to ſtay waſte in the tenant for life.

I am of opinion they might have ſupported it, but here it is the ſecond tenant for life, who has done it, and though he has no right to the timber, yet if the defendant, the firſt tenant for life, ſhould die without ſons, the plaintiff will have an intereſt in the maſt and ſhade of the timber.

The caſe of *Welbeck Park*, which has been mentioned, was a very particular one, becauſe there by the accident of a tempeſt, the timber was thrown down, and was merely the act of God.

But this is not the preſent caſe, for here *a bare tenant for life* takes upon him to cut down timber, and it is not pretended that they are pollards only: And though the defendant's council have attempted to make a diſtinction between cutting down young timber trees that are not come to their full growth, and *decayed* timber, I know of no ſuch diſtinction, either in law or equity.

The cutting down decayed timber, is as much waſte as cutting down any other.

Therefore upon the authority of thoſe caſes, which have been very numerous in this court, of interpoſing to ſtay waſte in the tenant for life, where no action can be maintained againſt him at law, as the plaintiff has not the immediate remainder, the injunction muſt be continued till the hearing.

Mabank verſus *Metcalf*, *July* 4, 1744. Caſe 36.

A Bill was brought by a creditor againſt an executor for an account of aſſets.

On a bill brought againſt an executor for an account of aſſets, the evidence of a co executor, which tended to increaſe the teſtator's eſtate, was not allowed, as it was ſwearing for his own benefit.

The

The plaintiff offered to read the evidence of a co-executor, which would have tended to increaſe the teſtator's eſtate, and conſequently was ſwearing for his own benefit.

LORD CHANCELLOR.

There is an eſtabliſhed difference in this court between an executor and a truſtee.

A truſtee has a mere legal right only, but an executor has more, for if there is a ſurplus, he has a beneficial intereſt.

For the truſtee has the legal right only, and is merely nominal; but an executor has ſomething more in him than the mere legal right, as a bare truſtee, for he has a beneficial intereſt if there is any ſurplus.

But I am not ſatisfied you can read his evidence for another reaſon, becauſe *this executor* has a legacy of twenty-five pounds, and the releaſing it does not alter the caſe: for it is ſo much aſſets in the hands of the other executor, that he is ſtill liable to creditors of the teſtator if there are not aſſets *ultra* the legacy, and therefore his Lordſhip refuſed to admit the evidence.

Caſe 37. *Clark* verſus *Sewell*, *July* 7, 1744.

A legacy that ought to be deemed a ſatisfaction muſt take place immediately at the teſtator's death, for a debt being due then, the legacy muſt be ſo too, and not being payable in this caſe till a month after, the court held it to be no ſatisfaction.

EDWARD Godfrey by his will gives a legacy of two thouſand pounds to truſtees, in truſt to pay the intereſt thereof to his wife for life, and after her death the benefit of the principal to his ſon, but if he died before twenty-one then he gives it over to his daughters, and makes *James Sewell* and two more perſons executors.

The ſon attains twenty-one, and became intitled to the two thouſand pounds.

The directions in the will were that the executors ſhould carry on the teſtator's trade of a brewer, and in compliance with this they ſuffered the two thouſand pounds as well as the reſt of the teſtator's eſtate to continue in the trade.

The ſon after he had attained his age of twenty-one ſtill carried on the trade on the foot of the ſame ſtock which was left by his father.

The ſon afterwards makes *his* will without any reference at all to his father's, and gives a legacy of ten thouſand pounds upon different truſts from what his father had done of the two thouſand pounds, "for after the intereſt of the ten thouſand pounds to his mother for "life, he gives the principal to his ſiſter *Sewell*'s children, and "hargecs it upon all his real and perſonal eſtate, and to be paid to

" truſtees *in a month after his death.* Then follows a ſpecific " deviſe of a farm of thirty pounds a year to *Rivers Dickinſon*, " and then another legacy of ten thouſand pounds to his ſiſter " *Browning*'s children, and then a legacy of five thouſand pounds, " *&c.* And then the reſt and reſidue of all his eſtate, real and per- " ſonal, after payment of debts and legacies, among the children of " his ſiſters *Sewell* and *Browning*.

The ſon ſoon after dies, the plaintiff as deviſee of the mother, inſiſts both on the intereſt of the 2000*l.* as well as of the 10000*l.* and has brought his bill for that purpoſe.

LORD CHANCELLOR.

The firſt queſtion is, whether the intereſt of the ten thouſand pounds, given by the will of the ſon, is to go in ſatisfaction of the intereſt of the two thouſand pounds left by the will of the father.

Secondly, whether the plaintiff is entitled to a priority of ſatisfaction and payment before the other legatees under the will of *Godfrey the ſon*; and this divides itſelf into two more queſtions, one as to the real, and another as to the perſonal eſtate.

As to the principal queſtion, whether it ought to be deemed a ſatisfaction in this court according to the rule with regard to legacies being a ſatisfaction of debts, I am of opinion with the plaintiff, and that it ought not to be held a ſatisfaction.

It is true there are many caſes which have carried the doctrine of ſatisfaction a great way.

In later caſes the court have ſaid this doctrine has been carried too far, *for legacies naturally imply a bounty*, and therefore, though the court of late have not altogether diſavowed this doctrine of ſatisfaction, yet they have been very inclinable to lay hold of any circumſtances to diſtinguiſh the latter from former caſes.

Legacies naturally imply a bounty, and therefore on the point of ſatisfaction, the court have of late laid hold on any circumſtance to diſtinguiſh the latter from former caſes.

The conſequence of the ſon's carrying on the trade with his father's ſtock, was, that the two thouſand pounds was a debt upon his father's eſtate in his hands, or more directly and properly a demand upon his father's executors.

There is no pretence to ſay, that the principal of the ten thouſand pounds can be a ſatisfaction of the principal ſum of two thouſand pounds to the mother.

Nor is there any thing in the will that declares this to be a ſatisfaction of the intereſt of the two thouſand pounds.

But the point of time it is ſaid is ſo trifling, it being only a month, that no regard ſhould be paid to it, but though a ſmall one, yet it is a circumſtance that the plaintiff has a right to lay hold of, to take this out of the caſes that have been deemed a ſatisfaction.

For according to the rule of this court, a legacy that ought to be deemed a ſatisfaction muſt take place immediately after the death of the teſtator: for the debt, whether of a principal ſum or for intereſt, is due at the death of the teſtator, and therefore the legacy muſt be ſo too.

This court, which leans againſt incumbring eſtates twice, will overlook little circumſtances of time as to the payment of the two ſums to children, where both the proviſions move from the father, and are given for the ſame purpoſes.

What I have ſaid hitherto, I confine to the ſatisfaction of *debts*, for I agree the caſes of ſatisfaction of *portions* have gone further, for where both the proviſions move from the father to the ſame perſons, and for the ſame purpoſes, this court, which always leans againſt incumbring eſtates twice over, will overlook little circumſtances of time as to the payment of the two ſums to children, if it appears to be a double portion, and a double proviſion for younger children.

But that has never been the rule with regard to *debts*, where the funds for payment are appointed by different perſons.

The intereſt of the two thouſand pounds was part of the proviſion and livelihold of the mother, and a debt upon the eſtate of *Godfrey the father* in the hands of his ſon.

Now ſhe might have lived till within a day of the time, which was to be the commencement of the payment of the intereſt of the ten thouſand pounds to her, and yet not have been intitled to it, and therefore could not be a ſatisfaction.

For there is no caſe to make a legacy a ſatisfaction of a debt, where the legacy is not due at the time of the teſtator's death, but is made contingent, and to take place at a future day.

I ſent for a caſe from the regiſter, which I thought like this in ſubſtance, though it does not run *quatuor pedibus*, and that is the caſe of *Crompton* verſus *Sale*, *Eq. Caſ. Abr.* 205. before Lord Chancellor *King*.

I lay no weight upon there not being aſſets here, becauſe it is owing to an accident there are not; and therefore this caſe in the reaſoning of it comes very ſtrongly up to the preſent.

For whether the poſtponing the legacy is a month only, or a longer time, it makes no manner of difference.

Where

Where the court decrees a legacy to be a ſatisfaction of a debt, the court gives intereſt always from the death of the teſtator.

Where a legacy is decreed to be a ſatisfaction of a debt, the court gives intereſt always from the teſtator's death.

But in this caſe here is ſomething further ſtill, and that is a bond given by *Joſeph Sewell* to Mrs. *Godfrey* the mother, for the two thouſand pounds dated the 16*th* of *February* 1729. reciting that *Catharine Godfrey*, in purſuance of the power given her by her huſband, does empower the ſurviving executor to lend and advance the ſaid principal ſum of two thouſand pounds to *Joſeph Sewell*, he ſecuring to her the intereſt of the two thouſand pounds during her life.

It is true the act of executors cannot alter the right of parties, but it ſhews they underſtood it to be no ſatisfaction of the two thouſand pounds.

This queſtion would never have been ſtarted, had it not been for the deficiency of aſſets.

Another circumſtance is the decree in *July* 1736. on the will of the ſon.

There was no imagination that the legacy of the ten thouſand pounds was intended as a ſatisfaction for the two thouſand pounds, or the intereſt of it, for if ſo, it would have been mentioned in the decree as to the manner of taking the account, but inſtead of that, there is a general direction only to take an account of the debts of the ſon, *&c.* therefore I am of opinion that the two thouſand pounds muſt be conſidered as a debt, and the legacy of the intereſt of ten thouſand pounds was no ſatisfaction of the intereſt of the two thouſand pounds.

The ſecond queſtion is, as to the preference; and firſt with reſpect to the perſonal eſtate.

All the ſubſequent queſtions are upon the foot of marſhalling aſſets; but I ſhall lay theſe out of the caſe, for I am of opinion this legacy of ten thouſand pounds is not intitled to any preference.

For where legacies are given to perſons of the ſame degree of relationſhip, the court will not ſtrain to prefer one legatee to another, but will let the general rule of equality take place, unleſs there is ſomething inſuperable in the will, that does not juſtify the court in doing it.

The court will not ſtrain to prefer one legatee to another, but where there is a deficiency of aſſets will let the general rule of equality take place.

By the ſon's will, the real and perſonal eſtate is charged to the payment of this ten thouſand pounds to his ſiſter *Sewell*'s children.

As

Appointing a legacy to be paid at a different time will not give a preference.

As to the point of time I lay it out of the caſe, for there never was a rule in this court that appointing a legacy to be paid at a different time, will give a preference to that legatee, but where there is a deficiency of aſſets, all the legatees muſt abate in proportion.

The teſtator's charging his *perſonal* as well as his real eſtate is ſaying no more, than what the law ſays; for if it had not been expreſſly charged by the teſtator, the court would have directed it to have been firſt applied, and therefore no argument of preference can be drawn from thence.

" I do hereby charge my eſtate both real and perſonal with the " payment of ten thouſand pounds, &c. *Item*, all the reſt and re- " ſidue which ſhall remain after payment of my debts and legacies, " I give to the truſtees upon the truſts therein after mentioned.

It was ſaid this is a prior charge.

Suppoſe the teſtator had firſt applied theſe words to the ten thouſand pounds, then repeated them again to the legacy of 5000 *l.* &c. what would this have done? Why, all the legacies would have been equally a charge on the real and perſonal eſtate, and not one more than the other.

Therefore I am of opinion, as a man cannot ſpeak all his words at once, and as it is no matter how the clauſes are placed in a will, it is no more than a general charge of all his legacies upon the real and perſonal eſtate.

At the beginning the teſtator has taken care to charge all his eſtate with the payment of his debts.

This would have been ſufficient to charge the real eſtate, if the perſonal eſtate was deficient.

There is therefore no ground to ſay that this legacy ſhall have the priority of the other.

This is ſuch a conſtruction as a court of equity would incline to come into, becauſe it is making an equality between the legatees as to the loſs which has happened, who are upon the ſame foot of relation to the teſtator.

This is my opinion as to the reſidue, the next queſtion will be as to Mr. *Chute*'s client *Rivers Dickinſon*, to whom the teſtator has ſpecifically deviſed a farm of thirty pounds a year.

As

As to the caſe he put, that ſuppoſe a man deviſes all his real eſtate to *A.* and afterwards a particular farm to *B.* this would be an exception out of the generality to *A.* I admit it.

A man deviſes all his real eſtate to *A.* afterwards a particular farm to *B.* it is an exception out of the generality to *A.*

But it is otherwiſe, where there is a charge by a teſtator upon all his eſtates for payment of debts, for there the deviſee muſt take ſubject to that charge; and if the reſidue is not ſufficient to anſwer the debts, the eſtate deviſed to *Rivers Dickenſon* muſt in the next place be applied for that purpoſe.

Where a teſtator charges all his eſtates for payment of debts, the deviſee of a particular one muſt take ſubject to that charge.

His Lordſhip decreed the defendant to pay the intereſt of the two thouſand pounds to the plaintiff.

Heath verſus *Perry*, *July* 9, 1744. Caſe 38.

A Perſon by his will "gave one thouſand pounds apiece to five "brothers and ſiſters, (but who were no relation to him) to "be paid to them at their reſpective ages of twenty-one, in caſe "they ſhould reſpectively attain that age, *and not otherwiſe*; and if "any of them ſhould happen to die before they attain their re- "ſpective ages of twenty-one, that then and in ſuch caſe the le- "gacy or legacies of one thouſand pounds ſo given to them reſpec- "tively, ſhall be utterly void and of no effect.

A deviſe to five brothers and ſiſters (no relations) of 100 *l.* apiece, to be paid to them at 21. if they attain that age, and not otherwiſe; and if any die before, the legacy or legacies to be utterly void.

The legatees brought a bill for intereſt on their legacies; being not entitled to the payment of their legacies immediately, they ſhall not have intereſt in the mean time, nor the principal particularly ſecured to them till they ſhall arrive at their ages of twenty-one.

Then comes this clauſe.

"And I do hereby give my executors full power and liberty, du- "ring the reſpective minorities of the five legatees, until they ſhall "attain their ages of twenty-one, or the legacies otherwiſe become "void, to lay the money out in mortgages or other ſecurities for "the purpoſes and on the truſts of this my will, and to call it in "when they pleaſe, and my executors not to be ſubject to any "loſs that may happen; and makes *Baily Heath* his reſiduary le- "gatee.

The bill was brought by the legatees for intereſt upon their legacies.

Mr. *Talbot* for the plaintiffs cited *Nicholls* verſus *Oſborne*, 2 *P. Wms.* 419. and *Taylor* verſus *Johnſon*, 2 *P. Wms.* 504.

LORD CHANCELLOR.

Caſes of this kind, *how far a legatee, who is not entitled to the payment of his legacy immediately, ſhall have intereſt in the mean time*, depend upon particular circumſtances.

Some upon relationſhip, ſome upon the neceſſities of legatees, and moſt of them upon the particular penning of wills; and there is hardly one caſe which can be cited that is a precedent for another.

Where a legacy is given generally at marriage, or at twenty-one, the veſting and time of payment are the ſame.

Some things are certain in theſe caſes; for if a legacy is given generally at marriage, or at twenty-one, then the veſting and time of payment are the ſame, and ſhall not veſt till marriage, or twenty-one.

Where a legacy is actually veſted, as if given to *A.* payable at twenty-one, yet it ſhall not carry intereſt.

To go one ſtep further, where a legacy is actually veſted, as if given to *A. payable at twenty-one*, yet it ſhall not carry intereſt, unleſs ſomething is ſaid in the will, that ſhews the teſtator's intention to give intereſt in the mean time.

In the caſe of a child, let a teſtator give a legacy how he will, either at 21. or marriage, or payable at 21. or marriage, and the child has no other proviſion, the court will give intereſt by way of maintenance.

But all theſe caſes are ſubject to this exception, if it is in the caſe of a child; for then let a teſtator give it how he will, either at twenty-one or at marriage, or *payable* at twenty-one, or *payable* at marriage, and the child has no other proviſion, the court will give intereſt by way of maintenance, for they will not preſume the father *inofficious*, or ſo unnatural, as to leave a child deſtitute.

I have a note of the caſe of *Onſlow* verſus *Smith*, and by that it appears to have been heard before Lord *Cowper* the 5*th* of *July*, 8 *Ann.* there the legacy was given at twenty-one, and yet he directed the money to be laid up the mean time till it was ſeen whether the legatee would arrive at twenty-one, and in a new cauſe between *Onſlow* verſus *Draper* the 27*th* of *June*, 9 *Ann.* it was held to be no veſted legacy.

However, this direction may ſhew Lord *Cowper*'s inclinations, yet it is not an abſolute determination, and therefore is no precedent.

As to the caſe of *Bourne* verſus *Tynt* (on which a ſtreſs was laid in *Acherly* verſus *Vernon*,) 2 *Ventr.* 346.

That was a portion to a daughter, and an only one, and alſo a a veſted one, payable at a future day; a ſtrong circumſtance there, for maintenance was allotted to her during her minority out of the very intereſt of the principal ſum of three thouſand pounds.

But

But though this was determined by a very great man, I own I ſhould have had ſome doubt.

The truſtees had paid over the ſurplus for ſome time to Mrs. *Bourne*, but ſtopping their hands the plaintiff brought her bill, and the cauſe was heard before Lord Keeper *Finch*, when he firſt had the ſeals, on the 28*th* of *June*, 31 *Cha.* 2.

Conſider the objection there, the 80 *l. per ann.* was actually given to the mother for her maintenance, though indeed, as it was the caſe of a daughter, if the teſtator had not provided a maintenance, ſhe ſhould have had the intereſt for that purpoſe.

But the court laid hold of this ſingle circumſtance, that the 3000*l.* was not directed to be laid out in land for the benefit of the reſiduary deviſee, and that nothing was given to him but what was ordered to be inveſted in land: It was a diſinherited daughter, and therefore the court was willing to ſtrain in her favour.

The caſe of *Phillips* verſus *Carey* was clearly a veſted legacy, and only the time of payment was poſtponed; it was a ſum of 1000*l.* and part of it out of a ſpecific debt due to the teſtator, therefore this was a ſpecific legacy; and whether the whole or part of a debt due to the eſtate is given as a legacy, it is equally ſpecific, and therefore a diſtinct tree and diſtinct fruit; but where it is only given out of the great tree of the eſtate, there is no ground to ſever a branch from it in favour of a general legatee.

Whether a whole or part of a debt due to the eſtate is given as a legacy, it is equally ſpecific, and conſequently a diſtinct tree and diſtinct fruit; but if given out of the great tree of the eſtate, no ground to ſever a branch from it in favour of a general legatee.

The next is *Acherley* verſus *Vernon*, 1 *P. Wms.* 783.

By the will that was not a veſted legacy, but made ſo by the codicil.

The queſtion was, whether Miſs *Acherley* was entitled to the intereſt of the 6000 *l.* before twenty-one.

Lord *Macclesfield* gave it as his opinion ſhe was.

Beſides, Mr. *Vernon* put himſelf in the place of a parent, for ſhe was the daughter of his only ſiſter and heir at law, and he calls it *a portion*, therefore there were ſtrong circumſtances to make it a veſted legacy; but the governing circumſtance was this, that the teſtator had directed the reſidue to be laid out in land *after the debts and legacies were paid*; and Lord *Macclesfield* was of opinion, till debts and legacies were paid, nothing was to be laid out in land.

The queſtion is, whether any of theſe caſes govern the preſent, and I am of opinion they do not, therefore the will muſt be taken into conſideration.

The legatees are mere ſtrangers to the teſtator, and therefore it is plain he intended they ſhould be contingent, and to wait the event of their attaining twenty-one.

If the teſtator had ſtopped after the words, in caſe they ſhould attain their age of twenty-one and not otherwiſe, I ſhould have thought it had not been merely a poſtponing by reaſon of their nonage, and for the legatees conveniency, but that he intended they ſhould not veſt till twenty-one; but he goes on, and in caſe any of them ſhould happen to die before they attain their reſpective ages of twenty-one, that then and in ſuch caſe the legacies ſo given to hem reſpectively ſhall be utterly void and of no effect.

The legacies are merely contingent, and directed to ſink and merge; this plainly ſhews nothing was to be taken out for their benefit, but that it ſhould remain where it was, at home, as part of the old eſtate.

There could be no doubt, unleſs for the following clauſe, which is what the plaintiff chiefly depends upon.

" I do hereby give my executors full power and liberty during " the reſpective minorities of the five legatees, *&c.* *(ſee the clauſe.)*

It has been inſiſted for the plaintiff, that this clauſe brings it to the caſe of *Acherly* verſus *Vernon*, and *Bourne* verſus *Tynt*; and that though they ſhould not be intitled to the intereſt now, yet it ſhall accumulate in the mean time, till they arrive at their ages of twenty-one.

If there had been a particular direction for the benefit of the legatees by name, there might have been ſome weight in it.

I lay no ſtreſs upon its being a power, for I do not take this to be a direction to lay it out for the benefit of the particular legatees, but equally for the benefit of the reſiduary legatees.

For the purpoſes and upon the truſts, &c.

What is the meaning of this? Why, to anſwer all the proviſions of the will, as well for the reſiduary as the other legatees.

Therefore there was no obligation upon the executors to ſever a particular ſum of money to anſwer the legacies for the plaintiff, and other particular legatees.

But it is ſtronger ſtill, for he directs the executors either to call in, or to continue the ſecurities they ſhould find ſtanding out at his death,

death, which empowers them to do it without any regard either to the intereſt of reſiduary legatee, or the particular legatees.

There is another thing, which ſhews that the teſtator knew he had given them as contingent legacies, for he expreſsly calls them contingent in this clauſe.

Therefore, I am of opinion, that the reſiduary legatee is intitled to the intereſt in the mean time; nor are the plaintiffs intitled to have the principal particularly ſecured to them, till they ſhall arrive at their ages of twenty-one, but to be laid out for the benefit of all the legatees.

Swanton verſus *Raven*, *July* 10, 1744. Caſe 39.

A Huſband and wife join in a fine of the wife's lands to a purchaſer, and afterwards the huſband alone declares the uſes of it by articles.

A fine by huſband and wife of her lands to a purchaſer, but the uſes declared by the huſband only, no other deed being ſhewn declaring different uſes, and the uſes declared not varying from what the wife intended, it ſhall bind her notwithſtanding.

The queſtion is, Whether it ſhall bind the wife?

LORD CHANCELLOR.

As no other deed is ſhewn that declares different uſes, and the uſes declared do not vary from what the wife intended, it ſhall bind her notwithſtanding; and therefore the bill which ſhe has brought after an acquieſcence of fifteen years ſince her huſband's death, for poſſeſſion, on ſuggeſtion that ſhe is not bound by the fine, as ſhe did not join in the articles with the huſband, in the declaration of the uſes, muſt be diſmiſſed.

Lacon verſus *Briggs*, *July* 11, 1744. Caſe 40.

THE bill was brought to be let in as a creditor on Lord *Bradford*'s eſtate, under a direction in a former cauſe.

The plaintiff, adminiſtrator *de bonis non* to his father, who was ſteward or attorney to *Henry* Earl of *Bradford*, from the year 1710 to 1717, inſiſts that his father had ſeveral large ſums of money due to him, but knowing Lord *Bradford*'s averſion to buſineſs, did not care to preſs him to ſettle accounts, eſpecially as Lord *Bradford*, who was lord lieutenant of the county of *Salop*, had promiſed to make him clerk of the peace.

An executor of a houſe ſteward to Lord *Bradford*, after an acquieſcence of 17 years, ſets up a demand for a large ſum due for buſineſs done by his teſtator, to which the repreſentative of Lord *Bradford* inſiſted on the ſtatute of limitations. *Satisfaction to be preſumed from the length of time, for it is not to be imagined, if any thing was really due to the plaintiff, that he would have been quiet under it.*

The defendant Sir *Hugh Briggs*, executor of Lord *Bradford*, inſiſts upon the ſtatute of limitations.

Mr. Attorney General, council for the plaintiff, argued, that ſuppoſing the ſtatute of limitations is run, yet, that my Lord *Bradford*'s will creating a truſt of his real eſtate for the payment of his debts, has taken it out of the ſtatute; for notwithſtanding the plaintiff may be barred at law, yet in equity it is a debt in conſcience, and the will is in the nature of a new aſſumpſit.

Lord *Hardwicke* put it upon the defendant's council, to ſhew how this caſe differs from thoſe where a truſt for payment of debts has revived the debt.

Mr. Solicitor General, for the truſtees, ſaid, that it muſt be a certain clear debt, and not depending on an account, which a court of equity will admit to be a debt, on ſuch a truſt eſtate, and to be taken out by it from the ſtatute of limitations.

From the death of *Lacon* to the death of Lord *Bradford* is no leſs than ſeventeen years.

For *Lacon* died in 1717, and Lord *Bradford* in 1734, and there is no proof of any application for the pretended debt, but they have acquieſced all this time.

Another objection, he inſiſted, muſt be the expenſiveneſs of taking an account of ſuch length; and that the ſtaleneſs and improbability of the demand, would make the court very unwilling to direct ſuch an account.

My Lord *Bradford*'s executors cannot, after ſuch length of time, check *Lacon*'s accounts.

It is not poſſible to imagine, that the plaintiff would have lain by ſo many years, if there had been any thing really due, and therefore this alone is a ſtrong argument for the defendants.

Mr. *Brown*, in reply for the plaintiff, ſaid, none of the truſtees have pretended that they have found a ſtated account among my Lord *Bradford*'s papers, which is a preſumption that there is no ſuch account, for if they had diſcovered any ſuch, they would not have reſted altogether on the ſtatute of limitations.

LORD CHANCELLOR.

An account is demanded at ſecond hand by the repreſentative of a houſe ſteward, and it has been inſiſted, that there is an open one between him and his lord.

I am

I am of opinion, that if I ſhould decree an account to be taken in this caſe, I ſhould make one of the worſt precedents that a court of equity can make, for diſturbing the peace of families.

It is a demand clearly barred by the ſtatute of limitations, both in law and equity.

The defendant, in his anſwer, admits, that Mr. *Dovey* might tell him, who was the executor of *Lacon*, after the death of the Earl of *Bradford*, that there was ſuch an account depending, and money due to *Lacon*.

But then Sir *Hugh Briggs* very cautiouſly confines his belief of the debt, to the information of *Dovey*, and at the ſame time inſiſts on the ſtatute.

Now there muſt be a direct admiſſion of a debt, *to take it out of the ſtatute of limitations*; though there have been ſeveral caſes at law where this has not been held ſufficient, unleſs it is likewiſe attended with *an expreſs promiſe to pay*; but that may be rather too hard.

To take a debt out of the ſtatute of limitations, there muſt be *a direct admiſſion of it*, and in ſeveral caſes it has been held there muſt be *an expreſs promiſe to pay*.

What the executor ſays here, is only his perſonal belief, and notwithſtanding, he inſiſts on the ſtatute of limitations in behalf of his teſtator.

For if a man ſays, that a creditor told him there was ſomething due, he may give credit to it from the opinion he has of his veracity; and yet if he inſiſts on the ſtatute, that will, notwithſtanding, be a bar to the demand.

The ſecond queſtion, is on the truſt created on the real eſtate of the Earl of *Bradford*.

It is very true, where there is a truſt of a real eſtate for payment of debts, it has been held, *to revive debts which have been barred by the ſtatute of limitations, and that they are entitled to be paid as well as the other creditors.*

A truſt for payment of debts has been held to revive ſuch as have been barred by the ſtatute of limitations, but though now eſtabliſhed in equity, judges have always murmerred at it.

But I have often wondered how this rule at firſt prevailed, and judges have always grumbled at it, though it is now eſtabliſhed in equity. *Vide Lord Strafford's caſe, in the Houſe of Lords, February 7,* 1727.

It has been truly ſaid, that where real eſtate has been affected by ſuch ſtale debts, it is in a plain and clear caſe, and not to be charged

Where real eſtate has been affected by ſuch ſtale debts, it is in a plain caſe, and not where it depends on an account to be taken.

in

in ſo looſe a manner as this is, with a debt that muſt depend *upon an account to be taken.*

There is no evidence of any demand, or ſettling accounts in the life-time of the ſteward, nor of any demand or requeſt to ſettle the account, from the death of the ſteward to Lord *Bradford*'s death, which is ſeventeen years.

It is not probable any thing could be due to Mr. *Lacon*; all that is pretended is, that *Dovey*, his executor, had the admiſſion of one of the truſtees, that it was a juſt debt.

The court, in ſuch a caſe as this, ought to preſume ſatisfaction from length of time, becauſe it cannot be imagined, if any thing was really due to *Lacon*, that he would have been quiet under it.

The court would lay the party under ſuch difficulties in taking this account, that it would be unequitable to direct it upon no other grounds, but from the latitude and extenſive conſtruction which courts of equity have put upon truſts on lands for payment of debts.

Beſides, as *Lacon* was a domeſtick ſteward, there muſt have been ſeveral large ſums of money received and paid, without any writing or vouchers between Lord *Bradford* and *Lacon*.

Therefore it is impoſſible to direct an account, without injuſtice being done to the defendants in taking the account.

Upon all the circumſtances then, and after ſuch great length of time, I am of opinion, that this bill ought to be diſmiſſed; and it has been truly ſaid, that it will be charity to the parties not to direct ſuch an account; but in conſideration of Sir *Hugh Briggs*'s admiſſion, that on the information of *Dovey*, he did believe there might be a balance to *Lacon*, I will diſmiſs the bill without coſts.

Caſe 41. *The Attorney General* verſus *Price*, *July* 13, 1744.

The juriſdiction of this court over charities does not extend to ſuch, where local viſitors are appointed, for then he and his heirs have a right.

AN information has been brought relating to the ſchool of *Barkhamſtead*, a charity founded the ſecond and third years of *Edward* the ſixth, by act of parliament.

LORD CHANCELLOR.

Though this court has a general juriſdiction over charities, by iſſuing a commiſſion, and likewiſe can give directions for the management

nagement of a charity; yet this does not extend to charity-ſchools, where local viſitors are appointed.

If there is a private viſitor, then he and his heirs have a right.

If there is a publick endowment by the crown, then a commiſſion may iſſue from this court to inſpect the charity, and the application of the money.

But if by letters patent, or an act of parliament, a local viſitor is appointed, this court cannot interpoſe.

The warden of All Souls is the viſitor here; but the misfortune of this caſe has been, the reward is ſo ſmall to the viſitor, only thirteen ſhillings and four-pence, that he has never thought it worth while to exerciſe his viſitatorial authority; I may poſſibly give the viſitor an augmentation hereafter: Local viſitors do not viſit but from three years to three years, yet they may, if they pleaſe, hear complaints within that time.

Local viſitors do not viſit but from 3 years to three years, yet, if they pleaſe, may hear complaints within that time.

This is a ſchool of a very noble foundation, and ought to be taken care of: But I do not ſee any evidence of improper behaviour in the ſchool-maſter and uſher.

All that is proved, is a decreaſe of ſcholars, but that declenſion does not neceſſarily ariſe from the miſbehaviour of the ſchool-maſter or uſher; for this may depend upon a ſuperior or inferior ability in them.

There is evidence, beſides, that there is another ſchool for teaching *Engliſh* and arithmetick, which has been a diminution of this ſchool in reſpect to number, parents chuſing rather to ſend their children there.

I think them very much in the right of it; for ſending children of the lower ſort of people to a *Latin* ſchool, gives them a wrong turn, and takes off their inclination to huſbandry and trade, which is more ſuitable to their degree in the world.

To ſend children of a lower ſort to a *Latin* ſchool, gives them a wrong turn, as it takes off their inclination to huſbandry and trade.

Therefore, as to this part, the information muſt be diſmiſſed with coſts.

Next, As to the account.

The poor are intitled to the ſurplus, after the maſter and uſher's ſtipends are paid, and repairs. There are twelve leaſes expired, and if not let, I muſt preſume that the maſter and uſher of the ſchool have received the rents ever ſince, who are made a corporation for that purpoſe.

However, I can direct the maſter to inquire what repairs are neceſſary, and to make the maſter and uſher all juſt allowances.

As to letting the leaſes for the future, one conſideration is, whether I ſhall let for the improved rent, or direct fines to be taken; and I ſhall have a regard to the poor; and, to prevent the rich from taking it to themſelves, I will order the ſurplus ſhall be paid to ſuch poor as are not maintained by the pariſh.

I will leave it to the maſter, to inquire, whether letting on improved rent, or leaſing upon fines, be for the benefit of the charity, ſince a great deal depends upon the cuſtom of the country.

The leaſes I direct to be let to the beſt bidder; and whether upon fines, or the improved rack-rent, proper covenants to be inſerted for the tenants to keep the houſes in repair, and to pay all the charges of ſuch repairs.

I will reſerve the conſideration, whether the court is empowered to augment the ſtipends of the maſter and uſher, and in what proportion, till the cauſe comes back again after the report.

Caſe 42. *Jones* verſus *Jones*, *July* 16, 1744.

A bill charges forgery in a leaſe, and prays to be relieved againſt that, but by way of inducement only, mentions there were fraudulent circumſtances attending this caſe, without making it a diſtinct charge from the forgery, or bringing the truſtees who were parties to the leaſe, and to whom the fraud is imputed before the court, and for want of this the defendant's council objected to the plaintiff's going on with the cauſe. *Lord Hardwicke ſaid, as there had been already a decretal order, and an iſſue to try the forgery, and brought on now upon the equity reſerved; the only method to aſſiſt this caſe was, to let the cauſe ſtand over, and to allow the plaintiff, on paying the coſts of the day, to bring a ſupplemental bill, in which he may charge the fraud, and make the truſtees parties.*

THE bill was brought to ſet aſide a leaſe for forgery, and charges no other fact againſt the defendant, but by way of inducement only, that there were fraudulent circumſtances attending this caſe; but the plaintiff does not by the bill make it a clear and diſtinct charge from the forgery; and beſides, prays to be relieved only as to the forgery.

It was objected by the defendant's council, that the plaintiff cannot go on upon this part of the caſe, becauſe they have not put it properly in iſſue, ſo that the defendant has had no opportunity of applying his defence, or giving any anſwer to the pretended fraud and impoſition; and beſides, if there is any fraud inſiſted to be in the truſtees, who were parties to the leaſe, and who have been guilty of a breach of truſt in not carrying the truſts into execution, the plaintiff ought to have made them parties to the ſuit.

LORD

LORD CHANCELLOR.

This cauſe has been brought on very oddly; and the objection for want of parties comes very late; for the rule is, that it ought to be upon opening the proceedings, and before the merits are diſcloſed.

An objection for want of parties, muſt be upon opening the proceedings, and before the merits are diſcloſed.

But it is frequently known, that after a cauſe is gone into, and even thoroughly heard, yet the court is compelled to let it ſtand over, for want of parties.

Therefore the objection, though it is not taken in time, muſt have its weight, becauſe, otherwiſe, the court cannot on the one hand, do juſtice to the defendant, and on the other, I ſhould be obliged to diſmiſs the bill, which is never done now, though it was attempted by Sir *Joſeph Jekyll* formerly, but reverſed on an appeal to Lord Chancellor *King*; and ſince that time, cauſes are ordered only to ſtand over on paying the coſts of the day, that the plaintiff may have an opportunity of making proper parties.

Sir *Joſeph Jekyl* diſmiſſed a bill for want of parties; on appeal, Lord Chancellor *King* reverſed that order; and ever ſince, cauſes are directed to ſtand over only on paying the coſts of the day, that the plaintiff may have an opportunity of making proper parties.

In this caſe, after there has been one hearing already, and an iſſue directed to try the forgery, and the cauſe brought on upon the equity reſerved, the objection is now made for want of parties, and not before.

As here has been then a decretal order, and there cannot be a new examination in the cauſe, as it is cloſed, and publication paſt, all that I can do to aſſiſt this caſe, is, by giving the plaintiff leave to bring a ſupplemental bill, and make a diſtinct charge of the fraud, and the truſtees parties.

If the bill, which is now at hearing, had been properly framed, that is, if it had ſtated both the points of relief plainly, and clearly, firſt, the forgery; and then, if the leaſe was not forged, yet that it was fraudulent; there, though the plaintiff had not prevailed to ſet aſide the deed for forgery, he might have proceeded on the point of the fraud.

Had the bill ſtated both points of relief diſtinctly, the plaintiff might, when the cauſe came on upon the equity reſerved, have proceeded on the charge of fraud, though he has failed in ſetting aſide the deed for forgery.

I remember a caſe before Lord *Macclesfield*, who directed an iſſue on the forgery, and the deed being found not to be forged, my Lord *Macclesfield* permitted the plaintiff, when it came on upon the equity reſerved, to proceed on the fraud, becauſe the charges in the bill were diſtinct.

But here there is no other fact charged but the forgery, and I muſt not ſurprize the defendant, who had no notice of the leaſe, being impeached for fraud, and therefore is not prepared with any defence as to the fraud.

It has been objected, there is no receipt given on the back of the leaſe, for the conſideration of three hundred and fifty pounds.

But it is not very uſual to give receipts for fines on the back of a leaſe.

Now, it is inſiſted by the defendants council, the truſtees ought to be made parties, that if the plaintiff prevail, the defendant may have relief over againſt them who have been guilty of a breach of truſt, if they have not applied the 350*l.* towards the execution of the truſt.

There is another point on the general head, which intitles the defendant to have the truſtees before the court, and that is, if the defendant ſhould appear to have paid the truſtees the three hundred and fifty pounds, as he inſiſts he did, and it is no anſwer, to ſay, that the defendant ought to have brought a croſs bill.

For when a perſon brings a bill to ſet aſide a deed for forgery, fraud, and impoſition, it is his buſineſs to have all proper parties before the court, and the defendants are not obliged to bring a croſs bill.

As this bill is framed, the defendant was excuſable for not making his objection, for want of parties, ſooner, and therefore I ſhall direct the cauſe to ſtand over, and the plaintiff to pay the coſts of the day, and thereupon leave him at liberty to bring a ſupplemental bill, and to make the truſtees, or the repreſentatives of them, parties, who joined in the leaſe of the firſt of *September* 1716. and his Lordſhip directed accordingly.

Caſe 43. *The Attorney General* verſus *Milner*, *July* 18, 1744. *at the Rolls.*

As the legacy to *E. L.* under the will of *A. S.* was to be paid out of a real eſtate, and he is dead before the contingency happened on which he was to take, this caſe is within the general rule, and ought to ſink in favour of the heir at law.

ANN Smith by her will, amongſt other legacies, ‘ gives to “ three truſtees eight thouſand pounds upon truſt, that they “ ſhould diſpoſe thereof in the purchaſe of lands of inheritance in “ fee-ſimple, to be ſettled to the uſe of her grandſon *Thomas Milner*, “ and the heirs of his body; and for default of ſuch iſſue, directed “ the truſtees to convey the ſame to the Drapers Company, upon “ truſt that they ſhould, within three months after the eſtate ſhould “ be conveyed to them, by mortgage, or ſale of ſome part thereof, “ raiſe, and pay to *Edward Lynch*, her nephew, two thouſand “ pounds, which ſhe bequeathed to him, in caſe of the death of “ her grandſon without iſſue; and that they ſhould diſpoſe of ſo “ much of the rents of ſuch eſtate, after payment of the two “ thouſand pounds, as ſhould be neceſſary for purchaſing a convenient

“ piece

piece of ground for a charity, and till the purchaſe could be made the intereſt of the money was to go as the profits of the land: and by her codicil taking notice ſhe had given ſix thouſand pounds to the charity, ſhe thereby gives only five thouſand pounds.

Edward Lynch died the 29th of *April* 1738. and one *Hill* was adminiſtrator to him.

Thomas Milner the grandſon died in *May* 1742. under the age of twenty-one, and without iſſue.

The queſtion was, whether this legacy of two thouſand pounds was lapſed, as *Edward Lynch* died before the contingency happened, or whether it is tranſmiſſible to his repreſentative.

It was inſiſted on for the repreſentative of *Lynch*, that though the fund out of which this legacy is payable is to be conſidered as land, and the legacy a charge upon it, yet with regard to the legatee it muſt be looked upon as a ſum of money: upon the falling out of the contingency that it veſted, and was conſequently tranſmiſſible, and for that purpoſe the following caſes were cited, *Eames* verſus *Hancock*, the 19th of *February* 1742. before Lord *Hardwicke*, * *Pinbury* verſus *Elkin*, 1 *P. Wms.* 563. *King* verſus *Withers*, *Trin.* term 1735. *Caſ. in Lord Talbot's Time* 117. *Buckley* verſus *Stanlake* at the Rolls the 6th of *December* 1715. 2 *Ventr.* 347.

* See before, Caſe 291. Vol. 2.

For the heir at law and adminiſtrator of *Milner* the grandſon, it was inſiſted that the queſtion depends upon the nature of the deviſe itſelf, and the rule of the court falling in with the diſpoſition that is made: For this is a pecuniary legacy to be raiſed and paid out of land, and the conſtant rule is, that if the legatee does not ſurvive the time of payment, it cannot be raiſed for his repreſentative: This it was ſaid was undeniably the caſe with regard to portions; and there is no difference where the legacy is given to a child or a ſtranger. In ſupport of which was cited *Hall* verſus *Terry*, 8 *November* 1738. *Van* and *Clarke*, 21 *July* 1730. both before Lord *Hardwicke*; for the 1ſt *vide* 1 *Tra. Atkyns* 502. and for the laſt *vide* 1 *Tra. Atkyns* 510.

Maſter of the Rolls (Forteſcue.) He ſtated the words of the will, and then ſaid the only queſtion upon it was between the repreſentative of *Edward Lynch*, and the heir at law, whether this two thouſand pounds ſhall ſink into the real eſtate or go to the repreſentative of *Lynch*.

The former decree does not determine this queſtion, but declares the deviſe over to *Lynch* is not upon too remote a contingency; but his death happening in the life-time of *Thomas Milner* the grandſon, and before the contingency fell out, brings on the preſent point.

It muſt be firſt conſidered, whether this two thouſand pounds ought to be looked upon as given out of a real eſtate.

Money directed to be laid out in land, is conſidered as land, and the intereſt goes as the profits would after a purchaſe.

The expreſs deviſe is, that eight thouſand pounds ſhall be laid out in land, and veſted in truſtees for the ſeveral uſes mentioned in the will: The intent of the teſtatrix was, that it ſhould be ſettled as land: And it is the conſtant rule of the court that when money is directed to be laid out in land, it ſhall be conſidered as land, and the intereſt is directed to go as the profits of the land would till a purchaſe made.

It cannot be conſidered as money in reſpect to the legatee, becauſe the will directs it ſhall be raiſed by *mortgage or ſale*, which ſhews it muſt be out of land.

It is ſaid, though this ſhould be looked upon as land, with regard to the heir at law, yet as to the legatee it ſhould be conſidered as money; but I think that cannot be in this caſe, becauſe the teſtatrix directs it ſhall be raiſed by mortgage or ſale, which ſhews it muſt be out of land: And the determination muſt be the ſame with reſpect to the legatee as to the heir at law: The heir at law will indeed have the advantage of it, as I am of opinion it muſt be conſidered as if to be raiſed out of land.

The ſecond queſtion is, whether this is ſuch a legacy as ought to go to the repreſentative of *Edward Lynch*, or ſink in the real eſtate for the benefit of the heir at law?

It is inſiſted by Mr. *Hill*'s council, that this is a veſted legacy in *Lynch*, and that though he died before *Thomas Milner*, it ought to go to his repreſentative; the words of the will are, *that the Drapers Company ſhall raiſe by mortgage or ſale if Thomas Milner die without iſſue, &c.*

Where a deviſe is annexed to a legacy, if the perſon dies before the time comes, it is lapſed; but if given to a legatee, and to be paid at a future time, there, as it depends on the payment, and not the legacy, it ſhall veſt immediately.

The conſtant rule of conſtruction is, that if a legacy is given to the legatee to be paid at a diſtant time, as it depends upon the payment, and not the legacy, it ſhall veſt; but if the deviſe is not annexed to the time but the legacy, in that caſe if he dies before that time is come, it is a lapſed legacy.

As the eſtate is deviſed to the Drapers Company only in caſe of the death of *T. M.* without iſſue, and the legacy to *E. L.* upon the ſame event, the time ſeems to be annexed to the legacy, and not given in general to be paid upon that contingency.

As to this, it is plainly not given till after the death of *Thomas Milner* without iſſue, becauſe the eſtate was given to the Drapers Company *upon his death without iſſue*, ſo that the time ſeems to be annexed to the legacy, and not given in general to be paid upon that contingency: And I am not clear whether that would be ſuch a veſted legacy as would go to the repreſentative.

But I ſhall conſider it as if it was a legacy given to him, but to be paid at a diſtant time.

In that light the queſtion will be, whether, as it is to be paid out of a real eſtate, and not out of a perſonal eſtate, the repreſentative can take?

The general rule is, that if it was to be paid out of a perſonal eſtate, it would be a veſted legacy and tranſmiſſible: But as far as it is to be paid out of land it will have another conſtruction, and will ſink into the land for the benefit of the heir at law; and the rule of the eccleſiaſtical law is followed as to it's being veſted, though to be paid at a future day, if it is payable out of the perſonal eſtate.

In *Chandos* verſus *Talbot*, 2 *P. Wms.* 610. *Hall* verſus *Terry*, upon a deviſe out of land the legacy was decreed to be void.

In *Van* verſus *Clark* it was decreed not to be raiſed, though given out of a mixed fund.

Atkins verſus *Hiccocks* was indeed by way of portion, and to be paid upon marriage, and therefore not quite ſo ſtrong for the preſent purpoſe.

With regard to childrens portions, the rule of the court has been, that where the child dies before it becomes payable, it ſhall ſink into the land.

Pawlet verſus *Pawlet*, *Yates* verſus *Fettyplace*, are to that purpoſe.

And if the rule is, that a legacy out of land, given as a portion to a child who dies before the contingency happens, ſhall go to the heir, and not to the repreſentative of the child, I think it is much ſtronger where the legacy is given to a ſtranger payable out of land.

If a child, who has a legacy payable out of land, dies before the contingency happens, it goes to the heir; *a fortiori* where it is given to a ſtranger.

Several caſes have been cited to ſhew, that the court upon many occaſions varied from this general rule.

King and *Withers* is the caſe of the greateſt authority, and moſt relied on.

But there is a clauſe in that will which ſhews the 3500 *l.* additional portion was to be paid in all events whenever the contingency ſhould happen, and the lands were chargeable with it whenever it became payable.

And there Lord Chancellor ſaid it was different from all the caſes cited with regard to childrens portions: For in thoſe the children

died

died before it became payable, and before they wanted it; here ſhe had both married, and was of age, and his Lordſhip did not controvert the general rule where the death happens before the portion becomes payable. This was to go in addition of the portion, and might advance her in marriage, as the huſband might look upon that contingency as part of her fortune.

Therefore this is different from the preſent caſe, becauſe *Edward Lynch* did not live till the time when it was directed to be paid; that was the caſe of a child's portion, *Edward Lynch* is quite a ſtranger, and the conſideration of marriage is not an ingredient in the caſe.

Pinbury and *Elkin*, and the caſe in 2 *Ventris*, were legacies payable out of perſonal eſtate, and not out of land, and therefore are no authorities.

Bulkley verſus *Stanlake* was a deviſe out of land, a rectory for lives, and it was decreed there the legacy ſhould be paid; but it differs from this, becauſe the wife by will deviſed the ſame eſtate to new truſtees to diſpoſe of for the beſt price, and to pay the debts and legacies of her huſband not paid before her death: She had the ſole right of the rectory, and ſhe gave it upon that particular truſt; it could have no other conſtruction but that, and it muſt be paid to the repreſentatives of the legatees, as they were dead before her deviſe, though ſubſequent to that of her huſband's.

In *Eames* verſus *Hancock* there was a clauſe of entry, and it was decreed not to be a lapſed legacy, but that it ſhould go to the repreſentative of *Elizabeth*: But the giving the power of entry was as much as giving a term of years till payment, and was a chattel intereſt that ſhould go to the executors.

The preſent caſe does not come within any of the caſes cited to diſtinguiſh it out of the general rule; and though it is ſuch a legacy as might be veſted in *Edward Lynch*, and ſuch as would go to his repreſentative if it was to be paid out of perſonal eſtate, yet as this is to be paid out of a real eſtate, it is within the general rule, and ought to ſink in favour of the heir at law.

Uvedale

Uvedale verſus *Uvedale*, *July* 20, 1744. Caſe 44.

" *JAMES Uvedale* made his will dated the 22d of *February* 1736. *J. W.* by his will directs his real eſtate to be ſold after his wife's death, and the money ariſing therefrom, to be equally divided between *R. U.* and five other perſons; the bill is brought by the widow for a ſale; *R. U.* is an infant, and as heir at law to the teſtator had the legal intereſt in the eſtates. *Though the uſual practice is for the parol to demur till the infant comes of age, yet it being for his intereſt that it ſhould be ſold, and as in this caſe there was a truſt to be performed, and the court can ſee to a proper application of the money, Lord Hardwicke decreed a ſale, but declared at the ſame time he did not mean by this direction to break in upon the rule of the parol demurring.*

" therein reciting, that he had by leaſe and releaſe conveyed to " truſtees the ſeveral eſtates therein mentioned, in truſt for the " plaintiff the widow as a jointure; he thereby confirms the ſame, " and wills that ſhe ſhould have the rents, *&c.* of the ſaid lands, " *&c.* during her life, according to the deeds, *and after her death* " *wills that the ſame ſhould be ſold*, and the money ariſing by ſale " thereof, to be equally divided between his nephew *Robert Uve-* " *dale*, and five other perſons, ſhare and ſhare alike, and in caſe of " any of their deaths before the ſale, their ſhares to go to their " children, and if no children, to be at their own diſpoſal.

The bill was brought by the widow of the teſtator to have the real eſtate of *James Uvedale* ſold, or ſo much thereof as ſhall be ſufficient to ſatisfy the plaintiff's demand.

The plaintiff had fifteen hundred pounds to her fortune, and before marriage *James Uvedale* the huſband covenanted with truſtees that he would pay to them fifteen hundred pounds, to be laid out in the purchaſe of lands for her jointure.

He in his life-time laid out money to the amount of two thouſand eight hundred and fifty-one pounds, in the purchaſe of lands, and makes a ſettlement of theſe lands on the plaintiff for her jointure.

The plaintiff after her huſband's death refuſed to enter on the jointured eſtate, but inſiſted that the teſtator had made the purchaſe for his own convenience, without the conſent of her truſtees, and that ſhe was not obliged to accept the lands ſo purchaſed in performance of the articles, but that they ought to be ſold, and the money ariſing thereby, together with ſo much of the teſtator's perſonal eſtate as would be ſufficient for that purpoſe, ſhould be laid out in purchaſe of other lands.

The defendant *Robert Uvedale*, one of the deviſees of the teſtator's real eſtate, is an infant, and as heir at law to the teſtator has the legal intereſt in the eſtate.

It came on before the Chancellor on exceptions, and it was allowed by all the parties to be for the intereſt of the infant that the eſtate ſhould be ſold; but the doubt was, whether according to the rule of the court it can be directed, for the practice is for *the parol to demur* till the infant comes of age.

LORD CHANCELLOR.

The principal queſtion is, whether the court can decree a ſale, or whether *the parol muſt demur*, till the defendant *Robert Uvedale* the infant comes of age.

Now this is extremely deſirable, if it can be attained, and the court will go as far as poſſible to do it: And I am in hopes the court may come at it in the caſe before them.

The will takes the lands to be ſettled, but the ſettlement will not alter the caſe; for though it gives an eſtate for life, it does not break the diſcent: For it is not material whether the infant takes an immediate inheritance, or expectant upon an eſtate for life, for the court can decree a ſale of a reverſion, as well as of an eſtate in poſſeſſion.

Now, if this had been a deviſe of a remainder or reverſion to truſtees to ſell, the difficulty would have been removed, for the court then would have directed them to ſell, and given the infant a day to ſhew cauſe.

But this is not the caſe, for the eſtate is deſcended on him, and he has taken the legal eſtate by diſcent, ſubject to the purpoſes of the truſt.

The wife renounces the eſtate for life, under the will, which will put this out of the caſe; the words *after her deceaſe* were not put in to poſtpone the ſale.

But the queſtion ſtill recurs, whether the eſtate may be ſold when it is upon the bill of a ſpecialty creditor prayed to be ſold.

The plaintiff's bill is not merely for the ſatisfaction of a ſpecialty debt, but for the performance of a truſt likewiſe.

But this will not alter the caſe, for ſtill it is as to the infant a demand for payment of a ſpecialty debt.

What diſtinguiſhes it from the common caſe is, that here is a ſpecialty creditor, who is entitled to a ſatisfaction out of the real eſtate, before the truſt for the ſale can be performed.

And

And the *ceſtuy que truſts* likewiſe are entitled to have this eſtate ſold, and the court is only to take care to have the money ariſing from the ſale properly applied.

I go upon this, that it may be remembered I do not give this direction to break in upon the rule of *the parol demurring for an infant*, that as here is a truſt to be performed, I think I may decree a ſale, as the application of the money is what the court is principally to take care of in this caſe.

The ſum of three thouſand pounds ariſing from the ſale muſt be directed to be laid out in the purchaſe of lands, to be ſettled to the uſes in the articles.

Another queſtion is, whether the executor can be allowed his coſts of this ſuit.

The rule of law is, that wherever an executor is ſued for a debt of a teſtator, the courts of law look upon it as an unjuſt defence, and give coſts *de bonis propriis*; but in equity it is diſcretionary, whether they will make an executor pay coſts or no; and though this may be an unfortunate caſe to the executor, yet he muſt conſider with himſelf before he applies for the probate, for afterwards he muſt take the event; and this court, though the ſpecialty creditor ſweeps away the whole perſonal eſtate, will not let the executor reimburſe himſelf his coſts out of the real eſtate of the debtor, to the prejudice of his heir at law.

Where a debt of a teſtator is recovered againſt an executor at law, coſts are given *de bonis propriis*, but in equity diſcretionary, whether they will make him pay coſts or not.

The perſonal eſtate is apprehended to be deficient to ſatisfy the ſpecialty debt, but if the perſonal aſſets are more than ſufficient to pay this debt, the executor may then have his coſts out of the reſidue.

Stag verſus *Punter*, *July* 23, 1744. Caſe 45.

UPON exceptions to a Maſter's report for not allowing ſixty pounds for the teſtator's funeral:

LORD CHANCELLOR.

At law where a perſon dies inſolvent, the rule is, that no more ſhall be allowed for a funeral than is neceſſary, at firſt only 40 *s.* then 5 *l.* and at laſt 10 *l.*

Though at law, where a perſon dies inſolvent, his executor will be allowed no more for his funeral than is neceſſary, yet if he is led into a greater expence on this account, by ſeeing large legacies left by the will, which induced him to think the eſtate was ſolvent, this court will not adhere to the rule laid down at law that he muſt not exceed 10 *l.*

I have often thought it a hard rule, even at law, as an executor is obliged to bury his teſtator before he can poſſibly know whether his aſſets are ſufficient to pay his debts.

But this court is not bound down by ſuch ſtrict rules, eſpecially when a teſtator leaves great ſums in legacies, which is a reaſonable ground for an executor to believe the eſtate is ſolvent.

As this is the caſe here, I am of opinion that ſixty pounds is not too much for the funeral expence, eſpecially as the teſtator had directed his corps ſhould be buried at a church thirty miles from the place of his death; and beſides there is ſtill another eſtate to be ſold, ſo that itis not clear that there will be any deficiency; and on theſe circumſtances his Lordſhip allowed the exception to the Maſter's report.

Caſe 46.

Jeffreys verſus *Jeffreys*, *Trinity term*, 16 *Geo.* 2.

A. by his will bequeaths to his two daughters *Ann* and *Elizabeth* 2702 *l.* 3 *s.* capital ſtock in the bank of *England*, and 2000 *l.* ſterling capital ſtock in the *Engliſh Eaſt-India* company, to be equally divided between them; after making his will he ſold 702 *l.* 3 *s.* of the bank ſtock. *The court held that the teſtator having the ſtock at the time he made his will, he meant to give that very individual ſtock, and the ſale of part afterwards was an ademption pro tanto.*

THE queſtions in this cauſe aroſe upon the will of one *James Jeffreys*, dated the 11th of *June* 1734. in which was the following clauſe.

" *Imprimis*, to my two daughters now in *Dantzick*, *Ann Louiſa* " *Jeffreys*, and *Elizabeth Jeffreys*, I give and bequeath two thou- " ſand ſeven hundred and two pounds three ſhillings, capital ſtock " in the bank of *England*, and two thouſand pounds ſterling capital " ſtock in the *Engliſh Eaſt-India* company, to be equally divided between them.

At the time of making his will he had 2702 *l.* 3 *s.* bank ſtock, and 2000 *l. Eaſt-India* ſtock, but before his death ſold ſeven hundred and two pounds three ſhillings of the bank ſtock, ſo that the teſtator at the time of his death had only 2000 *l.* bank ſtock, and 2000 *l. Eaſt-Idia* ſtock.

The bill was brought by the daughters and legatees againſt the widow and executrix of the teſtator, (who was a ſecond wife of the teſtator, and by whom he had left other children, and deviſed to them the whole reſidue of his perſonal eſtate) charging that the teſtator had received 20,000 *l.* and upwards of their mother's eſtate, and that what he had deviſed to them was the whole proviſion made by him for the plaintiffs, and prayed that they might be decreed to have the benefit of this deviſe, and that the executrix might be directed to purchaſe out of the other aſſets, which were very conſiderable, enough to make up the deficiency in the bank ſtock of the ſeven hundred and two pounds three ſhillings.

Againſt this the defendant the executrix inſiſted, that the ſale of this ſtock by the teſtator in his life-time was an ademption of the deviſe *pro tanto*, and by her anſwer ſet forth that the plaintiffs had very large portions left to them by their grandmother, one Mrs. *Colmer*, with whom the plaintiffs lived at *Dantzick*; that the teſtator

their

their father had been at great expence in bringing the plaintiffs from *Dantzick*, and in a cauſe in this court for recovery of what was ſo left to them; and upon the hearing of that cauſe it was, amongſt other things, referred to a Maſter to ſtate what was fit to be allowed for the plaintiff's maintenance for the time paſt and to come, and that the Maſter by his report allowed a ſum of upwards of 400 *l.* for the further expences, and the maintenance of the plaintiffs; but when the cauſe came on again upon the maſter's report, it was referred back to the Maſter to ſtate, whether the father was not in circumſtances to maintain his children, and in what manner the Maſter had computed the allowance, but nothing further was done in that cauſe; and now the defendant inſiſted to have this money deducted from the plaintiff's legacies.

Maſter of the Rolls (Forteſcue.) Here are two queſtions made in this cauſe.

The firſt is, whether the ſale of the ſeven hundred and two pounds three ſhillings bank ſtock, is, or is not to be conſidered as an ademption *pro tanto* of the plaintiff's legacies.

Secondly, whether the defendant is entitled to have the allowances made to her which ſhe hath claimed by her anſwer, and to have the ſame deducted out of the legacies.

With regard to the firſt, it has been ſaid by the plaintiffs council that this is not an individual ſpecific deviſe of what ſtock the teſtator had at the time of making his will, but a general deviſe to be made good by the executor.

There is no doubt but in ſpecific deviſes this diſtinction has been taken, that where a man deviſes ſuch a quantity of corn or number of ſheep generally, this is not to be conſidered as the corn or ſheep which he then had, but a deviſe of quantity only.

Where a man deviſes ſuch a quantity of corn, or number of ſheep generally, it is a deviſe of quantity only.

But I think there is a difference between a deviſe of ſtock, and of corn or ſheep.

Corn or ſheep are in their nature periſhable, but when a man buys ſtock, he buys it to have continuance as long as he lives, and therefore when he deviſes any quantity of corn or ſheep, though he has ſuch quantity at the time of making the will, yet he cannot from the nature of the thing be taken to intend that the individual quantity of corn or ſheep ſhould go to his legatee; but where he deviſes any quantity of ſtock, which in it's nature is durable, and may continue in the ſame ſtate to the time of his death, if he has the ſtock at the time, he cannot but be taken to intend that very individual ſtock, and if ſo, the ſale of it is undoubtedly an ademption *pro tanto*; and this is

very ſtrong in the preſent caſe, in reſpect that the ſtock deviſed, and the ſtock which he then had, agree exactly, even in the odd money. Conſider then how far the caſes that have been cited come up to this caſe.

The firſt caſe is *Aſhton* verſus *Aſhton*, 152. *Caſes in Lord Talbot's time*, which was before his Lordſhip in 1735, and I believe it is rightly ſtated in the book; but that caſe differs from the preſent: There 6000*l.* *South Sea* ſtock was deviſed, when the teſtator had but 5360*l.* and yet held that it was a ſpecific individual deviſe of the ſtock, and that no more ſhould paſs than what the teſtator left; and it was ſaid by Lord *Talbot*, if in that caſe the teſtator had actually had as much as he deviſed, but before his death had ſold a part, it had been an ademption *pro tanto*.

As to the teſtator's ſelling the ſtock at five different times, in the preſent caſe, it ſeems to make no difference, for he might every time intend to diminiſh the legacy for ſo much as he ſold.

The next caſe is that of *Partridge* verſus *Partridge*, which was before Lord *Talbot* in 1736. there the teſtator deviſed 1000*l.* *South Sea* ſtock; at the time of making the will he had 1800*l.* ſtock, which he reduced afterwards to 200*l.* and then purchaſed 1600*l.* more; then came the act of parliament which changed three-fourths of the ſtock into annuities, and ſoon after the teſtator died, and what had ſo happened at the making of the will, was determined to occaſion no ademption of the legacy, and the deviſe was held to be deſcriptive only of the nature of the thing which he intended to give, and the act of parliament was taken moſt clearly not to affect the legacy.

But this caſe differs from the preſent; and if his buying in could be ſaid to reſtore the legacy, as it was ſaid it did, it implies that his ſelling out was an ademption.

And in that caſe the deviſe was not of the particular ſtock that the teſtator had, which makes it different from this caſe.

* 1 *T. Atk.* 414. As to *Purſe* verſus *Snaplin*, * if the 5000*l.* ſtock given to one of the deviſees was a ſpecific individual deviſe, there was no ſtock for the other deviſee; and then, as to him, it was as a deviſe of ſtock where the teſtator had none, and is as a direction to the executor to procure it for the legatee.

The rule is, that if a man has a debt owing, and deviſes it, and it is paid in voluntarily, the legacy continues.

In *Brunſden* verſus *Winter*, the teſtator had more ſtock than was deviſed, and the navy bills were received in a courſe of payment;

but

but here the teſtator ſold the ſtock; and, as to the navy bills, I take it to be a conſtant rule, that if a man has a debt owing, and deviſes it, and it is payed in voluntarily, the legacy continues.

As to the allowances claimed by the defendant, I think they ought not to be allowed.

In ſuch caſes, the uſage of a court is to refer it to a Maſter, to ſee if the father is not in circumſtances to maintain his children, and it is certainly the duty of a father to do it, if he can, and wherever maintenance is allowed, it is always to be paid to the father out of the child's eſtate, and was never known to be deducted out of a legacy left by the father to his child; beſides, I cannot now take upon me to anticipate the order in the other cauſe, or to determine now what was not made a queſtion there.

Where maintenance is allowed, it is always paid to the father out of the child's eſtate, and no inſtance of its being deducted out of a legacy left by a father to the child.

I muſt therefore decree the two ſums of 2000*l.* bank ſtock, which is all the bank ſtock teſtator hath left, and the 2000*l.* *Eaſt India* ſtock to be transferred for the benefit of the plaintiffs, clear of all deductions.

Note; In the arguing of this caſe at the bar, *Swinb. fol. edit.* 173, 179, 540, and 2 *Domat* 159, 160. were cited for the plaintiffs, and the caſe of *Brunſden* verſus *Winter*, which was alſo cited for the plaintiffs, was a deviſe to this effect; I deviſe the ſum of 2000*l.* capital *South Sea* ſtock, in the *South Sea* company, to *A. B.* and *C. D.* my truſtees, and alſo two navy bills, which *South Sea* ſtock, and navy bills I direct ſhall be applied in the ſame manner as my real eſtate, *&c.* which were deviſed upon ſeveral truſts, for the benefit of the defendant Mr. *Winter*'s children: The teſtator, at the time of making his will, had 2200*l.* *South Sea* ſtock; afterwards the teſtator ſold out 1625*l.* and then came the act for annihilating, *&c.* and the queſtion was, whether the deviſe of the ſtock was a ſpecific individual legacy out of the particular ſtock that the teſtator had at the time of making the will, and ſo the ſale an ademption, or whether it was to be taken as a general legacy of ſo much ſtock which the executor ought to provide out of the reſidue of the teſtator's aſſets? And the *Maſter of the Rolls* held it to be a general legacy, to be made good by the executor; it was heard at the *Rolls*, the 5th of *February* 1738. before Mr. *Verney*.

Upon the queſtion, as to the allowances, Mr. Solicitor General cited the caſe of *The Bank of England* and *Morris*, that came firſt before Lord *Talbot*, and afterwards went up into the Houſe of Lords, in which caſe it was firſt held by Lord *Talbot*, that where a father is indebted to his children, and dies, that his executor ſhall not

be permitted to deduct any thing from the debt, in reſpect of maintenance of the children by the father in his life-time, though inſiſted on by creditors: And although this part of the decree was reverſed in the Houſe of Lords, yet it was only in favour of creditors, and not to be carried further.

For the defendants were cited *Godolphin's Orph. Legacy* 411. This decree was affirmed by Lord *Hardwicke*, the 21ſt of *April* 1744.

Caſe 47. *Dormer* verſus *Forteſcue*, *April* 28, 1744.

Clear both in law and equity, and from natural juſtice, that the plaintiff, from the death of his father, the time when his title accrued, is intitled to the rents and profits.

THIS cauſe came on again before the court upon the equity reſerved.

Mr. Solicitor General, council for the plaintiff, ſaid, the queſtion is, whether this court can decree the plaintiff an account of rents and profits from the time of his title accruing, which is from the death of his father *Euſebe Dormer*, who died the third of *September* 1729.

The plaintiff was obliged to come into this court, in order to have the family ſettlement produced at the trial at law, for the defendant wrongfully detained it, notwithſtanding he had got all the four parts in his own hands, and pleaded himſelf a purchaſer for a valuable conſideration.

Lord *Talbot*, at the hearing, directed the deed to be produced at the trial at law, in order to determine the title there, and the bill to be retained for a twelve-month, and a term for years to be removed out of the way, and all further directions to be reſerved till after the trial.

The original bill, beſides, prays general relief.

The plaintiff's title having been eſtabliſhed at law, he is now entitled to a complete relief, *an account of rents and profits.*

For if he has not the rents and profits as well as the eſtate, he has not complete juſtice done.

There are caſes where at law a perſon may not recover rents and profits, and yet this court will direct it, where it has a proper juriſdiction, as in an action for rents and profits, which is in the nature of an action of treſpaſs, if the perſon dies againſt whom it is brought, *moritur cum perſonâ*, but this court will direct an account of rents and profits notwithſtanding.

It

It is ſaid, that if the court decree an account of rents and profits, that it muſt begin only from the time of the ſupplemental bill.

But the court wherever they decree it, do it from the time of the titles accruing.

There were no laches or neglect on the part of the plaintiff, for his father died the latter end of 1729, and the plaintiff brought his ejectments in 1731, and his original bill in 1732.

By the ſtatute of *Glouceſter*, damages in an aſſize are given, and after a trial in ejectment, there can be no other way of meaſuring the damages, but by rents and profits.

It was objected at a former hearing, that the ſtatute of limitations has barred the plaintiff from carrying back the account any further than the filing the ſupplemental bill, ſix years having incurred before it was brought.

But when this matter came on, *March* 20, 1741, and the demurrer and plea was argued, this objection was over-ruled, and is now out of the queſtion.

Lord Chancellor aſked if the original bill charges the defendant, Mr. Juſtice *Forteſcue*, to be in poſſeſſion of the eſtate, for it is admitted that it does not pray ſpecifically an account of rents and profits, but only general relief.

Mr. Solicitor General: The bill indeed does not charge poſſeſſion in the defendant, but it ſets forth that the plaintiff has brought ejectments againſt him.

The caſes cited by Mr. Solicitor General, and the reſt of the council, for the plaintiff, were *Coventry* verſus *Hall*, 2 *Ch. Caſes* 134. *id. in* 2 *Rep. in Chanc.* 134. *The Duke of Bolton* verſus *Deane*, *Prec. in Eq.* 516. *Bennet* verſus *Whitehead*, 2 *P. Wms.* 644. 1 *Vern. Anon.* 105.

After they had finiſhed, his Lordſhip adjourned the cauſe; and on the 2d of *June* 1744. it came on again, when Mr. Attorney General, for the defendant, ſaid, that the avowed end of the original bill was not to try the right in a court of equity, for it does not pray poſſeſſion, or the title deeds to be delivered up, or the eſtate; neither does it aſk an account of the rents and profits, nor charge the defendant with the receipt of them.

The decree of this court, and of all courts, muſt be *ſecundum allegata*, as well as *probata*.

The decree has been already made for all the purpoſes prayed by the original bill, namely, that the deed ſhould be produced, and a term for years removed out of the way at the trial at law.

Where the right can only be determined at law, and the plaintiff cannot come here originally for the determination of the right, there is no inſtance where this court will decree an account of rents and profits.

The plaintiff has gone altogether on the foundation of its being a legal right, ſtates it ſo in his bill, and has not prayed the court to determine the right in any ſhape whatever.

The court cannot ſay now, that the final right to the inheritance is determined, for Mr. Juſtice *Forteſcue* may, upon the new ejectment brought by him, recover it again; and therefore if the court ſhould decree an account of rent and profits, it would be decreeing at the ſame time, that the right is abſolutely determined, and for this reaſon, while the ejectments are depending, this court cannot properly decree an account of rents and profits.

In the caſe of *Coventry* verſus *Hall*, the court there decreed the rents and profits, becauſe they had determined the right to be in the plaintiff, which differs it very much from the preſent caſe.

The plaintiff did not make an actual entry till *October* 1736.

As the original bill did not extend to this, what they call a ſupplemental bill, is, to all intents and purpoſes, to be conſidered as an original bill; for where a party brings a ſupplemental bill, and prays a new relief, it muſt be taken as an original one.

That the court may as well decree a perpetual injunction, as decree the title deeds, which the plaintiffs pray, by their ſupplemental bill to be delivered up to them.

Mr. *Brown*, of the ſame ſide, ſaid, the plaintiff elected to try his title at law, and prays in this court a particular ſpecies of relief; the producing a deed in order to enable him to try it *there*, and when this was decreed *here*, they had given him all the relief he aſked.

There was nothing pointed out in the bill, but only a defect and impediment to his trying the title at law; for the only thing which

which was pronounced by the decree, or could be decreed, was the producing the deed, and removing the term out of the way.

The deed being in Mr. Juſtice *Forteſcue*'s hands, is no reaſon why they ſhould have an account of rents and profits here, for after the deed was produced, they might have recovered the rents and profits at law; for they are as much recoverable at law, as the title itſelf.

In the caſe of *Bennet* verſus *Whitehead*, a perſon was prevented by fraud from receiving the rents and profits, which gave this court the proper and only juriſdiction, the defendant knowing them in that caſe to be only leaſehold lands, as he had the very deeds in his hands, and yet ſets up a right to them as freehold.

There is no pretence of any fraud here, for the plaintiff in his original bill has ſtated the whole title under the ſettlement, and therefore nothing was concealed from him, that was neceſſary for him to know.

Where once a perſon has made his election to proceed at law, he muſt take his fate there; and though there is a determination in favour of the plaintiff at law, yet a court of equity will not think this a deciſive determination, unleſs there is an application to the court, expreſly to prevent the queſtion from being litigated again, and for a perpetual injunction.

As there is a new ejectment brought, till a trial has been had upon it, it is doubtful, at leaſt, whether the defendant may not recover the right again.

That the ſupplemental bill is not properly ſo; for it is a new relief which is prayed.

To ſay, that by praying general relief under the original bill, they are intitled to an account of rents and profits, would be carrying it to far, and attended with bad conſequences; for it would be allowing parties to take the advantage of accidents, which have happened after a decree, and which could not poſſibly be foreſeen at the time of bringing the bill.

They cannot, for the plaintiff, ſhew, that this court will decree an account of rents and profits, where there is no truſt ſtanding in their way, or any ignorance of their title at law.

The ejectments were brought before the filing of the bill; and if they have been guilty of an error in bringing thoſe ejectments, I do not know that this court ſits here to relieve againſt the blunders of parties in ejectments.

They afterwards brought new ejectments, and recovered upon them; what hinders them then from bringing an action of treſpaſs for the meſne profits? and may be done with as much eaſe, and leſs expence, than an account taken before a Maſter.

As to the delivery of the deeds, your Lordſhip will not do it, as it will be laying the defendant under ſuch difficulties as he can never get over, and will be equal in every reſpect to granting a perpetual injunction, and preventing him from ever trying the right again; and ſubmitted, that the court ought to diſmiſs the bill entirely, as to the account of rents and profits.

Mr. *Clerk*, of the ſame ſide, cited the caſe of *Owen contra*, *April* 1. *Ch. Rep.* 17.

LORD CHANCELLOR.

I am very well ſatisfied in my opinion upon this caſe; the general queſtion is, whether the plaintiff is entitled to an account of the rents and profits, and if he is entitled to them, from what time?

The firſt divides itſelf into two conſiderations:

Firſt, Whether on the foot of his general title the plaintiff has a right to an account of rents and profits from the time of his title's accruing.

Secondly, Whether in this court he has a right to demand them.

As to the firſt, nothing can be clearer both in law and equity, and from natural juſtice, than that from the death of his father, the time when his title accrued, he is entitled to the rents and profits.

There was a ſettlement made in 1662. for a valuable conſideration, and the plaintiff claims under the uſes of that ſettlement, by which he takes an eſtate-tail.

Mr. Juſtice *Dormer* who died laſt, was tenant for 99 years, with remainder to his ſon in tail, which ſon died in the life of Mr. Juſtice *Dormer*, and on his death the plaintiff's father was entitled, and after his father died, the plaintiff himſelf.

From

From that time he had a right in equity and conſcience, and if prevented from coming at it, it muſt be ſome impediment in law or equity that hinders him from receiving them.

It has been ſaid, the defendants being in poſſeſſion under a title, or ſuch a title as they were miſtaken in, that if they had taken the proper method they might have made it good; and that Mr. Juſtice *Dormer* and his ſon might have barred the eſtate-tail, either by getting the truſtees to preſerve contingent remainders to join with them, or by executing a feoffment upon the land, inſtead of a fine to make a tenant to the *præcipe*.

As to getting the truſtees, or the heir, to join, to make a tenant to the *præcipe*, that is a very uncertain thing, for I believe truſtees to preſerve contingent remainders would have been extreamly cautious in conſenting, as there was no marriage ſettlement on foot, as a plauſible pretence for declaring new uſes, different from thoſe under the ſettlement.

As to the other way, I lay no weight upon that, for it is only ſaying they might have done it by another method, which the law calls a wrong; ſuch a feoffment as that would have had its effect, and could only operate as a diſſeiſin, and would have gained a freehold by wrong, and that might have made a tenant to the *præcipe*; but no preſumption of favour ariſes from thence, for it is a wrong at leaſt, however it might have ſubſtantiated the title at law.

The plaintiff therefore certainly was entitled to the rents, from the accrual of his title.

The next branch of the caſe is more material, which is, whether the plaintiff has a right to demand an account of the rents and profits in this court; and I am of opinion, under the circumſtances of this caſe, he has a right to come into this court for that purpoſe.

Under the circumſtances of this caſe the plaintiff has a right to demand an account of the rents and profits in this court.

There are ſeveral caſes where the court will do it, and ſeveral to be ſure where they will not; but I can by no means admit the latitude in the *Anon.* caſe in 1 *Vern.* 105. or rather in that note of a caſe. *

The anonymous caſe in 1 *Vern.* 105. is a note of a caſe only, and imperfect.

* Where a man is put to his election, whether to proceed at law or in this court, if the bill be for the land, and to have an account of the meſne profits, he may elect to proceed in an ejectment at law for the poſſeſſion, and in equity upon the account, becauſe at law he can recover damages for meſne profits from the time only of the entry laid in the declaration. 1 *Vern.* 105.

Where an infant brings a bill for the land, and to have an account for the meſne profits, the court may elect him to proceed at law, and retain the bill for the meſne profits.

For if a man brings an ejectment bill for poſſeſſion, and an account of rents and profits, where there is no mixture of equity, the court will oblige the plaintiff to make his election to proceed here, or at law, and if at law he muſt proceed for the whole there: That caſe might very poſſibly be a bill brought by a *prochein amy* for an infant, or attended with ſome ſpecial circumſtances omitted by the reporter: if it was the bill of an infant, who has a right to come here, the court might elect him to proceed at law, and retain the bill for the meſne profits.

But, as I ſaid before, there are ſeveral caſes where this court does decree an account of rents and profits, and that from the time the title accrued.

Where there is a truſt, and a mere equitable title, the plaintiff ſhall have an account of the rents and profits from the time the title accrued, unleſs there are ſpecial circumſtances to reſtrain it to the bringing of the bill.

As where a man brings his bill in this court, where there is a truſt, and upon a mere equitable title, there he ſhall recover the eſtate, and the court will give him an account of the rents and profits, and that from the time the title accrued, unleſs upon ſpecial circumſtances, and then they will reſtrain it to the time of bringing the bill; as where the defendant had no notice of the plaintiff's title, nor had the deeds and writings in his cuſtody, in which the plaintiff's title appeared, or where the title of the plaintiff appeared by deeds in a ſtranger's cuſtody.

The court will reſtrain it to the filing of the bill, where there has been any default in the plaintiff in not aſſerting his title ſooner.

So where there hath been any default or laches in the plaintiff, in not aſſerting his title ſooner, but he has lain by, there the court has often thought fit to reſtrain it to the filing of the bill.

Whoever enters on the eſtate of an infant, enters as guardian or bailiff for the infant.

So in the caſe of a bill brought by an infant to have poſſeſſion of the eſtate, and an account of rents and profits, the court will decree an account from the time of the infant's title accrued, for every perſon who enters on the eſtate of an infant, enters as a guardian or bailiff for the infant.

There are other caſes where the court will do it merely upon a legal title, as wherever the plaintiff has been kept out of it by fraud, miſrepreſentation or concealment of the defendant.

Where a widow claims dower merely upon a legal title, but cannot aſcertain the lands, this court will aſſiſt her to find them out, and if her title to it is eſtabliſhed, will give her the profits not from the time of the demand only, but from the time her title accrued.

So in the caſe of dower, if a widow is entitled to dower, and her claim is merely upon her legal title, but cannot aſcertain the lands out of which ſhe is dowable, this court will aſſiſt her to find out the lands, and the court will order her to proceed upon a particular part, and reſerve the further conſideration till after judgment, and if her

title of dower is eſtabliſhed, will give her profits from the time not only of her demanding, which is the time ſhe is to have it in her writ of dower, but will give it her from the time of her title accrued, though the ſtatute of the 9 *Hen.* 3. *ch.* 1. gives her damages only from her demand.

I will put this caſe; ſuppoſe a widow entitled to dower of an eſtate, upon which a term for years was ſtanding out, and ſhe had her title of dower out of the reverſion of the term, and ſhe comes into this court to have it removed out of the way, they will decree her an account of the rents and profits from the time of her title accrued, and will ſet the term as a ſatisfied one out of the way; but if that term had been out of the way, and ſhe had no need to come into this court, it would have been otherwiſe.

If a dowreſs comes here to have a term removed, which is a ſatisfied one, this court will decree her an account of the rents and profits from the time of her title accrued; but if the term had been out of the way, and ſhe had no need to come here, it would have been otherwiſe.

Then conſider how far the preſent comes up to this caſe; it appears that the ſettlement under which the plaintiff's title aroſe was in the hands of the defendants, and detained by them, though I do not ſay it was fraudulently obtained, but ſtill the plaintiff could not come at it without the aſſiſtance of this court. The plaintiff, it is true, brought his ejectment before he brought his bill here, and from hence the defendant's council have inferred that he knew his title; but how did he know it? why, only by gueſs, for it is plain the plaintiff did not ſo much as know there was this two hundred years term ſtanding out, for the deed by which it was created is not ſo much as mentioned in the bill, and he only knew it by its being read in the cauſe.

This is one reaſon which weighs with me.

There is another ground ſtill remaining, and a ſtronger one, that I think this to all material purpoſes an equitable title: here is a term created of two hundred years by the ſettlement, the legal eſtate was in truſtees, and the term was appointed likewiſe to be attendant on the inheritance, ſo that it was a plain bar in the plaintiff's way at law; and he having then brought his ejectment at random, Lord *Talbot* ordered the bill to be retained for a twelvemonth, that he might, if he pleaſed, bring a new ejectment.

The ſtrength of the preſent caſe is, that it is a mere equitable title, the legal eſtate in the 200 years term being in truſtees, and appointed to be attendant on the inheritance, and for that reaſon a bar in the plaintiff's way at law.

Beſides, if the plaintiff had known any thing of this truſt term, he would certainly have made the truſtees parties to the ſuit, that they might convey to him, if he ſhould eventually appear to have the remainder in the inheritance.

But notwithſtanding this court has undoubtedly a juriſdiction with regard to decreeing rents and profits, yet if the plaintiff has not taken a proper remedy, or proceeded in a proper method to have an account, he cannot be entitled; and whether he is or not, will depend upon two things:

Firſt,

Firſt, As to the nature of the original bill.

Secondly, Upon the ſupplemental bill.

As to the firſt, it has been inſiſted for the defendants, that it is brought for another purpoſe, *diverſo intuitu*, and is confined merely to the diſcovery of the ſettlement, and for producing the deed on the trial at law.

If there is not ſuch a caſe made by the bill as will intitle the plaintiff to an account of rents and profits, praying general relief will not entitle him to it.

To be ſure, if the plaintiff has not made ſuch a caſe by his bill as will entitle him to an account of rents and profits, it is rightly ſaid, that his praying general relief will not entitle him; though Mr. *Dobbins*, a council formerly in this court, uſed to ſay, that *praying general relief*, was the next beſt prayer to the Lord's prayer.

The plaintiff's charging that he has brought ejectments againſt the defendant for the eſtate, is tantamount to charging poſſeſſion in the defendant.

The bill then, no doubt, is inartificially and defectively drawn, for want of ſo full a charge as might have been laid of the poſſeſſion in the defendant: but then the plaintiff has charged that he has brought ejectments againſt the defendants for this eſtate, which is tantamount to charging poſſeſſion. And the defendant, Mr. Juſtice *Forteſcue*, actually by his anſwer admits himſelf in poſſeſſion.

Where a bill is merely for a diſcovery of a deed, or for producing it at law, no affidavit is neceſſary; otherwiſe where the plaintiff wants to change the juriſdiction from a court of law to a court of equity.

Where the defendant's council would confine the general relief, prayed by the original bill, to the producing the deed at the trial, they are miſtaken in the nature of the bill, for the bill deſires not only that the deed may be produced at the trial, but delivered up for the benefit of the plaintiff; and what puts it out of all doubt, is, that here is likewiſe an affidavit annexed of the want of the deed, which makes it a very ſtrong caſe for the plaintiff, becauſe the annexing an affidavit is, where the plaintiff has an intention to change the juriſdiction from a court of law to a court of equity; and if the bill was merely for a diſcovery of a deed, or for producing it at law, no affidavit is neceſſary; and this is the conſtant diſtinction.

Had the truſtees been parties to this bill, the court might have decreed poſſeſſion and a conveyance of the truſt eſtate, if the point had been clear with the plaintiff.

And as this appears to be the nature of the bill; ſo I think my Lord *Talbot* underſtood it in this light; and if the truſtees had been parties to it, the court might have decreed poſſeſſion, and a conveyance of the truſt eſtate, if they thought it a clear point for the plaintiff, or might do as Lord *Talbot* has done, direct a trial at law when it is doubtful.

Here his Lordſhip has likewiſe decreed the deed to be produced at the trial at law, and that the term for two hundred years ſhould not ſtand in the way, and reſerved all further conſiderations.

It

It is all one as to the juriſdiction of the court, whether they make uſe of one mode of expreſſion in drawing up their decrees, or another, or whether they direct the parties to proceed in the ejectment, or a trial at law: but if the very truſtees of this term had been before the court, I would not have directed an aſſignment of this truſt, till the point in relation to the title had been firſt determined.

I am of opinion that the original bill extends to every thing which is now inſiſted on by the plaintiff, and that I ought not to confine it to the ſingle matter of producing the deeds at the trial; and that in the firſt place, the court under this bill may very properly give directions as to the diſpoſition of the title deeds.

But ſuppoſe the original bill to be as defective as the defendant's council would have it, could any thing be more proper than to bring a ſupplemental bill, to put this matter in iſſue, and to ſupply the defects of any in the original bill.

Supplemental bills are often brought even in aid of a decree of this court, as in a decree to account, for want of full direction before; and directions are given under the ſupplemental bill that the new matter ſhould be connected with the former decree.

Where full directions have not been given, a ſupplemental bill may be brought in aid of a decree of this court.

If the plaintiff's original bill had not prayed this general relief, it was very proper to bring a ſupplemental bill that he may have an entire relief; and I think that they ought to be conſidered as one bill, and connected together.

The ſupplemental and the original ought to be conſidered as one bill, and connected together.

All the caſes which are material have been cited, the firſt caſe was that of *Coventry* and *Hall, or Hill*, which was only a queſtionable title where a recovery could not be had at law.

The caſe of the Duke of *Bolton* verſus *Deane*, is merely a title at law, and therefore applicable to the preſent point, for I do not know that the Duke of *Bolton* could be ſaid to be out of poſſeſſion; for where the tenant held over after his term expired, he was by ſufferance only, and therefore his poſſeſſion was the Duke of *Bolton*'s poſſeſſion; this was as ſtrong a caſe to leave it to law as could be, and yet the court decreed under that bill an account of rents and profits.

The Duke of *Bolton* verſus *Deane*, a mere legal title, and was a ſtrong caſe for leaving it to law, and yet an account of rents and profits was decreed in this court.

Bennet verſus *Whitehead* is a much ſtronger caſe, and more ſimilar to the preſent; I was of council in it myſelf, and as it is in the book and alſo upon memory, it was a mere legal title, and there the deeds were in the cuſtody of the plaintiff himſelf, here in the defendant's hands, and therefore this is a ſtronger caſe.

Still it is objected that where a man is *bonæ fidei poſſeſſor*, he ſhall not account according to the rule of the civil law; and the rule of this court, and the civil law, is ſtronger in this reſpect than the law of *England*.

To be a *bonæ fidei poſſeſſor is*, where the perſon poſſeſſing is ignorant of all the facts and circumſtances relating to his adverſary's title.

But where a man ſhall be ſaid to be *bonæ fidei poſſeſſor*, is, where the perſon poſſeſſing is ignorant of all the facts and circumſtances relating to his adverſary's title: Which could not be here, for Mr. Juſtice *Forteſcue* had all the deeds, and the very ſettlement itſelf on which the title depended.

Another objection has been made, that though the plaintiff has obtained a verdict at law, this is not a final determination of the parties right, and therefore the court ought not to decree an account of rents and profits, becauſe a new ejectment is now depending, and the defendants may poſſibly recover the eſtate back again.

This would narrow the juriſdiction of the court too much.

There are inſtances where upon a mere legal title the court have decreed an account of rents and profits, as in the caſe of an infant who brings a bill for poſſeſſion, and for an account of rents and profits, and yet they do not decree a perpetual injunction, though they decree an account of rents, *&c.*

Though on a bill of diſcovery the court decree the deeds and meſne profits to an heir at law, yet if the defendant afterwards at law ſhould make out a better right, this court would aſſiſt him in recovering back the deeds again.

Suppoſe an heir at law brings a bill for diſcovery of deeds and writings, and for the meſne profits, and the court decree him the deed, *&c.* yet if the defendant ſhould afterwards at law make out a better right than he did here, this court would not diſturb him in it, but aſſiſt him in recovering the deeds back again.

If I was to delay decreeing the account of rents and profits now, it would be attended with infinite inconvenience, and therefore I am of opinion that the plaintiff is entitled to an account of the rents and profits from the time of the plaintiff's title accruing, which is from the death of his father in 1729.

And as to the deeds and writings let them be brought before the Maſter, upon oath, and as to the diſpoſition of them, I ſhall reſerve the conſideration of that till the final right to the inheritance is determined.

The opinion of the judges in the houſe of Lords, in the caſe of *Dormer* againſt *Forteſcue*, as delivered by Lord Chief Juſtice *Willes*, I apprehend will not be unacceptable, and therefore venture to give it to the publick, and hope in ſuch a manner as not to do any injury to the memory of that very learned and able judge.

Smith

Smith on the demiſe of Dormer againſt *Packhurſt et al'* *the 23d of February 1741-2. on a writ of error in the houſe of Lords, from the judgment in B. R. Mich. 14 Geo. 2.*

Caſe 48.

LORD Chief Juſtice *Willes:* In purſuance of your Lordſhips order, I and my brethren have met to conſider of the queſtions propoſed, and are unanimous in our opinions; but as it is a point of great conſequence and nicety, your Lordſhips will excuſe me if I take ſome time in ſtating the caſe, and the reaſon of our opinion; which I ſhall do in as clear and intelligible a manner as I can: Mr. *John Dormer* in the year 1662, upon the marriage of his eldeſt ſon *John Dormer*, made a ſettlement of his eſtate with ſeveral limitations; and as the queſtions in the cauſe aroſe upon the words of the ſettlement which are agreed on both ſides, I ſhall repeat them; "After limitting an eſtate to his ſon *John Dormer* and the heirs of "his body, he limits his eſtate as follows; and in default of ſuch "iſſue, to the uſe and behoof of *Robert Dormer*, one of the brothers "of the ſaid *John Dormer*, for the term of 99 years, if he ſhall "happen ſo long to live; and from and after the death of the ſaid "*Robert Dormer*, or other ſooner determination of the eſtate li- "mited to him for 99 years, to the uſe and behoof of *T. S.* and "*J. R.* and their heirs during the life of the ſaid *Robert Dormer*, "upon truſt to preſerve the contingent uſes and eſtates herein after "limited from being defeated and deſtroyed, and for that purpoſe "to make entries and bring actions, as the caſe ſhall require; but "to permit the ſaid *Robert Dormer* and his aſſigns to receive the "rents and profits of the ſaid eſtate during the term of his life, and "after the end or other ſooner determination of the ſaid term, "to the uſe and behoof of the firſt and every other ſon of the ſaid "*Robert Dormer* in tail male, with remainder in the ſame words "to *Fleetwood*, another brother of the ſaid *John Dormer*, remainder "to *Peter* another brother, and the laſt remainder to *Euſebe* the "father of the leſſor of the plaintiff for 99 years, if he ſo long live, "remainder to the truſtees in the like manner as in the limitation "to *Robert Dormer*, and to the firſt and every other ſon of *Euſebe* "*Dormer* in tail male." *Robert Dormer* had one ſon *Fleetwood*, and when he came of age *Robert* and his ſon *Fleetwood* levied a fine to make a tenant to the *præcipe*, and ſuffered a recovery, in which *Fleetwood* was vouched; the ſon died without iſſue, then *Robert Dormer* died, leaving no other ſon, but four daughters. *Fleetwood* and *Peter* are both dead without iſſue, and *Euſebe* being dead, his ſon, the leſſor of the plaintiff, and the neareſt ſurviving remainder man, made his actual entry within five years, and being ſo ſeiſed demiſed to the plaintiff, *&c.*

All the judges were unanimouſly of opinion, that the fine and recovery ſuffered by *Robert Dormer* and his ſon when he came of age were no bar, for a good eſtate being veſted in the truſtees during the life of *Robert Dormer*, he and his ſon could not by any act defeat the remainder-men without the conſent and joining of the truſtees during the life of *Robert Dormer*, as the freehold was in them.

The two queſtions propoſed by your Lordſhip were, firſt, whether the remainders limited to the firſt and every other ſon of *Euſebe* were good remainders in their firſt creation; and ſecondly, whether the fine and recovery ſuffered by *Robert Dormer* and his ſon barred theſe remainders.

Such a conſtruction ought to be made of deeds, *Ut res magis valeat quam pereat.*

Before I proceed to the queſtions, I ſhall lay down ſome general rules and maxims of the law, with reſpect to the conſtruction of deeds; firſt it is a maxim, that ſuch a conſtruction ought to be made of deeds, *ut res magis valeat quam pereat*, that the end and deſign of the deeds ſhould take effect rather than the contrary.

Words are not the principal things in a deed, but the intent of *the grantor*, and though the judges have no power to alter them or inſert others, yet they ought to conſtrue them the moſt agreeable to his meaning, and reject any that are inſenſible.

Another maxim is, that ſuch a conſtruction ſhould be made of the words in a deed, as is moſt agreeable to the intention of the grantor, the words are not the principal things in a deed, but the intent and deſign of the grantor; we have no power indeed to alter the words or to inſert words which are not in the deed, but we may and ought to conſtrue the words in a manner the moſt agreeable to the meaning of the grantor, and may reject any words that are merely inſenſible: theſe maxims my Lords are founded upon the greateſt authority, *Coke*, *Plowden*, and Lord Chief Juſtice *Hale*, and the law commends the aſtutia, the cunning of judges in conſtruing words in ſuch a manner as ſhall beſt anſwer the intent; the art of conſtruing words in ſuch a manner as ſhall deſtroy the intent may ſhew the ingenuity of council, but is very ill becoming a judge.

Though the law will not admit a perpetuity, yet the intention of the party ſo far as is conſiſtent with its rules, ought to be obſerved.

Having laid down theſe maxims, I ſhall proceed: In this caſe the intention of the party cannot be doubted, the grantor manifeſtly intended to continue the eſtate in his name and blood as far as he could by the rules of law, the law will not admit a perpetuity, but the intention of the party ſo far as is conſiſtent with the rules of law ought to be obſerved.

The plain intent of making *Robert Dormer* tenant for 99 years only, was to prevent him and his ſon from barring the eſtates in remainder without the joining of the truſtees.

In this caſe it was ſaid that the intention of the party by appointing truſtees to preſerve the contingent remainders, was only to preſerve the eſtate till there were iſſue of *Robert Dormer*, and that they were not meant to preſerve the diſtant remainders; but if this had been the caſe how came *Robert Dormer* not to be made tenant for life, for even though he had been tenant for life, the truſtees could have preſerved the remainders till his ſon came of age; but the plain intent of making him tenant for 99 years only, was to prevent him and his ſon from barring the eſtates in remainder without the joining of the truſtees, the effect of which is, that it could not be barred without the conſent of the truſtees during the life of *Robert Dormer*, which is going as far as the law will permit.

The objections to the limitations to the firſt and other ſons of *Euſebe*, *&c.* were theſe; firſt, that the commencement of the eſtate

to the truſtees and to the firſt ſon was at the ſame time, and conſequently the latter limitation was void. Secondly, That the limitations were inconſiſtent, and therefore void; and thirdly, that where there is an eſtate limited upon two disjunctives, which cannot ſtand together (becauſe if one happens the other cannot) that in ſuch caſe it ſhall take effect upon neither, but the ſettlement ſhall rather be conſtrued to be void.

As to the firſt we are clearly of opinion, that the limitation of the eſtate to the truſtees and to the firſt ſon, *&c.* commenced at different times; in ſupport of the firſt objection it was ſaid that an eſtate limited during the life of another to commence at his death, is void; this is certain, but when the deed goes on and ſays, or other ſooner determination of the term for years, this manifeſtly fixes a commencement of the eſtate to the truſtees, at the determination of the term, which might happen not only by effluxion of time, but may take effect by ſurrender, or forfeiture, ſeveral ways, in the life-time of *Robert Dormer* or *Euſebe:* And we are of opinion, that the eſtate to the truſtees might ſo commence; but the eſtate to the firſt ſon, *&c.* could not commence till the death of their reſpective fathers.

The word term, though more properly applied to a term for years, yet may mean an eſtate for life.

It is ſaid by my Lord *Coke*, that the word term, though it is more properly applied to a term for years, yet may mean an eſtate for life, and it is plainly in this deed uſed in that ſenſe: The truſtees are to permit *Robert Dormer*, *&c.* to receive the profits during the term of his life; and the eſtate to the children is not to commence till the end, or other ſooner determination of the ſaid term, which, by referring the relative to the laſt antecedent, muſt mean the term of his life; as to the words *ſooner determination*, inſerted after the eſtate for life, theſe are inſenſible, and may be rejected; they were probably thrown in *currente calamo*, or by following a precedent, and if the precedent was before the reformation when there was a civil death, as well as a natural, by entring into religion, it might then have a meaning.

As to the ſecond point, ſince we are of opinion that there was a different commencement of the eſtates limited to the truſtees, and the iſſue in tail, there is no inconſiſtency.

As to the third, it is highly abſurd, and againſt reaſon, and I think againſt law too: But in ſupport of this, the caſe of *Camberford* and *Birch*, 2 *Lev.* 157. was cited by the defendant's council; there the ſettlement was with a proviſo, that in caſe none of the brothers or ſiſters of *A.* or any of the children be living, then immediately, or after a term of 21 years ended, to the uſe of *B. C.* and *D.* his brothers, ſucceſſively in tail male, remainder to the plaintiff: *A.* died without iſſue, *B.* and *C.* died without iſſue male, but *B.* had iſſue a daughter; and *A.* himſelf had ſiſters living; this the court

held to be one ſentence, and a condition precedent; that none of the brothers or ſiſters of *A.* or any of their children be then living, and which, as it had not happened, all the remainders were void, and judgment for the defendants; and it was not at all determined on the neceſſity there was, that the remainders ſhould take effect on both disjunctives; but that caſe does not come up to the preſent, for it was never intended that the remainder ſhould veſt on the death of *Robert Dormer*, but as appears by the expreſs words on a determination of the eſtate *for 99 years* before his death, and ſuch a conſtruction as the defendant's council contended for, would deſtroy not only the remainder to *Euſebe*, but every one of the remainders limited by the deed, except the remainder to *John Dormer* and his heirs; and the words of a deed muſt be extremely ſtrong, which would induce us to conſtrue all the limitations in the deed to be void: We therefore are of opinion, that the limitations to the firſt and every other ſon of *Euſebe*, were good remainders.

As to the ſecond principal queſtion, Whether the limitations to the firſt and other ſons of *Euſebe*, were well barred by the fine and recovery, without the joining of the truſtees? It was inſiſted upon, to ſhew they were barred, *firſt*, that no eſtate at all veſted in the truſtees; *ſecondly*, if any eſtate veſted, it was a contingent eſtate, or a right of entry only; and, *thirdly*, that whatever eſtate it was, it was effectually barred by the fine and recovery.

As to the firſt, we are of opinion, that an eſtate commenced in the truſtees immediately after the determination of the term for years, by effluction of time, forfeiture, or otherwiſe.

That a remainder is contingent, when uncertain whether it would take effect or not, is by no means the true legal definition of it; for if an eſtate be limited to *A.* for life, remainder to *B.* and the heirs of his body, this is a veſted remainder, notwithſtanding *B.* may die without heirs of his body, before the death of *A.* and the remainder never take effect in poſſeſſion.

As to the ſecond, whether the eſtate to the truſtees was a veſted or contingent eſtate, appeared to us the great difficulty in the caſe; the doctrine of contingent remainders is very nice and intricate, and if we were to cite all the caſes in the books, I fear we ſhould rather puzzle than explain the difficulty: The definition of a contingent remainder, laid down by the council for the plaintiff, that a remainder was contingent when it was uncertain, whether it would take effect or not, is, by no means, the legal notion of a contingent remainder; it is not the uncertainty of taking effect in poſſeſſion that makes it contingent; if an eſtate is limited to *A.* for life, remainder to *B.* and the heirs of his body, every one will allow that this is a veſted remainder; and yet, it muſt be allowed, that it is uncertain, whether *B.* may not die without heirs of his body before the death of *A.* and conſequently the remainder may never take effect in poſſeſſion.

We

We have conſidered this point a good deal, and are of opinion, that all contingent remainders may be reduced to theſe two heads; *firſt*, where a remainder is limited to a perſon not in being, and who may poſſibly never exiſt; and, *ſecondly*, where a remainder depends upon a contingency collateral to the continuance of the particular eſtate: I will give an inſtance of each: If an eſtate is limited to *A.* for life, the remainder to his firſt ſon before he has any child; this is a contingent remainder of the firſt kind, for it is uncertain whether he will have any ſon: If an eſtate is limited to *A.* for life, and after the death of *J. S.* to *B.* in fee, or after *J. S.* ſhall come from *Rome*; this is a contingent remainder of the ſecond kind; for it is uncertain what time *J. S.* ſhall die, or ſhall come from *Rome:* For as the law, for many good reaſons, will not permit the freehold to be in abeyance, it expects the contingent remainder to take place when the particular eſtate determines, and it cannot immediately veſt in thoſe caſes, when it is uncertain whether the contingency will happen.

All contingent remainders may be reduced to two heads; *firſt*, where a remainder is limited to a perſon not in being, and who may never exiſt: *ſecondly*, where a remainder depends upon a contingency collateral to the continuance of the particular eſtate.

The preſent caſe comes under neither of theſe heads, the truſtees are in being, and capable of taking: The eſtate does not depend upon any contingency collateral to the continuance of the particular eſtate; we, therefore, are of opinion, that, ſubject to the term of 99 years, a good eſtate of freehold veſted in the truſtees during the life of *Robert Dormer:* I will put one caſe; ſuppoſing a perſon grants an eſtate to *A.* for 99 years, if *A.* ſhould ſo long live, and after the death of *A.* to another; ſuppoſing *A.* ſhould outlive the term, or commit a forfeiture, is not the freehold veſted in the grantor during the life of *A.* and has not he a power to enter, and if he has an eſtate in this caſe, may he not grant it away upon the ſame terms, and would not his grantee have the ſame eſtate? but conſider what would be the conſequence, if the truſtees do not take but upon a contingency, their heirs cannot take; and if the truſtees die before the contingency happen, the limitation to their heirs fail; and if the eſtate limited here to the truſtees is contingent, ſo are the limitations to truſtees in all ſettlements, and conſequently all the ſettlements for theſe 200 years, ever ſince the ſtatute of uſes, may be queſtioned: But, can we conceive, my Lords, that every one has been miſtaken for theſe 200 years, and that this new light is juſt now ariſen to us? ſurely it is a much leſs evil to make a conſtruction, even contrary to the common rules of law, (though I think this is not ſo) than to overthrow, I may ſay, 100,000 ſettlements; for it is a maxim in law, as well as reaſon, *communis error facit jus.*

As to the right of entry, I ſhould ſcarce have thought it deſerved an anſwer, but that ſome weight has been laid upon it; we are of

A right of entry always ſuppoſes an eſtate; for a right of entry is nothing without a right to hold and receive the profits; and if an eſtate be granted to a man, reſerving rent, and in default of payment, a right of entry be granted to a ſtranger, it is void.

opinion

opinion, that a right of entry always ſuppoſes an eſtate; for what is a right of entry, without a right to hold and receive the profits; therefore, I have always thought, that if an eſtate is granted to a man, reſerving rent, and in default of payment, a right of entry was granted to a ſtranger, it was void: A caſe was cited to endeavour to ſhew, that a right of entry might ſubſiſt without an eſtate; but I am inclined to think ſome material circumſtances in that caſe are omitted, and are agreed in our judgment, that the law is otherwiſe; and for theſe reaſons are of opinion, that not a meer right of entry, nor a contingent eſtate, but an eſtate of freehold, was veſted in the truſtees during the life of *Robert Dormer*.

The laſt point to be conſidered, is, what will be the effect of the fine and recovery.

A feoffment differs materially from a fine, for the feoffment is maid openly upon the land, and the feoffee immediately put into poſſeſſion, but a fine has nothing publick except the proclamations; and therefore by 4 *Hen.* 7. *c.* 24. *non-claim* runs only from the proclamations. A feoffment can only be of land, a fine may be of tithes, and other incorporeal inheritances.

As to the fine, it hath been inſiſted, that it is a feoffment upon record, and that a fine even by tenant for years is not void; as to this fine, it muſt be conſidered either as a fine of leſſee for years, or as a fine of a reverſioner in tail; fines of leſſee for years, I confeſs, are not abſolutely void, but operate by way of eſtoppel, and therefore bar the parties claiming under them; a reverſioner may levy a fine, for this reaſon, and it bars the iſſue in tail, but it can never be conceived that the fine of a reverſioner can get the freehold; let us therefore conſider it as the fine of a leſſee for years; it has been ſaid, that leſſee for years, in this caſe might have barred all remainders by a feoffment; that a fine *ſur done grant* and render ſuppoſes a gift, which means a feoffment, and therefore is equivalent to a feoffment: I am of opinion that even a feoffment would not have been a bar unleſs the truſtees had been aſleep, for they might have immediately entered, and poſſeſſed the eſtate; if they had lain by till the recovery had been perfected, that might have been a bar, but that is not to be ſuppoſed. It has been ſaid, that a fine ſuppoſes a feoffment; but the word *done*, though it ſometimes ſignifies a feoffment, has many other ſignifications; it may ſignify grants of incorporeal inheritances, which will not paſs by feoffment, and therefore does not neceſſarily ſuppoſe a feoffment: A feoffment differs very materially from a fine, for in notoriety of fact, the feoffment is ſuppoſed to be made openly upon the land, and the feoffee is immediately put into the poſſeſſion, but a fine has nothing publick except the proclamations; and therefore by the act of parliament of 4 *Hen.* 7. nonclaim runs only from the proclamations; whereas, if a fine ſuppoſes a feoffment, it will have its effect from the time of acknowledging, which is a private tranſaction; a feoffment can only lie of land, a fine may be of tithes, and other incorporeal inheritances.

Great weight has been laid upon Lord *Coke*'s authority, who ſays a fine is a feoffment upon record; he was certainly a great man, which has made ſome people think every thing he ſays is right, though he has his miſtakes; but in anſwer to it, I ſhall offer two or three great authorities, and one of equal age and authority with Lord *Coke:* In the caſes that were cited at the bar, it was determined by Lord Chief Juſtice *Holt*, and Lord *Macclesfield*, that a fine was a feoffment upon record when the party had ſuch an eſtate as will intitle him to levy a fine, that is an eſtate of freehold; otherwiſe a fine has no effect whatſoever with reſpect to a ſtranger, and operates as an eſtoppel only, and bars none but the party claiming under it.

A fine is not a feoffment upon record, unleſs the party has ſuch an eſtate as will intitle him to levy a fine, that is an eſtate of freehold; otherwiſe a fine has no effect whatſoever with reſpect to a ſtranger, and bars none but the party claiming under it.

As to the authority I promiſed, which was equal to the authority of Lord *Coke*, it is Lord *Coke* himſelf, who in the page before that of the caſe cited *Co. Lit.* 9. *a.* has theſe expreſſions, a feoffment is the moſt ancient and ſure way of conveyance, both for that it is ſolemn and publick, and therefore beſt proved, and alſo for that it cleareth all diſſeiſins, *&c.* which cannot be done even by fine and recovery; ſo that it is Lord *Coke*'s own opinion, that a feoffment can effect that which a fine and recovery cannot, and therefore it cannot longer be maintained, that he has laid it down, a fine is to all purpoſes a feoffment upon record.

A feoffment is the moſt ancient and ſure way of conveyance, both as it is publick, and therefore beſt proved, and alſo as it clears all diſſeiſins, *&c.* which cannot be done even by fine and recovery.

It was ſaid that if a fine was void in this caſe, how would it make a forfeiture: there are ſure many caſes where an act may be void as againſt another, and yet be a forfeiture to the perſon; I will give one inſtance, that of a copyhold tenant, a leaſe made by him is certainly void againſt the Lord, and yet is a forfeiture. Upon the whole we are of opinion that the fine and recovery were no bar to the remainders.

Many caſes where an act may be void againſt another, and yet a forfeiture to the perſon; as a leaſe for inſtance made by a copyhold tenant, is certainly void againſt the Lord, and yet is a forfeiture as to himſelf.

Adlington verſus *Cann and Andrews*, *July* 3, 1744. Caſe 49.

LAWRENCE Holliſter being ſeiſed of ſeveral meſſuages, lands and tenements in *Briſtol* and other places, "did by will dated "the 16th of *March* 1725. deviſe all his meſſuages, *&c.* in *Briſtol* "to a company of merchants there, in truſt to diſpoſe of the rents,

There muſt be a will duly executed to create a charitable uſe, and the court will not ſet up a truſt for a charity without a declaration in writing; for in this caſe Lord *Hardwicke* held that charitable uſes are within both the clauſes of the ſtatute of frauds and perjuries, as well within the clauſe of deviſes, as the clauſe relating to the declaration of truſts; and notwithſtanding there were circumſtances which ſhewed the inclination of the teſtator here, that ſome part of his eſtate ſhould go to charitable uſes, yet he did not think the evidence ariſing from thence certain enough to decree this to be a truſt for charity, and that admitting parol evidence to prove it would be breaking in upon the ſtatute.

" &c. not exceeding 350 *l.* for the building of an hoſpital to be " called *St. Lawrence's Hoſpital*, and to be under a Maſter for in- " ſtructing in reading, writing arithmetick, and mariners art, as " many boys as the profits of the eſtate given by him to the uſe of " the hoſpital would cloath; and it was his deſire that the defen- " dant and other perſons named in the will ſhould determine all " matters in difference relating to the hoſpital, and after their deaths " the dean and chapter of *Briſtol*, and their ſucceſſors for ever, " ſhould be the inſpectors of the hoſpital, and appointed the defen- " dants *Cann*, *Andrews*, and four other perſons, executors.

Mr. *Holliſter* being in ſome apprehenſions whether this was a good diſpoſition to a charity, and being apprehenſive that it was void under the ſtatute of mortmain, 9 *Geo.* 2. *ch.* 36.

On the firſt of *Auguſt* 1738. he made a ſecond will, " reciting " that the defendant *Cann* had been for many years concerned for " him in the way of his profeſſion in various affairs, and had diſ- " charged them with great integrity and to his entire ſatisfaction; " and reciting alſo that his couſin the defendant Mrs. *Andrews* had " for about 20 years ſerved him as his houſekeeper with great fide- " lity, he deviſed to the defendants and their heirs all his meſſuages, " &c. in *Briſtol* to hold to the defendants their heirs and aſſigns for- " ever, in the nature of joint-tenants, and likewiſe gives ſeveral " other eſtates in different counties to theſe two defendants in joint- " tenancy, and gave to the plaintiff, (who is his only child and heir " at law) twenty guineas to buy her mourning, and ſtrictly enjoins " her to ſubmit to the diſpoſition he had thereby made of his eſtate " (ſhe being handſomly provided for by his marriage ſettlement on " her mother, and otherwiſe ſince,) and that ſhe ſhould not preſume " to conteſt the ſame; it being made and publiſhed by him on the " moſt cool and mature deliberation; all his leaſehold eſtates and " perſonal eſtate not before diſpoſed of he gave to the defendants, " their executors, adminiſtrators and aſſigns, and appointed them " executor and executrix, revoking all other wills.

On the 11th of *Auguſt* following the teſtator died, and ſometime after his death the defendants admit they found in his cloſet a paper writing ſubſcribed by him, and is as follows.

" Rules, requeſts, that are deſired to be obſerved and followed " touching the execution of a certain will made by *Lawrence Hol-* " *liſter*, dated the ſecond day of *Auguſt* 1738. the adminiſtration and " power is wholly left to the management of the worthy Mr. *Cann* " and *Mary Andrews*, their heirs and aſſigns for ever in the nature " of jointenants. It was never my thoughts that my worthy friend " *William Cann*, Eſq; ſhould have any trouble in this affair more " than to aſſiſt my couſin *Mary Andrews* in managing the ſame,

and

" and I hope that through *his great goodneſs and charitable diſpoſition* " he will be pleaſed to bring the whole affair to it's deſired iſſue: " And becauſe I am not willing to incumber the ſaid worthy *Wil-* " *liam Cann*, Eſq; I have wrote a full particular account of all " matters that are to be tranſacted under the adminiſtration of my " ſaid will, in the directions that are ſeparately given to the ſaid " *Mary Andrews*, which I hope and doubt not but the ſaid worthy " *William Cann*, Eſq; will according to his undoubted generoſity " and integrity ſee performed, according to the humble requeſt of " a true and real friend, and according to your wonted and well " diſpoſed charitable diſpoſition towards all men. *Law. Holliſter.* " *Dundry, Auguſt* 9, 1738.

This paper was written by one *William Long*, and ſubſcribed by the teſtator.

Mary Adlingtan, only daughter and heir of the teſtator, filed her bill againſt Mr. *Cann* and Mrs. *Andrews* the 25th of *May* 1739. and prayed a diſcovery of the truſt, and of what they know to have been ſaid or wrote by *Lawrence Holliſter*, or his order, touching the application of his real and perſonal eſtate, and that the will of the 1ſt of *Auguſt* may be declared null and void, and that ſhe may be let into poſſeſſion of the real eſtate, and that they may account to her likewiſe for the perſonal eſtate of her father.

The defendants to ſo much of the bill as ſeeks a diſcovery of any ſecret truſt for charitable uſes, or any parol, or other declaration of truſt of the real and perſonal eſtates of *Lawrence Holliſter*, not made by him in writing, and not ſigned by him, they plead that he was ſeiſed in fee of thoſe lands, and that by the will of the firſt of *Auguſt* 1738. he diſpoſed of them abſolutely to them and their heirs.

And further plead the act of 29 *Cha.* 2. *ch.* 3. for prevention of frauds and perjuries, *by which all declarations or creations of truſt of any lands ſhould be manifeſted by ſome writing ſigned by the party, or by his laſt will, or elſe ſhould be utterly void and of none effect.* And therefore the diſcovery of ſuch parol declarations of truſt, as ſought by the bill, is no ways material to the plaintiff's relief, nor are defendants obliged to anſwer to it, and therefore plead the will and act in bar.

In anſwer to the reſidue of the bill the defendant *Andrews* poſitively denies, that ſuch directions as are alluded to by the ſaid writing, or any other directions, were ever given by the ſaid teſtator to her touching any charitable uſe, or truſt in the bill mentioned, or any other truſt whatſoever.

They both likewiſe deny that they were ever named or appointed, in any writing to their knowledge, to have the management of any charitable uſe as truſtees: or that the teſtator did ſignify to them in any kind of writing his deſigning to ſettle his eſtate in truſt for the benefit of any charitable uſe or uſes.

On the 28th of *July* 1740. the plea came on to be argued before Lord *Hardwicke*, who ordered it to ſtand for an anſwer, with liberty to except, and the benefit of the plea was ſaved to the deſendants till the hearing of the cauſe.

This cauſe ſtood in the paper the 5th of *June*, and was heard ſoon after.

Mr. Attorney General for the plaintiff.

That though the teſtator has taken all the care he can to evade the ſtatute of mortmain, yet the ſtatute will not permit an act to avoid the act.

That *clauſulæ inconſuetæ inducunt ſuſpicionem*, and that the introduction of the will, and giving the eſtate to the defendants in joint-tenancy, are very extraordinary.

That the act does not require, that the deviſe of land upon a truſt ſhould be ſuch a one as is capable of being carried into execution.

That the paper is to be taken as part of his will, that this is a truſt, and appears to be ſo by proof and admiſſion; and clear that it is a declaration of truſt, though it does not appear for what purpoſes.

That the law being for a general good, ought to be liberally expounded.

By the ſtat. of *Mortmain*, 9 *G.* 2. *ch.* 36. "No manors, lands, *&c.* "nor ſums of money, goods, *&c.* or any other perſonal eſtate what-"ſoever to be laid out in the purchaſe of any lands, *&c.* ſhall be "given, granted, *&c.* or any ways charged or incumbered by any "perſon or perſons whatſoever, *in truſt or for the benefit* of any cha-"ritable uſes whatſoever, unleſs ſuch gift, conveyance, appointment, "*&c.* be by deed indented, ſealed and delivered in the preſence of "two or more credible witneſſes, twelve kalendar months at leaſt "before the death of ſuch donor or grantor (including the days of "the execution and death) and be inrolled in the court of Chan-"cery within ſix kalendar months next after the execution there-"of, *&c.*

That under the words, *in truſt or for the benefit of*, they might be admitted to read parol proof, to ſhew it to be a truſt for a charity.

Mr.

Mr. *Wilbraham* for the defendants.

The teſtator had a power to give the eſtate as he thought proper, ſo as his diſpoſition was conſiſtent with the rules of law, as well with regard to the manner of giving, as the object of the gift.

If the gift be to the deviſees for their own benefit, in point of law it is a good deviſe.

Upon the face of the will it appears to be ſo, and *primâ facie* in every deviſe not only the legal, but the beneficial intereſt paſſes.

To deprive a deviſee of this benefit, it is incumbent on the plaintiff to ſhew that it was given upon a truſt, or that the will is inconſiſtent with the rule of ſome poſitive law, and that the deviſee took the legal intereſt in ſuch eſtate, not for his own but for the uſe of another.

This muſt be done by ſhewing it to be a truſt, and that cannot be done but by ſhewing a declaration of that truſt in writing; and therefore the plaintiff has recourſe to the paper writing; and this is ſaid to be a declaration of the truſt of the legal eſtates given by the will.

If this were a voluntary deed, would a paper even declaring a truſt be ſufficient to take it from the grantee? no certainly.

If an eſtate is given by a will, can a paper-writing declare that the truſt of the lands ſhall be to *A.* remainder to *B.* and take it clearly from the deviſee, and give it to another?

This would evade the intent of the ſtatute of frauds and perjuries, which was to prevent frauds in obtaining wills from perſons by obtending other inſtruments, or by forgery.

Here, if a man was conſcious that another had left his eſtate to one or two perſons, if a third ſhould get a declaration that the deviſees were truſtees for himſelf, or if ſuch a paper ſhould be forged; this would take away the deviſed lands from the deviſee, who had them by a ſolemn inſtrument, and tranſlate the gift to another, without any other ſolemnity but a paper writing barely ſigned, but not atteſted.

The queſtion is, whether here is ſuch a declaration of a truſt in writing as the court can make any decree upon, to wreſt the legal eſtate out of theſe deviſees for the benefit of a third perſon. And the reſolution of this queſtion will depend on another.

Whether here are grounds ſufficient for a court of equity to have declared the defendants truſtees for a charity; for I will not contend but that if they were truſtees for a charity, though an indefinite one, that might be ſufficient to enable the crown to apply the gift.

This paper is not ſufficient to determine upon, that the teſtator meant to give his eſtate at all in charity.

That it is too uncertain to found a judgment upon, and but conjectural at leaſt.

Whether he meant this will is not clear, for the date is different, the paper referring to a will of the 2d of *Auguſt*: nor does it with certainty anſwer the deſcription, for the defendants are not joint-tenants of the whole, part of the eſtate being given to Mr. *Cann* ſolely.

It appears likewiſe by theſe deeds that the teſtator had a regard for Mrs. *Andrews*, and a deſign to provide for her.

Lord Chancellor thinking there might be ſome reſemblance between this caſe and thoſe upon the ſtatutes of ſuperſtitious uſes, where *non conſtat* that there was any ſuch uſe on the face of the wills themſelves, but a ſecret truſt for that purpoſe, ordered this cauſe to ſtand over to ſearch into precedents. And on the 3d of *July* 1744. the cauſe came on again, when the council for the plaintiff produced three precedents out of the court of Exchequer.

Firſt, The Attorney General againſt *Jones*, the 4th of *James* the ſecond.

Secondly, The *King* verſus *Lady Portington*, the 4th of *William* and *Mary*, 1 *Salk.* 162. and *Caſes in B. R. in the time of William the third, Caſe* 31.

Thirdly, The *Attorney General* againſt *Lawſon*, *Trinity term, the third of William and Mary.*

To ſhew that notwithſtanding there is not under a will an expreſs deviſe to a ſuperſtitious uſe, yet that a court of equity will from ſuſpicious circumſtances, as where a teſtator deviſes his eſtate to a ſtranger and his heirs without declaring a truſt, admit parol evidence to ſhew the teſtator's intention to give it to ſuch a uſe.

The council for the defendants inſiſted that two out of the three caſes did not come up to the preſent, for they were not the caſe of wills, but upon a conveyance.

The

The laſt has ſome reſemblance, becauſe it was upon a will, a deviſe to Lady *Portington* and her heirs, without any truſt; the court declared it to be a ſuperſtitious uſe, and therefore the King ſhall order it to be applied to a proper uſe.

So far as this decree was founded upon parol evidence, it differs from the ſtatute of frauds and perjuries.

But it is material what grounds they went upon in admitting ſuch proof.

It is ſtated in Mr. ſerjeant *Salkeld's Reports*, " that it was held " firſt, that the ſtatute of frauds did not bind the King, but took " place only between party and party. Secondly, That the King, " as head of the commonwealth, is obliged by the common law, " and for that purpoſe intruſted and impowered to ſee that nothing " be done to the diſheriſon of the crown, or the propagation of a " falſe religion, and to that end entitled to pray a diſcovery of a " ſuperſtitious uſe. Thirdly, This uſe being ſuperſtitious, is merely " void, and for that reaſon the King cannot have it: yet however " it is not ſo far void as that it ſhall reſult to the heir, and therefore " the King ſhall order it to be applied to a proper uſe;" ſo that the ground upon which the decree goes upon there, is the prerogative given to the King by the firſt of *Edward* the 6th, *ch.* 14.

There are three caſes where a ſtatute ſhall bind the King, though he is not named.

Firſt, He is included in the 13th of *Elizabeth* for reſtraining college leaſes *under the general words body politick or corporate.*

Secondly, He ſhall not be exempted by conſtruction of law out of the general words of acts made to ſuppreſs wrong.

Thirdly, The general words of ſtatutes which tend to perform the will of a founder or donor ſhall bind the King though not named. See *Magdalen Coll. caſe*, 11 *Co.* 66. *b.*

The reaſon why a benefit is given to the King where there are ſuperſtitious uſes, is to prevent the growth and encouragement of a falſe religion. *Vide* 1 *Edw.* 6.

Fromt his time down to the ſtatute of frauds, the King might have had the benefit of parol evidence; but as the King is not bound by the *Stat.* of frauds and perjuries, for he is not named, and relating only to party and party, the reaſon of the court of Exchequer's admitting parol evidence was founded upon this rule.

The

The preſent queſtion is between an heir at law and a deviſee; and there is no prerogative in this caſe, neither is there any particular privilege belonging to a charity, to exempt it out of the ſtatute of frauds.

That the ſtatute of mortmain does not veſt any thing in the crown, or by a deviſe to charity, but operates only by annulling the deviſe abſolutely.

That the conſtruction aimed at by the plaintiffs would be totally deſtroying the ſtatute of frauds, the great fence of our property, if a paper which may be forged after a perſon has made his will, ſhall be admitted to be a declaration of truſt only in thoſe perſons, who had an abſolute deviſe by the will without any truſt.

The caſes of ſuperſtitious uſes are very different from this.

Superſtitious uſes are *mala in ſe*, and deſtructive to our conſtitution and government under the proteſtant religion, and therefore the law prohibits them; but it is not ſo with charitable uſes, which have been always favoured, as in copyhold eſtates given by will to charitable uſes, ſurrenders have been ſupplied.

The true foundation of this ſtatute of mortmain was, that there was enough of land got into the hands of corporations that are indiſſoluble, and that even now charities may be eſtabliſhed in the lifetime of a perſon, but ſhall not be done in his laſt moments.

That the judges have declared ſuperſtitious uſes to be bad ones, which makes this caſe differ materially from them, and therefore is not at all affected by them.

That ſuppoſing this paper to have been a writing executed in the preſence of three witneſſes, yet it is not ſuch a deſignation of a charity, as will take this caſe out of the ſtatute of frauds.

Mr. Attorney General in his reply ſaid, there was nothing in the mortmain act which confines it to a truſt in writing.

For it is *to any perſon in truſt, or for the benefit of any charitable uſes.*

So that if the intention can be made appear whether it be in writing or not, it is equally within this ſtatute.

The point the ſtatute had in view, was to prevent the diſinheriſon of heirs, and if the conſtruction of the defendant's council ſhould prevail, it would be a means of letting in an evaſion upon this act.

Acts

Acts of parliament of this kind are to be conſtrued liberally and favourably, ſo as to ſuppreſs the miſchief, and advance the remedy.

That there are ſeveral expreſſions in this paper which are not reconcileable to any thing but a charity; ſuch as *I hope and doubt not but the ſaid worthy William Cann will according to his undoubted generoſity, and integrity, ſee performed, according to his wonted and well diſpoſed charitable diſpoſition towards all men.*

LORD CHANCELLOR.

I have been under ſome doubts as to the determination of this caſe.

Becauſe on the one hand great inconvenience may ariſe, from means being found out to evade and elude the ſtatute of mortmain: And on the other hand, it may be a dangerous thing to determine this caſe to be a truſt; for I muſt break in upon the ſtatute of frauds, by admitting parol evidence to prove the teſtator intended his eſtate for charitable uſes.

Therefore to find out a medium was the great difficulty.

As to the preſent caſe, if the court can find a way of determining it, which will avoid the eluding the ſtatute of mortmain, there is no reaſon to induce the court to make a ſtrain which might affect the ſtatute of frauds and perjuries.

It was a terror and apprehenſion which the teſtator had of this *mortmain* law, which induced him miſtakenly to revoke the firſt will, from an imagination that it was within that ſtatute; for if he had not revoked it, that will would certainly have ſtood, as it was made ſo long before his death.

But however this ought not to have any particular influence on my determination of the caſe.

There are three queſtions:

Firſt, Whether this be a caſe within the ſtatute of frauds and perjuries.

Secondly, Whether here is ſuch a declaration of truſt as is required by that ſtatute.

Thirdly, If not a caſe within the ſtatute of frauds, whether on the foot of parol proof, here is ſufficient evidence of a truſt for charity.

I am of opinion this is a caſe within that ſtatute; for otherwiſe I ſhould open a door to infinite inconvenience with regard to this ſtatute, and which would conſiderably overbalance the miſchief that can ariſe by leaving a loop-hole whereby to elude the ſtatute of mortmain.

Conſider that charitable uſes are within both the clauſes of the ſtatute of frauds, as well within the clauſe of deviſes, as the clauſe relating to the declaration of truſts.

That this has been determined, that there muſt be a declaration of truſt, and that there muſt be a will duly executed, in order to create a charitable uſe; and even though ſuch appointments have got the better of the ſtatute *de donis*, and copyhold eſtates, yet that it is not a good appointment to paſs freehold lands to a charitable uſe within this ſtatute.

It was determined by Lord *Talbot*, in the caſe of the *Attorney General* verſus *Spillet*, that the court could not ſet up a truſt for a charity without a declaration in writing, notwithſtanding there were ſuch circumſtances in favour of the charity, that the teſtator could not mean any thing elſe; and notwithſtanding the deviſees there, as well as here, were jointenants, the cauſe was reheard before me in *Trinity Term* 1739. and I was of the ſame opinion, and the decree was affirmed.

It has been objected by Mr. Attorney General, that there are words in the ſtatute of mortmain, that go farther than the ſtatute of frauds, and which were intended to take in parol truſts.

" That no lands, *&c.* ſhall be charged or incumbered to any " perſon *in truſt, or for the benefit* of any charitable uſe what- " ſoever."

Mr. Attorney General ſaid, this is a new law, ſubject to the ſtatute of frauds and perjuries, and that this act makes any diſpoſition void for the benefit of a charitable uſe, whether in writing or not.

The ſtatute of mortmain has not abrogated the ſtatute of frauds, which being made for the publick good, ought *normam imponere futuris.*

But I am of opinion this law has not abrogated the ſtatute of frauds, which, being made for the publick good, ought *normam imponere futuris.*

The diſabling ſtatutes againſt papiſts muſt be conſtrued by what is laid down in precedent acts; ſo in like manner the ſtatute of frauds, though it does not govern the particular proviſions of the ſtatute of mortmain, yet it governs the conſtruction of that act, as being a ſubſequent one.

It is true, the ſtatute of frauds cannot govern the particular proviſions of that ſtatute, but it muſt govern the conſtruction of ſubſequent

ſequent acts, as under the diſabling ſtatutes againſt papiſts, they muſt be conſtrued by the rules of law, and by what is laid down in precedent acts.

If it ſhould be admitted, that the ſtatute of mortmain took all theſe caſes out of the ſtatute of frauds, and was intended to introduce parol evidence, it would do more miſchief by laying the foundation for a great deal of perjury, than it can poſſibly do good in any other reſpect whatſoever.

But, as I ſaid before, this cannot be, for it muſt be conſtrued conformably to the ſtatute of frauds and perjuries.

The ſecond queſtion is, whether there is in this caſe a proper declaration of truſt? And this depends upon the conſtruction on the paper writing of the 9th of *Auguſt* 1738, called *Rules, Requeſts, &c.*

There is a miſtake in it, as to the deſcription of the will, but I lay no weight on this, except there had been another will in being, and therefore muſt take it to refer to the will of the 1ſt of *Auguſt* 1738.

Conſider whether from the nature of the paper it can be admitted as a declaration of truſt: And I am of opinion it can not, for the reaſons given at the bar, which are very proper ones.

If the teſtator had made a feoffment to himſelf and his heirs, and left ſuch a paper, this would have been a good declaration of truſt within the other clauſe of the ſtatute of frauds.

But this preſent caſe ariſes upon the clauſe of the ſtatute of frauds relating to a diſpoſition of lands by will.

Here is a paper ſubſequent in date to the will, and therefore, if it had any effect, it would operate as a revocation of the will with regard to the beneficial intereſt in the eſtate.

The ſame ſolemnities required by the ſtatute of frauds, to diſpoſe of a truſt or equitable intereſt in freehold lands, as of a legal eſtate in ſuch lands; nor can a teſtator revoke a truſt, any more than he can deviſe it, without theſe ſolemnities.

But it is not executed with the proper ſolemnities; for, as to freehold lands, a man can no more diſpoſe of a truſt or equitable intereſt, than he can of the legal eſtate in thoſe lands, under the ſtatute of frauds, without theſe ſolemnities.

Neither can he revoke a truſt, or equitable intereſt, in freehold lands, any more than he can deviſe it without theſe ſolemnities.

If

If, by this paper, he had even named another perſon for his truſtee, it would not have ſet aſide the will, unleſs the deviſee had by fraud prevailed upon the teſtator to give him the eſtate abſolutely under the will, and told the teſtator, that after the will was executed, ſuch a paper would be a ſufficient declaration of the truſt for a charity; but, upon the foot of a plain deviſe, and without any mixture of miſtake, or fraud, it is not a good declaration of a truſt.

Therefore, I am of opinion, this paper is not within the meaning of the ſtatute of frauds, nor does it amount to ſuch a *declaration of a truſt* as is there required.

But, thirdly, ſuppoſing it was not within the ſtatute of frauds, then, whether there is ſufficient foundation, conſidering the uncertainty of the proof in this caſe, to decree this to be a truſt for charity.

Now, as to this, the caſe, to be ſure, is more doubtful; but yet I am not ſatisfied to decree it upon this foundation.

I do agree, that there does appear to be an inclination in the teſtator, that ſome part of his eſtate ſhould go to charitable uſes.

To be ſure, he was in apprehenſions of the ſtatute of mortmain, by the evidence which has been given of his deſiring the defendant *Cann* to lend him the act to read it over carefully: And, that this paper is a circumſtantial evidence, to ſhew his intention of giving ſomething to charity; for, I do agree, that theſe expreſſions, Mr. *Cann's wonted and well diſpoſed charitable diſpoſition, &c.* muſt otherwiſe appear abſurd.

But, how is it clear to me, that the teſtator, Mr. *Holliſter*, intended the whole for charity, or how much, if he meant only part of his eſtate ſhould go in that manner.

For, upon the evidence, it is manifeſt he did not intend the whole ſhould go to charity.

The defendant's witneſſes prove, that the teſtator had a great regard for Mr. *Cann*, and Mrs. *Andrews*, and that he declared he had given them great part of his eſtate; and that he himſelf told Mrs. *Andrews*, juſt before his death, he had made his will, and done well for her; and, that ſhe replied, I have a greater regard for your relations than my own; to which he anſwered, do not give away ſo much, as to leave too little for yourſelf.

But I do not reſt it on the defendant's proof, for the plaintiff's evidence, in ſome meaſure, correſponds with it; for her witneſſes ſay, that Mr. *Holliſter* deſigned *the greateſt part* of his eſtate to charitable uſes, which implies, they did not think he intended the whole.

As to the charitable uſes, provided it was ſufficiently proved, and the ſtatute of frauds was out of the way, how am I to diſcover how much he intended to the deviſees, and how much to charity, or how ſhall I be able to draw the the line between the deviſees and the charity.

He could not under this new will, by reaſon of the mortmain act, deviſe it directly; and he did not know, that in point of law, the old one was good.

What rule then has a court of equity to go by, to determine how much of the will is void, and how much of the teſtator's eſtate ſhall go to the plaintiff?

Beſides, very little inconvenience can ariſe from my determination, for this caſe cannot be liable to great objections, as a general caſe, becauſe the inſtances of truſtees abuſing the truſt of charity are ſo frequent, that they are a ſufficient warning to reaſonable men, not to leave their eſtates under ſuch uncertainty, as to put them abſolutely under a perſon's power, and then truſt to his generoſity for the diſpoſing of them in charity.

The next conſideration is upon the caſes that have been cited of ſuperſtitious uſes, and the conſtruction of the law upon thoſe ſtatutes.

Now the court of exchequer, in Lady *Portington*'s caſe, held, that the ſtatute of frauds did not extend to the King, and entered into parol proof upon this foundation.

But, as I am of opinion the preſent caſe is clearly within the ſtatute of frauds, it makes a material difference, and takes them from being precedents here: And for this reaſon, I am not obliged to determine whether the judgment of the exchequer in Lady *Portington*'s caſe was right or not.

In Mr. Serjeant *Salkeld*'s report of this caſe, it was a traverſe to *an inquiſition poſt mortem*, where the jury found for the King, but ſubject to the opinion of the court, whether the deviſe could be averred to be a truſt to a ſuperſtitious uſe; and the court of King's Bench held it could not, and that both from the ſtatute of frauds, and from the nature of the thing.

The king, in the exchequer, may proceeed two ways, either on the *Latin* ſide, or on the *Engliſh*, by way of information.

But after this, on the 26th of *May* 1693, it came before the court of exchequer, upon an information for a diſcovery, and an application of the deviſe to an uſe truly charitable; for the King, in the court of exchequer, may proceed two ways, either on the *Latin* ſide, or on the *Engliſh*, by way of information.

The exchequer held, the ſtatute of frauds did not bind the king, but took place only between party and party, becauſe he is not named: Lord *Hardwicke* doubtful of this doctrine.

They held, that the ſtatute of frauds did not bind the King, but took place only between party and party: I own, I am doubtful as to this doctrine, that the King is not bound by a ſtatute unleſs he is expreſſly named.

There is a caſe, however, where it has been determined that he is not, and that is upon the ſixteenth ſection of the ſtatute of frauds, whereby it is enacted, "that no writ of *fieri facias*, or other writ of "execution, ſhall bind the property of the goods againſt whom ſuch "writ of execution is ſued forth, but from the time that ſuch writ "ſhall be delivered to the ſheriff, *&c.* to be executed; and for the "better manifeſtation of the time, ſuch ſheriff, *&c.* ſhall, upon "the receipt of any ſuch writ, indorſe upon the back thereof "the day of the month or year whereon he or they received the "ſame."

In extents granted by a baron, he marks the day of granting them, and they do not bind before that day; but where in a long vacation the teſte is dated as of the laſt day of the precedent term, it ſhall prevail againſt intermediate acts between the king's debtor and other perſons.

Now the King, notwithſtanding this clauſe in the caſe of *extents and executions*, is not bound by the teſte; as, where in a long vacation, the teſte is dated as of the laſt day of the precedent term; it ſhall prevail againſt intermediate acts between the King's debtor and other perſons; though the practice is in extents granted by a baron, to mark the day of granting them, and they do not bind before that day.

As to what was mentioned by Mr. Attorney General, on the ſtatute of uſury, I have looked into it, and likewiſe into the ſtatute of Queen *Ann*, which is penned in the ſame words, and where parol evidence has been admitted to ſhew *uſurious* intereſt taken by a mortgagee, though there was none upon the face of the deed itſelf, is upon this clauſe, 12 *Ann. ſt.* 2. *c.* 16. *ſect.* 1. "All bonds "and aſſurances for the payment of any principal or money to be "lent upon uſury, whereupon there ſhall be reſerved or *taken* above "five in the hundred, ſhall be utterly void.

If a mortgage be drawn for 5 *per cent.* and a mortgagee takes ſix, it would be void on the word *take*, in the ſtat of 12 *Ann.*

Suppoſe a mortgage to be drawn only for five *per cent.* and the mortgagee takes ſix, it would be void upon the word *take*.

In the preſent caſe, it is extremely improper for the court to make a decree for the plaintiff; becauſe the court cannot decree the de-

viſe to be void, ſince the making the ſtatute of mortmain, any more than they could deviſe it to be a truſt for the heir at law before the ſtatute.

But I am not under a neceſſity of interfering in this, becauſe the plaintiff has a remedy at law under the proviſion of the ſtatute of mortmain, *ſect.* 3. " that all gifts, grants, conveyances, *&c.* of any " lands, *&c.* or of any ſtock money, *&c.* which ſhall be made in " any other form than by this act is directed, ſhall be abſolutely, " and to all intents and purpoſes, void.

So that the deviſe of the legal eſtate is made void, and not merely the truſt for the charitable uſe.

The truſt then being made void, infects the legal eſtate, and makes void the whole deviſe, and then the land deſcends, and is exactly parallel with the ſtat. of 11 & 12 *W.* 3. relating to papiſts: And this point on the laſt mentioned ſtatute came in queſtion before Lord *King*, in the caſe of *Carrick* verſus *Errington*, 2 *P. W.* 361. where it was held, that if all the perſons who were to take the truſt were papiſts, it will make the legal eſtate void likewiſe.

Where the perſons who are to take the truſt are papiſts, it will make the eſtate void likewiſe.

There was another caſe of *Marwood* verſus *Dorwell*, which came firſt before the court of Common Pleas, and afterwards, on a writ of error, to the court of King's Bench, whilſt I was Chief Juſtice, and the whole court were unanimouſly of the ſame opinion.

The conſequence of this is, that the plaintiff may bring an ejectment if ſhe pleaſes; and, if ſo, I will retain the bill for a twelvemonth, to give her an opportunity of trying it at law, for the plaintiff's is undoubtedly an hard caſe, as ſhe is an only child, and heir at law; but this is all the relief I can give her.

The plaintiff not caring to be at the expence of a trial at law, but acquieſcing under Lord Chancellor's opinion, the bill was diſmiſſed without coſts.

Roſs

Caſe 50. *Roſs* verſus *Ewer*, *July* 5, 1744.

By a ſettlement before marriage 3000*l. S. S.* ſtock belonging to the wife was inveſted in truſtees, who were to tranſfer one moiety to ſuch perſon, &c. and for ſuch uſes, &c. as ſhe ſhould by her laſt will in writing, *or other writing*, under her hand and ſeal, to be atteſted by two or more credible witneſſes, appoint, &c. and for want of ſuch appointment, &c. then in truſt to tranſfer all ſuch ſtocks to her executor or adminiſtrators.

IN 1734, there was a treaty of marriage between the defendant and *Ann Thompſon*, widow, and ſhe being poſſeſſed of *South Sea* ſtock and annuities, to the value of three thouſand pounds, it was agreed, that the ſame ſhould be veſted in truſtees; and in purſuance of this agreement, ſhe did transfer her ſtock to truſtees accordingly; and by an indenture of the firſt of *June* 1731, reciting the intended marriage, it was declared the ſame was in truſt for *Ann* till the marriage, and then to pay all the intereſt and dividends to the defendant during the joint lives of him and *Ann*; and if ſhe ſhould die in his life-time, and there ſhould be any children of her body by him living at her death, then to pay a moiety to him of the ſaid ſtock, and the other moiety to ſuch child or children; *and in caſe of no child living at her death, (ſhe dying in his life-time) then the truſtees were to tranſfer the other moiety unto ſuch perſon or perſons, and to and for ſuch uſes, intents, and purpoſes, and in ſuch manner as the ſaid* Ann *ſhould, in and by her laſt will and teſtament in writing, or other writing under hand and ſeal, to be atteſted by two or more credible witneſſes, notwithſtanding her intended coverture, limit, direct, or declare, and for want of ſuch direction, limitation, or declaration, then in truſt to aſſign and transfer all ſuch ſtocks to the executors or adminiſtrators of the ſaid* Ann; in which indenture was contained a proviſo or power for the defendant and *Ann*, with the conſent of the truſtees, to revoke all or any of the truſts, and declare any other uſes or truſts as they ſhould think fit.

After her death, a paper was found in her cloſet of her hand writing, by which ſhe gave different ſums to different perſons, but not ſigned or ſealed by her, nor atteſted by witneſſes. *Lord Hardwicke of opinion, that the words, under her hand and ſeal to be atteſted by two or more credible witneſſes, are referable to the will as well as to the other writing, and for want of the ceremony of ſealing, and atteſtation by witneſſes, this paper was not a good execution of the power.*

The defendant and his wife having been married ſome time, and no probability of iſſue, ſhe was prevailed upon by him, to join in revoking the truſts as to one thouſand pounds, and the truſtees, by their directions, did aſſign one thouſand pounds to the defendant.

Ann died in *April* 1741. and on the day ſhe died, the defendant found a paper of her hand writing in her cloſet, in the preſence of one of her ſiſters, and another perſon, but not ſigned by her, nor ſealed, nor atteſted by witneſſes, and the defendant immediately took a copy of it, and then ſealed the original under cover, which remained unopened in his cuſtody, till the day he put in his anſwer; the defendant produced this copy at *Doctors Commons* when he took adminiſtration to his wife, on the 31ſt of *October* 1741. being informed there that the paper was of no ſignification.

A copy

A copy of the paper left by Mrs. *Ewer*, *December* 21, 1740.

I declare this my will.

To ſiſter *Elizabeth Taylor* —— ——	100
To ſiſter *Sarah Roſs* —— ——	100
To her ſon *Alexander Roſs* —— ——	400
To pay his aunt *Taylor* twenty pounds a year during her natural life, and then to return to himſelf	
To *Ann Roſs* fifty pounds —— ——	100
To *Dorothy Roſs* fifty pounds —— ——	
To *Thomas Bodenham* —— ——	100
To *Edward Bodenham* fifty —— ——	100
To *William Bodenham* fifty —— ——	
To *Mary Branch* fifty pounds —— ——	100
To *Richard Branch* fifty —— ——	
To *Joys Kitford* fifty —— ——	100
Mr. *Hinchley* fifty pounds —— ——	
To two truſtees fifty pounds.	
To Mr. *E.* —— —— ——	100
To Mr. *Spring* a ring.	
To ſiſter *M.* a ring.	
To Mrs. *Sarah Clamſon* twenty pounds.	
To her daughter *Elizabeth* twenty pounds.	

The plaintiffs have brought their bill againſt the truſtees, in whoſe names the ſtocks are now ſtanding, that they may be compelled to make ſale of a moiety of all ſuch ſtocks as remained undiſpoſed of at *Ann*'s death, and apply the money ariſing thereby, or ſo much as ſhall be neceſſary, to and among the plaintiffs, towards payment of the ſums given them by the ſaid paper writing, in proportion with ſeveral other ſums thereby given to other of *Ann*'s relations.

Mr. Attorney General, for the plaintiffs: It may be ſaid, perhaps, that though this paper writing is an appointment of money, it is not a proper one of ſtocks.

But if there is no other fund, out of which the ſums given by this writing can be paid, yet, I apprehend, that this will be ſufficient to entitle the truſtees to transfer the ſtocks.

LORD CHANCELLOR.

You need not labour this, for the caſe will not turn upon it.

Mr. Attorney General, the firſt queſtion is, whether Mrs. *Ewer* has made a ſufficient appointment within the meaning of the power.

It may be ſaid, perhaps, that this power cannot be executed without a writing in the preſence of two witneſſes, and under hand and ſeal; but it muſt be admitted to have been her own ſtock, ſo that ſhe had an abſolute dominion over it, and what ſhe has reſerved is out of her own property.

That the word *or* ſeparates the clauſe, and the atteſtation relates to the words other writing only, and if ſo, then this is a will within the meaning of the power.

That *a ſeal* is not neceſſary to make a will good.

That the court will not ſtrain to ſet aſide this execution of the power, where the intention of Mrs. *Ewer* was plain to diſpoſe of part of her ſtocks among the only relations ſhe had, the plaintiffs.

Secondly, Where there is a truſt for a wife's ſeparate uſe, this court looks upon her as a ſeme ſole.

If ſo, then this is a writing which would have paſſed her perſonal eſtate if ſhe had been a feme ſole, and it will equally paſs the ſeparate property of a wife, whom this court conſiders as a *feme ſole.*

Mr. *Wilbraham* of the ſame ſide: It has been held in many inſtances, that though a wife cannot make a will, yet that ſhe may appoint. *Cro. Eliz.* 27. *Eſton* verſus *Wood. Cro Car.* 219. *Morriot* againſt *Kingſman.*

The preſent is a contract of the ſame nature with theſe caſes at common law.

Whether this is ſo complete an inſtrument as would be eſteemed a will in the ſpiritual court, is the queſtion?

This is certainly a teſtamentary ſchedule at leaſt, and would be regarded as ſuch by that court.

Nothing can be ſtronger than the out-ſet here.

I declare this my will.

It is dated beſides, and all written with her own hand.

Mr *Tracy Atkyns* of the ſame ſide: Submitted that it was a good execution of the power; becauſe the words *or other writing*, ſeparated the ſentence, as *or* is in its natural ſignification a disjunctive.

That there is no inſtance of courts of law or equity conſtruing *or* a copulative, except where the intention of the party required it, but was never ſo conſtrued as to deſtroy an intention, or to defeat the execution of a power.

And therefore thought himſelf juſtified from the words themſelves, to inſiſt, that a will in writing unatteſted by witneſſes, is a good appointment within the meaning of this power, as witneſſes are not neceſſary to a will of perſonal eſtate, though they are to a deed, to which the drawer of this ſettlement has properly confined it. *Vid.* 10 *Co* 93. *Doctor Layfield's caſe, and* 1 *Inſt.* 7. *B.*

That, ſuppoſing there is any doubt in this clauſe, yet, in ſupport of the execution of a power, there ought to be a favourable conſtruction, for though formerly taken ſtrictly, yet latterly more liberally expounded. *Vide the Marquiſs of Antrim's caſe* verſus *The Duke of Buckingham*, 1 *Ch. Caſ.* 17. *Swinbourne* 94, 519, 522. *Dyer* 72. *A. 2d caſe.*

The two laſt were in the caſe of land, and though not the ſame ceremonies were required *then*, in a will of lands as ſince, under the ſtatute of frauds and perjuries, yet lands were always of higher eſtimation in the eye of the law than a perſonal chattle, and notwithſtanding it was held, that the real eſtate paſſed by theſe wills.

He alſo cited *Loveday* verſus *Claridge*, *in Limbrey* verſus *Maſon*, *Lord Chief Baron Comyns* 452. and ſeveral other caſes in the next page, to ſhew, that if powers are defectively executed, the court will ſupply it. *Vide Smith* verſus *Aſhton*, *Caſ. in Chan.* 1 *vol.* 263.

To obviate the objection againſt theſe caſes, that they have been where wife and children were concerned, and that this circumſtance weighed ſtrongly with the court in determining them, he mentioned *Gold* and *Rutland*, *Paſch. T.* 1719. *Eq. Caſ. Abr.* 346. where there was no execution in writing purſuant to the directions of a power, but all diſpoſed of by word of mouth, and in favour too of collateral relations (three nieces) to the prejudice of the huſband; and yet Lord *Macclesfield*, on a bill brought by the huſband to ſet this diſpoſition aſide, decreed for the defendants.

To apply the laſt caſe to the preſent.

Mrs. *Ewer* having reſerved the ſtocks to herſelf, had an abſolute power to diſpoſe of them as ſhe thought fit, and might have given them away abſolutely, or upon terms.

That

That by this power ſhe was made in the nature of a feme ſole, and as ſuch a diſpoſition in that caſe would have been good, why not in this? Her adminiſtrator in that caſe could not have impeached ſuch a diſpoſition, no more can her huſband in this, who has no other right but as an adminiſtrator.

And therefore the diſpoſition which ſhe has made to the plaintiffs is perfect and compleat, and hope that the judgment of the court will be accordingly.

Mr. Solicitor General for the defendant *Ewer*.

That he gave the plaintiffs an exact copy of this paper, and that they were ſo well ſatisfied they had no right to any part of Mrs. *Ewer*'s ſtocks, that they did not attempt to hinder the defendant to take out adminiſtration to his wife.

He argued that the plaintiffs are not entitled on ſeveral grounds.

Firſt, That this court cannot conſider it as a will, for it has not yet been proved in the ſpiritual court.

Secondly, That taking it to be a writing only, and not a will, yet if it is according to the power, that writing ought likewiſe to be proved firſt in the ſpiritual court; for though papers are admitted to be eſtabliſhed there as a will, yet they will not admit every paper, for their doing or not doing ſo depends upon circumſtances.

It is notorious in experience that the ſpiritual court do prove the will, where the feme covert has a ſeparate power reſerved over her eſtate.

LORD CHANCELLOR.

Where a feme covert has a power to diſpoſe of her eſtate by will, the writing ſhe leaves ought firſt to be propounded as a will in the ſpiritual court, and if no executor is appointed, they will grant adminiſtration to the huſband with the will annexed.

I am of opinion that though in the notion of law a wife cannot make a will, yet where a feme covert has a ſeparate power over her eſtate, and may diſpoſe of it by will, whatever ſort of writing ſhe leaves, it ought firſt to be propounded as a will in the ſpiritual court; and in this caſe, as there is no executor appointed under this writing by the wife, that court would have granted adminiſtration to the huſband with this paper or teſtamentary ſchedule annexed.

Therefore if the defendant's council do allow this to be a good excution of the power, I will direct the cauſe to ſtand over that, the plaintiffs may have an opportunity of propounding this paper to the ſpiritual court.

But Mr. Solicitor General, inſiſting it was not a good execution of the power, went on as follows:

That the will ought to have had the atteſtation by two witneſſes, and under hand and ſeal, becauſe the words of the power are not by will or *deed* in the preſence of two witneſſes, but *by will or other writing*.

Now the words *other writing* may be ſet in oppoſition to a will properly made, and may refer to ſuch a paper as ſhe has left behind her, and proves ſtrongly that ſhe ought to have executed even this paper under ſeal, and in the preſence of two witneſſes. He cited for this purpoſe the caſe of *Dormer* verſus *Thurland*, 2 *P. Wms.* 506.

Mr. Attorney General in reply ſaid, if your Lordſhip thinks this ought to be propounded to the ſpiritual court firſt, we will not diſpute it, but are very willing to try it there.

There are two ſorts of inſtruments by which ſhe might execute this power, the one a will, the other a writing.

The inveſting it in truſtees hands before her marriage ſhews her intention of preſerving an abſolute power over her property, and to prevent her huſband from ever intermeddling.

If this is a will proper to be proved in the ſpiritual court, it is in effect admitting it to be a will within the meaning of the power, becauſe it is very well known that they have no authority to meddle with an execution of a power by deed in the life-time of the perſon, which is to be under hand and ſeal, and where two witneſſes are neceſſary.

He then endeavoured to diſtinguiſh this caſe from *Dormer* verſus *Thurland*.

Lord Chancellor aſked the Attorney General, whether he thought that caſe would have been held good, if there had been no proof of a publication of the will.

He ſaid he thought it would.

Publication an eſſential part of the execution of a will, and not a mere matter of form.

The Chancellor denied it, and mentioned the caſe of Mr. *Windham* of *Clear-well* in the court of King's Bench, which was a trial at bar upon the will of his uncle; and the only queſtion was, whether the teſtator publiſhed it, for there was no doubt of his executing it in the preſence of three witneſſes, or their atteſting it in his preſence, which ſhews that *publication* is in the eye of the law an eſſential part of the execution of a will, and not a mere matter of form.

LORD CHANCELLOR.

There are two queſtions in this caſe.

Firſt, Whether this power is capable of being executed by any paper purporting to be a will.

Secondly, Whether the plaintiffs are proper to come into this court before the will is propounded to the ſpiritual court, of which I have already given my opinion.

But there is a queſtion which is more material, and goes to the merits, that taking it one way or other, whether as *a will* or *paper writing*, the ſolemnity of ſealing and atteſting are neceſſary to both.

I am of opinion the latter words in the clauſe, *under her hand and ſeal to be atteſted by two or more credible witneſſes*, are referable as well to the will, as to the other writing.

Firſt, upon the intention of the parties themſelves, and from the reaſon of the thing.

Then in truſt to transfer the other moiety unto ſuch perſon or perſons, and to and for ſuch uſes, intents and purpoſes, and in ſuch manner as the ſaid Ann ſhould, in and by her laſt will and teſtament in writing or other writing under her hand and ſeal, to be atteſted by two or more credible witneſſes, notwithſtanding her intended coverture, limit, appoint or declare, and for want of ſuch direction, limitation or declaration, then in truſt to transfer all ſuch ſtocks to the executors or adminiſtrators of the ſaid Ann.

This is one entire ſentence, and being ſo, the words are naturally referable to both.

Therefore the obſervation on the word *or* being a disjunctive, is not material in this caſe.

The meaning of framing it in this manner, was to give Mrs. *Ewer* a greater latitude than the words *will in writing* only would have done.

Theſe words *to be atteſted*, are as proper to a will, as to any other writing.

Now, if this clauſe had been ſtopped, there would have been a comma after the word *writing*, and another comma after the words *other writing*, and the next words by this means would, according to grammatical conſtruction, relate clearly to them both.

I do not deny the words may be conſtrued in another ſenſe, but would be much more ſtrained than the other.

I take it that the fettering and circumſcribing powers of this kind ariſe from jealouſies on both ſides.

Firſt, On the ſide of the next of kin, that the huſband may have ſuch influence over her, as to prevail upon her to do ſome act to diſpoſe of this money, which would prevent their having the benefit of it.

Secondly, The huſband might apprehend, that there might be ſome undue methods uſed by her near relations, to ſurprize her into an act which might deprive him of the advantage he expected from her fortune.

Now this intention is the moſt rational, for in the execution of a power every ſenſible perſon would chuſe to annex ſuch circumſtances to it.

The caſe of *Dormer* verſus *Thurland*, in 2 *P. Wms.* is a much ſtronger caſe than the preſent.

Though ſealing is not neceſſary to a will, yet being a circumſtance required by the power in that caſe; Lord Chancellor *King* held that it could not be diſpenſed with.

Sealing a will being required by a power, not to be diſpenſed with.

There is nothing that requires ſo little ſolemnity as the making a will of perſonal eſtate according to the eccleſiaſtical laws of this realm, for there is ſcarcely any paper writing which they will not admit as ſuch.

But in this caſe, to reject ſo material a part of the power, provided as a neceſſary caution in the deed, in order to prevent a diſpoſition by ſurprize or undue means, is what this court cannot warrant, therefore I ought not to diſpenſe with theſe circumſtances in the execution of the power; for if this ſhould be conſtrued not to refer to a will, the huſband might as well have allowed her to diſpoſe of it without any reſtrictions at all.

The caſe of *Dormer* verſus *Thurland* * is an authority in point; if any thing, the preſent is ſtronger in favour of the defendant, be-

* Baron and feme ſeiſed in fee in right of the feme, by deed and fine ſettled the premiſſes to the uſe of the baron and feme for their lives, remainder to the firſt, *&c.* ſon in tail, remainder to the daughters in tail, remainder to the huſband and wife and their heirs, with power to the baron, during the joint lives of him and his wife, by his laſt will, or any writing purporting to be his laſt will under hand and *ſeal*, atteſted by three witneſſes; if baron dies before his wife, to charge the premiſſes with 2000 *l.* The like power (*mutatis mutandis*) to the wife, if ſhe die firſt, to charge the premiſſes with the like ſum; huſband by will under his hand atteſted by three witneſſes, *but not ſealed*, charges the premiſſes with 2000 *l.* held void, being without *a ſeal*. *Dormer* verſus *Thurland*, 2 *P. Wms.*

cauſe

cauſe it agrees with the clear intention of all the parties, that there ſhould be the ceremony of ſealing and atteſting by witneſſes, for the reaſons I have before given, and therefore I muſt diſmiſs the bill, but without coſts.

Caſe 51. *Ex parte Bowes, July* 26, 1744.

An infant truſtee may levy a fine, but doubtful whether he can ſuffer a recovery without a privy ſeal.

THE application was, for an infant truſtee to join in ſuffering a common recovery, to make a conveyance effectual.

LORD CHANCELLOR.

It has been held that an infant truſtee may levy a fine, upon the act of parliament, 7 *Ann. c.* 19. impowering infant truſtees to convey eſtates, and the judges may take it, and it cannot be reverſed but upon inſpection, and during his nonage.

But I doubt whether judges would permit an infant truſtee to ſuffer a recovery, unleſs he procured a privy ſeal for that purpoſe.

But however I ſhall pen my order in this general manner.

That all parties are to concur in all neceſſary acts, for the infant's ſuffering a common recovery, in order to make ſuch conveyance effectual.

Caſe 52. *A petition in the name of the Attorney General, at the relation of Gray and others, on behalf of the charity,* verſus *Sir John Lock and others, truſtees of Magdalen College on Blackheath, under the will of Sir John Morden, July* 26, 1744.

LORD CHANCELLOR.

The court will not examine into the reaſons for an amotion of a penſioner from an hoſpital, with the ſame nicety as if the freehold of the perſon was in queſtion.

AT preſent the queſtion is, whether I ſhould be warranted on ſuch an application as this, to take a previous ſtep to reſtore theſe perſons to their places in the college.

It is incumbent upon this court to ſupport the charity.

It is likewiſe incumbent on them to maintain and guard the power of thoſe who have that authority from the donor.

For it would be of bad conſequence to the charity, if the authority of perſons intruſted with the management of the charity, was upon every inſtance to be enervated and broke into.

If there were to be the ſame niceties obſerved upon the amotion of ſome of the penſioners of an hoſpital, as if they had turned out a perſon from a freehold, no man of fortune or abilities would undertake ſuch a truſt.

Sir *John Morden* has not left the power of viſiting to his heir, but has made a perfect conſtitution of this charity.

Now this is very material to the firſt and great queſtion, the authority of the truſtees.

They and the ſurvivors are to have a power to place and diſplace the chaplain, treaſurer, and other officers and merchants, *&c.* at their will and pleaſure.

They have a power to make by-laws and rules for the regulating of the charity, and for the government and conduct of the houſe, which is a very general power; then he directs the ſaid governors and viſitors ſhall and may viſit the ſaid college once a year, or oftner if they think fit.

At which time they are to inſpect the treaſurer's accounts, and alſo to examine into the behaviour of the chaplain, *&c.* and if they find they have acted diſhoneſtly and improperly, to diſplace them, and put other perſons in their room.

And likewiſe, if they find any merchant immoral, guilty of drunkenneſs, *&c.* they ſhall and may remove them.

The firſt objection is, that this is within the caſe of *Sutton* verſus *Colefield*, *Hill.* 11 *Car.* and determined. *Duke's Char. Uſes* 68, 69. *pl.* 6. I agree that where there are govenors who are viſitors likewiſe, ſo far as relates to the eſtates of this charity, they are ſubject and accountable to this court.

If governors are viſitors alſo, they are accountable to this court, *quoad* the eſtates of the charity.

There are two ſorts of authorities here.

One as to the management of the eſtate and revenue; the other as to the management and government of the houſe.

In the latter they are abſolute, and not controllable by this court; and is like the caſe of the *Attorney General* verſus *Price*, which came before me the 13th of *July* 1744. * where I was of opinion that the power of viſiting was abſolute in the Warden of *All Souls*, and this court had no right to interpoſe.

* *Vide ante.*

As to the queſtion, whether they have an arbitrary power to remove at pleaſure, I will give no abſolute opinion, but I am inclined

to think they have ſuch a power of removing, without hearing or giving any reaſon for ſo doing.

My reaſons are theſe:

By the conſtitution of this charity they have a power of removing the chaplain, treaſurer, and other officers, at their will and pleaſure.

If it had reſted there, there is no doubt but they might have done it; but it is inſiſted by the Attorney General that there is another clauſe reſtraining them.

But I think the latter clauſe is not a reſtraining clauſe, or gives them leſs power, but only lays an injunction or obligation upon them to remove for ſuch general offences, and leaves them in every inſtance beſides to act at their diſcretion.

But afterwards, in their general local viſitation, they are to call the treaſurer to account.

This they might have done by virtue of their being governors, and therefore it is an injunction upon them to inſpect the treaſurer's accounts, *&c.*

Are they to remove the officers and ſervants for an offence that muſt be ſupported in a court of juſtice, with the ſame legal nicety as in the caſe of a freehold?

Is the chaplain or treaſurer an officer for life?

They would, if ſo, be equally reſtrained from removing them as the merchants themſelves.

As *to the merchants*, if guilty of drunkenneſs or any debauchery, then they ſhall and may by writing under hand and ſeal turn them out.

Shall and may in acts of parliament, or in private conſtitutions, are to be conſtrued imperatively.

The words *ſhall and may* in general acts of parliament, or in private conſtitutions, are to be conſtrued imperatively, they *muſt* remove them.

Upon the whole of this point I am of opinion that there is a general power of amotion, but, as I ſaid before, the founder has laid an obligation upon them to turn out for the *majora crimina*, if I may ſo call them.

Next as to the relators; and firſt, as to Mr. *Gray*.

It has been ſaid that this is only a decent application for an account of the charity.

But I think the letter he ſent to the governor is very groſs, and almoſt a libel, for ſaying that they have *fifteen thouſand odd hundred pounds* in their hands, certainly carries a reflection with it.

The other two relators admit themſelves to be privy to the letter.

The great difficulty with me is, the danger of making a precedent of reſtoring a mere penſioner of an hoſpital, upon the application of the penſioner himſelf.

Conſider what number of great hoſpitals there are in this kingdom, and how bad the conſequence would be for me to examine too nicely into theſe *amotions*, as if the freehold of a perſon was in queſtion.

The governors of theſe hoſpitals every day turn out, and put in, and there would be no end of ſuch inquiries, and would be a means of overturning theſe charities abſolutely.

This is, as has been very juſtly ſaid, to make a decree before the cauſe is heard upon motion, and even before an anſwer is put in.

Suppoſe it was an information againſt a ſchoolmaſter; would the court turn him out? or would they reſtore him upon a motion, without hearing the cauſe?

If you will compare it to caſes at law, compare it throughout.

Suppoſe a *mandamus* from the court of King's Bench to reſtore a perſon to an office, would the court in a ſummary way do it without examining regularly into the merits of the caſe? certainly not.

It would be a much leſs prejudice to the foundation, if one of theſe penſioners ſhould be turned out wrongfully, than that the truſtees and governors ſhould be perpetually liable to have every action of theirs ſifted and examined into.

But yet I would recommend it to Sir *John Lock*, and the other gentlemens conſideration, to allow ſomething in the mean time to the petitioners, that they may not ſtarve, but I will not make any order for it.

N. B. The defendants in their petition this day to the Maſter of the Rolls had been allowed a month's time to plead, anſwer or demur to the relators information, ſo as not to demur alone; and it was ordered that all proceſs of contempt for want thereof be in the mean time ſtayed.

Ex

Caſe 53. *Ex parte Barnſley, July* 30, 1744. *among the petitions in lunacy.*

The inquiſition.

That *W. B.* was incapable of governing himſelf and his lands, &c. is an illegal and void return to an inquiſition of lunacy.

TO inquire whether *William Barnſley* is a lunatick, or enjoys lucid intervals, ſo that he is not ſufficient for the government of himſelf and his affairs.

The return of the inqueſt.

That the ſaid *William Barnſley* at the time of taking this inquiſition, is, from the weakneſs of his mind, incapable of governing himſelf and his lands and tenements, and has been ſo from the 8th of *April* 1737. and upwards, but how and in what manner the ſaid Mr. *Barnſley* became ſo, know not.

The petition is preferred to quaſh the inquiſition as being an illegal and a void return.

Mr. Attorney General for the petition.

There are four grounds of lunacy, according to 1 *Inſt.* 247. *a.* and *Beverley*'s caſe, 4 *Co.* 123. *b. Sickneſs, Grief, Accident, and Drunkenneſs*; none of theſe are mentioned in the return.

In a caſe *ex parte Freak, January* 11, 1732. the jury upon an inquiſition there found that by *his* appearance he was not always in his ſenſes as other men be, and that it ariſes from *Fear* and *Provocation.*

This was quaſhed.

Ex parte Harvey, February 26, 1733. 7 *Geo.* 2. There it was found that *ſhe* is not of ſufficient underſtanding to manage her own affairs.

This was quaſhed by Lord *Talbot.*

In a caſe that came before the court on the 4th of *May* 1733. the finding was, that ſhe is ſo weak in her judgment and underſtanding that ſhe is not capable of managing herſelf and her eſtate, and has been under the ſame weakneſs for twenty years laſt paſt.

In this a committeeſhip was granted; this amounts to no more than a precedent *ſub ſilentio*, for it was never controverted.

Robert Aſhton the 8th of *December* found not a lunatick, but *incapable*; this was *quaſhed*.

Ex parte Read, *July* 7, 1654. the perſon being not found by expreſs words, whether he is a lunatick or not, was likewiſe quaſhed.

Mr. *Brown* of the ſame ſide, cited 2 *Inſt.* 405. and that the return of the inqueſt in the precedent of 1654. found, that he was not ſufficient to manage his perſon and eſtate, and becauſe they did not find expreſly that he was *a lunatick*, the court held it did not fall within the inquiſition, and quaſhed it.

Mr. *Noel* of the ſame ſide mentioned the late act of parliament, where an incapacity of marrying is made the conſequence of a perſon's being found a *lunatick*.

As the act uſes the word *lunatick* only, it would be of dangerous conſequence to add a different ſort of lunacy here, and under the act of parliament.

Mr. *Wilbraham* of the ſame ſide.

That there muſt be an abſolute finding, and that they cannot find *an inference* only, without finding a poſitive fact.

In the caſe of *Dennis* verſus *Dennis*, 2 *Sand.* 352. on a writ of dower it was inſiſted ſhe was *idiota*, and pleaded that ſhe was *ſanæ mentis*.

He ſaid he mentioned this to ſhew that *found mind* was of certain ſignification, and known in our law; and that you cannot in pleading ſay that a man was *lunaticus*, but *non ſanæ mentis*.

Here it would be impoſſible upon the inquiſition to know what *to plead*.

And if the court ſhould break that great land mark, that a perſon to be a lunatick muſt be found to have ſome degree of unſound mind, they would not know how to ſtop.

Mr. Solicitor General of the other ſide.

That this return is agreeable to many precedents, and agreeable alſo to reaſon that a commiſſion ſhould iſſue upon this inquiſition.

The order was made upon the 28th of *April* laſt, the attendance upon the inquiſition was by council on both ſides, that it took up *ſeven days*, and the jury were unanimous.

In the notion of the old law and writs, one of which is to inquire *de idiota*, and the other *de lunatico*, he muſt be found one of theſe.

The council for the petitioner inſiſt that the return of the inquiſition muſt be, that he is, or is not an idiot, that he is or is not a lunatick; and in ſupport of this, they cited a precedent during the uſurpation.

The court in theſe determinations found themſelves upon this, that the inqueſt did not in expreſs words find him a lunatick.

LORD CHANCELLOR.

The commiſſions are framed in analogy to this writ, and if the inquiſition is, whether he is *a lunatick*, they cannot find him *an ideot*: but there muſt be a new commiſſion.

Mr. Solicitor General.

The law having varied it under theſe two heads, and the jury being doubtful whether in conſcience they could find him a lunatick, the court in many precedents allow the jury not to find him in expreſs terms a lunatick.

In the caſe *ex parte Pauncefort*, *October* 11, 1725. the inquiſition returned, *eſt inſanæ mentis, & ſic deprivatus rationis & intellectus, ita quod regimini ſui & ipſius ſtatus ſui omnino incapax exiſtit.*

It was allowed to be a good finding, and the commiſſion iſſued.

Your Lordſhip too proceeded upon this reaſoning in the caſe of *Aſhton*.

Mr. *Clarke* of the ſame ſide.

That the court have exerciſed a more liberal uſe of this power, as ſtanding in the place of the crown, and if the gentlemen ſhould prevail to overturn this finding, it would ſhake all the determinations for a century paſt.

That weakneſs of body in wills, is put in oppoſition to ſoundneſs of mind, and therefore if this had been an inquiſition in *latin*, they would have uſed *inſanitas mentis*.

LORD CHANCELLOR.

I much doubt whether this would expreſs weakneſs of mind, and if it ought not to have been *infirmitas mentis*.

Mr. *Clarke:* That ſaying from the weakneſs of his mind he is incapable of managing himſelf and his fortune, is ſaying the ſame thing as that he is weak, and that he is incapable of managing himſelf and fortune with proper averments; and that this is warranted by grammatical as well as an equitable conſtruction.

That the caſe of *Aſhton* did not come before the court *ſub ſilentio*, but upon a ſecond finding of the inquiſition, for my Lord *Talbot* was not ſatisfied with the firſt.

LORD CHANCELLOR.

Though I am deſirous of maintaining the prerogative of the crown in it's juſt and proper limits, yet at the ſame time I muſt have a care of making a precedent on the records of the court, of extending the authority of the crown, ſo as to reſtrain the liberty of the ſubject, and his power over his own perſon and eſtate, further than the law will allow.

The court cautious of extending the prerogative of the crown, ſo as to reſtrain the liberty of the ſubject or his power over himſelf and his eſtate, further than the law will allow.

Notwithſtanding what has been ſaid of the change of the law, I think the prerogative of the crown, and the rule of law is ſtill the ſame, and cannot be altered but by act of parliament, for it is only the form of returns that is changed by this court.

The queſtion is, whether here is ſuch a finding returned, as will intitle this court to take the care upon them of Mr. *Barnſley*'s perſon and eſtate. *Vide the words of the inquiſition as before.*

Now it is certain, and is admitted, that this is a departure from the direction of the commiſſion, for the commiſſion is to inquire whether he is a lunatick, or with lucid intervals, ſo that, *&c.*

But though the return differs in words, yet if there are equipollent words, it will not be ſuch an objection as will quaſh the inquiſition.

For it is not a variance in the words, but in the ſenſe and meaning that will quaſh it.

Now it muſt be admitted, that the modern precedents have departed from the ancient form, which was before, that they muſt return whether he is *lunaticus vel non:* And I was apprehenſive that the form had been too various, but, upon ſearch, I was glad to find that, except in two or three inſtances, the return has been that he is *lunaticus*, or *non compos mentis*, or *inſanæ mentis*, or ſince the proceedings have been in *Engliſh*, of unſound mind, which amounts to the ſame thing.

The uniform return in inquiſitions of lunacy, except in a few inſtances, is *lunaticus, non compos mentis*, or *inſanæ mentis*, or ſince the proceedings in *Engliſh*, of unſound mind.

And I ſhall deſire that they may ſtill continue ſo, or elſe it will introduce great uncertainty and confuſion.

In

In conſtant experience, where a cauſe comes on here, upon a ſuggeſtion of a perſon's being impoſed on by weakneſs, when the council are aſked, do you proceed on the inſanity, the anſwer is always, No! We go upon fraud and weakneſs only; and this is the invariable diſtinction in cauſes of that kind.

Uſeful in ſome caſes, if a curator could be ſet over weak perſons, as in the civil law.

Poſſibly the law may be too ſtrict, and it might be uſeful in ſome caſes, that a curator or tutor ſhould be ſet over prodigal and weak perſons as in the civil law.

Conſider the modern caſes, and the rule the court goes on in thoſe caſes.

In two of the inſtances *ex parte Halſey*, and *ex parte Pauncefort*, the inqiſition found that the parties were incapable of managing, *&c.*

Which was finding the effect, as was truly ſaid, inſtead of the cauſe.

But that was not the ground of quaſhing it, but quaſhed, becauſe it was not a ſufficient finding of the lunacy by Lord *Talbot*.

Ex parte Pauncefort was before me and quaſhed for the ſame reaſon.

The other two were a ſecond finding in the caſe of *Halſey* and Mrs. *Wall*'s caſe.

I own, if they had come before me, I ſhould have doubted, whether this ſecond finding ought not likewiſe to have been quaſhed.

There is a departure from the legal words, for the jury do not find that ſhe was *non compos* or of *inſane mind*, but only *weakneſs* for the laſt twenty years.

Lord *Talbot* granted the commiſſion, but, however, I muſt take this as a commiſſion which paſſed *ſub ſilentio*, for no counſel were heard upon it, and therefore it is no precedent; and I believe I ſhould have done the ſame, as it was applied for at the unanimous requeſt of all the friends and relations.

The finding, *that ſhe was not capable of giving anſwers to the moſt eaſy queſtions*, was improper.

But my Lord *Talbot*, I dare ſay, laid no ſtreſs on this, becauſe it is a finding of evidence, which a jury ought not to do, but to return

turn the fact, or if they do return that ſhe is not capable of anſwering, &c. they ſhould expreſly ſtate the queſtions themſelves.

The other caſe of Mrs. *Wall* was a much weaker, they find her *worn out with age*, and *incapable of managing her own affairs.*

Now, as they have not applied the being worn out with age to *her mind*, ſhe might be bedrid only, and yet of good underſtanding, and capable of directing her affairs.

Then it will come to this queſtion, whether the finding in the preſent caſe is of the ſame ſignification, and equivalent to finding Mr. *Barnſley* a lunatick, *non compos*, or of unſound mind.

There are various degrees of weakneſs, and ſtrength of mind, from various cauſes.

There may be a weakneſs of mind that may render a man incapable of governing himſelf, from violence of paſſion, and from vice and extravagancies, and yet not ſufficient under the rule of law, and the conſtitutions of this country, to direct a commiſſion.

Being *non compos*, of *unſound mind*, are certain terms in law, and import a total deprivation of ſenſe; now weakneſs does not carry this idea along with it; but courts of law underſtand what is meant by *non compos*, or *inſane*, as they are words of a determinate ſignification.

Courts of law underſtand what is meant by *non compos* or *inſane*, as they are of a determinate ſignification.

My Lord *Coke*'s definition is, that they are perſons of *non ſane memory.*

Non compos mentis is uſed in the ſtatute of limitations, ſo that it is legitimated now under ſeveral acts of parliament.

Non compos mentis is a technical term, and now legitimated under ſeveral acts of parliament.

Several words are legitimated by act of parliament to a particular ſenſe, which before might bear a different meaning.

I remember a caſe, before the court of King's Bench, when I was Attorney General, upon a pardon, where it was directed he ſhould give ſecurity *noſtris juſticiariis de banco.*

Now this is the title of the court of Common Pleas.

The caſe ſtood over upon this point, and Lord Chief Juſtice *Eyre* found in *magna charta*, that the court of King's Bench were called Juſtices of *our* Bench; and this was held to have ſo *legitimated* the word, that the pardon upon this was adjudged to be a good one.

Lunatick is a technical word, coined in more ignorant times, as imagining theſe perſons were affected by the moon; but diſcovered by philoſophy, and ingenious men, that it is entirely owing to a defect of the organs of the body.

The reaſon of the court's enlarging the manner of finding, was to avoid the difficulty of obliging the jury to find expreſs lunacy, becauſe they might think it more a caſe of idiocy, which was equally a caſe that called for the care of the court.

The reaſon that Lord *Wenman* was ſo long before he could be found *ſo*, was the unwillingneſs the jury had to find him an idiot, becauſe of the conſequence; but upon an inquiſition of lunacy, they found him a lunatick immediately.

Here *no traverſe* can be taken, but an involved one, for the fact that muſt be traverſed, is only the inability to govern himſelf and his affairs, and the traverſe ought to be upon the lunacy only.

Therefore I am, for this reaſon, of opinion, that the inquiſition muſt be quaſhed; and I am extremely glad to find, upon ſearch of precedents, that the court has not gone further in departing from the legal definition of a lunatick.

The inquiſition was quaſhed accordingly.

Caſe 54. *Carte* verſus *Carte*, *March* 8, 1744.

Lord Hardwicke of opinion, the will in this caſe was ſufficient to paſs, not only the truſt of the leaſes then in being, but alſo the benefit of the ſubſequent renewals, to the plaintiff.

SAMUEL *Carte*, the plaintiff's father, was a prebendary of *Tachbrooke*, to which there is a corps belonging that fell to him in 1714, from that time, he, by indenture demiſed it to one of his children for twenty-one years; and ſuch child that was named *leſſee* always executed a declaration of truſt, declaring that his, or her name, was made uſe of in ſuch leaſe, in truſt for the father for ſo many years as he ſhould live of the term, and then for ſuch perſon or perſons as he ſhould by deed or will appoint, and in default thereof, to and among all his children equally; ſuch *leſſees* generally ſurrendered the leaſe yearly, and *Samuel Carte* granted a new one.

In *Auguſt* 1735, *Samuel Carte* leaſed the prebendal eſtate to his daughter *Sarah*, the defendant, who executed a declaration of truſt: On the 19th of *January* 1735-6. *Samuel Carte* made his will, and after giving ſome legacies, bequeaths to his eldeſt ſon *Thomas*, the plaintiff, all the reſt of his goods, chattels, and eſtate, whether real or perſonal, in poſſeſſion and reverſion, and makes him executor.

Then

Then by a ſupplemental clauſe: *Item*, It is my mind and will, that my eldeſt ſon *Thomas* ſhall have the diſpoſal of the leaſe of my prebend of *Tachbrooke*, made to my daughter *Sarah*, and that he ſhould receive to himſelf all the *profits* and *advantages* ariſing and accruing from it.

By another clauſe, ſubſequent to this, and which is contended by the plaintiff, to be made in 1739, he therein takes notice, that he had made his ſon *Thomas* executor and reſiduary legatee, and *that if he ſhould be moleſted and proſecuted by the government, by which he might incur a forfeiture, or could not be his executor*; then he makes the defendants *Samuel*, another ſon, and *Sarah*, his daughter, executors, and gives them what he gave to his ſon *Thomas*.

The leaſe in the year 1735, deviſed under the will, was ſurrendered in 1736, and ſeveral new leaſes were made, and the ſubſiſting leaſe, the leaſe in queſtion, was dated the 24th of *September* 1739, and made to the defendant *Sarah*, who, on the ſame day, executed a declaration of truſt, in truſt for the father, for ſo many years as he ſhould live of the term; then for ſuch perſon or perſons as he ſhould by deed or will appoint, and in default thereof, to and for the benefit of the defendant *Sarah*, and every other child of the teſtator, ſhare and ſhare alike.

The 16th of *April* 1740, *Samuel Carte*, the teſtator died.

The bill was brought by *Thomas*, the eldeſt ſon, claiming the whole benefit of the leaſe in 1739, and praying that the defendant *Sarah* might aſſign it to him; and that if the court ſhould be of opinion that he is not intitled to the whole benefit, that then he might have a third.

The defendants, *Samuel* and *Sarah*, ſay, that the plaintiff is only intitled to a third, for that the leaſe in 1739 is a revocation of the will, and did not paſs by it.

LORD CHANCELLOR.

The general queſtion is, whether the benefit of the renewed leaſe in 1739, paſſed to the plaintiff, by the will of his father, in 1735, either by the original will, or ſubſequent additions to the will: And this general queſtion depends upon theſe conſiderations.

Firſt, Whether the will of the 19th of *January* 1735-6 was ſufficient to paſs not only the truſt of the leaſes then in being, but alſo the benefit of the ſubſequent renewals, in caſe there had been no new declarations.

Secondly,

Secondly, Whether the new declarations of truſt that have been made on the ſubſequent leaſe, will make any alteration in this caſe by the different penning of them, and whether they amount to a revocation.

Thirdly, Suppoſing there was a revocation of the will, either by the ſubſequent renewal, or by the new declarations that were made upon thoſe new leaſes, whether here is ſufficient evidence of the republication of the will, after the leaſe and declarations of truſt of the 24th of *September* 1739.

Theſe three queſtions take in all the points that have been made in this cauſe.

As to the firſt, I am clear of opinion that the will was ſufficient to paſs it under the circumſtances of this caſe.

Revocations of wills, legacies, &c. by ſurrendering and taking new leaſes, have been all in the caſes of legal intereſts, and not on a legacy of a truſt eſtate.

The caſes of revocations of wills, legacies, and terms of years by ſurrendering and taking new leaſes, have been all of legal intereſts; and not upon a legacy of a truſt eſtate in a term of years.

The caſe in *Goldſborough*, and of *Sir Thomas Abney* verſus *Miller*, *June* 10, 1743. *Vide* 2 *Tr. Atk.* 593. were of a legal eſtate then ſubſiſting.

The penning of the laſt was very ſtrong to confine it to the term then in being, *as it was a bequeſt of the leaſe which I now hold*, and the teſtator had only the legal eſtate in him.

The queſtion here ariſes altogether on the penning of the will, and not from the inability in point of law to give it; the caſe of *Bunter* verſus *Coke*, *Salk.* 237. and the reſt of thoſe caſes, depend upon the particular penning.

There is no queſtion but a man by will may bequeath a term of years which he has not in him at that time, but comes to him afterwards.

Therefore all theſe caſes of revocations of legacies or bequeſts of terms for years ariſe from the ſhort penning of the will: And if in the caſe of *Abney* verſus *Miller* the teſtator had ſaid, *I give all the intereſt I have in the leaſe*, there is no doubt but it would have paſſed.

So that there is no queſtion concerning the inability to deviſe, but the want of a proper form of words.

If that is ſo, and a form of words may be uſed, which would paſs a ſubſequent renewed intereſt after making the will, then the queſtion is, whether the words here are ſufficient to paſs this intereſt: And clearly they are.

I take the conſtruction of this clauſe in as extenſive a manner as if he had particularly recited, and repeated the leaſe and declaration of truſt and given it to his ſon, and the effect would have been to have given him the whole truſt.

What was that?

Moſt certainly not the truſt of the then exiſting term only, but alſo all the renewals, and extends to all future leaſes as well as thoſe in being.

An objection has been made that this declares the truſt upon the preſent term in *Samuel Carte*.

It is not only a truſt to preſerve the legal eſtate to *Samuel Carte* the *elder* in the profits, but to preſerve the truſt in the whole intereſt, by giving him a power to ſurrender it to ſuch uſe as he ſhould appoint.

What is the whole of it taken together? Why, that *Samuel Carte the elder*, ſhould receive the profits of the leaſe during his life, and that it ſhall be ſurrendered as he ſhall direct.

What for?

Why to take a new intereſt for the benefit of the ſame truſt.

If the teſtator had recited in his will as before, could there be any doubt but that would have given to the plaintiff the benefit of this leaſe and all ſubſequent renewals?

It is the ſame as if a man poſſeſſed of a term had given that leaſe, and all ſuch leaſes as I ſhall take, which amounts exactly to the ſame thing.

This is only making a conſiſtent conſtruction.

Suppoſe inſtead of the declaration of truſt for *Samuel Carte* for ſuch uſes, *&c.* the declaration of truſt had been for particular perſons; and the leaſe had been renewed from time to time.

No body would have doubted but the ſubſequent renewals would have been for the benefit of the perſons named in the declaration of truſt: will it make a difference if the perſons are not named? No.

Suppoſe it had been for ſuch perſons as he ſhould by any deed (not by will) appoint: And he had made a declaration for particular perſons, by an inſtrument diſtinct from this eclaration.

Would not that have been for the benefit of ſuch perſons?

The word *advantages* ſufficient to take in all the benefits belonging to the truſt, not the profits only but the renewals, which are conſequential.

The deviſe in this will extends to the whole truſt, and the word *advantages*, is undoubtedly ſufficient to take in all the advantages and benefits belonging to the truſt.

It compriſed not only the profits, but the renewals, which are conſequential.

The words of the will are very ſufficient to paſs not only the truſt and beneficial intereſt then ſubſiſting, but alſo the renewed leaſe.

Mr. *Samuel Carte*'s making new declarations of truſt on every ſurrender *ex abundanti cautelâ* creates all the difficulty; for if he had reſted it upon the firſt, there could have been no doubt.

Secondly, Whether the new declaration of truſt that has been made on the ſubſequent leaſes will make any alteration in this caſe by the different penning of them, and whether they amount to a revocation.

It would be a very unfortunate caſe if thoſe acts which the teſtator moſt undoubtedly meant ſhould carry on the ſame intention, and preſerve the eſtate in the ſame manner, ſhould have this effect to revoke and alter the will, but if they are revocations in point of law they muſt prevail.

But the queſtion is, if they have ſo done, and I have more doubt of that than of the former part of the caſe.

Though he might have made it irrevocable in his life-time, not by way of will, but by way of diſpoſition, whereby it would have been out of his power to revoke it, and it would have been ſubject to the truſt, yet he has not done it in that way, but by his will, which is a revocable act in it's own nature.

Then the queſtion is made by the council, whether theſe words *by his laſt will and teſtament* ſhall refer to the act of making his will, or to the legal operation.

If to the firſt it is future, if to the latter, why then it is the operation only is future.

I cannot find any caſe where ſuch conſtruction has been put upon the operation of a will.

I do not know how far this may affect copyhold caſes, for upon ſurrendering ſuch eſtates to the uſe of a will, I do not remember that it has ever been aſked whether the will was made before or after the ſurrender.

Therefore

Therefore as this may be of very great conſequence to people, I am unwilling to determine it.

The operative part of a will is upon the point of the teſtator's death.

There is great force upon that reaſon: but no point has been determined of that kind, and I ſhall not determine this caſe upon that queſtion, nor is it material, becauſe I am of opinion for the plaintiff upon the laſt queſtion, as to the republication.

In a caſe of this ſort where it will be manifeſtly contrary to the teſtator's intention, this court will not extend it further than is abſolutely neceſſary.

This court upon revocations it is ſaid muſt go by the ſame rule as courts of law: And though this is rightly laid down, yet a court of equity does not favour revocations contrary to the plain intention of the teſtator.

A court of equity does not favour revocations of wills contrary to a plain intention of the teſtator.

But that rule is not applicable in this caſe, becauſe it only holds as to diſcents of eſtates or ſucceſſions of property, or to the effect and force of limitations of eſtates, and great miſchief would ariſe from conſtruing them differently here than at law.

That this court in revocations goes by the ſame rule as courts of law holds only as to diſcents of eſtates, or ſucceſſions of property, or to the effect of limitations of eſtates.

But abundance of acts are ſufficient to paſs the truſt, or equitable intereſt, which would not paſs it at law.

One inſtance was mentioned by council, the caſe of mortgages, that where the eſtate has been deviſed before it was mortgaged, the deviſee takes the equitable intereſt ſubject to the charge, and the court there does not follow the ſtrict law.

Where an eſtate has been deviſed before it was mortgaged, the deviſee takes the equitable intereſt ſubject to the charge.

As to the republication, the ſtrength of evidence is for the plaintiff, and though not quite clear, yet I am ſatisfied there was a republication, and that the addition to the will was after the leaſe and the declaration of truſt.

As to the objection which I myſelf made with regard to the propriety of this court's taking notice of it as a codicil, if I was to ſend it to the eccleſiaſtical court what could they do, it would ſtand as a will with a date to it, and a codicil annexed without any date.

And therefore there is no occaſion for a further inquiry in the eccleſiaſtical court, becauſe this court may take cogniſance of it: for was the eccleſiaſtical court to reconſider it, the queſtion would ſtill revert to the ſame thing here with regard to the point of time when the codicil was executed.

There

The addition of a codicil is a republication of a will.

There is no doubt but the addition of a codicil is the republication of a will, and it is not diſputed at the bar.

As to the proviſion in the will *in caſe Thomas Carte ſhould be moleſted and proſecuted by the government, &c.*

A man may name one perſon executor, and on a particular contingency appoint another.

The ſenſe and meaning is, that if any ſuch accident ſhould happen before the death of the teſtator, then this clauſe ſhould take effect; for a man may name one perſon executor, and upon a particular contingency appoint another.

A deviſe to a man and his heirs, or in tail; but in caſe he commits treaſon within ſuch a term, it ſhall go over; this is a void clauſe.

But I would not have it underſtood that I conſtrue this a continuing clauſe; for ſuppoſe a man gives an eſtate to *A.* and his heirs, but in caſe he commits treaſon within ſuch a term of years it ſhall go over; this is a void clauſe, and would be abrogating the law; the ſame as to an eſtate-tail.

A man may by will ſubſtitute another executor, if the firſt ſhould by treaſon forfeit during the life of the teſtator; but if he means to extend it beyond the term of his own life, it could not take effect, as it would be an evaſion of the acts made concerning treaſon.

Such a thing happening before the teſtator's death, is before an intereſt veſts in the executor, and is not a continuing intereſt; and a man may by his will ſubſtitute another legatee, or executor, if the firſt ſhould by treaſon forfeit during the life of the teſtator; but if he meant to extend this beyond the term of his own life, it could not take effect, for if it ſhould, it would be a plain evaſion of the ſtatute of *Hen.* 8. and other acts made concerning treaſon.

His Lordſhip decreed in *toto* for the plaintiff.

Roome

Roome verſus *Roome*, *March* 9, 1744. *in Lincoln's Inn Hall, before the Maſter of the Rolls, ſitting for the Chancellor.* Caſe 55.

STEPHEN *Roome* by will dated the 27th of *January* 1740. "gives to the plaintiff *William Roome* and his heirs all his meſ- "ſuages, lands, &c. in *Iſlington*, which he purchaſed of *Thomas* "*Anſtrope*: then directs his executors to place out at intereſt or "government ſecurities one thouſand pounds in their own names, "and directs that the intereſt or dividends thereof, or of ſuch part "thereof as they ſhould think neceſſary, ſhould be applied for the "maintenance and education of his grandſon the defendant *Stephen* "*Roome*, ſon of his late ſon *James Roome* deceaſed; and that his "executors might pay or apply all or any part of the ſaid thouſand "pounds, and the intereſt or dividend thereof in the binding his "ſaid grandſon apprentice, or ſetting him up in the world, as they "in their diſcretion ſhould think fit, and that ſo much thereof as "ſhould not have been paid or applied as aforeſaid, he willed and "directed ſhould be by them paid and transferred unto his ſaid "grandſon at his age of twenty-one years; and in caſe he ſhould "die under that age, that the ſame ſhould be equally divided "among the plaintiffs *William* and *Thomas Roome* and *Ann Barret*, "the children of the teſtator, and made theſe three perſons exe- "cutors."

One queſtion was, whether the want of a ſurrender of a copyhold eſtate ſhall be ſupplied in favour of a wife or child, the court doubtful whether it could againſt an heir diſinherited of the real eſtate. *S. R.* directs his executors to place out at intereſt 1000 *l.* in their own names, and that the intereſt ſhould be applied for *the maintenance, &c.* of his grandſon,

and that they might pay all or any part of the 1000 *l.* and intereſt in binding him apprentice, and ſo much as ſhould not have been ſo applied, he directed ſhould be transferred to his grandſon at 21.

The teſtator himſelf put his grandſon apprentice to an haberdaſher, and paid 126 *l.* with him to his maſter, and a year afterwards made a codicil to his will, by which he gave ſome legacies. The queſtion was, whether the 126 *l.* for apprenticing him was an ademption *pro tanto? The court was of opinion, as the* 1000 *l. was not given for this uſe alone, but for other purpoſes, and the codicil made after this ſum had been ſo laid out, it was a confirmation of the legacy, and amounted to a republication of the will, and decreed the whole* 1000 *l. to the grandſon.*

The eſtate in *Iſlington* was a copyhold eſtate, but no ſurrender was made to the uſe of the will.

On the ſecond of *November* 1742. the teſtator made a codicil to his will, whereby he gave legacies to three of his ſervants, which he had omitted in his will.

But after making his will, and before the codicil, namely on the 15th of *Auguſt* 1741. the teſtator put the defendant apprentice to one *Stanton* of *London* haberdaſher, and paid one hundred and twenty-ſix pounds with him to his maſter.

The bill is brought that the want of the ſurrender might be ſupplied, and that directions may be given by the court concerning

placing out, on ſecurities, ſuch part of the thouſand pounds given for the defendant's benefit, as the court ſhall be of opinion he is entitled to.

The defendant inſiſts that he is an heir at law totally diſinherited, and therefore ought not to be obliged to ſurrender the copyhold eſtates to the plaintiffs, and that the court will not ſupply the want of it; and that as the teſtator lived above two years after paying the hundred and twenty-ſix pounds for putting him apprentice, and made no alteration in the will with reſpect to the thouſand pounds, though he made a codicil upwards of a year after paying the hundred and twenty-ſix pounds, it was manifeſtly the intention of the grandfather that the ſame ſhould not be deducted out of the thouſand pounds, but the whole applied to the defendant's uſe: and being an infant, inſiſts his right to the real eſtate ought to be ſaved.

The Maſter of the Rolls made two queſtions:

Firſt, As to ſupplying the want of a ſurrender of the copyhold to the uſe of teſtator's will.

Secondly, Whether the payment of one hundred and twenty-ſix pounds by the teſtator in his life-time, is to be conſidered as an ademption *pro tanto* of the thouſand pounds legacy to the defendant.

With regard to the firſt of theſe queſtions, the plaintiff's council inſiſt that though there is no ſurrender to the uſe of the will, yet if the lands deviſed are for payment of debts, or as a proviſion for a wife or children, this court will ſupply the want of a ſurrender.

To be ſure, the general rule is ſo, though I do not remember it has been extended ſo far as a wife. (*Quære, for in Eq. Ca. Abr. title Copyhold, it appears to have been ſo extended; and in Hawkins* verſus *Leigh, 29th of November* 1739. *before Lord Hardwicke.*) See *T. Atk.* 1 *Vol.* 387.

It has been ſaid by the defendant's council, that it ought not to be ſupplied in this caſe againſt him, becauſe whenever an heir at law is diſinherited, the rule is otherwiſe, and is certainly a true rule.

But then it will be a queſtion whether upon the circumſtances of this caſe it ought to be ſupplied.

Mr. Attorney General ſays, that though an heir is barred of all the lands which he would have taken by diſcent, yet he ſhall not be ſaid to be totally diſinherited, provided he has a proviſion from his anceſtor in any other way.

But

But I do not remember any ſuch diſtinction, and always thought the rule meant an heir at law diſinherited of real eſtate, (*Quære*, for the caſe of *Hawkins* verſus *Leigh* was determined on this diſtinction by Lord Chancellor) however this point muſt be reſerved, for I cannot make any binding decree now, as the heir at law is an infant, and therefore ſhall give liberty to apply to the court in reſpect to the copyhold eſtate when he comes of age.

With regard to the ſecond queſtion, the doubt is, whether I can conſiſtently with the intention of the teſtator decree the whole thouſand pounds to the defendant.

A grandfather to be ſure is a very near relation, but ſtrictly ſpeaking does not ſtand *in loco parentis*; a father is indeed obliged to maintain his child, but a grandfather is not obliged to maintain a grandchild.

A grandfather does not ſtand *in loco parentis*, and therefore not obliged to maintain a grandchild, nor can he appoint a teſtamentary guardian.

A father can appoint a teſtamentary guardian of his child, but a grandfather cannot.

The plaintiff's council inſiſt, that as the thouſand pounds was given to bind the defendant out apprentice, that the teſtator having afterwards done this himſelf, it is a partial ademption, and ought to be taken out of the portion: and they have compared this to the caſe of a perſon's giving *A.* a thouſand pounds by will to build him a houſe; if the teſtator in his life-time lays out that ſum upon a houſe for *A.* it is a ſatisfaction, and *A.* ſhall not have the thouſand pounds under the will; and that as the defendant in the preſent caſe has had the thing intended, he ſhall not have the legacy.

But I think the preſent caſe differs from that which has been cited, becauſe the thouſand pounds is not given for the putting him out apprentice only, but for other purpoſes, maintenance, *&c.* neither are the executors obliged to expend ſuch ſums, as ſhall be neceſſary for apprenticing him, out of the thouſand pounds, but they may do it out of the intereſt and produce of it.

The defendant beſides might have choſen ſome other buſineſs, or perhaps none at all.

Therefore thoſe caſes, wherein ademption has been allowed, muſt be confined to ſuch inſtances where a teſtator gives a legacy for one particular purpoſe only, and after that applies a ſum of money to the ſame purpoſe.

Ademptions are confined to ſuch inſtances where a teſtator applies a ſum of money to the ſame purpoſe for which he had before given the legacy.

It appears too manifeſtly by one circumſtance, the teſtator did not intend himſelf there ſhould be any ademption of the thouſand pounds, and that is the codicil, (made above a year after the hundred

hundred and twenty-ſix pounds had been laid out for apprenticing the defendant) which is a confirmation of the legacy, and amounts to a republication of the will.

If the teſtator had had any intention of deducting the hundred and twenty-ſix pounds out of the thouſand pounds, he had a fair opportunity of doing it when he was adding a codicil; and as he has not done it, it will be the greateſt equity to decree the whole thouſand pounds to the defendant, the grandſon of the teſtator; and his Honour decreed it accordingly.

Caſe 56. *October* 19, 1744.

This court has a power to remove coroners where they miſbehave, or live out of the county.

A Petition on behalf of the freeholders of *Warwick*, to remove *Saunders*, a coroner, for neglect of duty, *&c.* and for abſconding.

LORD CHANCELLOR.

I have no doubt as to the authority of the great ſeal with regard to the removing of coroners, where they miſbehave, or where they live out of the county; and the precedent of the order made for that purpoſe by Lord *King* is an authority, which was an application on behalf of the freeholders of the county of *Derby*, *Auguſt* 5, 1725.

The court will not order a writ to iſſue *de coronatore exonerando*, till there is an affidavit of ſervice at the laſt place of his abode.

But, as there is no affidavit here of ſervice on the defendant the coroner, but a ſuggeſtion only, that they are not able to come at him, I will direct the petition to ſtand over till the ſecond *Wedneſday* in the term, becauſe, as it is an office of freehold, I will not order a writ to iſſue *de coronatore exonerando*, until there is an affidavit of ſervice at the laſt place of his abode.

The authority of this court does not extend ſo far as to remove one coroner, and to appoint another, but the choice of a new one muſt be by a majority of freeholders.

Caſe 57. *Ex parte Barnſley*, *October* 19, 1744. *amongſt the lunatick petitions.*

After *B.* had been found a lunatick under two inquiſitions, the court would not allow him to traverſe the ſecond.

AN application to the court to traverſe the *ſecond* inquiſition.

The ſecond inquiſition finds that at the time of taking it he is of *unſound mind*, ſo that he is not ſufficient for the government of himſelf, his manors, lands, meſſuages, goods and chattels, and that he hath been of ſuch unſound mind from the eighth of *April* 1737.

LORD

LORD CHANCELLOR.

The caſe of *Roberts* is diſtinguiſhable from this, he was found a lunatick of inſane mind only by one inquiſition; and there were alſo great objections as to the behaviour in finding that inquiſition, which alone would have induced me to quaſh it.

But in all theſe inquiſitions, they are not at all concluſive: for they may bring actions at law, or a bill to ſet aſide conveyances, ſo that it might have been diſputed afterwards upon an iſſue to be directed: but Doctor *Finny* ſubmitted there to be bound by the iſſue found on that traverſe; and as I thought this would put an end to the affair, therefore I allowed it.

It has been ſaid the parties have a right to traverſe it on the ſtatute of 2 *Ed.* 6. *ch.* 8. *ſec.* 6. if ſo, there is no occaſion to apply to me.

On a petition *ex parte Smith* in ideocy before Lord *King*, as the perſon was found to be an ideot, he thought it a hard caſe, and therefore would not grant the cuſtody without giving leave to traverſe the inquiſition.

Where an inquiſition finds a perſon an ideot, the court thinking it a hard caſe, gave leave to traverſe it.

There was another reaſon which induced me to ſuſpend the cuſtody of Mr. *Robert*'s eſtate, a great part of it lay in the *Weſt-Indies*, and if I had granted it, great injury might have been done by changing the management of the eſtate, for it would have put an end to the authority of the attorney there, which is the method of managing eſtates in the colonies.

If the gentleman has a right by law, and under the ſtatute to traverſe, he may take that method.

But if after two inquiſitions in this caſe, finding *Barnſley* a lunatick, (for the firſt was in ſubſtance good, though informal, and therefore ſet aſide) I ſhould allow the petitioner to traverſe the inquiſition, I ſhould ſpin out proceedings in lunacy to a very great length and infinite expence, and ſhould make them a very heavy burden upon the ſubject, and therefore I ſhall diſmiſs this petition.

If the caſe of Mr. *Roberts* * is to be brought up as a precedent upon every turn, I do not know any one order ſince I had the ſeals, that I ſhould repent of ſo much as in that caſe, but there is a wide difference between the caſes.

* *Vide* before.

Caſe 58. *Goring* verſus *Naſh and others*, *October* 22, 1744.

The articles made previous to the marriage of Mr. *Fagg* decreed to be carried into execution for the benefit of the plaintiff his eldeſt ſiſter.

THIS cauſe came before the court on a bill brought by Sir *Charles Goring* and his Lady, one of the daughters of Sir *Robert Fagg* the elder, to have a ſpecific performance of articles entered into on the marriage of *Robert Fagg* the younger, and to have the lands ſpecified in the articles ſettled to the uſe of *Lady Goring* in tail.

Sir *Robert Fagg* the father had one ſon and four daughters, namely the plaintiff and the three defendants: he had an eſtate amounting to 2800 *l. per ann.* and on the marriage of his ſon, *October* 22, 1729. entered into articles between him and his ſon, by which there was an agreement to ſettle the greateſt part of the eſtate, (eight hundred pounds a year excepted.)

By theſe articles the father and ſon covenant for themſelves, their heirs, executors, *&c.* to ſettle theſe lands to the following uſes.

As to one part of the value of 820 *l. per ann.* to Mr. *Robert Fagg* for life, and after the determination of that eſtate to raiſe a jointure of 400 *l.* a year rent-charge, for the wife, and then to truſtees to preſerve contingent remainders to ſons in tail male, afterwards to ſons by another marriage, and there is no other limitation.

Then the articles take up the conſideration of another part of the eſtate, and the uſes of this are limited to the ſame perſons as in the firſt mentioned lands, with a charge by way of additional portion of 4000 *l.* for Sir *Robert Fagg*'s daughters: and after ſeveral limitations, then came the limitation in queſtion to the plaintiff, Lady *Goring* and her heirs male, unleſs Sir *Robert Fagg* ſhould appoint other uſes under his hand and ſeal; then a limitation to the other daughters in tail, then to Mr. *Fagg* of *Grimſby*, then to Sir *Robert*'s right heirs.

Sir *Robert Fagg* the father died in 1736, the ſon ſurvived.

After the father's death the ſon directed a draught to be prepared to carry the articles into execution, but died before it was finiſhed.

The legal eſtate in ſome of the lands has deſcended on the four ſiſters in fee, as heirs both of the father and brother.

A bill has been brought by Lady *Goring* to have the articles carried into execution, and to have the intail of the eſtate, ſo limited to her as aforeſaid, ſettled accordingly.

LORD

LORD CHANCELLOR.

I gave orders on the 8th of *November* 1742, that the Maſter ſhould inquire what were the value of the eſtates comprized in the articles, and what eſtates were deſcended.

The Maſter has made his report, and the cauſe ſtands for further directions.

The eſtates are of three kinds.

Firſt, Lands comprized in the marriage articles, in which the uſes are carried no further than before mentioned, in value 820*l. per ann.*

Secondly, The eſtates in the articles, which are claimed as limited to the plaintiff in tail, the Maſter has divided into two kinds; one of which it is ſtated, he cannot determine, whether it is limited or not; and the other, to be clearly limited, amounting to 564*l.* 6*s.* 8*d. per ann.*

Thirdly, Lands which are unqueſtionably deſcended, both in law and equity, amounting to 804*l.* 14*s. per ann.*

Upon this caſe, the queſtion is, whether the plaintiff, Lady *Goring*, is, under theſe articles, intitled in a court of equity to have them carried ſpecifically into execution.

Now, the power of the court to carry articles into execution has not been doubted on either ſide; for the ſpecific execution of articles being the moſt adequate juſtice in general, ſhall not be left to an action at law.

The ſpecific execution of articles being the moſt adequate juſtice in general, the court will not leave it to an action at law.

But, notwithſtanding this, the defendant's council have taken three objections, on which they have principally relied.

Firſt, That the rule has ſeveral exceptions; and that it is diſcretionary in the court, whether they will decree a ſpecific execution upon the circumſtances of the caſe.

Though diſcretionary in the court whether they will decree a ſpecific execution, yet it is ſo on certain grounds, and not arbitrary, but governed by rules of equity.

Secondly, That the plaintiff is plainly a volunteer, and not within the valuable conſideration of theſe articles.

Thirdly, That great hardſhips would follow from ſuch a decree, for that the defendants would in a manner be diſinherited by it.

As to the *firſt*, it muſt be admitted; but then it ought to be underſtood in this manner, that it is diſcretionary on certain grounds, and not arbitrary, but governed by rules of equity.

The *ſecond* objection, and what has been principally relied upon, is, That the marriage between Mr. *Robert Fagg* and Mrs. *Sarah Ward*, was the ſole object, and that the preſent plaintiff is only a daughter of Sir *Robert Fagg*'s, and not the eldeſt; and beſides, no party contracting in the marriage articles, unleſs preſumptions are taken in to help it out.

This point has been clearly and fully argued, and the caſe of *Jenkins* verſus *Keymiſs*, reported in 1 *Lev.* 150, 237, 238. and in 1 *Chan. Caſ.* 103. has been mooted chiefly on both ſides: And it has been inſiſted, that the plaintiff is not ſuch a perſon as is intitled to have the articles carried into execution, or who could prevail againſt a ſubſequent purchaſer, which was the caſe of *Jenkins* verſus *Keymis*.

In a queſtion between relations in the ſame degree, the rule that governs the court in theſe caſes is, whether it would be attended with hardſhips, or not; or whether a ſuperior or inferior equity ariſes on the part of the perſon who comes for a ſpecific performance.

The ſtrict meaſure which governs the court in a queſtion between perſons who come to carry articles into execution, and purchaſers, is not the rule of this court, for, between families, the court have conſidered, whether it would be attended with hardſhips or not, or whether a ſuperior or inferior equity ariſes on the part of the perſon who comes for a ſpecific performance, and this was the ground Lord *Cowper* went upon, in the caſe of *Finch* verſus *Lord Winchelſea*, 1 *P. Wms.* 277.

Lord *Harcourt* had decreed the agreement between the old Counteſs of *Winchelſea* and the late Earl; and Lord *Harcourt*'s decree was affirmed in the Houſe of Lords.

The Earl of *Winchelſea*, after the agreement, confeſſed a judgment for juſt debts; when Lord *Cowper* had the ſeals a ſecond time, another bill was brought by judgment creditors, to be ſatisfied out of that eſtate: He decreed for the judgment creditors; for though it was a ſufficient agreement to bind the ſeveral branches of the family, yet not adequate to bind creditors.

I mention this, to ſhew, that the diſtinction has been already taken, and that it is one conſideration how far the court will ſupport agreements of this kind againſt relations in a family, and againſt purchaſers and creditors.

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In the caſe of *Watts* verſus *Bullas*, 1 *P. Wms.* 60. before Lord Keeper *Wright*, his reaſoning was too large, owing to his being then new in the court, and purſuing the maxims of law too far, as to the conſideration of blood to raiſe an uſe, for that would carry it to the remoteſt blood that could raiſe an uſe in law, and which this court does not regard; there the court made a decree for ſupplying a conveyance in favour of a half brother againſt an heir at law.

Lord Keeper *Wright*'s reaſoning in *Watts* verſus *Bullas*, was too large, owing to his being then new in the court, and purſuing the maxims of law too far as to the conſideration of blood to raiſe an uſe.

There was a caſe before me of *Newſtad* verſus *Searle*, *March* 2, 1737. 1 *T. Atkyns* 265. I only mention it, as the bar took notice of it, but not as any authority.

On this head of *conſideration*, and how far the court have ſupported agreements where the perſon who comes for a ſpecific execution is not within the conſideration of the articles, I will mention a caſe for the ſake of the reaſoning only. *Holt* verſus *Holt*, 2 *P. Wms.* 648.

In the preſent caſe, it is unneceſſary to take up time in citing particular caſes, becauſe I apprehend all the caſes are authorities for what I ſhall now decree.

All the decrees for ſpecific performance of marriage articles on limitations for younger children, are authorities in favour of the plaintiff, and where ſuch articles have been decreed at all, they have been carried into execution, even as to collaterals, and not carried into execution in part only.

A ſpecific performance of marriage articles has been decreed in this court, even as to collaterals.

Suppoſe in the preſent caſe, a bill had been brought by Mr. *Robert Fagg* the ſon, or the widow, muſt not this particular limitation have been decreed to the plaintiff at the ſame time.

I ſhall, in making my decree, rely on theſe grounds.

Firſt, That the plaintiff is clearly intitled to a ſpecific performance of part in theſe articles.

Secondly, That the truſtees would be clearly intitled to recover the whole value of the eſtate at law, out of the real aſſets.

Thirdly, That this limitation is part of the proviſion made by a father for a daughter.

As to the *firſt*, I go upon two reaſons: That the plaintiff is intitled to be relieved againſt Lady *Fagg*'s demand of dower, and can compel her to be bound by her agreement as to her jointure; but if any cavils were to be raiſed on the nature of this decree, whether it ſhould be by injunction to reſtrain her proceeding at law; yet

without controverſy ſhe is clearly intitled to a decree for raiſing of 4000*l.* as an additional portion for her, out of the 8000*l.* charged upon the lands comprized in the marriage articles.

The court will not decree a partial performance of articles; but where ſome parts appear unreaſonable, they always diſmiſs the bill.

Now, there is no inſtance of decreeing a partial performance of articles, the court muſt decree all, or none; and where ſome parts have appeared very unreaſonable, the court have ſaid, we will not do that, and therefore, as we muſt decree all or none, the bill has been diſmiſſed.

In caſes of fraud or miſtake, the court goes upon another ground, and relieve againſt the ſettlement it ſelf.

Inſtances have been mentioned of fraud or miſtake in marriage agreements, but courts will relieve there, by ſtriking out the miſtake, or ſetting aſide the fraud, and therefore in thoſe caſes, they go altogether upon another ground, and relieve againſt the ſettlement it ſelf.

No body can tell what it is that parties who are dead have laid the greateſt weight upon, in coming to agreements, and therefore it would be attended with bad conſequences if agreements were to be ſplit, and one part to be decreed, but not another.

In limitations of articles in *Wales*, where they make the eldeſt daughter in the nature of an eldeſt ſon, though ſhe is but part of an heir, yet the court will carry it into execution.

I mention this only as exemplifying what I have ſaid with regard to the confuſion it would make, if the court decreed theſe agreements to be carried into execution in part only.

An objection was made, that Sir *Robert Fagg* might have executed the power of revocation, as well upon the foot of theſe articles, as if they had been carried into ſtrict ſettlement.

But he did not execute that power, which is a full anſwer.

The *ſecond* ſpecial ground is, that the truſtees would be clearly intitled to the whole value of the land out of the real aſſets.

If an action had been brought againſt the ſon by the truſtees, they muſt have recovered the whole value againſt him, who, having no power of revocation, the jury could not take it in conſideration in damages.

This brings it near the caſe of *Vernon* verſus *Vernon*, before Lord Chancellor *King* 1731, for Mr. *Vernon* was as much a volunteer, and was a more remote relation than the plaintiff.

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In this caſe, if the truſtees had recovered in an action at law out of the real aſſets of the brother, the defendants might come into this court for the ſpecific lands, or to have the aſſets laid out in the purchaſe of lands.

Now, this would be ſuch a circuity as ought not to be allowed in equity, as it would be more adequate juſtice to decree it immediately.

One objection made on the part of the defendants was, that here was a remainder in tail limited to Mr. *Robert Fagg* the ſon, before this limitation to the plaintiffs, and he might have barred the plaintiff by recovery.

There is no doubt he might, but, as he hath not done it, it is no objection, and was the very caſe in *Vernon* and *Vernon*, and the ſame argument made uſe of there; and as in this caſe he has done no act; nay, ſtronger, has rather done an act which imports an intention to carry the articles into execution, by ordering a *draught* to be prepared for that purpoſe, it anſwers this objection.

The *third* ground is, that this is part of a proviſion for younger children, which is always favoured here, and carried into execution.

That they are conſidered as purchaſers, by reaſon of the natural obligation of parents to provide for their children, and this court will ſupply for their benefit the ſurrender of copyhold eſtates, *&c.* and one objection has been made, which deſerves an anſwer, that this is not within the common proviſions for a daughter, being after ſeveral limitations.

As to that, I am of opinion, that the father is a judge of the *quantum* of a proviſion, and likewiſe of the time when it ſhall take place.

A father a judge of the *quantum*, and alſo of the time when the proviſion for a daughter ſhall take place.

Limitations to them have been to ariſe frequently on failure of iſſue male of an eldeſt ſon or ſons, and yet in this court have been conſidered as a proviſion, and the time makes no difference.

Limitation to a daughter on failure of iſſue male of an eldeſt ſon or ſons, is conſidered as a proviſion, and not too remote.

Suppoſe the father ſeiſed of copyhold lands, ſhould limit them to a firſt ſon in tail, and a ſecond ſon, and a third, fourth, and fifth ſon, and there is no ſurrender, and the ſecond ſon brings a bill, who

A father limits a copyhold eſtate to a firſt ſon in tail, and to a ſecond, third, fourth, and fifth ſon, and there is no ſurrender; the ſecond brings a bill to have it ſupplied; the court will decree it for the third, fourth, and fifth ſon, in the ſame order in which the father has left it.

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is to take in poſſeſſion to have it ſupplied; Will not the court decree it for the third, fourth, and fifth ſons, as well as the ſecond, conſidering it as intended for a proviſion, and in the ſame order the father has left it?

A general objection has been made of hardſhip, as to the other three ſiſters, and I own, I thought it a hard caſe, and for this reaſon, I ſent it to a Maſter to ſtate the value; and there is clearly an eſtate of ſixteen hundred and twenty-five pounds a year deſcended, but an incumbrance of 23000*l.* upon it; however, as it is an old eſtate, it will ſell for 40000*l.* and doubtful, beſides, on the Maſter's report, whether another eſtate may not deſcend, but, if it ſhould not, they are amply provided for.

Therefore it ſtands diſtinguiſhed from the caſe of *Parry* verſus *Hughes*, in 1731, in the court of Exchequer, for there it muſt have been carried into execution for a total ſtranger.

Where it does not introduce a hardſhip, or leave the other children in diſtreſs, the court always decree the proviſion made by a parent for one child to be as extenſive as he intended it.

The court have always decreed the proviſion made by a parent for a child, to be as extenſive as the parent intended it, where it does not introduce a hardſhip, or leave the other children in diſtreſs, for a father may have a good reaſon to prefer one child to another; whether he had in this caſe I ſhall not inquire.

His Lordſhip decreed the articles in 1729 to be carried into execution for the benefit of the plaintiff.

Caſe 59. *King* verſus *Mariſſal*, *October*, 31, 1744.

THE plaintiff was drawn in by a promiſe of marriage, to ſuffer one *Dupin* to lie with her, he afterwards marries another woman.

Before execution on a judgment obtained againſt *D.* on an action upon a promiſe of marriage, he by mortgage conveys his whole effects to the defendant; the court would carry it no further than to allow the plaintiff to redeem the defendant.

She brings an action againſt him, and recovers 2000*l.* in damages; *Dupin*, in order to defeat the verdict, conveys his whole effects, by way of mortgage to the defendant, before execution on the judgment.

The bill is to ſet aſide the conveyance as fraudulent.

The defendant admits the verdict in *June*, 1741, and that the conveyance to him, though dated on the 29th of *September* following, was not executed till the 24th of *October*.

Dupin

Dupin himſelf is gone to *Holland.*

Mr. Solicitor General, council for the plaintiff, laid a ſtreſs upon its being dated a very little time before execution was taken out, which is a circumſtance to ſhew the fraud.

He cited 2 *Vern.* 616. *Crane* verſus *Drake and others*; and *Newgent* verſus *Giffard, November* 13, 1738, before Lord *Hardwicke*, 1 *T. Atk.* 463.

The defendant's anſwer was only as to his belief with what view *Dupin* executed this deed.

LORD CHANCELLOR.

If you wanted an anſwer to this part, you ſhould have interrogated him more particularly: I am clearly of opinion, the plaintiff can carry it no further than to redeem the defendant; and his Lordſhip decreed accordingly.

Walſh verſus *Peterſon, November* 6, 1744. Caſe 60.

A Queſtion in this caſe aroſe upon the following will and codicil.

P. gives two thirds of his real eſtate to his ſon, to hold to him, his heirs and aſſigns, for ever; but in caſe he dies before he ſhall attain the age of 21, or without iſſue, then to the teſtator's wife, her heirs and aſſigns: The ſon died after 21, without iſſue. *Lord Hardwicke held it to be a veſted eſtate in fee in the ſon, as he attained* 21. *and though he died without iſſue, that it did not go over to the mother, but deſcended on his heir at law.*

" As to ſuch real eſtate as I ſhall die ſeiſed and poſſeſſed of, I " give and deviſe one full equal third part thereof unto my wife " *Martha Peterſon*, to hold to her, her heirs and aſſigns for ever; " *and the other two thirds of all my real eſtate I give and deviſe to* " *my loving ſon Matthew Peterſon, to hold to him, his heirs and aſ-* " *ſigns for ever*; but my mind and will is, *in caſe ſaid ſon ſhall* " *happen to die before he ſhall attain the age of twenty-one years, or* " *without iſſue, then I do hereby give and deviſe the ſaid two thirds* " *of my ſaid eſtate, to my ſaid wife* Martha Peterſon, *her heirs and* " *aſſigns.*"

By the codicil, the teſtator recites this clauſe; and then proceeds thus:

" Now my further mind and will is, and I do hereby will and " require the ſame, *that in caſe my ſaid ſon ſhall happen to die be-* " *fore the age of twenty-one, or without iſſue as aforeſaid, and alſo in*

" *caſe of the deceaſe of my ſaid wife*, that then I do give and deviſe " the ſaid *two third parts* of my ſaid real eſtate, unto and amongſt " all and every the ſons, and daughters of my brother in law " *Thomas Dickenſon*.

The ſon died after the age of twenty-one, but without iſſue; and the queſtion was, whether the deviſe over to the mother ſhall take effect upon one of the contingencies happening only.

Mr. Solicitor General, for the defendant, the mother, ſaid, this was a contingency with a double aſpect, and cited the caſe of *Bellaſis* verſus *Uthwatt*, before Lord *Hardwicke*, 1 *Tr. Atk.* 426.

That reciting the will properly, and deliberately altering it in the codicil, is ſo ſtrong in her favour, that the court will not eaſily paſs it over, or incline to turn a disjunctive into a conjunctive.

There was a caſe before the council board, in which the two chiefs aſſiſted, and have not yet agreed as to the conſtruction of the word *or*.

LORD CHANCELLOR.

I think it a very plain caſe; the teſtator had a wife and a ſon living, if he had gone no further than the firſt clauſe, he had given him an abſolute fee, but then follows the executory part.

Upon the words in the codicil, there can be no doubt at all; it is to go over upon two contingencies; the words *as aforeſaid* take in all the former diſpoſition.

Suppoſe he had ſaid no more, than in caſe my ſon had died under twenty-one, *as aforeſaid*, would this have diſinherited the iſſue, if the father had died under twenty-one, and gone over to the mother? By no means; for I would have ſupplied the words, and without iſſue, and ſhould have been juſtified by the expreſſion, *as aforeſaid*.

The caſe of *Soulle* verſus *Gerrard*, in *Cro. Eliz.* 525. and *Moore* 422. was determined on this very point, " a deviſe to his ſon, and " if he die without iſſue, or before his age of twenty-one years, " that it ſhall remain to another; the ſon hath iſſue, but dies be- " fore twenty-one years, yet it was adjudged, that his iſſue ſhall " have the land, and not the remainder-man; and *or* there was " conſtrued for *and*; ſo ſtated in *Moore*, but called *Sowell* verſus " *Garret*: If the conſtruction had been otherwiſe, the grandſon of " the teſtator would have been diſinherited if the ſon had died be- " fore twenty-one.

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His Lordſhip held it to be a veſted eſtate in fee in the ſon, as he arrived at his age of twenty-one; and that though he died without iſſue, yet it did not go over to the mother, but deſcended on his heir at law.

Pringle verſus *Hartley*, *November* 15, 1744. Caſe 61.

THE defendant inſured the ſhip *Succeſs* from *London* to *Bermudas*, and ſo to *Carolina*; the ſhip was taken by a *Spaniſh* privateer, and afterwards retaken by an *Engliſh* privateer, and carried into *Boſton* in *New England*, where, no perſon appearing to give ſecurity, or to anſwer the moiety, *the re-captors* were intitled to, ſhe was condemned, and ſold in the court of admiralty, there *the re-captors* had their moiety, and the overplus money remained in the hands of *the officers of that court*.

The ſhip *Succeſs* being inſured from *London* to *Carolina* was taken by a *Spaniſh* privateer, and afterwards retaken by an *Engliſh* one, and carried to *Boſton*, where, no perſon appearing to give ſecurity, ſhe was condemned and ſold in the court of admiralty there; and after the re-captors had their moiety; the overplus remained with the officers of that court. The defendant brought an action on the policy, and had a verdict; the plaintiff, by his bill, prays an injunction, inſiſting the defendant ought to recover no more on the policy than a moiety of the loſs. *The court denyed the injunction, for as the defendant had offered to relinquiſh the ſalvage, he was intitled to recover the whole money inſured.*

An action was brought by the defendant, upon the *Policy*, who had a verdict.

The plaintiff brought a bill, ſuggeſting the capture to be fraudulent, and done deſignedly by the captain; and moved now for an injunction to ſtay the proceedings at law.

The counſel for the plaintiff argued, that though the capture might not be fraudulent, yet the defendant ought not to recover more on the policy than a moiety of the loſs, as the act of 13 *Geo.* 2. *c.* 4. *ſect.* 18. gives the ſalvage to the owner, and he is intitled to receive it from the officers of the admiralty, and that the plaintiff ought to be obliged to pay no more than the loſs he has actually ſuſtained, which cannot be aſcertained till after the defendant ſhall have received what might have come upon the ſalvage.

The defendant, in his anſwer, had ſworn he had offered, and was now willing to relinquiſh, his intereſt to them in the benefit of the ſalvage, and would give them a letter of attorney for that purpoſe to receive it.

LORD CHANCELLOR.

There is no ground for an injunction in this caſe; here there was an agreement to go to trial in one of theſe actions which had been brought, and to be bound by the event of that; at the time of

of the trial they knew the ſhip *was retaken*, and the manner of the capture.

The *quantum* of the damage and loſs ſuſtained, is the only thing now to be diſputed; for it is impoſſible to carry on trade without *inſuring*, eſpecially in the time of war.

Therefore regard muſt be had to the *inſured*, as well as the *inſurer*; and where there is no admiſſion in the anſwer, of any kind of fraud, though various pretences of that ſort may be ſet up by the bill, they are not to be regarded.

The queſtion then ariſes on the ſtatute of 13 *Geo.* 2. with regard to the ſalvage.

It has been ſaid, there ought to be only half the loſs recovered on the policy; and as to that, the act has made great alteration in the laws of nations with regard to *recaptures*.

By 13 *Geo.* 2. the recaption of a ſhip is the veſting of the owner's property.

The carrying a ſhip *infra præſidia hoſtium*, or *ſi pernoctaverit* with the enemy, makes it the prize of the perſon *retaking* it, as if it had been originally the ſhip of the enemy; but by the act, *the recaption* is the veſting of the property of the owner.

When inſurances are intereſt or no intereſt doubtful whether the act can operate.

But where inſurances are *intereſt, or no intereſt*, I am doubtful whether the act can operate or not.

This is an inſurance *according as intereſt ſhall appear*.

Salvage muſt be deducted out of the money recovered by the policy, if come to the hands of the inſured.

If there is a ſalvage, that muſt be deducted out of the money recovered by the policy; but if none has come to the hands of the plaintiff in the action, the jury cannot take notice of it.

The ſhip was condemned and ſold becauſe the moiety was not paid, or ſecured to be paid by the owners.

It is uncertain whether the defendant will receive any thing or not; and if any thing is recovered, he muſt have an allowance for his expences in recovering.

Therefore I take it, when he is willing to relinquiſh his intereſt in the ſalvage, he ought to recover the whole money inſured.

It would be miſchievous if it was otherwiſe, for then upon a *recapture* a man would be in a worſe ſituation than if the ſhip was totally loſt.

Colegrave

Colegave verſus *Juſon*, *November* 17, 1744. *rehearings.* Caſe 62.

THE plaintiff brought his bill for tithe of grain in kind; the defendant inſiſted upon a compoſition of one quarter of rye and one of oats in lieu of it. A trial at law was directed, and a verdict found for the modus.

A bill for tithe in kind, a compoſition ſet up of a quarter of rye and one of oats in lieu; a trial at law directed, and a verdict for the modus. The plaintiff inſiſted on a new trial upon the diſcovery of an old deed in the chapter-houſe at *Weſtminſter*, which he ſet up as a decree of the Pope's delegate, that *the revenues* of the church which had been alienated ſhould be reſtored, and would have it underſtood that the tithes were comprehended under the word *revenues*. *The court of opinion this paper was not a foundation to grant a new trial, and refuſed to do it.*

The plaintiff inſiſts now upon a new trial on a diſcovery of an old deed in the chapter-houſe at *Weſtminſter*, which he called the record of a cauſe determined before the Pope's delegate, in which it was decreed that revenues which had been alienated ſhould be reſtored to this church, and concludes that the tithes were comprehended under the word *revenues*; the judge at the trial refuſed to admit it as evidence.

LORD CHANCELLOR.

There is no foundation to grant a new trial, for if I ſhould, it would be a precedent to overturn the rights of men upon very uncertain grounds.

I am afraid this is a caſe where *Prowling* in an office has ſpirited up the rector to diſpute *this modus*; it happens very unfortunately for ſuch perſons that they ſtumble upon papers which they fancy are evidence of *tithes in kind.*

This is nothing more than a proceeding in ſome eccleſiaſtical court, what *non conſtat* found: Firſt, in the receipt of the Exchequer, and tranſmitted from thence to the chapter of *Weſtminſter.*

The receipt of the Exchequer is no office of record for things of this kind, but only in matters relating to the King's revenue.

The receipt of the Exchequer is no office of record, except in matters relating to the King's revenue.

The officer has taken upon him to put a title to it, which he had no authority do do, and which the paper does not warrant.

In it's utmoſt force it is a proceeding in an eccleſiaſtical court, concluding with an extrajudicial ſentence by the Pope's delegate.

The officers of the eccleſiaſtical courts ſhould not intitle their proceedings *recorda Domini Regis Georg. &c.* for they are only evidence of ſentences in their courts.

No proceedings in the eccleſiaſtical courts in this kingdom are records, they are only evidence of ſentences in their courts, therefore I mention this that the officers there may not take upon them to intitle them *recorda Domini Regis Georg. &c.* for the future.

I am of opinion it is not ſuch an inſtrument, that if the original had been produced, it would have been given in evidence.

The Pope before the reformation, exerciſed a juriſdiction either by way of *avocation*, or by requeſt from an inferior court.

Conſider what the juriſdiction was that the Pope exerciſed before the reformation, and though uſurped, yet it muſt have it's weight.

He might exerciſe it by way of *avocation*, or by requeſt from an inferior court.

The legate *a latere* exerciſed an authority without an appeal to the Pope.

The *legate a latere*, whilſt in the kingdom, did exerciſe a legantine authority without an appeal to the Pope, as for inſtance *cardinal Campejus*.

Neither the time nor the court does appear in this paper, and another inſtrument has been tacked to the parchment by a modern ſtring, but does not at all relate to the firſt paper.

Conſider what is the Pope's commiſſion to the archdeacon of *Leiceſter*, whom he made his delegate: the Pope does not take notice by what way the cauſe came before him, whether by appeal or by avocation, or by letter of requeſt.

So that here is no recital of any cauſe depending before him in any ſhape, only that there had been alienations of the revenues of the church, and that the alienees had obtained confirmations from the Popes themſelves.

This was a kind of general inquiſition only, how far the poſſeſſion of this rectory had been alienated.

The two inſtruments by which they would ſhew it to be a cauſe, have no relation to one another, but tacked together in modern times.

Though an uſurped authority, it was allowed by law at that time, and muſt have it's conſideration: yet as it does not appear by this parchment there was any cauſe depending before the Pope, it can be of no ſignification, and, even if it had it's utmoſt force, would be of no advantage to the rector againſt a compoſition.

I am clearly of opinion this was no ſort of evidence, and was very properly rejected by the judge who tried the cauſe.

There is the ſtrongeſt evidence of a modus in this caſe, and no pretence that tithes were ever paid in kind, except this paper, and therefore there is no foundation for a new trial.

Stirling verſus *Lydiard*, *November* 21, 1744. Caſe 63.

THE queſtion in this caſe aroſe upon Mr. *Lydiard*'s will, who deviſed in the following manner.

L. gives all and ſingular his leaſehold eſtate, goods, chattels and perſonal eſtate whatſoever, to his daughter, and if ſhe dies without iſſue living, then to the defendant. *L.* after making his will renews a leaſe with the dean and chapter of *Windſor*; this is no revocation, but the leaſehold eſtate paſſed by the will.

As to *all and ſingular* my *leaſehold eſtate*, goods, chattels and perſonal eſtate whatſoever, I give to my daughter *Johanna*, and if ſhe dies without iſſue living, then limits it over in the ſame manner to the defendant.

In the reſiduary clauſe teſtator repeats the words all and ſingular, *&c.*

He after making his will renews a leaſe with *the dean and chapter of windſor*.

Joanna is dead without iſſue, and her huſband as adminiſtrator and repreſentative of his wife brings his bill to have the leaſe, inſiſting that the renewal by teſtator after making the will is a revocation, and that conſequently he in the right of his wife is entitled to it.

LORD CHANCELLOR.

There is no doubt but *the leaſehold eſtate* paſſed by the will.

The plaintiff goes upon a miſtake, that this is a ſpecific legacy; it is nothing like it, for it is only an enumeration of the ſeveral particulars of his perſonal eſtate, but yet is a general deviſe of the whole.

The court never ſtrains to make a revocation.

But notwithſtanding, if in point of law it is a revocation, it muſt have it's effect here likewiſe.

But there is no foundation to ſay, what teſtator has done in this caſe is a revocation.

Suppoſe the teſtator had purchaſed a new leaſe, would not that have paſſed? Why then ſhould not a new term in a leaſe equally paſs?

If I was to conſtrue this a revocation, I do not know but if a man was to give all his bank, *Eaſt-India*, and *South-Sea* ſtock, and ſhould afterwards turn it into money, it might as well be inſiſted this was a revocation.

His Lordſhip declared there was no pretence for the plaintiff's demand, and therefore diſmiſſed the bill.

Caſe 64. *Shirley* verſus *Watts*, *November* 23, 1744. *before the Maſter of the Rolls.*

A judgment creditor, before he is intitled to redeem a mortgage of a leaſehold eſtate and bond creditor, muſt take out execution.

A Judgment creditor, who has not taken out execution, brings a bill againſt the defendant to redeem him, who is a mortgagee of the leaſehold eſtate, and likewiſe a bond creditor.

Maſter of the Rolls, (*William Forteſcue*, Eſq;) The caſe of *Angel* verſus *Draper*, in 1 *Vern.* 399. is in point, and a ſtronger one than the preſent, for there the defendant who had the goods in his hands ſeemed to have come to the poſſeſſion of them in a fraudulent manner: but notwithſtanding upon defendant's demurring, becauſe the plaintiff (a judgment creditor) had not alledged he had taken out execution, the court allowed the demurrer, and ſaid the plaintiff ought actually to have ſued out execution before he had brought his bill.

In the preſent caſe there is not the leaſt ſuggeſtion of fraud, the defendant being a fair and *bona fide* creditor by mortgage.

There was a caſe of *King* verſus *Mariſſall* laſt term, upon a bill by a judgment creditor to redeem, which came on before Lord *Hardwicke*, when he aſked for the writ of execution; and upon it's being produced, admitted the judgment creditor for this reaſon to redeem.

For want of it's being taken out now, the bill muſt be diſmiſſed, becauſe till execution the plaintiff has no *lien* on the leaſehold eſtate, and decreed accordingly.

Bridgeman

Bridgeman verſus *Dove*, *November* 27, 1744. Caſe 65.

A Perſon by her will ſays, " I deviſe to Sir *John Bridgeman* my " heir, *Clifton* lands, he paying all debts and legacies charged " on theſe lands, and after his deceaſe to my nephew *Bridgeman*, " Doctor of Divinity.

A. deviſes to *Sir J. B.* her heir *Clifton* lands, he paying all debts and legacies charged on theſe lands, and after his deceaſe to a nephew; *Sir J. B.* as tenant for life is obliged to keep down the intereſt, if the principal is not diſcharged; but if it is, he is to pay one third, and the reverſioner two thirds.

In another part of her will ſhe ſays, " I leave my jewels, plate, " pictures, *medals*, *furniture*, to my two executors, to be equally " divided.

" In the laſt clauſe of the will ſhe ſays, Creating *St. Mary*'s and " Creating *St. Olave's*, *I make liable to all debts I have contracted* " ſince 1735. notes or bonds, if any, and what remains to be paid " to *Mary Dove*, ſpinſter, after the Creatings are ſold.

LORD CHANCELLOR.

A principal queſtion is, whether the debts and legacies ſhould be paid out of Sir *John Bridgeman*'s eſtate for life.

Notwithſtanding the inaccuracy of the will, which is drawn by herſelf, her intention appears to me to charge the legacies upon *the Clifton lands*, but not ſo as to exhauſt all the profits of the eſtate for life.

What colour is there to ſay, that this creates a condition on Sir *John Bridgeman*, that he ſhall take nothing but upon paying.

Indeed it would be a ſtrange thing to give an eſtate for life to a perſon of ſeventy years of age, on condition to pay legacies of 2600 *l.* out of an eſtate of 600 *l. per annum*.

By the latter words, there is a plain charge in the will upon theſe lands, and therefore Sir *John Bridgeman*, as tenant for life, is obliged only to keep down the intereſt, if the principal is not diſcharged; but if diſcharged, to pay one third thereof, and the reverſioner the other two thirds.

The next queſtion is relating to the perſonal eſtate.

In all clauſes with reſpect to proviſions for payment of debts, they relate to the time of the death of the teſtator, in order to make a more honeſt and faithful proviſion for payment of debts.

Proviſions in wills for payment of debts relate to the time of the teſtator's death.

The words all the debts which I have contracted, muſt be conſtrued *ſhall* contract.

If it had been all debts *that I owe*, ſtill it would be extended to the time of her death: The words here, are, *which I have contracted*, *have* contracted muſt be conſtrued *ſhall* contract.

Perſonal eſtate is liable to pay the debts, unleſs there is a ſpecial exemption of it.

I know of no authority where the words, I make my real eſtate liable to pay my debts, will exempt the perſonal eſtate without any ſpecial exemption of perſonal eſtate: nor has the court ever ſaid that perſonal eſtate ſhall be applied only to pay legacies, and not the debts.

Nor will making a particular eſtate in land liable to pay debts exonerate the perſonal eſtate, becauſe it is the natural fund for payment of debts.

Suppoſe a man deviſes a real eſtate liable to the payment of debts, and ſubject to thoſe debts gives it over to another, or what remains after payment of debts, which is all one; if there are not expreſs words to exempt the perſonal eſtate, it ſhall be firſt applied, and I am of opinion that the reſidue of the perſonal eſtate here, ought to be applied in exoneration.

The laſt queſtion is upon the deviſe of the jewels, plate, pictures, *medals*, *furniture*.

Mr. *Clarke* for the executors, has inſiſted that under the word *furniture* books will paſs, and that under the word *medals* pieces of current coin kept with them will paſs.

Where current coin is curious, and kept with medals, it will paſs as ſuch.

If *current coin* are curious pieces, and kept with medals, I am of opinion notwithſtanding they are current coin; yet as they are kept with medals, they will paſs as ſuch, for even medals themſelves were once current coin.

A library of books will not paſs as furniture.

But as I am at preſent adviſed, I am clearly of opinion, that a library of books will not paſs as *furniture*.

Nor does it operate at all on my mind, that it will paſs as furniture, becauſe it is a ſmall library: for moſt commonly great libraries are more often put up as ornaments, and leſs accurately choſen, than ſmall ones.

As to the caſe which has been cited of the *Duke of Beaufort* verſus *Lord Dundonald and the Dutcheſs of Beaufort his wife*, 2 *Vern.* 739. there was very little oppoſition, being between a mother and ſon, and I lay no ſtreſs upon it.

But

But I take it too it has been determined that a library of books will not paſs as furniture; and his Lordſhip decreed accordingly.

Baſſet verſus *Baſſet*, *December* 17, 1744. Caſe 66.

LORD CHANCELLOR.

THE bill was brought by a poſthumous child to have an account taken of the clear rents of the father's eſtate *John Pendarvis Baſſet*.

A poſthumous child born after the next rent day had incurred after the death of his father, is under the 10 & 11 *W.* 3. entitled to the intermediate profits of the lands ſettled as well as the lands themſelves.

The diſputes are both in regard to the real and perſonal eſtate; I will take them in their order.

Firſt, As to the real eſtate.

The queſtion relating to the eſtate of *John Pendarvis Baſſet* is this; the plaintiff, now an infant, is a poſthumous ſon and heir, for the father died, and left his wife enſient of him: the real eſtate conſiſts of different parts, and under different intereſts; of ſome ſmall parts the father was ſeiſed in fee; the greateſt part is included under a ſettlement, which was to the father for life, then to ſecure a rent-charge of 800 *l.* a year to his wife for a jointure, remainder to truſtees during the life of the father to preſerve contingent remainders, remainder to the firſt and every other ſon of *John Pendarvis Baſſet*, remainder to the defendant the brother of *John Pendarvis Baſſet*.

The plaintiff was born after the next rent day had incurred after the death of his father.

It has been inſiſted by his council he had a right to enter, and was intitled to the rents in the intermediate time.

The determination of this point will depend on 10 & 11 *W.* 3. *c.* 16. which is to enable poſthumous children to take eſtates *as if born in their father's life-time.*

The miſchief intended to be remedied by the act, "Whereas it often "happens that, by marriage and other ſettlements eſtates, are limited "in remainder to the uſe of the ſons and daughters, the iſſue of "ſuch marriage, with remainders over, *without limiting an eſtate to "truſtees to preſerve the contingent remainders limited to ſuch ſons "and daughters*, by which means ſuch ſons and daughters, if they "happen to be born after the deceaſe of their father, are in danger "to be defeated of their remainder by the next in remainder after

" them, and left unprovided for by ſuch ſettlements, contrary to " the intent of the parties that made thoſe ſettlements.

" *The proviſion*, be it enacted, that where any eſtate already is, " or ſhall hereafter by any marriage or other ſettlement be limited " in remainder to, or to the uſe of the firſt or other ſon or ſons of " the body of any perſon lawfully begotten, with any remainder or " remainders over, to, or to the uſe of any other perſon or perſons, " or in remainder to or to the uſe of a daughter or daughters law- " fully begotten, with any remainder or remainders to any other " perſon or perſons, that any ſon or ſons, or daughter or daughters " of ſuch perſon or perſons lawfully begotten, or to be begotten, " that ſhall be born after the deceaſe of his, her, or their father, " ſhall and may by virtue of ſuch ſettlement take ſuch eſtate ſo " limited to the firſt and other ſons, or to the daughter or daugh- " ters, in the ſame manner *as if born in the life-time of his, her, or* " *their father, although there ſhall happen no eſtate to be limited to* " *truſtees after the deceaſe of the father to preſerve the contingent re-* " *mainders to ſuch after-born ſon or ſons*, daughter or daughters, " until he, ſhe or they come *in eſſe*, or are born, to take the ſame.

It has been inſiſted on the part of the defendant, the miſchief was only the diſability of the after-born child to take the eſtate, becauſe according to *Archer*'s caſe, 1 *Co.* 66. *b.* every remainder muſt veſt *eo inſtante* the particular eſtate determines, and that *Reeve* verſus *Long*, 3 *Lev.* 408. was adjudged upon this principle.

There is no notice taken in the act of parliament of the caſe of *Reeve* verſus *Long*.

But I am of opinion this was not the ſingle motive of the act, for the legiſlature intended intirely to remedy the miſchief; the ſon before loſt the whole eſtate, the profits from the death of his father, and all the ſubſequent profits.

This to be ſure was quite contrary to the intention of the parties, eſpecially in marriage ſettlements, for they could never intend it ſhould go, even perhaps to a remote remainder man; therefore the act of parliament intended to remedy both, and the very title itſelf expreſſes it ſo, *as if born in the father's life-time.*

What is the recital? *are in danger to be defeated of their remainder.*

This is a general expreſſion, and includes both the loſſes, the being precluded of the eſtate, and likewiſe of the profits.

Therefore this act of parliament ought not to be taken ſo narrow as the defendant's council would have it.

But

But allow it to be ſo, if the enacting words can take it in they ſhall be extended for that purpoſe, though the preamble does not warrant it; and innumerable inſtances of this kind are in the law-books.

Enacting words, if they take in the miſchief, ſhall be extended for that purpoſe, though the preamble to the ſtatute does not warrant it.

Next as to the proviſion of the act, the words are ſo plain that it is impoſſible to put any other conſtruction; nay, it would be repealing the act to ſay, that *the after-born ſon* ſhould not take the profits; for if he does not take the profits, he does not take in ſuch manner *as if born in the life-time of his father*.

The queſtion to be aſked upon this, is, how would he have taken *the eſtate* if born in the life-time of the father? and the obvious and natural anſwer would be, why from his death.

How then will he take the profits, if not born in the life-time of his father?

Why likewiſe from his death.

It has been inſiſted by the Solicitor General, that in the caſe of diſcents upon the heir, he muſt be *in eſſe*; and that there are a great many caſes that ſay, a new act of parliament ſhall be conſtrued according to the rules of the common law.

But that is, where the conſtruction can be conſiſtent with the words of the act.

There might have been ſome grounds for this if the act had ſaid, he ſhall take as a ſon by diſcent at common law, which, if the legiſlature had intended it here, might as well have been inſerted as the preſent words.

The next words in the proviſion are, *although there ſhall happen no eſtate to be limited to truſtees after the deceaſe of the father to preſerve the contingent remainders to ſuch after-born ſon, &c.*

The like words are in the preamble.

The legiſlature intended to put it in the ſame way, as if there had been truſtees to preſerve contingent remainders to an after-born ſon.

There can be no doubt but according to the uſual courſe of conveyancing the profits might have belonged to the poſthumous child.

In *Bridgeman's Conveyancer, fol.* 301. " In caſe the ſaid *J.* (the " wife) ſhall happen to be enſient with child by the ſaid *J. B.* (the " huſband) at the time of his death, to the uſe and behoof of the ſaid

" J. (and the two truſtees under the ſettlement) and their heirs, until " the ſaid J. ſhall be of ſuch child delivered, or die, which ſhall " firſt happen, in truſt for the benefit of ſuch child, &c.

Theſe words make the mother a truſtee thoughout of the profits for the after-born ſon, and by the words of reference, the after-born child is intitled.

An objection has been ſtarted, that there muſt be a tenant of the freehold, therefore the uncle muſt take, becauſe if *treſpaſs* was committed, there muſt be ſome perſon entitled to bring an action, that the uncle is ſeiſed, and how can the profits be taken from him.

Perhaps in this court it is not neceſſary to determine it, for I can come at them another way, and ſhould not ſcruple to do it.

According to the doctrine in the *Prince*'s caſe, 8 *Co.* an eſtate may ceaſe and revive again.

So here this may diveſt on the death of the father, and veſt on the birth of the ſon.

There is no ſort of difficulty: as in the caſe of a bargain and ſale inrolled when the eſtate veſts by relation in the bargainee from the time of the execution of the deed.

This act of parliament has in my opinion eſtopped every body from ſaying he was not born in the life-time of his father.

Suppoſe an ejectment brought by the ſon, and the demiſe laid from the death of the father, how could the defendant have excepted to it; for if he laid his demiſe upon the day after the death of the father, then it would have turned upon the conſtruction of this act; and the demiſe being only a form of proceeding to bring the title in queſtion, the defendant in ejectment muſt have confeſſed leaſe, entry and ouſter: or otherwiſe an infant could not bring an ejectment if it were conſidered as a real action.

This court would conſider the uncle as a receiver or a truſtee for the after-born ſon, even ſuppoſing the point againſt him at law.

But ſuppoſe the point is againſt him at law, yet I am of opinion this court would conſider the uncle as a receiver or a truſtee for the after-born ſon, in like manner as they would conſider truſtees to preſerve contingent remainders, and the words of the act warrant this.

This court conſiders every perſon who enters upon the eſtate of an infant as a guardian and receiver for him.

There are ſeveral caſes, where in conſequence of an act of parliament this court will interfere.

As

As where a new act of parliament is made to alter the law, and the judges are formal in adhering to rules of law, and will not conſtrue according to the words and intention of the act, there this court will take it up, and will give remedy here, though it is the buſineſs of judges to mould their practice ſo as to make it conformable to the legiſlature.

Where a new act of parliament is made to alter the law, it is the buſineſs of judges to mould their practice ſo as to render it conformable to the legiſlature.

It is true the moſt common way is to give *a legal* remedy; but to inſtance in acts relating to papiſts eſtates, the court have given remedy here, therefore I am of opinion that the intermediate profits of the ſettled eſtate muſt be accounted for to the ſon.

As to the profits of the eſtate deſcended, they muſt be accounted for only from the birth of the plaintiff.

The profits of the eſtate deſcended, are the poſthumous child's from his birth only.

The other queſtion relates to the perſonal eſtate, as to the ſum of 800 *l.* that belonged to Mrs. *Elizabeth Baſſet*, given by the grandfather of the plaintiff *Francis Baſſet* by way of general legacy, to be paid at twenty-one or marriage, charged upon a mixed fund partly real and partly perſonal eſtate.

A legacy of 800 *l.* deviſed to *E. B.* payable at 21 or marriage, charged on a mixed fund partly real and partly perſonal eſtate; *ſhe died before* 21, *and unmarried. As aſſets were admitted, this court will not grant an injunction to ſtay the proceedings in the eccleſiaſtical court for the recovery of the legacy, as they have a proper juriſdiction for legacies charged on perſonal eſtate.*

She died before twenty-one and unmarried.

As aſſets are admitted here, and as there has been no determination that where the perſonal eſtate is deficient, the real eſtate ſhall be applied, I will not direct it now. *Vide Jennings* verſus *Looks*, 2 *P. Wms.* 276. *and the Duke of Chandos* verſus *Talbot*, 2 *P. Wms.* 601, 611.

Will this court grant an injunction, to ſtay the proceedings in the eccleſiaſtical court for the recovery of the legacy?

Certainly not, as it is a proper juriſdiction for legacies charged on perſonal eſtate.

It muſt go to the repreſentative of *Elizabeth Baſſet*, and be paid out of the perſonal eſtate.

December the 18*th* 1744.

LORD CHANCELLOR.

I had not time yeſterday to conſider the caſe of *Baſſet* verſus *Baſſet* ſo well as I ſhould have done, but ſpoke chiefly from my memory, and

and therefore as I ſaw ſeveral gentlemen yeſterday take notes, I think proper to mention what in my opinion is very material, that they may add it to the caſe.

Before the 10 & 11 *W.* 3. all ſkilful conveyancers inſerted a limitation to preſerve the contingent remainders to poſthumous children, but ſince the ſtatute they have left it out; which ſhews their uniform opinion that this act of parliament carries the intermediate profits as well as the eſtate.

Before the making of 10 & 11 *W.* 3. the conſtant method of all ſkilful conveyancers was to inſert a limitation to preſerve the contingent remainders to poſthumous children.

Sometimes the limitations were made to the mother, ſometimes to a truſtee for the benefit of the child when born.

Ever ſince this ſtatute, all ſkilful conveyancers have left it out: And this is a ſtrong circumſtance to ſhew the uniform opinion of eminent conveyancers, that this act of parliament carried the intermediate profits as well as the eſtate.

If they thought there had been any doubt, they would not have left it out, becauſe it would be of conſequence, where the eſtates are large, for if half a year ſhould be incurred, it might be the odds of 5000 *l.* to the poſthumous child.

The practice of eminent conveyancers has always had great regard paid to it by every court of juſtice, and the point of dower in the Counteſs of *Radnor* verſus *Vandebendy* was determined intirely from their opinion.

The uniform opinion and practice of eminent conveyancers has always had great regard paid to it by all courts of juſtice; and as I have mentioned upon other occaſions, the caſe of the *Counteſs of Radnor* verſus *Vandebendy*, *Shower's Parl. Caſes* 69. was determined on the point of dower entirely from the opinion of conveyancers upon that head.

Caſe 67. *Aſhley* verſus *Pocock*, *amongſt the cauſe petitions*, *December* 19, 1744.

An executor ought to pay that creditor firſt who uſes the firſt diligence; ſo in an action at law, he who obtains the firſt judgment ſhall be preferred; otherwiſe as to legatees, for as there is no priority in legacies, an executor ſhould pay them *pari paſſu*.

MR. *Barnſley* by his will deviſes the reſidue of his eſtate between the *Kingſcots and Pococks*; the plaintiff *Aſhley* married one of the *Pococks*, the *Kingſcots* brought the firſt bill againſt *Barnſley*'s executor for an account, and obtained a final decree; then *Aſhley* brought the ſecond bill againſt the executor of *Barnſley*'s executor.

A petition is now preferred by *Aſhley*, who is intitled to a diſtribution under *Barnſley*'s will, for fourteen hundred pounds, to be paid him out of a ſum of money placed in the bank to the credit of this cauſe.

LORD CHANCELLOR.

Suppoſe two creditors at large of the firſt teſtator *Barnſley*, and one brings a bill before the other, and obtains a final decree, and a report of the Maſter, and that report has been confirmed, and then the other brings a bill, and obtains a final decree, and his demand is confirmed; to be ſure the executor ought to have paid the firſt who had uſed the firſt diligence; ſo in the caſe of an action at law, the creditor who obtains the firſt judgment ſhall be preferred.

But this is not the preſent caſe, for the perſons here are not creditors of the firſt teſtator but legatees under his will; and therefore *Pocock*, the executor of *Barnſley*, ſhould have paid them *pari paſſu* in his life-time, for there is no priority in legacies.

Robinſon verſus *Litton*, *December* 12, 1744.

Caſe 68.

THE father of the plaintiffs and defendant, by his will deviſed to the defendant, his ſon, *John Robinſon Litton*, "the lands "upon which the queſtion ariſes, to him and his heirs for ever, "and in caſe he ſhould not live to twenty-one, and die without "iſſue, he gave the lands to his daughters (who are the plaintiffs) "with ſeveral remainders over; then he goes on, and ſays, my "will is, in caſe my ſon ſhall not attain twenty-one, my eſtate "ſhall be ſold, and the money divided among my daughters, for "an augmentation of their fortunes, and gave to his daughters "10000*l.* beſides."

A. deviſes lands to his ſon and his heirs, but in caſe he ſhould not attain 21, and die without iſſue, then he gives the lands to his daughters, and directs they ſhould be ſold, and the money divided among the daughters: the ſon, who wants three quarters of a year of 21, intended cutting down 3000*l.* worth of timber: the daughters bring a bill to ſtay waſte: *The court of opinion, they are intitled to an injunction, as it is purſuing the teſtator's intention, and preſerving the value of the eſtates intended to go to the daughters.*

The eſtate which came to the ſon by ſettlement, was between three and four thouſand pounds a year.

The ſon, who wants about three quarters of a year of coming of age, intends cutting down three thouſand pounds worth of timber off the eſtate.

The bill is brought by the daughters amicably, for an injunction to ſtay waſte, and in order to have the opinion of the court on this point, whether the defendant had a right to cut down the timber.

LORD CHANCELLOR.

If the defendant has a legal right, and there are no equitable circumſtances to reſtrain him, I ſhall not do it.

But though he may have a legal right, yet if there are equitable circumſtances he may be reſtrained, and it is not proper for me to give a liberty in doubtful caſes.

As to the intention of the teſtator, he certainly had not the leaſt thought that the ſon before his age of twenty-one, ſhould fell all the timber upon the eſtate.

The inheritance is conſtituted of the land and timber upon it, and that is deviſed to be ſold for the benefit of his daughters.

The intent was to give the value of the eſtate at the time it was deviſed.

A perſon having meadow ground might as well make it arable.

What is the will?

The clauſes muſt be conſtrued as if they were in one and the ſame clauſe.

Suppoſe the laſt clauſe had been firſt, the defendant would have been conſidered as a truſtee of the inheritance for the benefit of the daughters; and that is the point I ſhall ground the injunction upon to ſtay waſte.

This court have gone greater lengths to ſtay waſte than the courts of law have in giving actions, or granting prohibitions againſt it.

Tenant for life ſubject to waſte, remainder for life diſpuniſhable for waſte, remainder in fee, the court will not ſuffer an agreement betwen two tenants for life to commit waſte, to take place againſt the remainder-man.

As where there is tenant for life, remainder for life, remainder in fee, ſo where there is tenant for life ſubject to waſte, remainder for life diſpuniſhable for waſte, remainder in fee, the court will not ſuffer an agreement between the two tenants for life to commit waſte, to take place againſt the remainder-man, before the time comes when the ſecond tenant for life's power commences.

Where a mortgagor commits waſte, he will be reſtrained, becauſe the whole eſtate is a ſecurity.

So, in mortgages and ſecurities, where the mortgagor has been in poſſeſſion, it is always granted, becauſe the whole eſtate is a ſecurity, but the court does it more ſtrongly where there is a truſt.

The clauſe in this will amounts to as much, as if he had ſaid, I give my eſtate to my ſon and his heirs, till twenty-one, to receive the profits, then to increaſe my daughters portions; and here there could be no doubt but the court would have done it.

There are at this day three ſorts of eſtate in lands; the legal eſtate, that is the fee or freehold.

Secondly, The uſe, which by the ſtatute draws the legal eſtate after it.

Thirdly, The beneficial intereſt.

How does it ſtand upon this deviſe?

There is an undoubted eſtate in fee in the defendant, and he may receive the profits till twenty-one.

This amounts to a deviſe of the beneficial intereſt to him for that time, and it would be very extraordinary to ſuffer him to take away a great part of the inheritance of the eſtate, which was directed to be ſold, not for ſtrangers, but for the benefit of the daughters for their portions.

The father is to judge of the proviſion for his children.

After giving the daughters 10,000*l.* he then directs this ſhall go in augmentation.

There have been ſeveral caſes put which have never been determined, as that of a child *in ventre ſa mere*, but always ſaid *arguendo*, and I ſhould make no ſcruple in ſuch a caſe to grant an injunction.

Lord Hardwicke declared he ſhould have no ſcruple to grant an injunction to ſtay waſte in favour of a child *in ventre ſa mere*, though it has been hitherto ſaid *arguendo* only.

Suppoſe the caſe of an executory deviſe, as in *Gore* verſus *Gore*, I ſhould doubt whether the heir at law ought not to be reſtrained from committing waſte in the mean time.

Inclinable to think, that in an executory deviſe the heir at law ought to be reſtrained from committing waſte.

I am therefore of opinion, the injunction ought to be made perpetual.

It is purſuing the intention of the teſtator, and preſerving the value of the eſtates intended to go to his daughters.

Stamper

Caſe 69. *Stamper* verſus *Millar*, *February* 20, 1744.

A proviſo in a ſettlement, that 1000 *l.* *ſhall and may* be laid out by the truſtees in the purchaſe of lands.

A Queſtion in this cauſe aroſe upon a ſettlement made upon a marriage, in which there was a proviſo, that one thouſand pounds therein mentioned ſhall and may be applied and laid out by the truſtees in the purchaſe of lands and hereditaments, freehold or copyhold.

Where there is a power to lay out money in land, but the original intention was, it ſhould be conſidered as money, if not veſted in land, it ſhall not be conſidered as ſuch, and go to the heir.

It has been inſiſted by the plaintiff, the heir at law of the covenantor in the ſettlement, that the thouſand pounds was at all events to be laid out in land; and though the truſtees have not done it, yet, that it is to be conſidered in this court as land, and conſequently he is intitled to an account from the truſtees repreſentatives.

LORD CHANCELLOR.

Where there is a power to lay out money in land under ſome particular circumſtances, but the original intention was that it ſhould be conſidered as money, if it is not actually veſted in land, it ſhall not be conſidered as land, and go to the heir.

The firſt clauſe under the deed is a clear truſt of money, and a compleat direction of the intents and purpoſes for which it was created.

All the words in the deed, while it is to continue money, are poſitive and imperative.

But the proviſo relating to the laying it out in land is only the aforeſaid 1000 *l.* *ſhall or may* be applied, *&c.*

Though the words *ſhall or may* in acts of parliament have been conſtrued abſolutely, yet here they were inſerted only to leave the election to the truſtees, either to continue the 1000 *l.* as it was, in perſonal ſecurities, or call it in, and lay it out in land.

It is different from the truſts of the money, for there is no covenant upon the truſtees to do it, but begins with the principal ſum of one thouſand pounds: And though *ſhall or may* in acts of parliament have been conſtrued abſolutely, yet this caſe differs greatly from that.

All the three truſtees are dead, and is not poſſible to be done now.

The words *ſhall or may* were only inſerted to leave the election to the truſtees, whether they would, for ſecuring the 1000 *l.* let it continue as it was already in mortgages or bonds, or call it in from theſe ſecurities, and lay it out in land.

The

The heir at law is not at all in the conſideration of the ſettlement, and therefore appears to me to be an extreme clear caſe againſt the plaintiff, that the thouſand pounds ſettled by the deed is to be conſidered as money.

His Lordſhip diſmiſſed the plaintiff's bill, but without coſts.

Hearn verſus *Barber*, *February* 28, 1744.

Caſe 70.

A Son of a freeman of the city of *London* received a ſum of money from his father after his marriage, but it did not appear to have been paid as a portion, nor under the father's hand, but it was admitted at laſt, by council, that the parents on both ſides met, ſome years after the marriage, and agreed to advance two hundred pounds apiece, to lie by, till they could purchaſe a commiſſion in the army for the ſon.

Some years after the marriage of the ſon of a freeman of the city of *London*, the parents on both ſides met, and agreed to advance 200*l.* a piece, to lie by, till they could purchaſe for him a commiſſion in the army. *It appearing to the court to be intended as a marriage portion, they conſidered it as an advancement, and a bar to the orphanage ſhare.*

The queſtion is, whether this bars the ſon of the orphanage part.

I always took it, that the cuſtom of *London* relates to advancement upon marriage, and though *Jud's Law* is in general terms, ſtill it may be relative to the portion.

But I do not know whether the fact will warrant me to ſend it to the court of lord mayor and aldermen, to certify whether this is ſuch an advancement as is a bar; for it appears upon the very face of it to be a marriage portion, and as this is the fact, it certainly is an advancement.

But as to another child of the freeman, the ſums advanced to him, as he was not married, is clearly no excluſion.

Jud's Law, which was an act of common council, in the time of King *Henry* the Sixth, does not make it a bar, unleſs it was an advancement upon marriage, for the only doubt upon that law is, whether an advancement to a child either before, or after the marriage, is a bar.

Jud's Law, which was an act of common council, in *H.* the 6th's time, does not make it a bar, unleſs it was an advancement upon marriage.

The difficulty I ſhould have been under was this, had not the fact been (as it is now admitted by the council on both ſides) whether, ſuppoſing a freeman of *London* advances ſums of money at different times, and none of them appear under the father's hand to be advanced upon the marriage, this would be a bar to the child's claiming his orphanage part.

The father being dead inteſtate, the ſon intitled to his whole ſhare of the teſtamentary part, without bringing into hotchpot the money he received in advancement.

Lord Hardwicke ſeemed to make a doubt at firſt, whether the child, advanced by the father, muſt not bring the part of the orphanage ſhare he received in his father's life-time into the teſtamentary (the father being dead inteſtate) before he can be intitled to a ſhare under the ſtatute of diſtributions.

But upon the hardſhip of it, as it would in effect be excluding him from receiving any thing from his father, his Lordſhip held, that he would be intitled to his whole ſhare of the teſtamentary part, without bringing into hotchpot the money he received in advancement in the life-time of his father.

Snellgrove verſus *Baily*, *March* 11, 1744.

Caſe 71.

S. B. who had a bond for 100*l.* from one *Spackman*, delivers it to the defendant, ſaying, in caſe I die it is yours, and then you will have ſomething: This is a ſufficient *donatio cauſa mortis* to paſs the equitable intereſt of this bond on the inteſtate's death.

A Bond for 100*l.* was given by one *Spackman* to *Sarah Baily*, which *Sarah Baily* delivered to the defendant, ſaying, in caſe I die, it is yours, and then you will have ſomething.

The plaintiff, as adminiſtrator to *Sarah Baily*, has brought this bill to have the bond delivered up.

Mr. *Attorney General*, council for the defendant, cited *Drury* verſus *Smith*, 1 *P. Wms.* 404. and *Jones* verſus *Selby*, *Prec. in Chan.* 300.

LORD CHANCELLOR.

I am ſatisfied upon the reaſon of the thing, and the caſes which have been cited, that this is a ſufficient *donatio cauſa mortis* to paſs the equitable intereſt of this bond upon the inteſtate's death.

The bill is brought, knowing where the bond is, to have the defendant deliver it up to him.

The queſtion is, whether the plaintiff is intitled to take this bond out of the defendant's cuſtody.

Though you may give evidence of a deed at law, that is loſt, you cannot of a bond, for you muſt make a profert of it.

This is not a bill brought merely upon the loſs of a bond.

You cannot ſue at law without the bond; for though you may give evidence of a deed at law that is loſt, yet you cannot of a bond, becauſe you muſt make a profert of it.

There is no evidence, but the defendant's anſwer, that ſhe has the bond; and by her anſwer, ſhe ſets forth the whole caſe.

The queſtion is, whether this bond is the proper ſubject of ſuch a gift, eſpecially, conſidering how far the courts have gone lately in aſſignments of *choſes in action*.

Put the caſe, If a chattel in poſſeſſion had been bought by the inteſtate, and the bill of ſale taken in a third perſon's name in truſt, the legal property would have been in the truſtee, and only the equitable intereſt in the *ceſtuy que truſt*; and yet, if the *ceſtuy que truſt* had delivered it over to the defendant, that would have been a good gift *donatio cauſa mortis* as to the equitable property.

This comes very near the caſe of a *choſe in action*, and the caſes are ſo, and that in *P. Wms.* particularly is in point. *

Therefore his Lordſhip decreed for the defendant, and diſmiſſed the bill, but without coſts.

Gage verſus *Bulkeley*, *March* 23, 1744.

Caſe 72.

THIS was a plea of a foreign ſentence in a commiſſary court in *France*, relating to the ſame matters for which the bill was brought here.

A plea of a foreign ſentence over-ruled, being in a commiſſary court only, that is of a political nature, for determining diſputes relating to *French* actions.

LORD CHANCELLOR.

It muſt be over-ruled, for it is the moſt proper caſe to ſtand for an anſwer, with liberty to except, that I ever met with; and the more ſo, as it is a ſentence in a commiſſary court only, which is of a political nature, in order to determine diſputes that might ariſe in relation to *French* actions.

Eaſter Term, *May* 9, 1744.

Caſe 73.

SIR Herbert Packington, tenant for life, without impeachment of waſte, of an eſtate at *Weſtwood*, in *Worceſterſhire*, being out of the kingdom, his agent was made defendant to a bill brought to ſtay waſte by Mr. *Packington*, ſon of Sir *Herbert*, and firſt tenant in tail, and has put in an anſwer.

Though a perſon be tenant for life, *without impeachment of waſte*, yet this court will grant an injunction to reſtrain him from cutting down trees in lines or avenues, or ridings in a park, as they are for ornament.

The motion now was, for an injunction to ſtay Sir *Herbert Packington*'s agent from cutting down trees in the park at *Weſtwood*, which are either *an ornament, or ſhelter*, to the manſion houſe.

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* One by will diſpoſes of his perſonal eſtate, and afterwards, by parol, gives 100*l.* bill to one, to deliver over to his nephew, if the teſtator ſhould die of that ſickneſs; ſuch gift decreed good. *Drury* verſus *Smith*, 1 *P. Wms.* 404.

LORD

LORD CHANCELLOR.

The reaſon why the common law gave ſo large a power to a tenant for life, *without impeachment of waſte*, was, for the intereſt of the publick, as timber might thereby circulate for ſhipping, and other uſes.

It might be for the intereſt of private families if the common law had not given ſo large a power to tenant for life, *without impeachment of waſte*, equal to a tenant in fee; but the common law thought it for the intereſt of the publick, as timber might thereby circulate for ſhipping and other uſes

But this court has reſtrained their power greatly, in compariſon of what it was formerly.

The firſt caſe came before Lord *Cowper*, of *Vane* verſus *Lord Bernard*, 2 *Vern.* 738 where the defendant was reſtrained from pulling down *Raby Caſtle*.

The court has gone farther, and has reſtrained ſuch tenant for life from cutting down timber, either for ornament or ſhelter of the houſe; and farther ſtill in the caſe of *Charleton* verſus *Charleton*, in extending it to the caſe of a park.

There was, indeed, a difference of opinion between Lord Chancellor *King*, and the Maſter of the *Rolls*, but only in part, for Lord *King* continued the injunction as to trees for ornament, or ſhelter, but diſſolved it as to ſtraggling trees.

It is very proper for the court to preſerve trees that are a ſhelter to the manſion houſe.

In the preſent caſe, only three oaks have been cut down, and if there was no intention to commit further waſte, it would be material, but this appears to be but the beginning of waſte; for Sir *Herbert Packington*'s letter has been read in 1741, whilſt he was abroad, in which he ſays, if his ſon will not join with him in cutting off the intail, he will give orders for cutting down all the ornamental timber trees.

The queſtion is, whether theſe are grounds for an injunction to ſtay waſte?

The firſt objection is, that theſe trees grow in a wood, and have ariſen naturally, and by accident, and not from planting.

Whether trees grow natural, or were planted, if they ſerve as an ornament, or ſhelter, it is the ſame thing.

But I do not think this will hold, becauſe, whether trees grow natural, or were planted, if they ſerve as an ornament, or ſhelter, it amounts to the ſame thing; and it is very probable the ſituation of the houſe was choſen for the ſake of cutting ridings, and viſtas through the woods; and I can mention two of this kind of my own

own acquaintance, *Hamſtead*, a ſeat of Lord *Craven*'s, and another in *Eſſex*.

I will reſtrain the defendant, therefore, from cutting down trees in lines, or avenues, or ridings in the park; and likewiſe from cutting down trees that are not of a proper growth to be cut.

Upon a ſuggeſtion that this might create diſputes, as to what were of proper growth, and that very little young timber grows in this park, his Lordſhip left out the laſt part of the order, and as to the other, granted the injunction.

Jones verſus *Jones*, *Eaſter Term*, 1745. Caſe 74.

THIS cauſe came before Lord *Hardwicke* upon the equity reſerved.

If the objection by the defendants in the original cauſe, for want of parties to the ſupplemental, is not made in the firſt inſtance, it is too late to do it when the cauſe comes on again, where it was put off only for want of formal parties, in order that the decree might be complete.

An objection was ſtarted, that the plaintiff had not made the defendants in the original bill parties to a ſupplemental bill, brought after a decree in the original cauſe.

Lord Chancellor over-ruled the objection.

A ſupplemental bill, properly ſo called, is a bill brought for any new matter, ariſen ſince the filing the original bill, and before the original comes to a hearing, and there the defendants to the original, ought to have been made parties to the ſupplemental bill.

But, when the cauſe comes to be heard, if the objection by the defendants in the original cauſe, for want of proper parties to the ſupplemental, was not made in the firſt inſtance, it will be too late to make the objection when the cauſe comes on again, if it was put off only for want of formal parties by the court, in order that the decree might be complete.

It is not neceſſary to make defendants in an original bill parties to a ſupplemental one, in the nature of a bill of revivor, nor on the rehearing, can they object for want of parties.

In a decree to account, if, during the account, any party ſhould die, and a deviſee of that party, or any other formal party as truſtees (which is the preſent caſe) ſhould be wanting, a bill to bring them before the court, is not, in the ſtrict ſenſe of the word, a ſupplemental bill, but rather a ſupplemental bill in the nature of a bill of revivor, and to ſuch a bill it is not neceſſary to make the defendants in the original bill parties, nor, when the cauſe comes on to be reheard, can thoſe defendants object for want of parties.

Caſe 75. *Brown and others* verſus *Martin and Heathcote*, *May* 24, 1745.

The ſame defendants who made default in another cauſe, make default again, at the hearing of a ſupplemental one,

THERE was a decree *niſi* in another cauſe againſt *Martin* and *Heathcote*, who made default; the plaintiffs there were aſſignees under a commiſſion of bankruptcy againſt *Roger Williams*; after the decree new aſſignees were choſen, who bring a ſupplemental bill, in the nature of a bill of revivor; at the hearing the ſame defendants make default again.

where the bill is brought by new aſſignees in a commiſſion of bankruptcy choſen ſince the decree in the firſt cauſe, the prayer of this bill praying only that theſe defendants might ſhew cauſe, and not that they might ſhew cauſe *why the former decree ſhould not be made abſolute*, which it ought to have done, *the court only ordered that the plaintiffs be at liberty to ſerve the defendants with a ſubpœna to ſhew cauſe againſt the former decree.*

The queſtion is, whether the plaintiffs, the new aſſignees, can have any other decree, but that the defendants making default, may ſhew cauſe why the order ſhould not be made abſolute, for carrying the former decree into execution, which decree is only unleſs cauſe.

LORD CHANCELLOR.

This occaſions great delay and expence; but the queſtion is, whether the plaintiffs in the ſupplemental bill have prayed any more than that the defendants making default ſhould ſhew cauſe.

They ſhould have prayed, that the defendants at the ſame time might ſhew cauſe why the former decree ſhould not be made abſolute. *N. B.* The prayer of the *ſubpœna* was ſo, but not the prayer of the bill.

Upon further conſideration the Chancellor made this order.

Let the former decree be revived, and let the plaintiffs in the preſent cauſe ſtand in the place of the former to all intents and purpoſes, and be at liberty to ſerve the defendants *Martin* and *Heathcote* with a *ſubpœna* to ſhew cauſe againſt the former decree.

I

Trinity

Trinity term, June 14, 1745. Caſe 76.

MR. *Green* moved that a perſon might ſtand committed, for an abuſe of the proceſs of this court, in ſpeaking contemptuouſly of it, when a *ſubpœna* was ſerved upon her.

Though contemptuous words were ſpoken of a *ſubpœna*, and the perſon ſerving it ſeverely beaten, yet as theſe facts were proved by the oath of a ſingle perſon only, the court would not in the firſt inſtance order him to ſtand committed, but made a rule upon him to ſhew cauſe, why he ſhould not ſtand committed.

Lord Chancellor was of opinion at firſt, that notice ought to have been given of the motion before a commitment can be moved for; but upon Mr. *Green*'s ſuggeſting that the perſon who had ſerved the *ſubpœna*, and received ſeveral blows in the face, and had been very ſeverely beaten, his Lordſhip ordered the affidavit to be read.

The fact of the contemptuous words, and likewiſe of the beating, was proved by the oath of a ſingle perſon only.

His Lordſhip thought it was not ſufficient to found a commitment, unleſs the charge had been made out by the oaths of two witneſſes.

But upon aſking Mr. *Edwards* the regiſter, what was the rule in theſe caſes, he ſaid, he took it to be the rule of the court, that upon a motion for a commitment, for contemptuous words, upon ſerving the proceſs of the court, the oath of two perſons is neceſſary to prove the fact, but that one is ſufficient to prove a battery upon the perſon by whom the proceſs is ſerved.

Mr. *Edwards* the Regiſter on being aſked, ſaid, he took it to be the rule of the court, that on a motion for a commitment, the oath of two perſons was neceſſary to prove contemptuous words, upon ſerving the proceſs of the court; but one was ſufficient to prove *a battery* on the perſon by whom it was ſerved. But Lord *Hardwicke* doubted of this difference.

His Lordſhip doubted whether this difference had been taken; and therefore made a rule only for the perſon complained againſt to ſhew cauſe, why he ſhould not ſtand committed.

Billingſley and others verſus *Wills and others*, *June* 17, 1745. Caſe 77.

THE queſtion aroſe in this caſe out of the will of *Arthur Billingſley*, of the 19th of *November* 1720.

The court of opinion that *L.* on the circumſtances of the caſe was not entitled under the will of *A. B.* to a ſhare in 1500 *l.* therein deviſed, and conſequently not tranſmiſſible to the defendant *Wills*, her huſband and repreſentative.

" I do further give and bequeath to my brother *Capel Billingſley* " *the intereſt of fifteen hundred pounds* during his natural life, then " from and after the deceaſe of my brother *Capel Billingſley*, I give " the ſaid ſum of fifteen hundred pounds unto and amongſt all " and

" and every the younger ſon and ſons, in caſe there be any younger " ſons, and all and every the daughter and daughters of my brother " *Capel Billingſley* now lawfully begotten, or to be hereafter be- " gotten, ſhare and ſhare alike; *but in caſe he ſhall have only* " *daughters lawfully begotten, then only unto and amongſt the younger* " *daughter or daughters, and to be paid to them all, every and each* " *of them, at and when they ſhall have obtained to their reſpective* " *ages of one and twenty years.*

" But my expreſs will and meaning is, that no elder ſon, in caſe " there ſhall be more than one ſon, nor any elder daughter, if there " be only daughters of my *Brother Billingſley living at his deceaſe,* " *ſhall have any part, ſhare or intereſt in the* 1500 *l.*

" But in caſe all the children of my ſaid brother *Capel Billingſley* " except one, either ſon or daughter, ſhall happen to die before " their reſpective ages of twenty-one, then I give one thouſand " pounds, part of the fifteen hundred pounds, to ſuch ſurviving only " child, whether ſon or daughter, and to be paid to him or her " at their age of twenty-one.

The plaintiffs by their bill prayed, that the former cauſe, ſo far as relates to the ſum of 884 *l.* 14 *s.* 6 *d. South-ſea* annuities in the bank, may be revived, and the plaintiffs have the benefit thereof.

LORD CHANCELLOR.

The facts in this caſe are, that *Capel Billingſley* had three children, a ſon and two daughters, at the time of *Arthur Billingſley*'s making of his will, and one ſon born after the death of the teſtator.

Lætitia, one of the daughters, marries and attains her age of twenty-one, but dies before her father, and then he dies.

The queſtion is, whether *Lætitia*, the daughter of *Capel Billingſley*, having attained her age of twenty-one, but dying in the life-time of the father, was entitled under the will of her uncle *Arthur Billingſley* to a ſhare in the payment of the fifteen hundred pounds, and if it is tranſmiſſible to her repreſentative, the defendant *Wills* her huſband.

I am of opinion ſhe is not entitled.

There are ſome obſcure clauſes in the will.

The teſtator does not begin with giving the fifteen hundred pounds to *Capel Billingſley*, but only the intereſt, then follows, *Item*, from and after the deceaſe of my brother *Capel Billingſley*, I give the ſaid ſum of fifteen hundred pounds, *&c.*

Now

Now, if there had been nothing ſaid of the intereſt before in the will, and the clauſe had begun with from and after the deceaſe of *Capel Billingſley*, *&c.* there could have been no doubt but the veſting muſt have been after the father's death, for the payment is annexed to *the ſubſtance of the legacy*, which is *Clobery*'s caſe, 2 *Ventr.* 242.

It is plain in this caſe nothing is given in the principal ſum of fifteen hundred pounds to the children till after the death of the father, and that it is not to take place till then in point of veſting, as well as in point of payment.

And to be paid to them all at and when they ſhall have attained to their reſpective ages of twenty-one years.

Not intended to make it abſolutely payable at twenty-one, but only to reſtrain the deviſees from receiving till twenty-one, if they ſurvived the father, and ſhould be infants at the time of his death.

It has been contended on the part of the defendants that this clauſe meant to give it to any ſons or daughters who ſhould attain the age of twenty-one, at any time.

It is manifeſt to me that this relates to younger ſons and younger daughters, who ſhall be living after the deceaſe of the father *Capel Billingſley:* for at the time of the teſtator's making his will, *Capel* had only one ſon and two daughters; the teſtator conſidered no doubt both the daughters as younger children, whether in fact ſo, or not; for this court too conſiders them as ſuch, though in point of age the daughters are older than the ſons.

The words *but in caſe he ſhould have only daughters*, cannot poſſibly refer to the time of making the will, for the brother had a ſon as well as daughters living at that time, therefore muſt refer to ſome future time, that if he ſhould *hereafter* have only daughters, *then to the younger daughter or daughters*, *&c.*

The queſtion is, when will be that future time.

It muſt naturally be the time the teſtator mentions at the beginning of his will, the death of *Capel Billingſley*.

The words *when they ſhall have attained their reſpective age of twenty-one years*, are not pretended to relate to the time of veſting, becauſe the father was to enjoy the intereſt of the 1500 *l.* during his life.

But my expreſs will and meaning, is, that no elder ſon ſhall have any part, ſhare or intereſt in the fifteen hundred pounds.

What is the effect of theſe words? Why, plainly to deſcribe further the perſons who were to take the benefit of this legacy.

Nor any elder daughter, if there be only daughters of my brother Billingſley living at his deceaſe, ſhall have any ſhare, &c. in the fifteen hundred pounds.

What do the words *living at his deceaſe* refer to? Undoubtedly to both members of the ſentence, and is a further deſcription, *videlicet*, that ſhould there be ſuch ſons or ſuch daughters, be they one, or the other, who ſhould be living at the time of *Capel Billingſley* the father's deceaſe.

Theſe words are not only deſcriptive of the child excluded, but likewiſe of the children which are to take.

All the ſons and daughters *living at the time of his deceaſe*, falling in with the intention of the teſtator upon the preceding part of the bequeſt, *the veſting at the time of his brother's deceaſe.*

It has been ſaid this muſt be conſidered as *veſting* at the death of the teſtator, in thoſe children who were born before the teſtator's death, and the child born afterwards, but diveſting again, when either of them die before the age of twenty-one; there is no pretence for this, nor will the words admit of ſuch a conſtruction.

It has been ſaid too that the moſt liberal conſtruction ought to be made in the caſe of portions.

I do agree in thoſe caſes where a father is making a proviſion for children, which is called *a debt of nature*, the court will ſtrain in their favour: but this is not the preſent caſe, for it is the bequeſt of a collateral relation, and is a mere bounty only.

Upon the latter clauſe, *but in caſe all the children of my ſaid brother Capel Billingſly, &c.* It has been ſaid, as this is not reſtrained to his ſurviving the father, it ought to affect the conſtruction of the other parts of the will.

But as this is a contingency which has not happened, for there are two ſons and a daughter living, I ſhall not extend it ſo far as to affect any other preceding clauſe.

And if the firſt words are to have the conſtruction I have already mentioned, even *if that one child* had died before his age of twenty-one, he could not have been entitled.

Upon

Upon the whole, I am of opinion that all the ſubſequent words muſt relate to the preceding, *from and after the deceaſe* of the teſtator's brother *Capel Billingſley*.

Lord *Hardwicke* ordered, that the dividends which accrued due on the 884*l.* 14*s.* 6*d.* *South-Sea* annuities now ſtanding in the name of the Accountant General before *Michaelmas* 1743. and which were not received by *Capel Billingſley* in his life-time, be paid to the plaintiff *Ann Billingſley* the adminiſtratrix of her late huſband *Capel Billingſley*, and that all ſuch dividends as have accrued ſince *Michaelmas* 1743. be divided into moieties, and one moiety thereof be paid to the truſtees in the aſſignment by the defendant *Dove* and *Ann* his wife, the ſurviving daughter of *Capel Billingſley*, and the other moiety of the ſaid dividends be paid to the plaintiff *Ann Billingſley*, *John Billingſley* her ſon, by his council praying the ſame. And further ordered that ſo much of the 884*l.* 14*s.* 6*d.* *South-Sea* annuities be ſold as is ſufficient to anſwer the coſts to ſuch of the parties againſt whom the bill is diſmiſſed, and that the reſidue be divided into moieties, and one moiety thereof be transferred to the plaintiff *John Billingſley*, and the other moiety to the truſtees, ſubject to the truſts in the defendant *Dove*'s aſſignment.

Williams verſus *Lee*, *June* 26, 1745. *in the paper of pleas and demurrers.* Caſe 78.

THE bill was brought in order to ſet aſide a verdict and judgment at law, as obtained againſt conſcience.

The defendant pleads the verdict, and judgment in bar.

The caſe, as ſtated by Lord *Hardwicke*, was as follows:

A ſpecific legacy being left under a will to the defendant in this court, he applied to the plaintiff, who was the executor, and who aſſented to the legacy, but delaying to deliver it, the defendant brought an action of trover for the legacy, conſiſting of ſeveral ſpecific things mentioned in the will, and had a verdict and two hundred pounds damages.

A ſpecific legacy being left to *L.* he applied to the plaintiff the executor, who aſſented; but delaying to deliver it, *L.* brought an action of trover for it, and had a verdict and 200*l.* damages; the executor preferred his bill here, and inſiſted, 1ſt, an action of trover would not lie for a legacy; and 2dly, that it is a verdict againſt conſcience, the damages being exceſſive. *The court held, that after an executor has aſſented, an action of trover certainly lies for a legatee; and that this was not a caſe where they would relieve againſt a verdict, and therefore allowed the plea of the verdict and judgment.*

The equity the plaintiff inſiſts upon, is, *Firſt*, That an action of trover would not lie for a legacy.

Secondly, That it is a verdict againſt conſcience, the damages being exceſſive.

A legatee is not obliged in every inſtance to bring a bill for the recovery of a legacy againſt an executor.

As to *the firſt*, it is very extraordinary if a legatee muſt in every inſtance bring a bill in this court for the recovery of a legacy againſt an executor; for though it is ſaid by the plaintiff's council, that after a teſtator's debts are paid the reſidue veſts in an executor, and the legatee is not entitled to it at law, yet after an executor has aſſented, an *action of trover* will certainly lie for the legatee.

The caſes in which this court relieves againſt verdicts are, where the plaintiff knew the fact of his own knowledge to be otherwiſe than what the jury found, and the defendant was ignorant of it at the trial.

As to relieving againſt verdicts, for being contrary to equity, thoſe caſes are, where the plaintiff knew the fact of his own knowledge to be otherwiſe than what the jury find by their verdict, and the defendant was ignorant of it at the trial; as where the plaintiff's action might be for a debt, *&c.* and the defendant after the verdict diſcovers a receipt for the very demand in the action, here the court would relieve.

Where a defendant ſubmits to try it at law firſt, when he might by bill of diſcovery have come at the fact, from the plaintiff's anſwer on oath before ſuch trial was had, the court will not always relieve againſt a verdict.

But even in theſe caſes they will not always relieve againſt a verdict, where the defendant ſubmits to try it at law firſt, when he might by a bill of diſcovery have come at this fact by the plaintiff's anſwer upon oath, before any trial at law was had.

But this is not the preſent caſe, for though the plaintiff at law firſt of all made an affidavit, the demand was worth forty pounds; that was done only in order to hold the defendant there to ſpecial bail, for he declared for things left under the will to the value of two hundred pounds, and the jury gave a verdict accordingly.

Allowing the damages to be exceſſive, the defendant at law ought to have applied to the court where the cauſe was tried, and moved for a new trial on that account.

But ſuppoſing the damages were exceſſive, the defendant at law ought to have applied to the court of Common Pleas, where the cauſe was tried, and moved for a new trial on account of the exceſſive damages; and as the defendant at law knew of the plaintiff's affidavit, where he ſwore to the cauſe of action being forty pounds, he might have uſed this as an argument upon the motion for a new trial, that the plaintiff himſelf upon oath valued the legacy at a fifth part of the damages only.

His Lordſhip allowed the plea.

Aggas verſus *Pickerell*, *June* 26, 1745. Caſe 79.

A Bill was brought to redeem a mortgage of four hundred pounds upon an eſtate of four hundred pounds *per ann.* after the mortgagee had been in poſſeſſion of the mortgaged premiſſes at leaſt thirty years.

A plea of the ſtatute of limitations allowed to a bill for redemption, after a mortgagee had been in poſſeſſion of the mortgaged premiſſes at leaſt 30 years.

The plaintiff by way of excuſe for not coming ſooner, ſays, the mortgagor was ſeveral years out of the kingdom, and died abroad.

The defendant pleads the ſtatute of limitations in bar, and by his plea inſiſts upon the length of time, he and the perſon under whom he claims having enjoyed the eſtate, and been in quiet poſſeſſion for ſuch a number of years.

LORD CHANCELLOR.

The excuſe the plaintiff makes is not ſufficient, for the perſon who has a right to redeem, ſhould take notice of it at his peril.

But I have a great doubt with me, whether the defendant can in this caſe plead the ſtatute of limitations, for inſiſting on the length of time againſt a bill to redeem, is only a kind of equitable bar, and taken by way of *analogy* to the ſtatute of limitations.

Length of time againſt a bill to redeem, is a kind of equitable bar, and by way of analogy to the ſtatute of limitations.

And the rule is for a defendant to inſiſt by his anſwer, and not by plea, upon the length of time.

Mr. *Hoſkins* ſaid there was a precedent in Lord Chancellor *King*'s time of ſuch a plea allowed by him, and that alſo he remembered where a demurrer in ſuch a caſe was allowed, which is ſtronger than a plea.

Mr. Solicitor General inſiſted, that Lord *Hardwicke* doubted in a former caſe, if a plea of the ſtatute of limitations to a bill to redeem a mortgage could be maintained: Whereupon the Chancellor ordered the plea to ſtand over to ſearch for precedents.

This matter came on again on the 6th of *Auguſt* 1745.

The caſes cited in ſupport of the plea were 1 *Ch. Caſ.* 102. *Pearſon* verſus *Pulley*. *Jenner* verſus *Cray*, the 26th of *May* 1731. *Clapham* contra *Boyer*, *Ch. Rep.* 110. 1 *Vern.* 418. *St. John* verſus *Turner*, *Ryley* verſus *Harveſt*, *January* 16, 1730. *Trevor* verſus *Floyd* in the court of Exchequer, before Lord Chief Baron *Pengelly*.

LORD CHANCELLOR.

Theſe caſes are very ſtrong, eſpecially thoſe that are cited from the books called *Chancery Caſes*, and *Chancery Reports*, and there can be no inconvenience reſulting from a plea.

Lord Chancellor *King* in a caſe of this kind allowed a demurrer; but Lord *Hardwicke* ſaid he was of a different opinion, and ſhould have over-ruled it, becauſe if allowed, the bill would be out of court, and that is carrying it too far.

But I am of a different opinion where it is inſiſted on by way of demurrer, for how is it poſſible to give a greater allowance to length of time, than the ſtatute of limitations does?

If a bill is brought to redeem, and the plaintiff ſets forth that he has been long out of poſſeſſion, and does not ſhew himſelf to be within any of the exceptions of the ſtatute, you cannot take advantage of that by demurrer; for the plaintiff may make it appear by way of reply, or by amending his bill, he is within the ſavings of the ſtatute, or upon a plea, he may prove himſelf to be within the exceptions.

But if it is to be allowed by way of demurrer, the bill would be out of court, and that I think is carrying it too far.

His Lordſhip allowed the plea in this caſe.

Caſe 80. *Southcot* verſus *Watſon*, *June* 9, 1745. *ſtood for judgment*.

General *Pulteney* by his will gives in the firſt part of it to Mrs. *Ann Watſon* the yearly ſum of 400 *l.* payable quarterly; and in the laſt clauſe gives her all his houſhold goods and furniture, (three pictures excepted) and all his plate, linen, watches, jewels and clothes whatſoever, and declared her ſole executrix.

THE bill was brought for an account of the perſonal eſtate of General *Pulteney* undiſpoſed of by his will, dated the 7th of *January* 1741. "whereby he gave ſeveral annuities out of his "ſtocks in the funds, amongſt the reſt to Mrs. *Ann Watſon* the "yearly ſum of 400 *l.* payable quarterly, and ſix other annuities; "then follow theſe words: *Item*, my will is, that what dividends "or ſums of money are now due upon any of the ſtocks or funds "in the Bank, *South-Sea*, *India*, or other public funds or ſecuri-"ties, and not received by me, the ſame ſhall be received by my "executrix, and laid out in the purchaſe of ſome other ſtocks, "with the advice of *William Pulteney*, Eſq; for the providing a "fund for the better payment of the ſaid annuities, in caſe my per-"ſonal eſtate in the ſtocks is not ſufficient for that purpoſe; but if "it ſhould be found ſo to be by my ſaid executrix, not doubting "but ſhe will give a faithful account of what is belonging to me in "the ſaid ſeveral ſtocks, then the ſaid dividends to be received by

The bill was brought for an account of ſuch part of the perſonal eſtate as is undiſpoſed of, and for a diſtribution. *The bequeſt of the ſpecific things to Mrs. Watſon excludes her from the reſidue.*

"her

" her as aforeſaid, ſhall be laid out in ſuch manner as my ſaid exe-
" cutrix and *William Pulteney* ſhall agree to be moſt proper for the
" purpoſes following.

" *Item*, After the deceaſes of the ſeveral annuitants aforeſaid, I
" give and bequeath to my nephew *William Pulteney*, Eſq; his exe-
" cutors, adminiſtrators and aſſigns, all my principal ſtocks and
" ſecurities whatſoever, in truſt for his ſon *William* now an infant,
" and for ſuch younger ſon and ſons as he the ſaid *William* the in-
" fant ſhall leave at his death, ſhare and ſhare alike; and in caſe
" there is but one younger ſon, then I give the whole to him.
" *Item*, I give to Mrs. *Ann Watſon* all my houſhold goods and fur-
" niture, (except what is herein after excepted) and all my plate,
" linen, watches, jewels and clothes whatſoever, and I declare the
" ſaid *Ann Watſon* ſole executrix.

N. B. *The exception was of two pictures to the Dutcheſs of Mountague, and another to ſomebody elſe.*

LORD CHANCELLOR.

This cauſe comes before the court on a bill brought by the plaintiff to have an account of ſome part of the perſonal eſtate of General *Pulteney* undiſpoſed of by his will, and to have it diſtributed according to the ſtatute made for that purpoſe of inteſtates eſtates.

The principal annuity is given to Mrs. *Watſon* of four hundred pounds *per annum*, the firſt payment to be made on the firſt quarter day after General *Pulteney*'s death.

Then follows the clauſe upon which the queſtion principally ariſes.

Item, *After the deceaſe of the ſeveral annuitants aforeſaid, I give and bequeath to my nephew William Pulteney, Eſq; his executors and adminiſtrators, all my principal ſtocks and ſecurities whatſoever, &c.*

The moſt eſſential part to the preſent cauſe is what follows: Item, *I give to Mrs. Ann Watſon all my houſhold goods and furniture, (except what is herein after excepted), &c.* and all my plate, *&c.*

The teſtator died about three days after making his will on the 10th of *June* 1741.

The queſtions will fall *materially* under the following diviſions:

Firſt, Whether in a court of equity any part of the perſonal eſtate may be ſaid to be undiſpoſed of by his will?

Making a will and an executor, is held at law to be a diſpoſition of the whole perſonal eſtate.

This is merely a conſideration of equity; for at common law making a will and an executor is held to be a diſpoſition of the whole perſonal eſtate.

The rule of this court has been, ever ſince the caſe of *Foſter* verſ. *Munt*, that where a man gives his executor a legacy, he is to be conſidered as a truſtee for the next of kin.

Ever ſince the caſe of *Foſter* verſus *Munt*, 1 *Vern.* 473. before Lord Chancellor *Jefferies*, which underwent various fates, the doctrine eſtabliſhed in this court has been, that where a man makes a will and an executor, and gives him a legacy, he is to be conſidered as a truſtee merely for the next of kin, upon an equity founded on the ſtatute of diſtributions.

It is true this doctrine has prevailed by different ſteps and degrees.

Whether a legacy be given to an executor for his care and pains, or generally, it equally excludes him from the whole.

In *Foſter* and *Munt* the legacy was given to executors for care and pains, and held to be a bar of the reſidue; afterwards determined ſo where it was a legacy given generally; for there is nothing more in one caſe than in the other, becauſe it could not be imagined, if a teſtator gave his executor a particular legacy, that he could intend him the whole.

Some caſes indeed ſince have not ſo ſtrictly adhered to this rule.

Mr. *Vernon* ſaid to Lord *Macclesfield*, who conſulted him on this ſubject, that he apprehended it to be a principle as much fixed, as that fee ſimple land ſhould deſcend to the heir.

But in the caſe of *Farrington* verſus *Knightly*, 1 *P. Wms.* 544, 551. Lord *Macclesfield* ſaid, he had conſulted with Mr. *Vernon* upon this ſubject, who ſaid there had been ſo many decrees upon the point where a legacy was given to an executor, and no diſpoſition of the ſurplus, that the executor was but a truſtee for ſuch ſurplus; and this point had been thereby ſo fully eſtabliſhed, that he did not think it worth while to take notice of any latter decrees of this nature, apprehending it to be a principle as much fixed, *as that fee-ſimple land ſhould deſcend to the heir.*

The plaintiff, and ſome of the defendants, inſiſt the executrix was excluded from the ſurplus by ſeveral legacies being given to her, and that any one of them would have been ſufficient to bar her.

Had the queſtion reſted on Mrs. *Watſon*'s annuity only, it would have admitted of great doubt, as the firſt payment was not to begin till the quarter day after teſtator's death.

Firſt, As to the four hundred pounds a year annuity, if it reſted upon that, it would admit of great doubt, for the firſt payment is not to begin till the firſt quarter day after the teſtator's death.

So that if ſhe had proved the will, and yet died before that quarter day, ſhe would not have been entitled.

It is charged too upon a fund which is liable to other legacies, therefore the annuity ariſes by way of charge upon a legacy, or by way of exception out of it; like the caſe of *Lady Granville* and *the Dutcheſs of Beaufort*, 2 *Vern.* 648.

The annuity being charged on a fund liable to other legacies, is either by way of charge, or exception out of it; had it been given out of the general reſidue it might have been a bar.

If given out of the general reſidue, indeed it might have been a bar, becauſe otherwiſe it would have been giving all, and ſome, which is an abſurdity.

Next as to houſhold goods and furniture, and all my plate, linen, watches, jewels and clothes.

This is a bequeſt of ſpecific things, though under a general deſcription.

But yet I am of opinion that ſhe is excluded of the reſidue.

Several objections have been made.

Firſt, That though a pecuniary legacy will exclude executors, yet a ſpecific one will not; and ſeveral caſes have been cited for this purpoſe; and it has been ſaid, that the teſtator might intend that in caſe there ſhould be a deficiency of the ſurplus, ſhe ſhould be ſecure of *the ſpecific legacies*.

This reaſoning would prove too much, it would hold almoſt as ſtrongly in the caſe of a pecuniary legacy, for it might be ſaid the teſtator intended his executor ſhould take ſomething at all events, and not depend merely upon the ſufficiency of the ſurplus.

As for the precedents which have been cited for the executrix, they ſeem to me to fail entirely.

The firſt caſe mentioned was *Jones* verſus *Weſtcomb*, *Prec. in Chanc.* 316. the report in this caſe is very ſhort as to the point for which it is here applied, and is beſides the caſe of a wife.

The next caſe was *Griffith* verſus *Rogers*, *Prec. in Chan.* 231. a huſband deviſes his library of books to *A.* except ten books, ſuch as his wife ſhould chuſe, and made her executrix, and held ſhe was not excluded from the ſurplus.

A huſband deviſed his library of books to *A.* except ten books ſuch as his wife ſhould chuſe, and made her executrix; held ſhe was not excluded from the ſurplus.

In this caſe the determination aroſe from the particular penning of the will; but the ſtrong reaſon which directed the court in their determination was, that there was no bequeſt of the books at all to the

The ſtrong reaſon which directed the court in the determination of that caſe was, that there was no bequeſt of the books to the wife, but the whole to another.

wife, but the whole to another perſon, and uncertain what ſhe will take, but left to fall into the ſurplus.

The next caſe was *Ball* verſus *Smith*, 2 *Vern.* 633. there the whole reaſon reſts in a manner, upon its being the caſe of a wife, and and no ſtreſs was laid at all on its being a ſpecific legacy.

On the other hand, that ſpecific legacies, generally ſpeaking, will exclude executors equally with pecuniary, are clearly and ſtrongly proved by the caſes cited for that purpoſe.

The caſe of Lady *Granville* verſus *Dutcheſs of Beaufort*, in 2 *Vern.* 648. and 1 *P. Wms.* 116. is extremely material.

The ground of the reverſal of the decree in the houſe of Lords was, that the legacy operated by way of exception out of, or was a charge upon a legacy given to another. *

If it had been before ſettled that ſpecific legacies would not have barred an executor of the reſidue, there would have been no occaſion to have reſort to this diſtinction; for according to the common rule, *exceptio probat regulam.*

The caſe of *Shrimpton* verſus *Stanhope* 1736. before Lord *Talbot.*

A bill was brought for a diſtribution among three children the next of kin; the words of the will were, I likewiſe appoint them heirs to my perſonal eſtate, conſiſting of, *&c.* ſpecifying what, together with my books.

Lord *Talbot* was of opinion the ſurplus was undiſpoſed and diſtributable.

This is a plain authority that ſpecific legacies bar an executor, and though the outſet mentioned generally perſonal eſtate, yet Lord *Talbot* reſtrained it by the particular words that followed afterwards.

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* The bill here was brought for a diſtribution of the ſurplus againſt the defendant, as executrix to the late Duke of *Beaufort*, who had deviſed the uſe of his table plate to the Dutcheſs for life, and afterwards to his grandſon, and made no diſpoſition of the ſurplus. *Lord Chancellor Cowper* admitted proofs to be read, that the teſtator intended to give *the ſurplus* to his executrix, but not thinking the evidence ſtrong enough, decreed a diſtribution.

This cauſe came afterwards before the Houſe of Lords upon appeal on the 18th of *December* 1710. The appellant's council inſiſted that it was proved in the cauſe, that it was the intent of the teſtator that the appellant ſhould have the ſurplus of the perſonal eſtate to her own uſe; which proof, as it agrees with the rules of law to preſerve the legal title to the executrix, that of common right ſhe has to the ſurplus, ſo it ſhall prevent and ought to rebut the conſtruction of equity, which would create a reſulting truſt, and make the executrix to be a truſtee in equity for the next of kin; and for theſe reaſons (among others) prayed that the decree might be reverſed, and *it was reverſed accordingly without diviſion.* *MS. Report*, Dutcheſs of *Beaufort* appellant, Lady *Granvill* reſpondent. *Viner*, title *Deviſe*, *p.* 194. *ſect.* 21.

Lord *Talbot*'s reaſoning as to the perſonal eſtate, was that this clauſe was not intended to give them the perſonal eſtate by implication, but to veſt it in them as *executors* only.

And that the laſt clauſe was explanatory only.

Upon the whole he decreed a diſtribution.

The next caſe was *Newſtad* verſus *Johnſon*, before me *July* 15, 1740. * I had not the leaſt thought in that caſe there was any difference between ſpecific legacies and pecuniary, as to barring executors. * 2 *Tr. At.* 45.

There was a plain reaſon there, why the teſtator ſeparated the ſtock from the reſt of his perſonal eſtate, becauſe otherwiſe the huſband of the legatee would have been entitled.

In the next place ſome arguments have been uſed from the words of the will; firſt, upon the introductory clauſe, that it is very ſtrong to ſhew he intended to diſpoſe of the whole.

Nothing could be ſtronger than the introduction in the caſe of *Farringdon* verſus *Knightly*, and yet determined to be a bar. And I look upon this as nothing more than words of form thrown in by drawers of wills.

The next of kin take by a kind of ſucceſſion *ab inteſtato*, without the aſſiſtance of this court; and it is the law throws it upon them. The law throws the ſurplus on the next of kin, who take it by a kind of ſucceſſion *ab inteſtato*.

It has been ſaid that Mrs. *Watſon* ſhould be accountable for nothing except the ſtocks, but the words will not warrant this conſtruction ſo as to excuſe her from accounting for ſo much of the perſonal eſtate as is not diſpoſed of by the will.

To conſider it in one plain inſtance, ſhe muſt account for *the dividends*.

Another objection has been ſtarted from the circumſtances attending the deviſe of ſpecific legacies themſelves, that where another reaſon appears for giving them ſhe ſhall not be excluded; and that this is introduced only for the ſake of excepting the three pictures out of it.

The exception of the three pictures is not out of the whole perſonal eſtate, but out of a particular ſpecies only, and therefore cannot be offered as a reaſon for his particular expreſſing another thing: beſides, it would have been much more natural to have given the the pictures as diſtinct legacies, and not as an exception out of a legacy.

All

All the excepted caſes will be found to be grounded upon one of theſe three reaſons.

Firſt, By way of particular intereſt, or *uſufructuary* eſtate out of a legacy given to another perſon.

Secondly, By way of exception.

Thirdly, Where it is given for the ſake of ſome truſt which the executor is to perform.

But the preſent caſe cannot fall in with any of theſe diſtinctions.

This is not an exception for the benefit of the executrix out of a legacy given to another, but it is an exception for other perſons out of a particular ſpecies of perſonal eſtate given to the executrix herſelf.

No defendant by his anſwer can affect the rights of other parties.

No weight is to be laid on any paſſages in anſwers, for no defendant by his anſwer can affect the rights of other parties, or perſons.

The conſequence of the whole upon this point is, that the undiſpoſed part of the perſonal eſtate muſt go amongſt the next of kin, but muſt bear the burthen of the debts and funeral expences in the firſt place.

The ſecond queſtion is, What is the undiſpoſed part of the perſonal eſtate?

Bank notes cannot be conſidered as a ſecurity for money, but according to common uſage, which regards them always as caſh.

In the firſt place, the ready caſh in his houſe, in the next the rents unreceived; ſecondly, the bank notes for one hundred pounds; it has been ſaid that theſe ought to be conſidered only as a ſecurity for money; but I am of opinion they muſt be taken according to the common uſage and notion of bank notes, which are always conſidered as caſh, and made payable to bearer; if ſecurities were to be extended in this manner, arrears of rent might be called ſo, for *the reddendum*, and covenants for payment of rent, might be plauſibly called a ſecurity for money.

The next particular which is inſiſted to be undiſpoſed of, is the dividend upon teſtator's bank ſtock lying in the bank, endeavoured to be brought within the deſcription of the will.

In the firſt place the dividends ſo lying in the bank do not anſwer the deſcription, for they are not dividends to become due upon the ſtocks, for the company had paid them before.

Now the teſtator having kept his caſh with the bank, the receipt of the bank was his receipt; and you might as well ſay that caſh

in the hands of a ſteward received by rents, is not the caſh of the principal.

I am of opinion the balance of teſtator's account in the bank muſt be conſidered as undiſpoſed of.

Thus far I am of opinion for the plaintiff.

But as to the dividends unreceived, I am of opinion for the defendant.

In caſe his perſonal eſtate in the ſtocks is not ſufficient, &c. Vide the will.

Theſe are words of reference.

The next ſentence is plainly connected with the former.

Then the ſaid dividends ſhall be laid out in ſuch manner as, *&c.*

There is no doubt as to this part of the will.

The only remaining conſideration is as to certain things which are mentioned to be given in the will, and yet not intirely given.

And this is founded on the words of the will, where ſtocks are deviſed to Lord *Bath.*

The queſtion reſults to this, when the bequeſt to Lord *Pulteney* is to commence in point of intereſt?

It is very inaccurately penned, but the court muſt put ſuch conſtruction as will beſt anſwer the intention.

Was Lord *Pulteney* to be kept out of the poſſeſſion of enjoying the ſurplus of the dividends of theſe ſtocks till even the annuitant of ten pounds a year is dead? that would be very hard.

The commencement of the truſt is put upon ſome event of dying, and though I have no doubt of the intention in my own private opinion, yet I muſt conſider it with judicial eyes.

Though the court can conſtrue and expound the words of a teſtator's will, yet they cannot ſtrike them out of it entirely.

The court may expound the words of a will, but cannot ſtrike them out.

It is plain the teſtator did not think of any ſurplus of the dividends, for he has provided an auxiliary fund if dividends ſhould fail; but when any of the annuitants died, he ſaw there would be a ſurplus, and has provided for it; and this muſt be conſtrued like the

caſe of *Hylet* verſus *Chip*, in *Cro. Jac.* 259. and *Aylet* verſus *Choppin* in *Yelv.* 183.

It is true an objection has been made, that croſs remainders by implication cannot be between more than three. And the caſe of *Barnard* verſus *Bowden*, before me the 14*th* of *November* 1743. has been cited.

A precedent by no means applicable, for the words there were peremptory after the deceaſe of a particular perſon; I was very apprehenſive the conſtruction I put upon it was not according to the intention; but I could not ſo conſtrue it, without ſtriking words out of the will: but here the court may conſtrue it according to the intention of the teſtator, which they are bound to do, if they can conſiſtently with the rules of law.

It has been ſaid, that the death of any one of the annuitants doth not influence the ſurplus of dividends; and I agree it doth not as to the dividends themſelves, but after the gift commences, it attaches upon the ſtocks, and will carry all the dividends.

This is my opinion upon the ſeveral parts of the will.

His Lordſhip declared, that ſo much of the teſtator's perſonal eſtate, as is not diſpoſed of by his will, belongs to and ought to be diſtributed among his next of kin, ſubject to his debts and funeral expences.

He alſo declared that the teſtator's caſh, ready money, bank notes, arrears of rent, the money due to the teſtator on his account kept with the bank, and alſo the ſurplus of the dividends accrued upon the ſaid ſtock between the teſtator's death, and the death of Mrs. *Ann Watſon*, one of the annuitants, over and above what was ſufficient to ſatisfy the growing payments of the annuity given during that time, ought to be conſidered as undiſpoſed of by the ſaid will.

But that all ſuch dividends and ſums of money as were due, and in arrear upon any of the ſaid teſtator's ſtocks, and accrued at the time of his death, and alſo the ſurplus of the ſaid dividends accrued or to accrue upon the ſaid ſtocks, between the teſtator's death and the deceaſe of ſuch of the annuitants as died firſt, ought to be conſidered as diſpoſed of by the ſaid will for the benefit of Lord *Pulteney*, and his younger ſons, ſubject to the contingency thereon.

Therefore I decree that it be referred to a Maſter to take an account of all ſuch parts of the ſaid teſtator's perſonal eſtate as are not diſpoſed of by the will, as have been received by *Ann Watſon* in her life-time, and by defendant *Nathaniel Watſon* ſince her death.

At

At the ſecond Seal after Trinity Term, 1744. Caſe 81.

MR. Solicitor General moved to diſcharge an order for coſts, on the following caſe.

There had been a reference by the direction of the court, to a Maſter, to inquire into the regularity of proceedings under a commiſſion for examination of witneſſes, and the Maſter reported them irregular; exceptions were taken to the Maſter's report; and the court, thinking the proceedings regular, allowed the exception, and the party that ſucceeded had his coſts of the application.

The Maſter, to whom it was referred, reported the proceedings under a commiſſion for examination of witneſſes irregular, on exceptions; the court thought them regular, and allowed the exceptions, and the party who ſucceeded had his coſts of the application: *Lord Hardwicke* diſcharged the order for coſts, becauſe the plaintiff's was not a vexatious proceeding, but in the Maſter's opinion well founded; and the rule is, never to give coſts but where no juſt ground appears for the proceeding.

LORD CHANCELLOR.

I think this analogous to the caſe, where exceptions are taken to a defendant's anſwer for inſufficiency, and the Maſter reports it inſufficient, and, upon exceptions, the court is of opinion, it is ſufficient, the party ſucceeding in this application, ſhall not have the coſts of it, but it ſhall wait the event of the cauſe; and for this reaſon, becauſe the plaintiff's did not appear to be a proceeding merely vexatious, but, in the opinion of the Maſter, well founded; and the rule of the court is never to give coſts, but where there appears to have been no juſt grounds for the proceeding.

Exceptions to an anſwer for inſufficiency, and ſo reported; upon exceptions, the court held it to be ſufficient; the party ſucceeding in the application not intitled to coſts, but it ſhall wait the event of this cauſe.

But, though I am of opinion to diſcharge the preſent order, yet, I think, on a ſpecial motion, and ſtating particular circumſtances in the caſe, the court might give coſts, though the Maſter had reported it in favour of the other party.

On a ſpecial motion, and ſtating particular circumſtances, the court may give coſts, though the Maſter reports it in favour of the other party.

His Lordſhip diſcharged the order here for coſts.

Mead verſus *Lord Orrery and others*, *July* 19, 1745. Caſe 82.

THE plaintiffs, two of the children of *John Mead*, the elder, of *London*, banker, charge, by their bill, that he had a mortgage of three thouſand five hundred pounds on the eſtate of *William*

As the act which was done in this caſe appears to be the tranſaction of all the executors, and two not intereſted, and no colour of fraud, but a purchaſe for a valuable conſideration, there are not ſufficient grounds to ſet aſide their aſſignment of a mortgage belonging to *J. M.* their teſtator.

*

Kirby

Kirkby, and that, being ſo intitled, about the 25th of *April* 1712, died, leaving *Jane* his widow, and five children; that, by his will, he appointed his wife, his eldeſt ſon *John Mead*, and another perſon, executors, and thereby deviſed to his executors and their heirs, *&c.* " all his real and perſonal eſtate, not by his will otherwiſe diſ-
" poſed of, in truſt that they ſhould, by charging, leaſing, or ſel-
" ling his eſtates, or any of them, raiſe money for the payment of
" all his debts, and what ſhould remain, he directs to be divided
" into equal proportions, ſhare and ſhare alike, between his five
" children, and left it to his executors, to make proper allowances
" for their maintenance until there ſhould be a diſtribution made of
" his eſtates."

That *Jane Mead* the widow, and *John Mead* the younger, proved the will, and after the teſtator's debts and legacies were paid, a large ſurplus remained to be divided amongſt the five children.

In a cauſe between the executor of *Fowle*, who was partner with old *Mead*, and his executors, the mortgage deed relating to *William Kirkby*'s eſtate, was directed to be left in the hands of Mr. *Bennet*, the Maſter in Chancery, till the partnerſhip account ſhould be finally adjuſted.

That the defendants, the executors of the Dutcheſs of *Buckingham*, pretend, they have got an aſſignment of the legal eſtate of the mortgaged premiſſes from *John Mead* the younger, in his life-time, and refuſe to account to the plaintiffs for what they have received out of the ſaid premiſſes, or to deliver up the deeds and writings, and therefore the bill was brought for an account, and for the deeds.

What is principally inſiſted on by the defendants, the executors of the Dutcheſs of *Buckingham*, is, that on the 18th of *May* 1726, *John Mead*, the younger, was appointed receiver of the rents and profits of all the real and perſonal eſtate of *Edmund* Duke of *Buckinghamſhire*, and that *John Mead* propoſed to aſſign this mortgage on *Kirkby*'s eſtate to Maſter *Bennet*, as a ſecurity for his receiverſhip; and accordingly, by deed dated the 21ſt of *December* 1726, (to which *Jane Mead*, and the other executor of old *Mead* were parties) reciting that there was due on the mortgage 9000*l.* and upwards, and that the ſame was the proper money of *John Mead* the younger, they conveyed to *Thomas Bennet*, his heirs and aſſigns, the ſaid mortgage, and all money due thereon, to hold to him, his heirs and aſſigns for ever, *ſubject to a proviſo, that if the ſaid* John Mead *ſhould, and did, once in a year, during the time he continued receiver of the rents, profits, &c. of Duke* Edmund's *real and perſonal eſtates, juſtly account with* Thomas Bennet, *and well and truly pay the balance of ſuch account, then* Thomas Bennet *was to reconvey the mortgaged*

mortgaged premiſſes to John Mead, *his heirs, executors or adminiſtrators.*

That *Mead* the younger died inteſtate, without having accounted for what he had received by virtue of his receiverſhip, and greatly indebted to Duke *Edmund*'s eſtate, and that they, as executors of the Dutcheſs, who was the executrix of Duke *Edmund*, claim the benefit of the mortgage and ſecurity to Maſter *Bennet*, and inſiſt the plaintiffs have no right to any of the money due on the mortgage, till ſatisfaction is made for what is due from *John Mead* the younger, on account of ſuch receiverſhip; and though they believe they may have ſeen a copy of the will of *John Mead* the elder, yet inſiſt, notwithſtanding any thing in that will, *John Mead* the younger, and the other executors, had full power to aſſign the mortgage as aforeſaid, as it was not ſpecifically deviſed by the will to any particular perſons, or to any particular uſe, and conſequently did abſolutely veſt in the executors.

LORD CHANCELLOR.

With regard to what Maſter *Bennet* has done, I entirely diſapprove of going out of the courſe of the court, which requires *a ſecurity by the receiver, and two ſureties* in a recognizance, and taking an aſſignment of a mortgage belonging to the receiver inſtead of it, is very improper.

The courſe of the court requires a ſecurity by the receiver, and two ſureties, in a recognizance, and taking the aſſignment of a mortgage belonging to a receiver very improper, and ought not to have been done.

There are two queſtions in this cauſe.

Firſt, Whether the plaintiffs, as reſiduary legatees of old *John Mead*, are intitled to be relieved againſt the aſſignment of the mortgage, and to have ſuch account, *&c.* as is prayed by their bill?

Secondly, Or whether the executors of *Edmund* Duke of *Buckinghamſhire* are intitled to retain this aſſignment, and if intitled, how far they ſhall have the benefit?

The firſt queſtion depends upon this point, whether this was a good alienation of the aſſets of old *John Mead* the teſtator.

It muſt be admitted to be good in point of law, for, unleſs executors do it colluſively, it is good there, and neither creditors or legatees can call it back again.

An alienation of aſſets by an executor, good at law, unleſs done colluſively.

The legal eſtate is veſted in *Bennet*, the Maſter in Chancery; but it has been inſiſted by the plaintiffs, if good in law, yet not in equity.

Thus much muſt be admitted, that as the defendants have gained the legal eſtate, and likewiſe for a valuable conſideration, it muſt be a very powerful equity to take it from them.

It has been contended by the plaintiffs, that this mortgage was part of the perſonal aſſets of old *John Mead*, and a truſt for the reſiduary legatees, and that the parties had notice at the time the aſſignment was made to *Bennet* of the plaintiffs right, and therefore cannot avail themſelves of it under ſuch circumſtances.

If a perſonwill purchaſe with notice of another's right, giving a conſideration will not avail him.

Now, to be ſure, notice in a court of equity is extremely material; for if a perſon will purchaſe with notice of another's right, his giving a conſideration will not avail him, for he throws away his money voluntarily, and of his own free will.

Whoever takes from an executor, muſt do it with notice of a will, and if the doctrine was to prevail of notice to an aſſignee of an executor, it would hold in every will, and none would dare to purchaſe or take an aſſignment from an executor.

The caſes of notice cited by the plaintiffs council are very material as to the general rule, but not ſo material as to the particular caſe of an executor; for whoever takes any thing from an executor, muſt do it always with notice of a will, and if this doctrine was to prevail of notice to an aſſignee of an executor, it would extend to any caſe of a will, and no body would dare to purchaſe or take an aſſignment from an executor.

Therefore the bare points of notice of the will is not ſufficient.

This is the firſt attempt that has been made by a reſiduary legatee, to overturn an aſſignment by an executor of the aſſets of his teſtator.

The precedents of following aſſets into the hands of purchaſers as aſſignees, have been chiefly in the caſe of creditors.

Now, creditors have a demand againſt an executor for the whole aſſets of the teſtator, after the account is made up, but not by way of ſpecific lien on the aſſets.

A ſpecific legatee, as a lien on the aſſets for that ſpecific part, after the executor has aſſented, otherwiſe as to a reſiduary legatee.

There have been ſome inſtances too of ſpecific legatees following aſſets, for he has a ſpecific lien upon the aſſets for that ſpecific part, after the executor has aſſented, and differs from a reſiduary legatee, who has no demand upon any particular part.

But the claim of the plaintiffs depends upon an account to be taken, and a liquidation of the whole, which of conſequence ſuppoſes an alienation or variation of aſſets by an executor, in order to make a ſatisfaction for thoſe demands, which muſt precede the legacies.

So much in general; next as to the particular points.

It

It has been inſiſted for the plaintiffs, that executors are to be conſidered as truſtees, and the aſſignment made by them in this light; or if it was made by them as executors only, was not a right diſpoſition of aſſets, and had not *a tendency at all* (as Mr. *Wilbraham* expreſſed it) to a due adminiſtration of aſſets.

This mortgage is admitted to be part of the perſonal eſtate of old *John Mead*, and came to him from the partnerſhip in his ſhop, as a banker; theſe are clear facts.

Conſider then how far he has deviſed his eſtate; there are three executors to the will, *and deviſes to them and their heirs, &c. all his real and perſonal eſtate, not by his will otherwiſe diſpoſed of, in truſt, &c. for payment of debts, and what ſhall remain, to be divided equally among his five children.*

From hence it has been inſiſted on by the plaintiff's council, that the whole of the perſonal eſtate of old *John Mead*, in the hands of the executors, was affected by this truſt.

I am of a different opinion, and that the manner of deviſing here does not alter or reſtrain the power of executors over the perſonal eſtate.

What does this amount to more than appointing them executors, and giving the ſurplus of this eſtate to be divided equally between his children?

The teſtator, as to a particular part of his perſonal eſtate, may affect it with a truſt; but as to the whole perſonal eſtate, when he makes them executors, he gives them the legal right, and though he does after give the reſidue to be divided among his children, it does not take away their power as executors.

It would be moſt miſchievous if it did.

It has been argued, that as all the executors joined in the aſſignment, notwithſtanding one had renounced, they were conſidered as truſtees; but there is nothing in this obſervation, for though one renounced he never releaſed to the other two, and might have come in afterwards and proved the will, for the whole veſts in him, and before probate the executor may diſpoſe of the eſtate.

The plaintiffs council have gone further, and inſiſt, that taking it abſtractedly from a truſt, ſuppoſing they acted as executors, yet they could not aſſign this mortgage.

A point that deſerves well to be conſidered.

It

The executor had not a bare authority, but the intereſt in the thing aſſigned, for neither reſiduary or ſpecific legatees have any intereſt without the aſſent of executors.

It is undoubtedly a good diſpoſition in law, and has veſted the legal intereſt in *Bennet*, the Maſter, as a ſecurity for the receiver; and the executors who aſſigned had not bare authority, but the intereſt in the thing aſſigned, for neither reſiduary or ſpecific legatees have any intereſt without the aſſent of executors.

If good at law, the queſtion is, whether there are ſufficient grounds to ſet it aſide in equity, ſo as to enable the reſiduary legatee to follow the aſſets into the hands of the aſſignees.

It has been admitted by the council for the plaintiffs, that executors may ſell part of the aſſets, becauſe ſuppoſed to be ſold for payment of debts, and admitted for the ſame reaſon they may mortgage; but then it has been inſiſted, this was a ſecurity for money, *that was to come into the hands of one of the executors only.*

The diſtinction is extremely nice, for if he may do as he thinks fit, by ſelling or mortgaging of aſſets, how does it differ from the preſent caſe, which is an aſſignment by *John Mead*, in order to bring a great ſum of money into his hands, and enable him to better the eſtate, and alſo to carry on with more advantage his office of executor.

Conſider the caſes.

Unleſs fraud appears between the executor and the aſſignee, no inſtance of an aſſignment made by him for a valuable conſideration being ſet aſide by this court.

I do not know any inſtance where an aſſignment has been made by an executor for a valuable conſideration, that this court have ſet it aſide, unleſs ſome fraud appears between the executor and the aſſignee.

In *Crane* verſus *Drake*, 2 *Vern.* 616. the queſtion was, whether the ſale of a leaſehold eſtate to the defendant by an executor, was good to bind an unſatisfied creditor, and a decree for the plaintiff at the *Rolls*, and affirmed upon appeal.

Upon ſearching *the regiſter's book* for that caſe, it appears, that it was admitted by the anſwer, that he had notice of the plaintiffs debt, and upon that, and the evidence in the cauſe, Lord *Cowper* decreed for the plaintiff, ſaying the defendant was a party, and conſenting to, and contriving *a devaſtavit*.

The next was the caſe of *Paget* verſus *Hoſkins*, *Prec. in Canc.* 431. I ſee no grounds for Mr. *Vernon*'s diſſatisfaction at the decree there. *

The

* A freeman of *London*, having iſſue two daughters, deviſes 600 *l.* apiece to them, and makes his wife executrix; by an eſtimate it appeared that his perſonal eſtate was at his death 18,000 *l.* to 6000 *l.* of which the widow being intitled, *A.* her ſecond huſband, in conſideration

The caſe of *Humble* verſus *Bill et al'*, 2 *Vern.* 444. *A.* having a term in the printing-office, by will directs 2000*l.* ſhall be raiſed out of the profits for his daughter and her children, and made *B.* executor; *B.* mortgages the term: Decreed the daughter and her children ſhould redeem, or be fore-cloſed; *but reverſed by the Houſe of Lords.*

This differs extremely from the preſent caſe, becauſe there was a charge upon a particular part of the eſtate for ſecuring the ſum of 2000*l.* and therefore it would have been going a great way, to ſay, that making a ſubſequent mortgage ſhould prevail againſt a prior mortgagee, and, as being a charge upon the profits of a printing-office, it might, beſides, produce enough in time to pay both.

A caſe was cited of the defendants ſide, that came before me, which was *Nugent* verſus *Giffard*, in 1738. 1 *T. Atk.* 463. upon conſideration of the danger of breaking in upon the power of executors; I was of opinion, that a purchaſer there, under an aſſignment from an executor, ought to have the benefit of it: Now, I do not ſee that this differs from the preſent caſe, only I think that was rather ſtronger. *

But there is ſomething here very particular, that diſtinguiſhes it from all the caſes that have or can be cited, for it is not a ſole executor diſpoſing of the aſſets for his own benefit, but here are three executors aſſigning, two of them are not intereſted in it, and the other is one of the reſiduary legatees under the will: Here is an aſſignment dated the 21ſt of *December* 1726, made upon *John Mead* the younger's being appointed one of the receivers of the Duke of *Buckinghamſhire*'s eſtate, appears to be fairly tranſacted, and no colour of fraud; Mr. *Pigot* the conveyancer was the perſon adviſed with as to the manner of doing it; three executors were all of them treated with, and all of them joined in it.

It is recited, that whereas it is the proper money of *John Mead*, the younger; and alſo recited that *John Mead*, &c. are the executors.

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ration thereof, ſettled a jointure of 600*l. per ann.* afterwards a loſs of 12000*l.* befell the freeman's eſtate; and though the wife was dead, and it was urged that the ſecond huſband was a purchaſer of her fortune, yet decreed that the daughters ſhould have a proportionable recompence out of the 6000*l.* *Pagott* verſus *Hoſkins*.

* An executor aſſigns over a mortgage term of his teſtator to *A.* as a ſatisfaction of a debt due to *A.* from the executor; this is a good alienation, and *A.* ſhall have the benefit of it againſt the daughters of the teſtator, who were creditors under a marriage ſettlement.

At law, an executor may alien the aſſets of a teſtator, and when aliened, no creditor can follow them; and where the alienation is for a valuable conſideration, this court ſuffers it as well as at law. *Nugent* verſus *Gifford*, 1 *Tr. Atk.* 463.

What do theſe recitals import? Why, that the mortgage is the proper money of *John Mead*, the younger.

It may be aſked, which way could he acquire the ſole property?

As he was one of the executors, and in whoſe ſhop the money affairs were tranſacted, he might be a creditor for this ſum by money advanced by him on account of the reſidue.

Or the other two executors might have releaſed and aſſigned this mortgage to *John Mead*, the younger, as his ſhare of the reſiduary eſtate of old *John Mead*; and ſuppoſe he alone had aſſigned this to *Bennet*, as a ſecurity for his receiverſhip, would the other reſiduary legatees have been at liberty to follow it into the hands of the aſſignee?

I am of opinion they could not.

For otherwiſe it would be ſaying, that no man could have an aſſignment from executors without coming into the court of chancery, to have an account from him how he has diſtributed the aſſets of his teſtator; for *notice* to the aſſignee, of the will, would have been equally the ſame in this caſe of an aſſignment of one executor, as now in the aſſignment of three.

To ſay, that the aſſignee ought to have looked into the account of the executorſhip, and given notice of it to the reſiduary legatees, is going too far; for how could the aſſignees look into the account, for they could not poſſibly do it without looking into the whole ſhop account of *Mead*, as it was mingled and confounded together.

Therefore, as this appears to be the tranſaction of all the executors, and two of them were not intereſted, and there is no colour of fraud, I am of opinion there is not ſufficient grounds to ſet aſide this aſſignment.

Some other circumſtances have been inſiſted on by the plaintiffs council, that there was a ſuit at the time of the aſſignment about the mortgage, who was entitled to it.

I do not ſee how that *lis pendens* could affect this aſſignment, unleſs it had been determined this was the mortgage of *Fowle*, the partner of old *John Mead*, and belonged to his creditors, the plaintiffs in that cauſe.

But, as it was determined to be part of old *John Mead*'s eſtate, there is an end of this objection.

A *lis pendens*, is only a general notice of an equity to all the world, but cannot affect any particular perſon with a fraud, unleſs there was a ſpecial notice of the title in diſpute there, to that perſon.

A *lis pendens* cannot affect any particular perſon with a fraud, unleſs he has a ſpecial notice of the title in diſpute there.

There are ſeveral other circumſtances that do deſerve to be conſidered on the part of the defendants.

It appears that this tranſaction was for the benefit of the ſhop, that had for ſeveral years received the rents of the eſtate, which was a very great advantage, and therefore, for the intereſt of the ſhop, the eſtate ſhould be continued there.

Conſider then the reflections that naturally ariſe from a matter of this kind.

Old *John Mead* died in 1712, his ſucceſſors carried on the buſineſs, accounts were kept in the ſhop, and managed as before, down to the time of making the aſſignment, and down to the bankruptcy of *William Mead*, the uncle of the plaintiff.

The teſtator's eſtate appears to me to be indebted to the ſhop; the preſent plaintiff came of age in 1721; the bankruptcy of *William Mead* was after the death of *John Mead* in 1727.

There is no pretence that the plaintiff claimed to be creditor under the commiſſion for any debt due to the eſtate of old *John Mead*, as reſiduary legatee of him, but the executors of the Duke of *Buckingham*, are admitted creditors for the ſurplus, over and above what was ſecured to them by the aſſignment of the mortgage, and no objection taken; and plaintiffs inſtead of claiming it there, come here in order to follow the aſſets into the hands of a purchaſer for a valuable conſideration.

The bill was not filed till the year 1739, a great many years ſince the death of old *John Mead*; at the filing of the bill, twenty-ſeven years, and now thirty-two after it.

Thus much muſt be admitted by the plaintiffs, that the defendants, as executors of the Duke of *Buckinghamſhire*, are intitled to what ever was the ſhare of *John Mead* the younger, as one of the reſiduary legatees of old *Mead*; ſo that there muſt be an account to be taken of his ſhare, and likewiſe of all old *John Mead*'s debts, which is almoſt impoſſible to be done.

Upon

Upon the whole, I am of opinion, there is no pretence to ſet aſide this aſſignment, as the executors had the legal right, as there is no colour of fraud, and as two of the executors, who had no intereſt in the aſſignment, joined, which they might do; and as here is a purchaſer too for a valuable conſideration, it ought not to be affected by an account to be taken of aſſets in favour of reſiduary legatees.

When a receiver has been appointed by this court, and he paſſes his accounts regularly before the Maſter, according to the courſe of the court, the ſureties are bound by it.

A mortgagor in poſſeſſion is not liable to account for the rents and profits to the mortgagee, for he ought to take the legal remedy to get into the poſſeſſion.

As to the mortgagor, I do not know any inſtance where he keeps in poſſeſſion, that he is liable to account for the rents and profits to the mortgagee, for the mortgagee ought to take the legal remedies to get into the poſſeſſion; but as to that part of the eſtate which *Kirkby* diſpoſſeſſed the mortgagee of, by colluding with the tenants, and prevailing upon them to attorn to him, there he ought to account, provided the eſtate is redeemed by him.

His Lordſhip declared firſt, the Maſter ought not to have taken a ſecurity of *John Mead* the younger, as receiver of the rents and profits of the eſtate of the late Duke of *Buckinghamſhire*, by aſſignment of the mortgage, but by *recognizance with ſureties*, according to the courſe of the court; and that he mentioned this in order to diſcourage it for the future; but was of opinion, the defendants, the executors of *Edmund* Duke of *Buckinghamſhire*, are intitled to the benefit thereof, as to what is due on account of *the receiverſhip of* John Mead.

Directed the Maſter to examine and aſcertain what was due from *John Mead* the younger, at the time of his death, which came into, and remained in his hands, as *receiver* by virtue of the decree, and report in the former cauſe.

Hardcaſtle

Hardcaſtle verſus *Smithſon and Slater*, *July* 1745. Caſe 83.

A Bill was brought by the plaintiff as impropriator of the rectory of *Coverham* in *Yorkſhire*, for the tithe of hay-herbage, and agiſtment of cattle.

The court thought it would be going too far to over rule the *moduſſes*, after the admiſſion that tithes had not been paid time immemorial; and therefore according to the rule of the court of Exchequer in theſe caſes directed an iſſue to try the *moduſſes*.

The defendants inſiſt, that there are and for time immemorial have been ſeveral ancient uſages and cuſtoms within the ſeveral villages, *that all and every the occupiers of lands and tenements therein*, have uſed to pay yearly on *St. James's Day* to the impropriator of *Coverham*, certain annual ſums of thirty ſhillings, twenty ſhillings, *&c.* in lieu of all *tithe hay* yearly happening within the lands, *&c.*

The defendants inſiſt, as to *the agiſtment tithes*, that there are payable, by ancient and immemorial cuſtom and uſage within the ſaid pariſh, one penny halfpenny for each milk cow having a calf, and one penny for a cow not having a calf at *Eaſter* every year.

A croſs bill was brought to eſtabliſh *the moduſſes*, and Mr. *Hardcaſtle* in his anſwer admitted, that there have been time immemorial ſuch uſages and cuſtoms, as are inſiſted on by the defendants to the original bill.

LORD CHANCELLOR.

Though *tithes in kind* are the parſon's right, yet immemorial cuſtomary payments ought to have weight.

Though it is true *tithes in kind* are the right of the parſon, yet where there are *cuſtomary payments* in lieu of them time immemorial, it muſt have weight.

The anſwer to *the croſs bill* admits, that theſe payments have been accepted time beyond the memory of man.

Unleſs there are very ſtrong reaſons to overturn cuſtomary payments, the court will not eaſily be brought *quieta movere*.

Every purchaſer who comes into the pariſh pays according to the rate of theſe payments, and buys upon the faith of them, and unleſs there are ſome ſtrong unſurmountable reaſons to overturn *theſe cuſtomary payments*, the court will not eaſily be brought *quieta movere*, and yet rules of law ought to be adhered to with regard to *moduſſes*.

The queſtion is, whether theſe *moduſſes* can be ſupported? And if they are eſtabliſhed, it muſt be on *the croſs bill*.

They are laid in this manner, *that all and every the occupiers of lands and tenements therein, &c.* (*Vide the words before.*)

As to theſe *moduſſes* a great many exceptions have been taken.

1ſt; That they are unreaſonable, becauſe the *modus* is laid for the occupiers of the lands and tenements within the pariſh, which may

take in houſes, wood, arable, *&c.* which do not pay *tithe hay*, and therefore, there is a preſumption no agreement of this kind could be entred into between the parſon and pariſhioners, and that it is in the mouth of the parſon to ſay no ſuch agreement could be made; and I allow, if there was a violent preſumption of this kind, it would have weight.

But I think no ſuch preſumption is created here, for the lands might be preſumed to be in the hands of one perſon at the time when the agreement was made, and if they were in the hands of ſeveral owners, they might all probably pay *tithe hay*, and therefore might agree, that they would pay ſo much for the *tithe of hay* whether they ſhould have tithe hay or not, for as they pay it at all adventures, they have the benefit of the *modus* when they have hay, and they may therefore have hay if they pleaſe; and ſo are the caſes, 1 *Ventr.* 3, *&c.*

The rule of law is, that a *modus* ought to be equally certain, as the tithes in lieu of which it comes; the meaning of which is, it muſt be ſo taken to a common reaſonable intent, but not to be weighed by grains and ſcruples.

The ſecond objection was, that the *modus* ought to be certain in point of quantity, and in point of remedy: And in general the rule of law is, that a *modus* ought to be equally certain, as the tithes in lieu of which it comes; and is ſo laid down in a caſe in the court of King's Bench of *Startupp* verſus *Dodderidge*, *Salk.* 657. *that a modus ought to be as certain as the duty which is deſtroyed by it.*

To ſay it muſt be equally certain, does not mean that it is to be weighed by grains and ſcruples.

In a caſe in *Hob.* 39. there was a *modus* for a park of two ſhillings a year and a ſhoulder of every third deer killed in the park, which is now diſparked.

Conſider how uncertain this was, for the owner might kill none: and yet Lord *Hobart* was of opinion, after it was diſparked the *modus* remained of two ſhillings a year.

I mention this to ſhew, that when books ſay that the *modus* muſt be as *certain*, they mean it muſt be ſo taken to a common reaſonable intent.

As to the ſums in the preſent caſe they are certain, but the main objection is as to *the remedy*; for it is ſaid that the perſon, whether he ſues in the eccleſiaſtical court, or brings his bill in equity, he muſt make all *the occupiers parties*, becauſe they are jointly liable, and not ſeverally.

This deſerves to be conſidered.

The laying *of this modus*, does import that all the occupiers are liable, and it muſt be underſtood of all the occupiers of the ſeveral vills and hamlets mentioned in the defendants anſwer.

It

It has been truly ſaid that all theſe lands might originally belong to one perſon, and that branching it out afterwards to different occupiers *ſhall not alter the modus.*

See the caſe of *Sheldon* againſt *Montague*, in *Hob.* 118. and *Cooper* againſt *Andrews*, in *Hob.* 39. as to the laying it in occupiers.

If this doctrine was to be allowed, that if a parſon is under a neceſſity of making all the occupiers parties, it will deſtroy a *modus*, it would be of very extenſive conſequence, and overturn great number of *moduſſes* in the kingdom.

The *majus*, or *minus*, the greater or leſſer quantity of land does not alter the caſe.

So in the caſe of *Stopp* verſus *Peacock*, 3 *Lev.* 386. the *modus* was for all the tenants and occupiers, and the court of Common Pleas in conſideration of the caſes aforementioned in Lord *Hobart's Reports* granted a prohibition.

I mention this to ſhew, that theſe *moduſſes* have been allowed notwithſtanding the preſcription has been laid in the *occupiers*, and notwithſtanding it has been uncertain.

I admit that every part of the land is liable to *the modus*, ſo that no occupier can be diſcharged till the whole *modus* is paid, the eccleſiaſtical court would then be juſtified in determining that every occupier is liable *in toto*, and *in ſolido.*

None of the occupiers can be diſcharged unleſs *the whole modus* is paid; and it is a very reaſonable ground for the court to go upon, that every occupier is liable for the whole, and for each other, and therefore ſuing a part of the occupiers is ſufficient. If it reſted only upon the caſe of the biſhop of *Hereford* verſus *the Duke of Bridgewater*, in the court of Exchequer, I ſhould not determine againſt *this modus*, without directing an iſſue to try it: for the caſes of tithes are more frequently in that court, as they have the proper juriſdiction.

Though a *modus* be laid in all the occupiers, yet each is liable for the whole, ſo that ſuing a part of the occupiers is ſufficient.

It came twice before the Exchequer; firſt, upon demurrer before Lord Chief Baron *Pengelly*, *&c.* and upon the hearing before Lord Chief Baron *Reynolds*, *&c.* and the court did not ſay that the *modus* was bad, but ſtrongly inclined it was good, and were of opinion that it ought to be tried; for, ſaid Lord Chief Baron *Reynolds*, if it was good in point of fact, he did not ſee why it might not be ſo in law.

There never was any appeal from this decree though the tithes were of great value.

It is admitted by the anſwer to the croſs bill, that the tithes here have not been paid in the memory of man, and therefore it is too much for the court to over-rule the *moduſſes*.

For all the objections are equally proper to be inſiſted on at the trial, and to be laid before a jury, as to be inſiſted on here.

It is not neceſſary lands excepted out of a *modus* ſhould have the ſame deſcription as when the *modus* was firſt ſettled, for if they agree in point of fact, ſufficient.

It is not neceſſary that the deſcription of the lands, which are excepted out of the *modus*, ſhould have the ſame deſcription as when the *modus* was firſt ſettled; for if they agree in point of fact, it will be ſufficient.

I am of opinion to follow the ſame method and rule as the court of Exchequer, and to direct a trial.

Which was directed accordingly.

Caſe 84. *Greenſide and others* verſus *Benſon and others*, *June* 28, 1745.

The plaintiffs were two ſureties with Mrs. *Hudſon* in an adminiſtration bond to the commiſſary of *York*, who exhibited an inventory there of the inteſtate's effects; the defendant *Benſon* being a creditor by bond of the inteſtate in the penalty of 600 *l.* brought his action againſt the adminiſtratrix, who pleaded ſhe had no aſſets *ultra* 54 *l.* *Benſon* not ſatisfied with the inventory, procured the commiſſary to aſſign to him the adminiſtration bond, and brought three actions on it, one againſt her, and one againſt each of the ſureties, and aſſigned for breach of the bond, that Mrs. *Hudſon* had not exhibited a true inventory; no defence, and judgment by default. *The adminiſtratrix and the ſureties are bound by the verdict, and no excuſe, it was without defence, for that ſpeaks a conſciouſneſs ſhe had none; and the court ordered the verdict ſhould ſtand as a ſecurity for ſo much as the account to be taken on the inventory ſhould fall ſhort to ſatisfy Mr. Benſon's principal and intereſt on his bond.*

THE plaintiffs were two ſureties with the defendant Mrs. *Hudſon* in an adminiſtration bond given to the commiſſary of *York*, according to the ſtatute of diſtributions, for her bringing in a true and perfect inventory of the inteſtate's effects, the defendant Mrs. *Hudſon* did afterwards exhibit an inventory in the ſpiritual court of *York*.

The defendant *Benſon* being a creditor of the inteſtate by bond in the penalty of 600 *l.* brought an action againſt the defendant Mrs. *Hudſon* upon that bond, and ſhe pleaded that ſhe had not aſſets *ultra* fifty-four pounds, which ſhe paid into court.

The defendant *Benſon* not being ſatisfied with the inventory brought in by her, procured the commiſſary of *York* (by indemnifying him) to aſſign the adminiſtration bond to him, and he put it in ſuit by bringing three ſeveral actions, one againſt her, and one againſt each of the ſureties; and aſſigned for breach of the bond, that ſhe had not exhibited a true and perfect inventory.

Theſe

Theſe cauſes came on to be tried, and no defence was made by the two ſureties, and there was judgment for the plaintiff by default.

The bill is brought againſt the defendant *Benſon*, inſiſting that he as a creditor had no right to put the bond in ſuit againſt the ſureties, according to the ſtatute, and prayed an injunction to ſtay the proceedings at law.

Mr. Solicitor General, for the plaintiffs in equity, cited the caſe of *the Archbiſhop of Canterbury* verſus *Wills*, *Salk.* 315.

The queſtion (he ſaid was,) whether the bond taken by the ordinary under the ſtatute of 22 & 23 *Ch.* 2. relating to inteſtates eſtates, is to be confined only to the exhibiting an inventory for the benefit of the next of kin, or whether it extends to creditors.

The 31 *Ed.* 3. *ſtat.* 1. *c.* 11. the 21 *Hen.* 8. *c.* 5. and *Ch.* 2. do not extend to reſiduary legatees, but is expreſſly tied down to *an inteſtacy*, ſo even that caſe is out of that ſtatute.

As there have been caſes determined already upon this point, it would be directly encountring them to ſay, a bond within this ſtatute may be aſſigned to a creditor, and that he may aſſign a breach.

The bond was taken in the penalty of ſix hundred pounds by the creditor of the inteſtate, when the inteſtate was declining in his circumſtances, and before any account was ſettled, ſo that it was not certain how much was due, and this court will not allow him to recover ſix hundred pounds at law, unleſs he can make out ſo much was due to him.

The adminiſtratrix has exhibited an inventory, but there is ſome trifling miſtake in it, and ſhe has in effect adminiſtered entirely: for ſhe applied the aſſets in paying the rent her huſband owed the landlord, which is at leaſt of as high a nature as a bond, and expended no more than five pounds in the funeral, which is only three pounds more than the law allows where the deceaſed dies inſolvent.

Mr. *Clark* of the ſame ſide.

The act of parliament did not intend to give the ordinary juriſdiction either in reſpect of funds, or perſons, larger than what he had before.

The fund, over which he exerciſed a juriſdiction, was that which could not be appropriated to the debts.

The account was not to be litigated by any body, but was to be implicitly relied on by the ordinary.

Before the act of parliament he was to deliver in an inventory when called for; but by the act of parliament he is to account by a particular time.

The third clauſe directs to whom the ordinary ſhall compel a diſtribution, the widow and children, and not amongſt creditors, ſo that the defendant *Benſon* has no pretence to come upon this fund.

A creditor is not within the view and intention of this act of parliament, and his proper and ordinary remedy was at law, and not in an eccleſiaſtical juriſdiction.

He cited the caſe of *Brown* verſus *the Archbiſhop of Canterbury*, 1 *Lutw.* 882. *b.*

Mr. *Owen* of the ſame ſide.

Upon the creditors application to the eccleſiaſtical court, they can only compel the adminiſtrator to exhibit an inventory, and when once exhibited, the eccleſiaſtical court can do no more for creditors, but they muſt take their remedy at law.

But in the caſe of the next of kin, after the inventory is brought in, they can proceed in that court, and compel the adminiſtrator to diſtribute according to the ſtatute.

Mr. Attorney General council for the defendant *Benſon*.

Mr. *Benſon* is a creditor of the late Mr. *Hudſon* for three hundred pounds, who gave him a bond to ſecure it in the penalty of ſix hundred pounds on the 26th of *March* 1741. he left a widow the defendant Mrs. *Hudſon*, who in point of law was entitled to adminiſter.

There was an application by the defendant to let him take out adminiſtration; Mrs. *Hudſon* refuſed, which it is probable ſhe would not have done, but upon an apprehenſion there were aſſets ſufficient to pay the debts.

He ſent appraiſers to appraiſe the inteſtate's goods, which they valued at two hundred and eighty pounds and upwards.

This appraiſement was taken ſome time after the widow had been in poſſeſſion: She gave the common ſecurity, and the plaintiffs were her ſureties.

The

The adminiſtratrix pleaded to the defendant's action ſhe had aſſets only amounting to 55 *l. ultra* what ſhe had already paid.

The jury find two hundred and twenty-five pounds beyond the fifty-five pounds, and ſo he became entitled to both ſums.

Doctor *Ward* the ordinary aſſigns the bond to the creditor, who brings an action againſt the ſureties, and who joined iſſue, but made no defence, and ſo there was judgment for the plaintiff.

The relief prayed by the bill is, that the defendant *Hudſon* may indemnify the plaintiffs for being ſureties in the bond, and for an injunction againſt Mr. *Benſon* till an account is taken between them and Mrs. *Hudſon*, and till ſhe ſhall have ſatisfied Mr. *Benſon* as far as the aſſets will go.

He inſiſted that the point made by the other ſide, cannot ariſe out of this prayer of the bill.

Lord Chancellor inclined to think the general relief was inconſiſtent with the particular relief, but directed Mr. Attorney General to go on.

Mr. Attorney General: This is a queſtion of great conſequence, and if determined for the plaintiffs, would take away one great ſecurity the ſtatute intended for creditors.

The firſt queſtion is a mere queſtion at law, what is the conſtruction of the ſtatute in regard to this bond.

They muſt ſhew ſome equitable principles diſtinct from the principles of law, for the ſtatute has given a legal remedy, and leaves equitable remedies upon the foundation of equitable principles.

He obſerved firſt upon the words of the ſtatute, which are very clear, and ſaid there ought to be an extreme plain intent to overturn the words.

The condition of the bond is, *that the adminiſtrator do make or cauſe to be made a true and perfect inventory of all and ſingular the goods, chattels, and credits of the ſaid deceaſed, which have or ſhall come to the hands of the adminiſtrator.*

If the ſtatute had intended that a creditor ſhould not have the benefit of the inventory, why did not the ſtatute ſay it?

When words are ſo explicit and plain, they muſt make the intention of the ſtatute as clear as the ſun, before a court of equity would interfere.

The

The ordinary at common law might have diſpoſed of the whole to charitable uſes, and could not be compelled to grant adminiſtration, or was even ſo much as obliged to pay debts; therefore the ſtatute of *Ed.* 3. and *Hen.* 8. gave him a power to grant adminiſtration, and bound him to pay debts, and for that reaſon it became extremely material for him to ſee the perſon who was to adminiſter pay the debts.

The ordinary therefore obliged the adminiſtrator to bring in an inventory, and to ſee that it was diſtributed in payment of debts; and this was the occaſion of a number of caſes in prohibition to prevent the ordinary from applying inteſtate's effects otherwiſe than in the payment of debts.

This gave riſe to the ſtatute of 22 *Ch.* 2. relating to inteſtate's eſtates, in order to ſettle the diſpute between the eccleſiaſtical and common law courts.

Who are the perſons that are firſt and principally intereſted in the eſtate at law? certainly the creditors!

The law ſays the adminiſtrator ſhall bring in a true and juſt account.

Is not this a reaſonable uſe for the legiſlature's compelling adminiſtrator to bring in a true inventory?

He inſiſted it was more reaſonable to do it for a creditor than for the next of kin.

To ſhew this has been always the practice, what Mr. *Owen* mentions is ſtrong for the creditor, if the meaning of the act is, that a creditor ſhall not make uſe of any inventory, or be entitled to any benefit from it, they might as well in the firſt inſtance apply to a court of law for a prohibition, to prevent the creditors compelling the adminiſtrator even to bring in an inventory.

To ſay a creditor is to have a benefit from the condition of the bond, and not from the ſecurity *the penalty*, is an abſurdity.

The inventory is merely an account of the eſtate of the inteſtate, but an account before the ordinary is an account of money expended by the adminiſtrator, and how he has done it.

LORD CHANCELLOR.

The commiſſary who is the obligee of the bond may aſſign a breach in not delivering a perfect inventory, and even without citation, and there muſt have been judgment for the ordinary.

There is no doubt but the archbiſhop's commiſſary the obligee may aſſign a breach in not delivering a true and perfect inventory, and

even without citation, and nothing elſe appears at law, and there muſt have been a judgment for the ordinary, becauſe no doubt there was a breach in not exhibiting ſuch an inventory.

What the council for the plaintiffs and for Mrs. *Hudſon* aim at would have been right, ſuppoſing the ordinary *Doctor Ward* had aſſigned for breach the non-payment of the creditors debts.

The eccleſiaſtical court underſtand no more by an account than ſome account in nature of an inventory, and depends only upon the particular wording of inventories by adminiſtrators.

The caſe principally relied on is the *Archbiſhop of Canterbury* verſus *Wills*.

The ordinary, after an adminiſtrator has exhibited an inventory, cannot compel the adminiſtrator to account, but it muſt be *ad inſtantiam partis*, and therefore the inventory and account are as to the ordinary the ſame thing. *Vide Wheeler* verſus *Wheatly*, *December* 7, 1723. before Lord *Macclesfield*.

The ordinary cannot compel the adminiſtrator to account, but it muſt be *ad inſtantiam partis*.

What the defendant Mr. *Benſon* aſks is, that this bond, upon which the penalty is recovered, may ſtand only as a ſecurity for what is juſtly due to the creditor.

The adminiſtratrix to be ſure cannot now diſpute the verdict, which finds ſhe did not adminiſter the whole aſſets, and ſhe is bound by a verdict which has unravelled a matter, and it is no excuſe to ſay that the verdict was without defence of the adminiſtratrix, for that is rather a conſciouſneſs that ſhe had no defence.

Therefore the court will not think it proper to have the whole account taken over again, or to alter what has been found by the verdict.

The caſe of the ſureties is not at all better, for, as the verdict was obtained againſt the adminiſtratrix, who was the proper perſon to try it, it would be hard to have this tried over again, in as many actions as the plaintiffs pleaſe.

His Lordſhip ordered an account to be taken only of what was exhibited upon the inventory, and the verdict to ſtand as a ſecurity for ſo much as that ſhould fall ſhort to ſatisfy the defendant's principal and intereſt on his bond.

Caſe 85. *Guidot* verſus *Guidot*, *between the ſeals*, *after Trinity term* 1745.

By articles previous to the marriage of *A. G.* with the plaintiff, reciting her portion to be 2800 *l.* and that the defendant as an advancement of his brother, *&c.* had agreed to pay 4000 *l.* it was agreed to be laid out in the purchaſe of lands, or in ſome church, college, or other renewable leaſe, to be ſettled to the ſame uſes as the freehold and leaſehold eſtates, which *A. G.* was ſeiſed and poſſeſſed of, are appointed to be ſettled; the laſt limitation to *A. G.* and his heirs.

The 2800 *l.* and 4000 *l.* have never been laid out in land, but remained in money to *A. G.*'s death; he by will deviſed all his freehold, leaſehold and copyhold lands, lying in *Iſlington*, and in *Elsfield* in *Hampſhire*, or elſewhere, to the plaintiff for life, and after her death to the defendant and his heirs; and his perſonal eſtate, after paying his debts and legacies, he gave to the plaintiff, and made her and the defendant executors.

The 2800 l. and 4000 l. muſt be laid out in the purchaſe of lands of inheritance, or in church or leaſehold, for the court was of opinion, if there had been only a general deviſe of his lands, this money would certainly have paſſed.

THE bill was brought that the defendant Mr. *Guidot* may account for four thouſand pounds and intereſt from *Auguſt* 1735. and that the defendant Mr. *Child* may account for eighteen hundred pounds and intereſt.

By articles made previous to the marriage of *Anthony Guidot* (the defendant's brother) with the plaintiff, reciting "her portion to be "two thouſand eight hundred pounds, and that the defendant, as an "advancement of his brother, and for a better proviſion for the "plaintiff and the iſſue of the marriage, had agreed to pay four "thouſand pounds, it was thereby declared and agreed, that the "2800 *l.* and the 4000 *l.* ſhould be laid out in the purchaſe of "lands in *Great Britain*, or in ſome church, college or other re-"newable leaſe, to be ſettled to the ſame uſes and truſts as the "freehold and leaſehold eſtates (which *Anthony* was ſeiſed and "poſſeſſed of) are appointed to be ſettled, the laſt limitation to "*Anthony* and his heirs, and until a purchaſe could be had, in truſt "for the truſtees to put out the ſaid money upon mortgages, or on "government or other ſecurities, and to apply the produce as if "lands had been purchaſed."

The 2800 *l.* and the 4000 *l.* have not been inveſted in the purchaſe of any freehold or leaſehold lands, but the ſame remained in money to the death of *Anthony Guidot*.

Anthony Guidot by his will "deviſed all his freehold, leaſehold "and copyhold lands lying in *Iſlington*, and in *Elsfield* in *Hamp-"ſhire*, or elſewhere, to the plaintiff during her life, and after her "death to the defendant *Guidot* and his heirs; and as to his per-"ſonal eſtate of what nature and kind ſoever, he gave the ſame to "the plaintiff, paying his debts and legacies, and made her and the "defendant *Guidot* his executors."

The

The plaintiff inſiſted that the 2800 *l.* and 4000 *l.* ought to be taken to be part of the teſtator's perſonal eſtate, and that ſhe is entitled thereto as part of *the reſiduum* of ſuch perſonal eſtate bequeathed to her by the teſtator's will, and that the defendant *Guidot* had no power to make any purchaſe with theſe two ſums, it not being the intent of the articles.

The defendant *Guidot* ſubmitted to the court, whether the 2800 *l.* and 4000 *l.* being a marriage portion articled to be laid out on land, is not in this court conſidered as land, and conſequently does not belong to the plaintiff, nor is included in the bequeſt of perſonal eſtate; and likewiſe leaves it to the judgment of the court, whether theſe ſums ought not to be laid out in the purchaſe of lands, and ſettled to the uſes of the marriage articles and will.

The council for the plaintiff cited *Soreſby* verſus *Hollings*, *Auguſt* 6, 1740. and 1 *P. Wms.* 172. and *Mallabar* verſus *Mallabar*, *Caſes in Ch. in the time of Lord Talbot* 78. and 1 *Rolls* 725. and *Curling* verſus *May*, *M. term* 8 *Geo.* 2. before Lord *Talbot*; the laſt caſe with an intent to ſhew, that when it is doubtful, whether it ought to be conſidered as money or land, this court will not interfere; and they ſtated it thus:

" *A.* gives five hundred pounds to *B.* in truſt that *B.* ſhould lay out " the ſame upon a purchaſe of lands, or put the ſame out on good " ſecurities for the ſeparate uſe of his daughter *H.* (the plaintiff's " then wife) her heirs, executors and adminiſtrators, and died in " 1729. In 1731. *H.* the daughter died without iſſue before the " money was veſted in a purchaſe; the huſband as adminiſtrator " brought a bill for the money againſt the heir of *H.* and the money " was decreed to the adminiſtrator, for the wife, not having ſigni- " fied any intention of a preference, the court would take it as it is " found; if the wife had ſignified any intention, it ſhould have " been obſerved, but it is not reaſonable now to give either her " heir or adminiſtrator, or the truſtee, liberty to elect; for Lord " *Talbot* ſaid, it was originally perſonal eſtate, and yet remained ſo, " and nothing could be collected from the will, as to what was the " teſtator's principal intention.

A. gives 500 *l.* to *B.* in truſt, to lay it out in the purchaſe of land, or on good ſecurities, for the ſeparate uſe of his daughter, her heirs, executors and adminiſtrators; ſhe died without iſſue, before the money was veſted in a purchaſe; on a bill brought for the money againſt the heir of the wife by the huſband, it was decreed to him, as it was originally perſonal eſtate, and the teſtator's principal intention with regard to it not to be collected from the will.

Mr. Attorney General cited for the defendant the caſe of *Linguen* verſus *Souray*, *Prec. in Ch.* 400. and 1 *P. Wms.* 172.

LORD CHANCELLOR.

The queſtion is, whether theſe two ſums are to be conſidered as money or land; I ſee but very little doubt in this caſe (and ſtopped Mr. Attorney General from going on for the defendant).

The

The articles ſay, it ſhall be laid out in the purchaſe of lands of inheritance, or in church, and leaſehold.

Then the court muſt take it to be the one or the other; and during the life of the huſband and the wife, if laid out, it muſt have been in one or the other.

No ſort of election was made by the huſband; then at the time of the will, and his death, it ſtood in equity as it did in the articles, either to be laid out in freehold or leaſehold; and therefore this court will call it one or the other, according to the rule in equity, *that what is agreed to be done, muſt be conſidered as done.*

If it had not been for the locality, eſtates in *Middleſex* and *Hampſhire*, no doubt could have ariſen; but then follows, or *elſewhere*, which is the moſt comprehenſive word he could have uſed.

It is ſaid the lands do not lie any where, for they are not yet purchaſed.

Such a deviſe as the teſtator has made here will paſs every thing he has, and money by the *tranſmutation* of this court is changed into land.

When people make ſuch deſcriptions as the teſtator had done here, they intend to paſs every thing they have in the world; now the money is ſomewhere, and that by *the tranſmutation* of this court is changed into land.

Money is in *England*, like *bona notabilia* in the eccleſiaſtical court, which muſt be either in the dioceſe of the biſhop where the perſon dies, or in the dioceſe of the metropolitan, if he was poſſeſſed of money in different places; ſo here it is either in money, or a mortgage, and therefore the word *elſewhere* certainly takes it in.

Then I muſt conſider it as laid out in one or the other: *Linguen* verſus *Souray* is a caſe in point, for there was as much an objection upon the locality as in the preſent. *

I declare that the 2800 *l.* and 4000 *l.* under the articles ought to be laid out in the purchaſe of lands of inheritance, or in church and leaſehold; for if there had been only *a general deviſe* of his lands, this money would certainly have paſſed.

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* By marriage articles 700 *l.* being the wife's portion, together with 700 *l.* to be added to it by the huſband, was agreed to be laid out in the purchaſe of lands, to be ſettled in ſtrict ſettlement, with remainder in the uſual form to the heirs of the huſband; before any purchaſe made, the huſband dies without iſſue, having firſt deviſed his perſonal eſtate, which was of greater value than the 1400 *l.* but without taking notice of it, to his wife, and his real eſtate to his two nephews, one of whom was his heir at law: this money ſhall in a court of equity be looked upon as land, and the deviſe to the wife, which was of greater value, as a ſatisfaction thereof. *Prec. in Ch.* 400.

Caſtledon verſus *Turner*, *July* 27, 1745.

Caſe 86.

WILLIAM Wetherby by his will ſays, I bequeath my lands to my wife *Alicia* during her life, and after her deceaſe I give the lands to *Margaret Dinton*, niece to my ſaid wife; *Item*, I give the uſe of five hundred pounds ſtock for and during *her* natural life, but after *her* deceaſe, I give the five hundred pounds among the brothers and ſiſters of my ſaid wife.

W. bequeaths his lands to his wife for life, and after her deceaſe to *M. D.* niece to his wife, and then ſays, *item*, I give the uſe of 500*l.* ſtock for *her* natural life, but after *her* deceaſe, I give the 500*l.* among my wife's brothers and ſiſters. *The wife, and not the niece, is intitled to the* 500*l. ſtock for life.*

Mr. Solicitor General for the plaintiff the niece, who claimed five hundred pounds, ſaid, that parol evidence cannot be admitted here to explain the teſtator's intention, according to Lord *Cheyney*'s caſe in 5 *Co.* 68.

The words in this will are equally applicable to one perſon as another, and not ſufficiently certain that it belongs to the wife or niece.

It has been determined where there are introductory clauſes with the word *item*, they are conſidered as abſolute clauſes.

Niece to the wife, is only deſcriptive of the perſon, and therefore in grammatical conſtruction the wife is not the laſt antecedent; and as it can be conjectural only that he meant the wife, the court cannot determine wills upon conjecture only, but muſt be void for the uncertainty.

In *Cheyney*'s caſe, a deviſe to the ſon of a perſon, and he had two ſons, held to be void for the uncertainty.

Mr. Attorney General council for the wife, argued, that from the beginning to the end of the will, there is not one word but what is applicable to *niece*, *or wife*.

Her is a relative word, and muſt refer to ſome perſon who was mentioned before.

It has been ſaid it cannot mean the wife, becauſe ſhe is not the laſt antecedent; and I am ſure as to the niece it may be as well to a ſtranger.

But I apprehend *her* throughout is applicable to the wife; he cited the caſe of *Tomkins* verſus *Tomkins*, lately before *Lord Hardwicke*; there was a deviſe of 50*l.* apiece to *three* children of *A.* and *A.* had four, and his Lordſhip decreed 50*l.* to each of the four children of *A.* notwithſtanding.

Mr. *Weldon* of the ſame ſide cited *Hodgeſon* verſus *Hodgeſon*, 2 *Vern.* 593.

LORD CHANCELLOR.

If there is an abſolute want, or omiſſion of a deviſee in a will, there no parol proof can be admitted.

Mr. Solicitor General's reply.

Mr. Attorney ſays, that the court muſt determine whether it is one or the other by a probable conjecture.

I differ with him as to the rule of evidence; and upon ſtandard rules laid down in *Cheyney*'s caſe, *he* ſhall have it whom the teſtator intended ſhould have it, and not being certain whom he intended, it was held to be void.

There has been no authority cited to impeach this rule.

The caſe of *Tomkins* verſus *Tomkins* is not parallel.

For it did not fix which of the three children ſhould take, but that the word three, was ſurpluſage; and the court determined the teſtator miſtook the number, and that the bequeſt was fifty pounds apiece to the children.

That *Item* is introductory of a new clauſe, and divides, ſo far from connecting it with the precedent.

Suppoſe it had been for natural life only, who could it be conſtrued to mean then? The addition of *her* only ſhews he meant a woman inſtead of a man.

LORD CHANCELLOR.

Where there is no deviſee named, this is an abſolute omiſſion, and cannot be ſupplied by parol evidence.

I am of opinion this is ſuch an omiſſion as is not proper to be ſupplied by parol evidence; for notwithſtanding, where a perſon has two ſons of the name of *John*, it may be ſupplied, yet not where there is an abſolute omiſſion.

Then it muſt be determined by the conſtruction of the will, and there is no rule of law that prevents it from being ſhewn by the conſtruction of the will itſelf.

Firſt, Conſider it upon the clauſe, *Item*, I give the uſe of 500 *l.* ſtock for and during her natural life, *&c.*

It

It has been rightly admitted on the part of the plaintiff, that the words for *her* natural life do import he meant ſome woman or other.

Then conſider the word *her*, it muſt be a word of reference, and but two perſons are named in the will; if right in my firſt reaſoning, it muſt mean either wife or niece; to be ſure *her* does not name the perſon, then ſhall it refer to the wife or niece?

Though the teſtator has ſaid no more than *her*, I am clearly of opinion for the wife; for the wife is the laſt mentioned and the laſt antecedent.

The intention of the teſtator is plain, he had no relations of his own for whom he had any regard, and therefore conſidered her relations as his own.

Would it be natural to make him prefer the wife's niece before the wife herſelf?

It is true the words *to her uſe* are left out in the beginning of the firſt clauſe; but I am not ſatisfied the word *Item* muſt be conſtrued as independent of the preceding clauſe.

It is not neceſſary the word *item* in a will ſhould be conſtrued as independent of the preceding clauſe.

Put it into *Latin do uxori meæ* the lands and houſes, and then afterwards *do & lego* the five hundred pounds ſtock, the latter words would have been clearly in that language carried back to the former words *my wife*.

The manner of the diſpoſition under this will muſt be taken notice of; who is the teſtator principally taking care of for her life? why, the wife.

The wife was the perſon the teſtator was principally taking care of, and therefore ſhe is naturally meant by the word *her*.

He muſt naturally mean her for whom he had before been ſecuring the lands for life.

The word *her* in every part of the will beſides means the wife, conſidered her as the woman that he was taking the moſt care of, and had her in his view, κατ' ἐξοχήν.

Therefore, I am of opinion the wife is entitled, and decreed accordingly.

Caſe 87. *Lucas* verſus *Evans*, *Auguſt* 6, 1745.

A. gives his wife the whole ſurplus of his perſonal eſtate, but if ſhe marries again, then ſhe is to deliver up half to his brother, and his heirs: A bill brought to diſcover whether ſhe is married; ſhe demurred to the diſcovery, as it would ſubject her to a forfeiture. *This being a conditional limitation over of an eſtate, ſhe muſt ſhew ſhe has performed the condition; and the demurrer was over-ruled.*

A. By his will gives to the defendant his wife the whole ſurplus, but if ſhe ſhould marry again, then that ſhe ſhould quit and deliver up half of the ſurplus of his perſonal eſtate to the plaintiff, the teſtator's brother and his heirs, and that he ſhall call her to an account for the ſame.

The bill was brought in the preſent caſe for an account of the moiety, and for a diſcovery whether the defendant was married again. The defendant demurred to the diſcovery, as not being obliged to diſcover what would ſubject her to a forfeiture.

The defendant's council cited *Monins* verſus *Monins*, 2 *Ch. Rep.* 36. and *Chancy* verſus *Tahourdin*, before Lord *Hardwicke*. (2 *Tr. Atk.* 392.)

LORD CHANCELLOR.

The caſe of *Chancy* verſus *Tahourdin* was expreſſly a forfeiture of the whole portion, and there the teſtator was a father, who is bound by nature to provide for a child.

But, conſider this caſe, where the teſtator gives a wife the whole ſurplus of his perſonal eſtate, if ſhe does not marry again, but if ſhe does, he limits over one moiety to his own brother, and directs that ſhe ſhall account for it to him.

Then conſider the proviſion that he was making for every branch of his family; it is within the rules and diſtinctions in former caſes; where it is a conditional limitation over of an eſtate, there the perſon muſt ſhew that they have performed the condition, and cannot demur to a bill for a diſcovery of it; *the demurrer was over-ruled.*

Caſe 88. *Pearly* verſus *Smith*, *October* 22, 1745. *among the cauſe petitions.*

A. had an intereſt in new *South Sea* annuities during his life, and dies before the *Chriſtmas* half year becomes due; *the purchaſer of* A.'s *intereſt in his life time in theſe annuities, is not intitled to the* Chriſtmas *dividend.*

A Purchaſer from an huſband of an intereſt in new *South Sea* annuities during his life, remainder to other perſons, (which had been originally ſecured upon a mortgage, but by order of this court had been transferred to government ſecurities), inſiſted, that notwithſtanding the huſband died before the *Chriſtmas* half year became due, yet that he was intitled to be paid proportionably, at the

rate of four *per cent.* for the time the huſband lived, from *Mid-ſummer* to the day of his death.

LORD CHANCELLOR.

If it had continued a mortgage, the purchaſer would have been intitled to the demand he now makes, becauſe there intereſt accrues every day for forbearance of the principal; though notwithſtanding it is uſual in mortgages to make it payable half-yearly.

Had it continued a mortgage, the purchaſer would have been intitled to his demand, for there intereſt accrues every day for forbearance of the principal.

But *South Sea* annuities are by act of parliament conſidered merely as annuities, and therefore the purchaſer here is no more intitled to receive the half-year's dividend which did not become due till after the huſband's death; than he would in the caſe of a common annuity payable half-yearly, where the annuitant (in whoſe place he ſtands) dies before the half-year is completed.

South Sea annuities are by act of parliament conſidered merely as ſuch, and are exactly in the caſe of a common one, payable half-yearly, where the annuitant dies before the half-year is compleated.

Toomes verſus *Conſet*, *October* 25, 1745. Caſe 89.

THE end of the plaintiff's bill was, to be let into poſſeſſion of the premiſſes in queſtion; a leaſe of a term which had been granted for 60 years, as a collateral ſecurity being expired; and that he may have a reconveyance of the ſaid premiſſes, and that the recognizance the ſecurity for the 3500 *l.* the money borrowed, may be vacated, or ſatisfaction thereof acknowledged upon record.

A leaſe of 60 years, which had been granted as a collateral ſecurity to a recognizance, for 3500 *l.* being expired;

the plaintiff, by his bill, prayed to be let into poſſeſſion, and that the ſecurity might be vacated, or ſatisfaction entered on record. *The account directed to be taken of the rents which have accrued ſince the expiration of the leaſe, and received by the defendant, and to be deducted out of the principal, intereſt, and coſts, and the plaintiff decreed to be intitled to a conveyance of the inheritance of the eſtate in queſtion, and poſſeſſion on payment of what ſhall be found due.*

LORD CHANCELLOR.

This court will not ſuffer, in a deed of mortgage, any agreement in it to prevail, that the eſtate become an abſolute purchaſe in the mortgagee upon any event whatſoever; and the reaſon is, becauſe it puts the borrower too much in the power of the lender, who being diſtreſſed at the time, is too inclinable to ſubmit to any terms propoſed on the part of the lender.——

This, it is inſiſted, is become irredeemable by the length of time, and other conſiderations.

The court makes a diſtinction in the caſe of *a collateral ſecurity*, to indemnify a perſon in the purchaſe of a term.

Theſe collateral ſecurities lie out a great length of time, and there is not the ſame inconvenience as where a perſon has been for a long time in poſſeſſion of the mortgaged premiſſes, and a difficulty ariſes in taking the account; here there is no difficulty, for the account to be taken is only ſince 1739, after the term of ſixty years was expired, and alſo another term of twenty-one years, and as the poſſeſſion of the premiſſes could not be come at till the effluction of theſe terms; they might conclude that the collateral ſecurity extended to the term of ſixty years, till they had conſulted with council.

No bill has been brought to compel them to redeem, or foreclose.

Lord *Hardwicke* declared, that the plaintiff was intitled to a conveyance of the inheritance of the eſtate in queſtion, and to the poſſeſſion thereof, upon payment of what ſhall be found due; and directed the Maſter to take an account of the rents of the premiſſes in queſtion, which have accrued ſince the expiration of the leaſe of the 6th of *November* 1658, and been received by the defendant, and that what ſhall be coming on account of the rents, be deducted out of what ſhall be found due for principal, intereſt, and coſts.

Caſe 90. *Jeſus College* verſus *Bloome*, *Michaelmas Term* 1745.

Bill for a ſatisfaction for waſte in cutting down trees, againſt an aſſignee of the leſſee of the college, after the aſſignment, and for waſte done before the aſſignment after the eſtate of the tenant, that cut down the timber, is determined by aſſignment; a bill cannot be entertained merely for ſatisfaction, without praying an injunction.

THE bill was brought to have an account and ſatisfaction for waſte, in cutting down trees, againſt the defendant, an aſſignee of the leſſee of the college, after an aſſignment of term, and for the waſte done before aſſignment.

LORD CHANCELLOR.

Upon the opening of the caſe, the bill ſeems improper, and an action of trover is the remedy.

Where the bill is for an injunction, and waſte has been already committed, the court, to prevent a double ſuit, will decree an account, and ſatisfaction for what is paſt.

So, upon bills for diſcovery of aſſets, the court will decree an account, which the party is intitled to here, and is incident to the other relief.

Let precedents be ſearched, for if there are any, I will follow them, but if none, I will not make one; his Lordſhip adjourned it to the firſt day of cauſes after term; and upon that day, Mr. *Hoſkins* cited for the plaintiffs, 1 *P. Wms.* 406. *Biſhop of Wincheſter* verſus *Knight*, and 2 *P. Wms.* 240. *Whitfield* verſus *Bewit*.

LORD CHANCELLOR.

The firſt queſtion is, whether bills ought to be entertained merely for ſatisfaction for timber cut down, after the eſtate of the tenant that cut it down is determined, by aſſignment, or otherwiſe, without praying an injunction.

I am of opinion they ought not.

Waſte is *a tort*, and the remedy lies at law.

In an action of waſte, the place waſted is recovered; in an action of trover, *damages*.

In waſte, the place waſted is recovered, in trover, *damages*.

The ground of coming into this court is, to ſtay the waſte, and not by way of ſatisfaction for the damages, but by way of prevention of the wrong, which courts of law cannot do in thoſe inſtances, where a prohibition of waſte will not ſtrictly lie.

To ſtay the waſte, and not by way of ſatisfaction of damages, is the ground of coming into this court.

But in all theſe caſes, this court has gone further, merely upon the maxim of preventing multiplicity of ſuits, which is the reaſon that determines this court in many caſes.

As in bills for account of aſſets, *&c.* that originally was only a bill for diſcovery, which cannot be had without an account, and therefore the court will make a complete decree, and give the party his debt likewiſe.

The court now make a compleat decree in bills for an account of aſſets, by giving the party his debt likewiſe.

So, in bills for *injunctions*, the court will make a complete decree, and give the party a ſatisfaction, and not oblige him to bring an action at law, as well as a bill here.

On bills to ſtay waſte, the court will make a complete decree, and give the party injured a ſatisfaction.

But nothing would tend to greater vexation, than to admit of ſuch bills as the preſent, after the term is at an end; and I am glad to find there is no precedent.

It does not appear in the caſe cited out of 2 *P. Wms.* that no injunction was prayed, I believe there was, and if ſo, it is the common caſe.

It is, beſides, different from the preſent, becauſe the plaintiff there was only intitled to a moiety of the mines, and of the timber, which was the principal matter, and therefore an account was neceſſary.

Many inſtances where the court have decreed an account in the caſe of mines, which they would not have done in the caſes of timber.

The other caſe was the caſe of a mine, which is a ſort of trade, and an account was therefore neceſſary; and there are many caſes, where this court have made decrees in the caſes of mines, which they could not have done in caſes of timber.

Therefore the preſent caſe is reduced to this, that it is a bill brought by the college, to have an account (after the determination of the tenant's eſtate, he having aſſigned) of a little timber cut down, without praying an injunction; and I think it is ſuch a bill as the court ought not to entertain.

The next queſtion is, as to coſts; and I am of opinion, as the plaintiff is not barred of his remedy at law, he ought to pay coſts: Beſides, what the bill is brought for, is of ſo ſmall value, as to be beneath the dignity of the court.

Where the ſuit might have been brought in the grand ſeſſions of *Wales*, it has often been the reaſon for diſmiſſing bills here.

Another reaſon is, that this ſuit might have been brought in the court of grand ſeſſions in *Wales*, which has been often held, and this is a ſtrong reaſon for diſcouraging bills here, therefore, let the bill be diſmiſſed with coſts, but without prejudice to any remedy the plaintiff may have at law.

Caſe 91.

Loyd verſus *Griffith*, *January* 17, 1745.

The Maſter being of opinion, that covenants in a conveyance by counſel for a purchaſer, were unreaſonable, and ought to be ſtruck out; and having inſerted a covenant only againſt the ſeller's own acts, and reported, he approved of the draught as it now ſtands: The court, on exceptions to the report, directed the Maſter to alter his draught, by inſerting proper covenants from *W.* againſt her own acts, and the acts of *L.* her deviſor, as to ſo much as ſhe will be benefited by the eſtate deviſed.

MR. *Loyd*, who died in 1738, had conveyed his eſtate in *Shropſhire* to Mr. *Hill*, for ſecuring twenty-three thouſand pounds; the ſame year, he charged his eſtate in *Shropſhire*, and his eſtate in *Angleſea*, with two thouſand pounds more, and the eſtates to ſtand as a ſecurity for twenty-five thouſand pounds.

By two ſeveral ſettlements, executed by Mr. *Loyd*, a conſiderable time before his death, in conſideration of fourteen thouſand pounds, he conveyed his *Shropſhire* eſtate to Mrs. *Heſter Webb*, in fee.

By deed poll, he releaſed her from the payment of fourteen thouſand pounds.

Afterwards

Afterwards, by his will, reciting the two ſettlements on Mrs. *Heſter Webb*, and the deed poll, he ratifies and confirms *the ſaid ſettlements* and *releaſe to her*; and then deviſes to two truſtees, and their heirs, all his manors, lands, *&c.* in the iſle of *Angleſea*, and county of *Carnarvon*, to the intent that they, or the ſurvivor, *&c.* ſhall, with all convenient ſpeed, after his deceaſe, out of the rents of his ſaid eſtate, or by ſelling and mortgaging the ſame, or by all or any the ways or means aforeſaid, raiſe ſuch ſum as ſhall be ſufficient to diſcharge the mortgage of the lands already ſettled on Mrs. *Webb*, as well as all other my juſt debts, and after the ſame ſhall be ſo paid, he gives the ſame manors, *&c.* to his natural ſon, and his heirs; one of the truſtees is dead, and the other has renounced, and adminiſtration, with the will annexed, is ſince granted to *Frances Newton.*

The plaintiff, the natural ſon, has brought his bill to carry the truſts of the will into execution, which were decreed accordingly, and referred to Maſter *Bennet* to take an account of the perſonal eſtate, and of the teſtator's debts, and the perſonal eſtate to be applied in payment of the debts, in a courſe of adminiſtration; and if the perſonal eſtate ſhould not be ſufficient, the deficiency directed to be made good out of the real eſtate deviſed to the truſtees, and if the rents and profits of the real eſtates were not ſufficient, then the ſaid eſtates ſo deviſed to the truſtees, or a ſufficient part, ſhould be ſold to the beſt purchaſer to be approved of by the Maſter, in which ſale all proper parties were to join, and the money ariſing by ſuch ſale to be applied to ſatisfy ſuch of the teſtator's debts as the perſonal eſtate and rents would not ſatisfy.

Purſuant to ſeveral advertiſements for ſale, Mr. *Andrews* was allowed by the Maſter to be the beſt purchaſer of the *Angleſea* and *Carnarvon* eſtates deviſed to the truſtees, at the ſum of twenty-ſeven thouſand pounds; the report was confirmed, and the purchaſe money paid into the bank, and he has approved of the title, and Mr. *Andrews* has been let into poſſeſſion of the eſtates purchaſed, and a draught of the conveyance has been prepared by the purchaſers council, with covenants againſt their own acts reſpectively, from *Hill* the mortgagee, Sir *Edward Leighton*, ſurviving truſtee in the will, *the two truſtees* appointed by the decree in the room of Sir *Edward Leighton*, from Mr. *Loyd* the plaintiff, and from *Frances Newton*, adminiſtratrix, with the will annexed, and with covenants from Mrs. *Heſter Webb*, as follow, " that Mr. *Hill*, and the ſeveral per-
" ſons abovementioned, have, or ſome of them have, at the ſeal-
" ing and delivery of theſe preſents, full power and authority to
" grant to the purchaſer and his heirs, the eſtates in *Angleſea* and
" *Carnarvon*, and that the ſaid Sir *Edward Leighton*, &c. have a
" right to ſell the ſame to the purchaſer and his heirs.

She is made to covenant likewiſe, for quiet enjoyment, without any interruption by Hill, *&c. and by herſelf, or by any of them, or by any other perſon or perſons lawfully claiming, or to claim by, from, or under them, or any of them, or by, from, or under the ſaid* Thomas Loyd *deceaſed*, Pierce Loyd, *father of the ſaid* Thomas Loyd, *deceaſed*, Pierce Loyd, *grandfather of the ſaid* Thomas Loyd, Pierce Loyd, *great grandfather*, Pierce Loyd *great great grandfather, or any of them, and that freely and clearly exonerated*, &c. *or by the ſaid* Heſter Webb, *her heirs*, &c. *and from time to time to be well and ſufficienty ſaved harmleſs from all manner of former and other gifts*, &c. *and from all other eſtates, title, incumbrances*, &c. *made*, &c. *by Mr.* Samuel Hill, *&c. parties hereto, or by the ſaid* Thomas Loyd, Pierce Loyd *his father*, &c. or any of them, or by any other perſon or perſons lawfully claiming any eſtate, right, *&c.* in, to, or out of the premiſſes, by, from, or under, or in truſt for them, or any of them, and likewiſe covenants, that the parties hereto, *viz. Hill*, &c. and all perſons claiming from them any eſtate in the premiſſes, or from *Thomas Loyd*, and ſo on, to his great great grandfather, ſhall do any further act for aſſuring, *&c.*

Mr. *Weldon* peruſed the draught on the part of the grantors, and was of opinion, that Mrs. *Heſter Webb* need not be a party granting, or that Mr. *Hill* ſhould be ſaid to convey at her requeſt, but, at moſt, only with her privity and conſent, nor that ſhe ſhould covenant for the title, or for quiet enjoyment, or for further aſſurance, and ſtruck thoſe covenants out of the draught.

Mr. *Booth* differed in opinion with Mr. *Weldon*, and declared the draught ſhould be reſtored as it ſtood before.

The Maſter being attended on the draught of the conveyance, referred the ſame for the opinion of Mr. *Lane*, who was of the ſame opinion with Mr. *Weldon*.

The Maſter being again attended, was of opinion, that the covenants from Mrs. *Webb* were unreaſonable, and ought to be ſtruck out, and *therein inſerted a covenant againſt her own acts only*; and on the 17th of *Auguſt* 1745, made his report, that he approved of the draught of a conveyance between the parties of the eſtate in queſtion, as it now ſtands *altered*.

But the purchaſer not being content with the Maſter's opinion, a caſe was prepared by his orders, and laid before *Fazakerley*, who was of opinion, that a court of equity would not compel Mrs. *Heſter Webb* to enter into theſe covenants, as ſhe is not intitled to the deeds and writings relating to theſe eſtates.

The purchaſer took the following exception to the draught of the conveyance as ſettled by the Maſter.

" For

" For that the covenants contained in the ſaid draught of the con-
" veyance, mentioned in the report, from Mrs. *Heſter Webb*, for the
" title, for quiet enjoyment, and for further aſſurance on her part,
" are ſtruck out of the draught of the ſaid conveyance; whereas
" the purchaſer inſiſts, that the Maſter ought to have let the ſaid
" covenants from Mrs. *Webb* have ſtood in the draught, or at leaſt,
" *the purchaſer ought to have had ſuch covenants inſerted therein, as*
" *would have indemnified him againſt any latent incumbrances made*
" *by* Thomas Loyd, or his anceſtors, to the amount of ſo much
" money as the ſaid *Heſter Webb* ſhould receive a beneficial intereſt
" from, in the eſtate in queſtion."

Mrs *Heſter Webb* did not appear by council, as not being a party to the ſuit.

The exception came on to be heard this day.

LORD CHANCELLOR.

A great number of ſales are directed by a decree of this court where there are no covenants at all.

It has been ſaid by the purchaſer's council, that Mrs. *Heſter Webb* muſt covenant againſt all the anceſtors of *Thomas Lloyd*, becauſe it is a rule among conveyancers, where an eſtate has been long in a family, that the vendor's covenant muſt go as far back as the firſt purchaſer of the eſtate; but where the vendor claims immediately under a perſon who bought the eſtate, there he need not covenant any farther back, than from that perſon, becauſe whoever buys this eſtate has the benefit of the covenants in the conveyance to the vendor's purchaſer.

Where the vendor claims immediately under the perſon who bought the eſtate, there he need not covenant any further back than from that perſon, for the buyer has the benefit of the covenants in the conveyance to that perſon at the time he purchaſed.

I never heard, nor do I know of any ſuch rule.

Where conveyances are to be made by a decree of this court, the ſettling them to be ſure, is to be by the like kind of rule as men of judgment among the conveyancers would direct.

Conveyances made under a decree of this court, are to be ſettled by the like rule as men of judgment among conveyancers would direct.

I cannot make an order upon Mrs. *Heſter Webb* to execute any conveyance becauſe ſhe is no party in the cauſe, and therefore if it cannot be finally ſettled to the ſatisfaction of all parties, the purchaſe muſt be diſcharged, but then the purchaſer by way of compenſation muſt have all his coſts.

I will conſider the covenant itſelf.

That

Of opinion that carrying the covenant no further back than to the perſon under whom *W.* claims is, ſufficient.

That Mrs. *Heſter Webb* ſhould covenant, all the anceſtors of her deviſor, &c. *(ſee the words in the conveyance ſettled by the purchaſers council,)* would be carrying it too far, for it would be unreaſonable to extend it to the firſt purchaſer, where a family have been for ſeveral generations in poſſeſſion of the eſtate, for they may have had the benefit of the ſtatute of limitations and other bars in their favour, and therefore carrying it no farther back than to the perſon under whom Mrs. *Webb* claims is ſufficient, and the council for the purchaſer now ſay they are contented with it.

It is not a deviſe to her, but to truſtees for the payment of debts, the material part of which is an incumbrance by mortgage on the eſtate given to her after his debts are paid.

But it has been inſiſted by the purchaſer's council, that it enures to the benefit of Mrs. *Webb*, becauſe the truſtees have no beneficial intereſt nor the mortgagee, and conſequently Mrs. *Webb* the *ceſtui que truſt* has, and therefore the Maſter has gone ſo far as to be of opinion, that ſhe ought to join in the conveyance by making her a grantor.

As ſhe is to join, the queſtion will be, how far ſhe is to covenant?

Where an eſtate is decreed to be ſold for payment of debts, and no ſurplus remains, the heir need not covenant any further than his own acts; ſame rule as to a deviſee.

There are undoubtedly a great many caſes in this court, where a perſon covenants no farther than their own acts; as where an eſtate is decreed to be ſold for payment of debts, and no ſurplus remains, the court will not require the heir to covenant any farther than his own acts; the ſame rule as to a deviſee.

But where the ſurplus is conſiderable, the heir muſt covenant that neither he nor his immediate anceſtor, and in the caſe of the deviſee, that neither he nor his deviſor have done any act to incumber.

But ſuppoſe ſuch a ſale was decreed, and after ſale a conſiderable ſurplus comes to the heir at law or deviſee, I believe there are ſeveral inſtances where they have been directed to covenant in the caſe of the heir, that neither he, nor the immediate anceſtor under whom he claims; and in the caſe of the deviſee, that neither he nor his deviſor have done any act to incumber.

A good deal depends upon the *quantum*; for if the purchaſe money ariſing from the ſale of the *Angleſea* and *Carnarvan* eſtates is twenty-ſeven thouſand pounds, and Mrs. *Webb* draws out twenty-five thouſand pounds for the exoneration of the mortgage upon the eſtate deviſed to her, ſhe may be ſaid to be a deviſee of that eſtate.

But if there are other debts beſides the mortgage to be paid, that are a charge upon that eſtate, then ſhe cannot properly be ſaid to be the deviſee of the whole of that eſtate, but of ſo much as is left after the debts are paid.

Lord

Lord Chancellor propoſed to refer it to ſome eminent conveyancer, to conſider whether the covenant required of Mrs. *Webb* is an uſual covenant, but her council refuſing, made the following order.

Let the exception be allowed, and let the Maſter alter the draught of the conveyance prepared and certified by him, by inſerting therein *proper covenants from Mrs. Heſter Webb againſt her own acts, and the acts of Mr. Thomas Lloyd* her deviſor, as to ſo much as ſhe will be benefited by the eſtate.

Gyles verſus *Wilcocks, Barrow and Nutt.* Caſe 92.

ON *March* the 13th 1740. this cauſe by order of Lord *Hardwicke*, ſtood at the head of the paper of that day, when he directed the bill againſt the defendant *Nutt* to be diſmiſſed without coſts, and as between the plaintiffs and the defendants *Wilcocks* and *Barlow*, by conſent of the plaintiff *Gyles* preſent in court, on behalf of himſelf and the other plaintiffs, and by conſent of the defendant *Wilcocks* preſent in court, and of Mr. *Hodgſon* of council with the defendant *Barlow*, all matters in difference between the ſaid parties in this cauſe, were by his Lordſhip referred to the award and determination of Mr. *Cay* and Mr. *Thomas Stephens*, and they were to make their award therein on or before the firſt day of *Trinity* term next; and in caſe they could not agree therein, they were to name an umpire, who was to make his umpirage on or before the firſt day of *Michaelmas* term next; and ſuch award or umpirage was directed by his Lordſhip to be performed by the ſaid parties, and to be made an order of this court; and no bill in any court of equity was to be brought againſt the ſaid arbitrators, or umpire, and the injunction was ordered to be continued in the mean time.

See 2 *Tr. Atk.* 141. Caſe 130.

Pack and others verſus *Bathurſt, July* 1745. Caſe 93.

THE bill was brought for an account of the perſonal eſtate of the teſtator *Edward Barthurſt*, and that it might be applied in a courſe of adminiſtration towards payment of the plaintiffs creditors, and in caſe the ſame ſhould be inſufficient for that purpoſe, that an account might be taken of the rents of the real eſtate of the teſtator, and ſo much ſold as might be applied in ſatisfaction of the debts of the plaintiffs.

One point in this cauſe was, whether a power to charge a ſum of money, *viz.* 5000 *l.* on land either by deed or will, and which had

A. had a power to charge a ſum of money on land, by deed or will, and executes it by a voluntary deed; the court in favour of the creditors of *A.* will conſider it as perſonal aſſets, and lay hold of it for their benefit.

been executed by a voluntary deed of the 16th of *Auguſt* 1738. ſhould be conſidered as perſonal aſſets; and a caſe was cited, where it was ſaid Lord *Talbot* was of opinion that it ſhould.

Mr. *Brown* the King's council ſaid, that it was a very extraordinary determination; but Lord *Hardwicke* declared he would lay hold of it for the benefit of creditors, and ordered it to be referred to the Maſter to take the accounts of the creditors of *Edward Bathurſt*, and alſo of his perſonal eſtate, and that the ſame be applied in payment of the debts in a courſe of adminiſtration; and his Lordſhip declared, that the defendants *Lutman* and *Wyat* and their wives, who claim the benefit of 4000*l.* for the wives by the ſettlement of the father made before marriage, which has been eſtabliſhed by a verdict, are not intitled to the benefit of the ſum of 5000*l.* under the truſt of the term created by the deed of the 16th of *Auguſt* 1738. but being made ſubject to the teſtator's appointment, ought now to be conſidered as part of his perſonal eſtate.

Caſe 94. *January* 25, 1744. *Rehearings.*

LORD CHANCELLOR.

Where a plaintiff examines only one witneſs to eſtabliſh a fact, yet the court will ſo far lay ſtreſs upon this evidence, as it ſerves to explain any collateral circumſtances.

WHERE the plaintiff charges a fact by his bill, which is denied by the defendant's anſwer, and the plaintiff examines only one witneſs to eſtabliſh it, though the rule of the court is, where there is oath againſt oath, that the plaintiff ſhall not have a decree for relief upon this fact, yet this court, as well as courts of law, will ſo far lay ſtreſs upon the evidence of a ſingle witneſs, as it ſerves to explain any collateral circumſtance.

Caſe 95. *Aſhenhurſt* verſus *James*, *February* 3, 1745.

The defendant, the aſſignee of two judgments which were prior in point of time to the plaintiff's mortgage, is entitled to have intereſt on the whole money, the accumulated ſum which he paid for thoſe two judgments.

THE bill was brought by the plaintiff a mortgagee againſt the defendant to redeem, who had one puny judgment and two prior, which he had taken an aſſignment of on the ſame eſtate, and for an account of the rents and profits of the premiſſes in queſtion, and for an aſſignment of the two judgments.

It appeared in the cauſe that the defendant had taken in the two prior judgments, by the deſire of the plaintiff, who was not able to do it himſelf.

LORD CHANCELLOR.

The firſt queſtion is, whether the defendant is entitled to have intereſt upon the whole money, the accumulated ſum which he paid for the two judgments aſſigned to him prior to the plaintiff's mortgage.

The ſecond queſtion is, whether the profits the defendant had received upon all the three judgments ſhould be applied by him, or only ſuch profits as he had received by virtue of the two prior judgments aſſigned to him by *Thomas Price*.

As to the firſt, I am of opinion the defendant is entitled to have intereſt upon the whole ſum, principal and intereſt, though not upon the general rule, but on the particular circumſtances of this caſe.

The general rule is where a man makes a ſecurity on mortgage, and there is an arrear of intereſt thereon, if the incumbrancer aſſigns the ſame, with the concurrence of the mortgagor, the intereſt paid to the mortgagee by the aſſignee ſhall be taken as principal, and carry intereſt; but where it is aſſigned without the conſent of the mortgagor, the aſſignee muſt take it only upon the ſame terms with the aſſignor.

Where a mortgage is aſſigned with the concurrence of the mortgagor, the intereſt paid to the mortgagee by the aſſignee ſhall be taken as principal, and carry intereſt; otherwiſe if aſſigned without the mortgagor's conſent.

This general rule admits of diſtinctions upon particular circumſtances.

Here is an eſtate to be ſold by virtue of a decree of this court, and the defendant is reported the beſt bidder. From that time he had as much reaſon to conſider himſelf the owner of the equity of redemption, as if he had been a purchaſer of it upon articles.

It is the ſame as if being confirmed the beſt bidder by authority of this court, where all the incumbrancers agree the defendant ſhall be purchaſer, and he takes an aſſignment of all incumbrances by the conſent of parties entitled to the eſtate, and therefore he is a creditor for the whole principal ſum: their conſent is the ſame thing as if they had been made parties to the aſſignment; this is ſtrengthened too by what is ſworn in his anſwer, that he deſired the plaintiff to take them in, but he not being able to do it, requeſted the defendant to take them in.

If the purchaſe had gone off on the default of the defendant, I ſhould then have thought he would not have been entitled.

I am of opinion for the plaintiff on the ſecond queſtion.

Three

Three judgments upon this eſtate, though defendant was a puny incumbrancer upon one of the judgments, being ſubſequent to the plaintiff's mortgage upon the ſame eſtate.

A judgment creditor in poſſeſſion of the eſtate, and prior to a mortgagee, aſſigns his judgment, the aſſignee's poſſeſſion is from the date of the aſſignment only, but the rents he has received ſhall be deducted out of what ſhall be reported due to him for principal, intereſt and coſts.

If a prior judgment creditor had continued in poſſeſſion of this eſtate, he would have been entitled before the mortgagee, but he does not continue in poſſeſſion, for he aſſigns his judgment to the defendant, and gives him poſſeſſion, then the defendant may be ſaid to receive the poſſeſſion from the dates of the aſſignment of that judgment only.

Indeed if he had extended his own judgment, he would have had a right to have retained the profits received upon his own judgment; but as the caſe now ſtands, the defendant muſt make an allowance for the profits, therefore let the Maſter ſee what is due to the defendant for the ſum of 260 *l.* 13 *s.* 9 *d.* paid by him to *Thomas Price* on his aſſigning the two judgments to him, and for the intereſt of that ſum, and to compute intereſt for 150 *l.* part thereof being the original principal ſum, after the rate of 5 *l. per cent. per ann.* and for the remaining 110 *l.* 13 *s.* 9 *d.* after the rate of 4 *l. per cent. per ann.* and take an account of the rents and profits of the premiſſes in queſtion, which have been received by the defendant, and what ſhall appear to have been received, to be deducted out of what ſhall be reported due to him for principal, intereſt and coſts; and on the plaintiff's paying unto the defendant what ſhall be remaining due to him for ſuch principal, intereſt and coſts, he is to aſſign the two judgments, and deliver the poſſeſſion of the ſaid eſtate to the plaintiff.

Caſe 96. *Pollexfen* verſus *Moore*, *February* 5, 1745.

M agreed to purchaſe an eſtate of the plaintiff's for 1200 *l.* but died before he had paid the whole purchaſe money; *M.* by will, after giving 800 *l.* legacy to his ſiſter, deviſes the eſtate purchaſed, and all his perſonal eſtate, to *J. K.* and makes him executor: *J. K* commits a *devaſtavit* of the perſonal, and dies, and the purchaſed eſtate deſcends on *B. K* his ſon. The court to give the legatee a chance of being paid her legacy out of the perſonal aſſets, directs the plaintiff to take his ſatisfaction upon the purchaſed eſtate for the remainder of the purchaſe money.

MR. *Thomas Moore* in his life-time agreed to purchaſe of the plaintiff an eſtate called *Orchard* in *Somerſetſhire* for twelve hundred pounds, but died before he had paid the whole purchaſe money. *Moore*, by will, after giving a legacy of eight hundred pounds to the defendant his ſiſter, deviſes the eſtate purchaſed, and all his perſonal eſtate to *John Kemp*, and makes him his executor.

Mr. *John Kemp* commits a *devaſtavit* of the perſonal eſtate, and dies, and the purchaſed eſtate deſcends upon *Boyle Kemp* his ſon and heir at law.

Mr.

Mr. *Pollexfen* brings his bill againſt the repreſentative of the real and perſonal eſtate of *Moore* and *Kemp*, to be paid the remainder of the purchaſe money.

Mrs. *Moore* the ſiſter and legatee of *Thomas Moore* brings her croſs bill, and prays that if the remainder of the purchaſe money ſhould be paid to Mr. *Pollexfen* out of the perſonal eſtate of *Moore* and *Kemp*, that ſhe may ſtand in his place, and be conſidered as having a Lien upon the purchaſed eſtate for her legacy of eight hundred pounds.

LORD CHANCELLOR.

The vendor of this eſtate has to be ſure a lien upon the eſtate he ſold for the remainder of the purchaſe money, for from the time of the agreement, *Thomas Moore* was a truſtee as to the money for the vendor.

From the time of the agreement for a purchaſe of an eſtate, the vendee is a truſtee as to the money for the vendor.

But this equity will not extend to a third perſon, but is only confined to the vendor and vendee; and if the vendor ſhould exhauſt the perſonal aſſets of *Moore* and *Kemp*, the defendant will not be entitled to ſtand in his place, and to come upon the purchaſed eſtate in the poſſeſſion of *Kemp*'s heir.

But this rule is confined merely to the vendor and vendee, and will not extend to a third perſon.

But then the heir of *Kemp* ſhall not avail himſelf of the injuſtice of his father, who has waſted the aſſets of *Moore*, which ſhould have been applied in paying the defendant's legacy.

Therefore the eſtate which has deſcended from *John Kemp*, the executor of *Moore*, upon *Boyle Kemp*, comes to him liable to the ſame equity as it would have been againſt the father who has miſapplied the perſonal eſtate; and in order to relieve Mrs. *Moore*, I will direct *Pollexfen* to take his ſatisfaction upon the purchaſed eſtate, becauſe he has an equitable lien both upon real and perſonal eſtate, and will leave this laſt fund open, that Mrs. *Moore*, who can at moſt be conſidered only as a ſimple contract creditor, may have a chance of being paid out of the perſonal aſſets.

Caſe 97. *Hicks* verſus *Hicks*, *November* 22, 1744.

A receiver, during the infancy of the plaintiff, who had no guardian, was directed to place out the ſurplus of the rents, when the ſame ſhould amount to a competent ſum, on government or other ſecurities, having never placed it out at intereſt, according to the decree, the court directed, that he ſhould pay intereſt at 4 *l. per cent.* from the time of the decree, till the infant came of age.

IT was moved that Mr. *John Applegath*, the receiver of the rents and profits of the eſtates in queſtion, may be charged with, and pay to the plaintiff intereſt for *the ſurplus* rents and profits, during the time the ſame remained in his hands, and which were not placed out by him at intereſt.

Mr. *Applegath* was appointed receiver in 1729. upon the 11th of *February* 1733. it was ordered by the decree in the cauſes, that the receiver, during the infancy of the plaintiff, who had no teſtamentary or other guardian, ſhould place out the ſurplus of ſuch rents and profits, when the ſame ſhould amount to a competent ſum, *with the approbation of the Maſter*, on government, or other good ſecurities, in the names of truſtees, to be approved of by the Maſter, and that the ſame ſhould be paid to the plaintiff when of age.

LORD CHANCELLOR.

I am of opinion, that the receiver muſt pay intereſt at four *per cent.* for the ſurplus, rents and profits from the time of the decree in *February* 1733. till the infant came of age.

Becauſe where there is no teſtamentary guardian, or any other appointed, it is the only care the court can take in ſuch a caſe, that the moſt may be made of an infant's eſtate during his minority.

There have been ſeveral excuſes made for the receiver.

Firſt, That the expreſs direction of the decree, is, that the receiver ſhall lay out the ſurplus rents, *&c. with the approbation of the Maſter in truſtees names to be approved of by him*; and therefore as the Maſter gave no directions, he could not do it of himſelf.

It is no excuſe for the receiver, that the Maſter did not give any directions about it, for it was his duty to remind the Maſter to lay out the ſurplus rents when it amounted to a competent ſum.

But there is no force in this argument, becauſe theſe words in the decree are merely of courſe, and the neceſſary buſineſs of Maſters may be ſuppoſed to prevent them from attending to every minute particular in a decree, and it was the duty of the receiver to remind the Maſter, to lay out the ſurplus rents, as often as it amounted to a competent ſum.

Another

Another excuſe was; that there were large buildings and farms upon the eſtate, which were in a ruinous condition, and very often tenants breaking, and that it was neceſſary for the receiver to keep the balance in his hands for rebuilding and repairs, or for the accident of empty farms, which muſt coſt a good deal in *ſtocking*.

That buildings and farms are in a ruinous condition, and tenants often breaking, will not juſtify a receiver's keeping the balance in his hands, for it is not to be ſuppoſed he could exhauſt the whole received from the rents of the eſtate.

If I ſhould allow this to be an excuſe, it would be attended with very ill conſequences, for then every *receiver* of the rents and profits of real eſtate would pretend repairs were neceſſary; but it is impoſſible to ſuppoſe, though tenants are very fond of buildings, and repairs, that the receiver could in this caſe exhauſt the money received.

A third excuſe, made for the receiver, or rather a defence for him was, that on the 23d of *Auguſt* 1743. (the infant coming of age but two days before) the receiver ſettled accounts with the plaintiff, delivered up his vouchers, gave him copies of all the accounts paſſed before the Maſter, *&c.* that the plaintiff looked them over carefully, admitted the balance to be right, and received the ſame without any objection.

The receiver's ſettling the accounts and delivering the vouchers to the palintiff when he came of age, and his admitting the balance, and receiving it without objection, had no weight, as this tranſaction was two days only after he came of age.

This does not weigh with me at all, for moſt young gentlemen are apt to paſs accounts when they come of age, without looking into them, and are tempted to do it in order to get the balance from the receiver into their own hands.

Upon the whole it is very neceſſary for the ſake of the practice of the court, with regard to infants, that the receiver in this caſe from the time of the decree in 1733. ſhould, for his negligence in not putting out the ſurplus rents, pay intereſt to the time the plaintiff came of age.

His Lordſhip directed the Maſter to inquire what ſums of money the receiver ought, or might reaſonably have laid out at intereſt, for the benefit of the eſtate, and that for ſuch ſums, the receiver ſhould be charged at the rate of four *per cent.*

Stribley verſus *Hawkie*, *November* 28, 1744. Caſe 98.

MR. *Newnham* moved for a writ of aſſiſtance to the ſheriff of *Cornwall*; there had been a writ of execution of the decree ſerved on the defendant, and there had been an attachment.

After a writ of execution of a decree, and an attachment ſerved on the defendant, the plaintiff may have an injunction to the defendant to deliver poſſeſſion, and next a writ of aſſiſtance to the ſheriff, commanding him to be aiding in putting the plaintiff in poſſeſſion.

LORD CHANCELLOR.

There must be an injunction to the defendant to deliver possession, the decree being for possession, and then a writ of assistance directed to the sheriff commanding him to be aiding and assisting to put the plaintiff in possession.

Case 99. *Honeywood* versus *Selwin*, *December* 1744.

S. gave a bond to pay 800 *l.* a year to *H.* during *S.*'s enjoying the office of or whilst any body held it in trust for him; *H.* put the bond in suit; *S.* brings a bill for an injunction, and a cross bill is brought by *H.* to discover whether *E.* held the office in trust for *S.* *S.* insisted in his answer he was not obliged to discover what would subject him to the incapacities of the several acts to vacate a seat in parliament on a member's accepting a place. *He is not obliged to make the discovery.*

THIS cause came before the court upon exceptions to the Master's report.

The exception was, for that the defendants have not set forth whether one *Eversham* did not hold the office of in trust for the defendant *Selwin*.

Mr. *Selwin* had given bond to pay 800 *l.* a year during his enjoying the office of or whilst any body held it in trust for him.

The bond was put in suit by *Honeywood*.

The bill was brought by *Selwin* for an injunction, and the cross bill by *H.* to discover whether *Eversall* held the office in trust for *Selwin*.

Mr. *Selwin* insisted in his answer, that he was not obliged to discover that which would make him liable to the incapacities of the 12 & 13 *W.* 3. and other acts that vacate a seat in parliament upon a member's accepting a place.

LORD CHANCELLOR.

The defendant did right in answering, for he could not have demurred to this matter, because that would have been admitting the facts to have been true.

The defendant has done right in insisting upon this matter in his answer, he could not demur to it, because that would have been admitting the facts to be true.

I think he is not obliged to make the discovery.

It has been objected, that the plaintiff in the original bill coming for equity, ought to do equity, and discover the office is held in trust.

But

But I am of opinion it has no weight.

It has been ſaid that *Selwin* might diſcover whether *Everſall* did not hold in truſt for him during all the laſt parliament, and that this could not affect his ſeat in parliament now.

S. ſhall not be compelled even to diſcover whether *E.* did not hold in truſt for him during all the laſt parliament, as it would affect his ſeat now; for as *E.* is ſtill in poſſeſſion of the place, the Houſe of Commons would believe *E.* a truſtee for *S.* and declare his ſeat void.

His Lordſhip declared he ought not to diſcover even this, becauſe if he did, upon an application to the houſe of Commons, they would certainly believe *Everſall*, who is ſtill in poſſeſſion of the place, is a truſtee for *Selwin*, and declare his ſeat to be void.

Anon. July 20, 1745.

Caſe 100.

A Bill brought by ſome of the members of a voluntary ſociety againſt others of the ſame ſociety, to ſettle and adjuſt ſome diſputes between them as to the place where it is to be holden, and other matters.

A voluntary ſociety entered into with an intention to provide by a weekly ſubſcription for ſuch of the members as ſhould become neceſſitous, and their widows, is in the nature only of a private charity, and not neceſſary the Attorney General ſhould be a party.

They entered firſt into this ſociety in 1709. and have printed orders and rules for the government of the ſociety; among the reſt it is to be held weekly at one particular victualling houſe; upon the death of the maſter of the houſe, the ſtewards of the year went away to another houſe, and took the box, *&c.*

The intention was to provide by a weekly ſubſcription of three pence a-piece for thoſe who ſhould become neceſſitous amongſt them, the lame, blind, *&c.* and the widows, *&c.*

Mr. Attorney General objected for want of his being a party, as looking upon it to be in the nature of a charity.

LORD CHANCELLOR.

This is not ſuch a ſociety as makes it neceſſary for the Attorney General in behalf of the crown, to be a party, in order to ſee the right application of the money, but is in the nature only of a private charity, and therefore the objection muſt be over-ruled.

Caſe 101. *Lawley* verſus *Hooper*, *November* 19, 1745.

The court of opinion the plaintiff was in this caſe intitled to a redemption; and that the annuity he granted ought to be reconveyed on his payment of 1050 *l.* with legal intereſt, to be computed from the firſt of *June* 1737, the date of the deed, but directed, if any ſums were advanced for the inſurance of the plaintiff's life they ſhould be added to the 1050 *l.* and carry 5 *per cent.* intereſt from the reſpective times of paying the ſame.

THE plaintiff being a younger ſon of Sir *Thomas Lawley* deceaſed, and intitled to an annuity of two hundred pounds a year for life, out of the eſtate of Sir *Robert Lawley* his elder brother, (for further ſecuring of which, Sir *Robert* being only tenant for life, had likewiſe entered into a bond in the penalty of 2000 *l.*) having by his indiſcretion, and when about twenty-one years of age, involved himſelf in debt, and being a priſoner in the *Fleet*, and (as he ſtated by the bill) having no means of delivering himſelf from a gaol, and the difficulties he laboured under, than by diſpoſing of the whole, or ſome part of the ſaid annuity, he, by indenture dated the 1ſt of *June* 1727, ſold to *Rowland Davenant* one hundred and fifty pounds a year, part of the ſaid annuity of two hundred pounds, in conſideration of one thouſand and fifty pounds: In the deed there was *a proviſo*, that if at any time the plaintiff ſhould *deſire to purchaſe back* the ſaid three-fourth parts of the ſaid yearly rent of two hundred pounds, and ſhould give ſix months notice in writing to the ſaid *Rowland Davenant*, his executors, *&c.* and ſhould, at the expiration of ſuch notice, pay to the ſaid *Rowland Davenant*, his executors, one thouſand and fifty pounds, then (all arrears of the ſaid annuity being paid) the ſaid *Rowland Davenant*, his executors, *&c.* would re-aſſign to the plaintiff, or his aſſigns, free from incumbrances.

After this deed was ingroſſed, and when all parties were met for the execution of it, *Rowland Davenant* inſiſted upon an Indorſement being made on the back of the deed, and ſigned by the plaintiff; that in caſe the plaintiff ſhould repurchaſe *or redeem* the ſaid three-fourth parts of the ſaid annuity of two hundred pounds, the ſame ſhould be upon payment of one thouſand and fifty pounds, and ſeventy-five pounds, and all arrears, which indorſement the plaintiff charged, he conſented to, by reaſon of *the diſtreſſed circumſtances* he was in at that time.

When the plaintiff executed the aſſignment he was in perfect health, and under the age of twenty-two years.

Mr. *Rowland Davenant* received the three-fourths of this annuity, being one hundred and fifty pounds *per ann.* to the time of his death, which happened in *October* 1737, and the defendants, who are his executors, have received it ever ſince.

The plaintiff has now brought this bill for an account of what was due to the defendants as repreſentatives of Mr. *Davenant*, for principal and intereſt of the thouſand and fifty pounds, and of what

defendant

defendant had paid for the inſurance of the plaintiff's life, which, by his bill, the plaintiff ſubmitted to allow; and that upon payment of what ſhould be due, the defendants might re-aſſign the ſaid annuity to the plaintiff, or as he ſhould direct, free from incumbrances, with all the ſecurities given by Sir *Robert Lawley*, for the due payment thereof.

The defendants, who were the executors of Mr. *Rowland Davenant*, inſiſted, this was a fair tranſaction, that it was a purchaſe, and not a mortgage, and the plaintiff was not intitled to repurchaſe, but on the terms of the deed and indorſement: They inſiſted Mr. *Rowland Davenant* knew nothing of the plaintiff's being in gaol, till after the purchaſe was agreed for, and ſaid, the reaſon of his inſiſting on the indorſement was, becauſe no time was limited in the deed for the plaintiff to re-purchaſe the ſame, which was contrary to the uſual forms of ſuch proviſoes, and that it was not worth his while to lay out one thouſand guineas upon the terms of being paid off ſoon; and they alſo inſiſted, that one thouſand and fifty pounds was the full market price for the annuity, eſpecially as it was only ſecured by a perſonal ſecurity, in caſe of the death of Sir *Robert Lawley*.

LORD CHANCELLOR.

There has been a long ſtruggle between the equity of this court, and perſons who have made it their endeavour to find out ſchemes to get exorbitant intereſt, and to evade the ſtatutes of uſury: The court very wiſely hath never laid down any general rule beyond which it will not go, leſt other means of avoiding the equity of the court ſhould be found out: Therefore they always determine upon the particular circumſtances of each caſe; and wherever they have found the leaſt tincture of fraud in any of theſe oppreſſive bargains, relief hath always been given.

The court hath very prudently avoided laying down any general rule in caſes of this kind, beyond which they will not go, for fear the ſchemiſts for exorbitant intereſt, ſhould find out other means to avoid the equity of this court.

In this caſe there are two queſtions to be conſidered, firſt, whether this aſſignment of the 1ſt of *June* 1737, is to be conſidered as an abſolute ſale, or as a ſecurity, or loan.

Secondly, whether there be any ground to relieve againſt it, admitting it to be a ſale.

As to the firſt, I think (though there is no occaſion to determine it) there is a ſtrong foundation to conſider it as a loan of money, and I really believe in my conſcience, that ninety-nine in a hundred of theſe bargains are nothing but loans turned into this ſhape to avoid the ſtatutes of uſury.

A ſtrong foundation to conſider this as a loan, for moſt of theſe bargains are merely loans, but turned into this ſhape to avoid the ſtatute of uſury.

Here

There is little difference between the meaning of the word redemption and repurchaſe, and in the indorſement are uſed promiſcuouſly, which ſhews the parties themſelves conſidered it as a power to redeem.

Here was an extravagant young man, who had been twice in priſon, was committed to the *Fleet* the 2d of *June* 1736, and diſcharged the 1ſt of *November* 1736; was again a priſoner the 7th of *March* 1736, and this produced the bargain: the deed bears date the 1ſt of *June* 1737, and he is diſcharged out of the *Fleet* the third: The proviſo in the deed uſes the word *repurchaſe*, but there is very little difference in reality between the meaning of the word redemption and repurchaſe; one of the witneſſes (*Sparrow*, the defendants ſolicitor) uſes the word redemption; and I take the word purchaſe, uſed in all the other depoſitions, to be only a cant word, meaning a ſale or mortgage; and the indorſement on the back of the deed uſes the words re-purchaſe and redemption promiſcuouſly, which plainly ſhews that it was conſidered by all parties as a power to redeem.

There being no covenant to repay the money, does not make it leſs a mortgage; for the *Welſh*, and moſt copyhold mortgages, have not this covenant.

But it is objected, that this is not to be conſidered as a mortgage, becauſe there is no covenant in the deed to repay the money; but that objection is not well founded, for it is not neceſſary; all *Welch* mortgages are without this covenant, and ſo are moſt copyhold mortgages.

Another objection which has been made, was, that a man muſt be out of his ſenſes to lend his money upon annuities for a life, which may drop the next day, and ſpeaking abſtractedly, and merely on the nature of annuities for life, there ſeems to be weight in this objection: But every body knows that this caſualty of loſing the principal, is ſecured, by inſuring the life upon which the annuity depends.

But it is ſaid that every life cannot be inſured; indeed, the inſurance offices will require different terms, according to the life, but ſtill they may be inſured, and it is admitted that this life was a good one.

But there are two circumſtances more, which ſhews that this was intended and underſtood as a ſecurity: When the parties met to have the deed executed, it was objected by the lender, to the terms of the condition to purchaſe back, that it was made to be at any time, and he ſaid it was uſual to reſtrain it to a certain period of time.

What does this import? It is plainly the language of a lender of a ſum of money: Another circumſtance is, that he inſiſted upon the payment of ſeventy-five pounds more, and would have ſix months notice; the conſequence of this was, that he would have this time to find out another hand to take his money, and would have intereſt for his money during thoſe ſix months, but upon payment of 75*l.* more he might redeem, which was the

ſame

ſame, as ſaying, you ſhall give me ſix months notice, or pay me ſix months of the annuity.

Therefore, upon all the circumſtances, I think this was, and is to be taken as a loan of money, turned into this ſhape only to avoid the ſtatute of uſury; but I do not think I am under any abſolute neceſſity to determine this point, for I am of opinion, that this is ſuch an agreement as this court ought not to ſuffer to ſtand, taking it as an abſolute ſale.

Lord *Hardwicke* of opinion that the difference in the value of annuities for one's own life, and that of another, has been intirely cauſed by the dealers in theſe annuities.

An objection was made, that great inconvenience would follow from ſuch a determination as this, becauſe it would oblige all annuitants of this kind to ſell abſolutely; but I think no inconvenience of this ſort will inſue, it will rather hinder ſuch annuitants from ſelling at all; and I believe in my conſcience, that the difference which is now made between the value of annuities for one's own life, and that of another, has been entirely cauſed by the dealers in theſe annuities.

The variation of the terms, was taking advantage of the plaintiff's diſtreſs, and ſo infects the whole caſe; that the agreement ought to be totally ſet aſide.

But conſider the circumſtances of this caſe, ſuppoſing it a ſale, there was no pretence for the addition of 75*l.* this was not an intereſt which was growing better, on the contrary, every year the plaintiff lived it was growing worſe; and yet he is made to agree to pay 75*l.* more for the repurchaſe, as if the annuity was worth more after three years of his life was ſpent, than it was at the time of the purchaſe: The plaintiff was then a priſoner in the *Fleet*, and in diſtreſs, and was forced to ſubmit to theſe terms, he could not then oppoſe them, and therefore I conſider the variation of the terms of the agreement as taking advantage of his diſtreſs, a variation for which there was no pretence, and a moſt unreaſonable thing: If, then, this was unreaſonable, it infects the whole caſe, and the relief muſt be by ſetting aſide the whole agreement.

Therefore, I declare, that under the circumſtances of this caſe, the plaintiff is intitled to a redemption of the ſum of one hundred and fifty pounds a year, part of the annuity of two hundred pounds, aſſigned to the defendant's teſtator the firſt of *June* 1737, and that it ought to be reconveyed to him upon the payment of the ſum of 1050*l.* with legal intereſt for the ſame; and let it be referred to the Maſter to compute intereſt upon the ſaid ſum, at the rate of 5 *per cent.* from the firſt of *June* 1737, and let him inquire whether any thing hath been paid by the teſtator in his life-time, or by the defendants, ſince his deceaſe, for the inſurance of the plaintiff's life; and let what ſhall appear to have been, or that ſhall be reaſonably ſo paid, be added to the principal ſum of one thouſand and fifty pounds, and carry intereſt at the ſame rate from the reſpective

times of paying and advancing the ſame; let him alſo take an account of all ſums of money received by the defendants teſtator in his life-time, and the defendants ſince his deceaſe, upon account of the ſaid annual ſums of one hundred and fifty pounds; and let what ſhall be ſo found to have been received be applied, in the firſt place, in payment of the intereſt of the ſaid ſum of one thouſand and fifty pounds, and afterwards in ſinking the principal; and if it ſhall appear that the defendants are over paid, then they are to repay and refund, and the defendants are to reconvey the ſaid annual ſum, or annuity of one hundred and fifty pounds, free from all incumbrances, by the defendants or their teſtator, in ſix months after the Maſter ſhall have made his report, and at ſuch time as the Maſter ſhall appoint, and deliver up all deeds, *&c.* and in default of payment by the plaintiff, his bill to be diſmiſſed with coſts.

The court will not allow any thing on account of inſurance, unleſs the life be actually inſured.

N. B. It was urged for the defendants, that they ought to be allowed for the inſurance of the plaintiff's life, though it was not actually inſured; but Lord Chancellor would not allow it; and *note* alſo, he decreed this redemption as above, without coſts.

Caſe 102. *Sheffield* verſus *Lord Orrery and others*, *December* 4, 1745.

LORD CHANCELLOR.

J. late D. of B. by his will ſays, that if no legitimate ſon nor daughter of mine ſhall live to leave at any time the bleſſing of any child behind them, in ſuch caſe of their dying thus, without leaving any iſſue behind them, I will and direct that *Charles Herbert*, and his iſſue, ſhall have all my eſtate. *The limitation over to* Charles Herbert, *now* Sheffield, *is not too remote, but warranted by rules of law.*

IN this caſe, the end of the bill is, to have benefit of a truſt created by the will of *John* Duke of *Buckinghamſhire*, relating to *Buckingham-Houſe*, the pictures, ſtatues, and other parts of his perſonal eſtate; and alſo for the rents and profits of certain eſtates called *Pimlico*, received ſince the death of Duke *Edmund*.

The whole depends upon the conſtruction of the will of Duke *John*, and two general queſtions ariſe thereon.

Firſt, Whether the whole of *Buckingham-Houſe*, or any part thereof, is freehold? For, if ſo, it is admitted it belongs to the plaintiff.

The ſecond general queſtion is, ſuppoſing the whole, or any part thereof, to be leaſehold, whether by virtue of the limitation in the will of Duke *John*, it did, on the death of Duke *Edmund*, go over to Mr. *Sheffield*.

I put

I put the council upon arguing this point firſt; to prevent expence and vexation; for, if this houſe is well limited to Mr. *Sheffield*, whether it is freehold or leaſehold, then all queſtions, whether in reſpect to its being freehold or leaſehold are unneceſſary.

The clauſes in the will on which this queſtion immediately depends, are the clauſes marked N°. 2, 4 and 9. as to the clauſes N°. 8 and 14, theſe are only made uſe of for argument and explanation, or taken up by way of objection: The clauſes are as follows:

Second clauſe. " In the firſt place my will and meaning is, that " my dear wife ſhall have during her life my new built houſe in " *St. James's Park*, with the two wings adjoining, and all the " ſtables, garden, courts and greenhouſes thereunto belonging, with " all my oil and water-coloured pictures and ſtatues therein, except " what I ſhall particularly mention and give away otherwiſe, either " now or hereafter; but I give all theſe things and this houſe alſo " before mentioned for her life, *upon this expreſs condition only, that* " *if my ſaid wife ſhall marry again, then my will and meaning is,* " *that my ſaid houſe with the ſaid two wings before mentioned, pic-* " *tures and ſtatues, ſhall go forthwith to my eldeſt ſon and his iſſue,* " and if all his iſſue male ſhall die, then to my eldeſt daughter and " her iſſue; and if I leave no lawful iſſue, then to a certain youth " called *Charles Herbert*, now under the tuition of Monſieur *Brezy* " at *Utrecht*, and if he ſhould die without iſſue, then to my two " natural daughters *Sophia* and *Charlotte*, now at ſchool in *Chelſea*.

The *fourth* clauſe. " In the next place my will is, that my " eldeſt ſon and his iſſue, and if he leave none, my eldeſt daughter " and her iſſue ſhall after my death have all my whole eſtate real " and perſonal, except ſtill what I have given thus to my dear wife, " and ſhall give by other diſpoſitions to her, or to any other uſes, " or to my natural children.

The *ninth* clauſe. " If I ſhould be ſo unhappy as that no legiti- " mate ſon nor daughter of mine ſhall live, to leave at any time " the bleſſing of any child behind them, in ſuch caſe of their dying " thus without leaving any iſſue behind them, I will and direct " that the before-mentioned *Charles Herbert* and his iſſue ſhall have " all my eſtate both real and perſonal, juſt in the ſame manner and " with the ſame reſtrictions and exceptions as to my wife.

The principal queſtions which ariſe under this general head are theſe three.

Firſt, Whether by the ſecond clauſe the houſe, pictures, and ſtatues, are abſolutely deviſed in all events to Duke *Edmund*, ſo as to receive no reſtriction or alteration from the ſeveral other clauſes in the will.

Secondly, Whether the houſe, pictures and ſtatues, mentioned in the ſecond clauſe, are compriſed in the 4th or 9th clauſes, or not.

Thirdly, Suppoſing they are compriſed in the 4th and 9th clauſes, whether the limitation therein contained to Mr. *Sheffield* is warranted by the rules of law, or is too remote?

B. deviſes that his wife ſhall have for her life his new built houſe in *St. James's Park*, with, *&c.* thereunto belonging, but on this expreſs condition, that if ſhe ſhall marry again, then that the houſe, *&c.* ſhall go forthwith to *his eldeſt ſon* and his iſſue, and if all his iſſue male ſhall die, then to his eldeſt daughter and her iſſue; and then ſays, if I leave no lawful iſſue, to *Charles Herbert*, and if he die without iſſue, then to, *&c. This is not a veſted remainder in the eldeſt ſon, but a contingent one, and to take effect on the wife of the teſtator marrying again.*

As to the firſt, It was inſiſted for the defendants, that this is a deviſe to the Dutcheſs during her widowhood, and the limitation to Duke *Edmund* was to take place either on the marriage, or death of the Dutcheſs; and if it be allowed this is an eſtate given to the Dutcheſs during widowhood, it is a veſted remainder in Duke *Edmund*, and the limitation to *Charles Herbert* is too remote: On the other ſide it was inſiſted, that this clauſe muſt be conſtrued according to the words, and that no eſtate is veſted in Duke *Edmund* but on the contingency of the Dutcheſs's marriage.

I am of opinion that upon the whole will the limitation to Duke *Edmund* was but a contingent remainder, and to take effect only on the Dutcheſs's marrying again; the words are upon this expreſs condition only, that if my ſaid wife ſhould at any time marry again, then my will and meaning is, that my ſaid houſe, *&c.* ſhall go forthwith to my eldeſt ſon and his iſſue.

I admit the authorities cited for the defendants to be as they are ſtated, but I do not ſee that any concluſive argument can be drawn from thence to influence the preſent queſtion.

The firſt caſe was *Jones* verſus *Weſtcombe*, *Eq. Caſ. Abr.* 245. that caſe was thus; *A.* poſſeſſed of a long term for years deviſed it to his wife for life, and after her death to the child that ſhe was enſient with, and if ſuch child died before it was 21. then he deviſed one third of the term to the wife, her executors, *&c.* the wife was not enſient, and the queſtion in the cauſe, ſo far as it relates to the preſent point, was, as the contingency upon which the deviſe to her was to take place never happened, whether the deviſe to the wife of the third part was good. Lord *Harcourt* delivered his opinion, that the deviſe was good; the ground of his opinion was, that the words ſhould be conſtrued, as if they had been, if ſuch child ſail before it was 21.

Fonereau verſus *Fonereau*, before Lord *Hardwicke*, *Eaſter* term 1745. (*vide poſtea.*) This caſe was determined nearly upon the ſame reaſon, but the penning of that will was ſo very particular, that no precedent can be drawn from thence.

Brown verſus *Cutler*, *Raymond* 427. and in *Shower*, and in 3 *Lev.* 125. under the name of *Luxford* verſus *Check*; the caſe was this:

John

John Church being ſeiſed in fee, having four ſons, *Humphry*, *Robert*, *Anthony* and *John*, made his will, and thereby deviſed his eſtate to his wife for life, if ſhe do not marry again, but if ſhe do, then that his ſon *Humphry* ſhould preſently after his mother's *marriage* enter and enjoy the premiſſes to him and the heirs male of his body, remainder to teſtator's other ſons in like manner with remainders over; the teſtator died, the wife enters, and dies without being married, the plaintiff claimed as the right heir of the teſtator, being his grandaughter; the defendant claimed as heir male of the body of the teſtator: The queſtion was, whether as the wife never married, a good eſtate-tail was created by the will; the court held it was a good intail, for that by the whole ſcope of the will it appeared that the teſtator intended an intail, and rather than the intent of the teſtator ſhould be defeated, the court conſtrued the words in ſuch a manner as to make it an intail. Thus it is reported in *Levinz*; and *Raymond* ſeems to have reported his own argument, rather than that of the court: This is the ſtrongeſt caſe cited, but differs materially from the preſent. The penning is different; there after the deviſe are added theſe words, *if ſhe do not marry again*, which reſtrain the original limitation, and are the ſame, as if they had been to the wife for life, if ſhe ſo long continue a widow. There are no ſuch words in the caſe at bar in the original limitation; but I do not lay much weight on this. The caſes appear to me to differ in ſubſtance; there were no words in that will which could ſubſtantiate the teſtator's intent without conſtruing it an eſtate-tail, otherwiſe the teſtator's intent would have been manifeſtly defeated: The court therefore was conſtrained by neceſſity to make ſuch a conſtruction as would ſatisfy the teſtator's intent; for this is the very reaſon given by Mr. Juſtice *Levinz*: In the preſent caſe there is no ſuch neceſſity for ſuch a conſtruction, for the ſubſequent words are ſufficient to expreſs his meaning; that after Duke *Edmund*'s death without leaving children, it ſhould go to Mr. *Sheffield*; and the intent of the Duke is more effectually anſwered by this conſtruction than any other.

A general rule was laid down by the council for the defendants, that where a teſtator gives a particular eſtate to a perſon, and after gives the remainder over upon a contingency, which contingency is to determine that eſtate ſooner than the eſtate would otherwiſe be determined, though the contingency does not happen, yet the limitation over ſhall be good after the determination of the firſt eſtate.

I know of no ſuch rule, for the caſes which can be put, depend upon particular words and the intent of the party: But there is an expreſs authority that there is no ſuch rule, *Amhurſt* verſus *Litton*; this

A. deviſed his eſtate to his ſon in tail, remainder to *B.* for life, on condition he changed his name to *Stroud*, and if he did not, gave it over to *D.* The ſon died without iſſue, *B* performed the condition, and died; *the Judges of the King's Bench were of opinion, and confirmed by the Houſe of Lords, that on the death of B. the remainder-men took no eſtate, but it went to the heir at law of A.*

was heard on the 11th of *March* 1729. in the houſe of Lords. The caſe was this: The teſtator deviſed an eſtate to his ſon in tail, remainder to *Beningfield* for life, upon condition that he ſhould change his name to *Stroud*, and if he did not, he declared the deviſe to be void; and gave it over to *George Darnelly*, with divers remainders over; the ſon died without iſſue, *Beningfield* performed the condition, and took the name of *Stroud*, and died; the queſtion was, whether the eſtate upon the death of *Stroud Beningfield* went over to the remainder-man, or belonged to the heir at law. This cauſe was firſt heard in 1727, when this court directed a caſe to be made for the opinion of the judges, whether the remainder-man was entitled, which turned on this queſtion, if upon the determination of the eſtate in *Stroud Beningfield*, *by his death*, and not by his non-performance of the condition, the remainder-man ſhould take any eſtate; after ſeveral arguments all the judges of the court of King's Bench were of opinion that the remainder-man ſhould take no eſtate, and their opinion was confirmed by the houſe of Lords, ſo that this ſeems an expreſs authority there is no ſuch general rule of law as was laid down by the council.

The next queſtion is, whether the particulars deviſed by the ſecond clauſe are compriſed in the fourth and ninth clauſes.

I am of opinion that the general remainder after the Dutcheſs's life does fall within the fourth and ninth clauſes.

B. by the 4th clauſe of his will ſays, that my eldeſt ſon and his iſſue, *&c.* ſhall after my death have all my whole eſtate real and perſonal, except ſtill what I have given to my wife, and ſhall give by other diſpoſitions to her, *&c. The exception takes out of this reſiduary deviſe only the intereſt given to the wife, and not the things themſelves.*

But it has been firſt objected that *the fourth* clauſe is reſiduary, and expreſſly excepts and takes out the particular things deviſed by the *ſecond* clauſe, and not the eſtate, and intereſt only in thoſe things.

I think this is contrary to the words, for the will in this clauſe mentions *all his whole real and perſonal eſtate*, and I think the exception takes out of it only the intereſt given to the Dutcheſs, and not the things themſelves; and this is ſupported by *Wheeler*'s caſe, and many others.

Next it was objected, there is a different diſpoſition in *the fourth* clauſe from that in the ſecond, the eſtates in the ſecond, being limited to Duke *Edmund* and his iſſue male, and by the fourth to Duke *Edmund* and his iſſue generally: I admit there is a difference, but that ſeems a miſtake in the ſecond clauſe, and is ſet right by the fourth clauſe, by making the eſtate and houſe go together.

If theſe particulars are compriſed in the fourth clauſe, they are ſtill more clearly compriſed in the ninth; the words in this clauſe are not only very general, *all my eſtates real and perſonal*, but in the ninth clauſe the ſubſequent words are more particularly adapted to ſhew, that the eſtate and intereſt only were ſaved to the wife, and not

not the ſubjects or things themſelves; the words are with the ſame exceptions as to my wife, and the word *reſtrictions* points out expreſſly a limited intereſt; but there are ſome objections which have been taken.

Firſt, It has been objected, that the eighth clauſe is co-extenſive with the ninth, and conſequently if the houſe is compriſed in the ninth, it muſt be in the eighth, for it is that all things compriſed in the eighth clauſe are directed to be ſold, and conſequently the houſe, pictures and ſtatues muſt be ſold contrary to the Duke's manifeſt intent.

This is clearly otherwiſe, for by the *eighth* clauſe the truſtees are not directed to ſell, but to diſpoſe of all his real and perſonal eſtate, and therefore the word *diſpoſe* does not import to ſell, but to manage to the beſt advantage for the family; and the ſubſequent words which direct to buy land are confined to money, and cannot extend to the houſe, ſtatues or pictures: And the general direction to ſell is conſtrained in the *fourteenth* clauſe.

The directing the truſtees to diſpoſe of all his real and perſonal eſtate, does not import to ſell, but to manage it to the beſt advantage for the family.

The third queſtion is, That ſuppoſing the particulars deviſed by the ſecond clauſe are compriſed in the fourth and ninth clauſes, whether the limitations over are warranted by the rules of law concerning the limitation of terms, or whether they are not too remote.

This ſeems the plaineſt point of all, and falls within the diſtinctions of the caſes on this head; the words are theſe, *If I ſhould be ſo unhappy as that no legitimate ſon, &c.* (*vide the words.*)

It is clear and certain, that no limitation over of a perſonal thing can be admitted after a dying without iſſue generally; but if this is confined within a life or lives in being, or within ten months, or the birth of a child, or in caſe of the death of ſuch child before the age of twenty-one, or if limited on a contingency to a perſon who never takes, the limitation is good. This has been determined in many caſes, particularly *Higgins* verſus *Dowler*, 2 *Vern.* 600. *Stanley* verſus *Lee*, 2 *P. Wms.* 618. *Sabberton* and *Sabberton*, *Caſes in Lord Talbot's time* 55, *&c.* In this preſent caſe it is very clear that the words are reſtrained to legitimate children of Duke *John*'s dying without iſſue *living* at their deaths: The words are, *If no legitimate ſon, &c. ſhall live to leave any child behind them, in ſuch caſe of their dying thus without leaving any iſſue behind them, I will and direct, &c.* in ſhort few caſes are ſo reſtrictive; the firſt words ſpoke of his immediate iſſue, the ſubſequent are extended to more remote iſſue, but ſtill are reſtrained to the caſe of dying *thus*, *&c.* ſo that no words can be more reſtrictive. In the caſe of *Pinbury* verſus *Elkin*, 2 *Vern.* 758. a liberal conſtruction was made to comply with the teſtator's intention.

If the limitation of a perſonal chattel be confined within a life or lives in being, or within ten months, or the birth of a child, or in caſe of his death before 21, or if limited on a contingency to a perſon who never takes, it is good.

In

In *Sabberton* verſus *Sabberton* it was determined on theſe words, *in caſe they ſhould not leave any lawful iſſue*.

Forth verſus *Chapman*, 1 *P. Wms.* 663. ſeems an authority in two reſpects; the caſe was this; *Walter Gore* by will deviſes all the reſidue of his eſtate real and perſonal to *John Chapman*, in truſt for the uſe of his nephews *William Gore* and *Walter Gore* during the term of a leaſe, and as to the remainder of the eſtate, as well as his freehold houſe, with all the reſt of his goods and chattels whatſoever, he gave to his nephew *William Gore*, and if either of his nephews *William Gore* or *Walter Gore* ſhould die, and *leave* no iſſue of their reſpective bodies, then he gave the leaſehold premiſſes to the daughter of his brother *William Gore*, and the children of his ſiſter *Sidney Price*: The queſtion was, whether the limitation over was good, or too remote. Sir *Joſeph Jekyll* was of opinion it was too remote; but Lord *Macclesfield* decreed this limitation good, upon the words *leave iſſue*.

In looking into the caſe of *Forth* verſus *Chapman*, 2 *P. Wms.* 663. the reporter ſeems miſtaken *in his ſecond note*, for

Mr. *Williams* ſeems miſtaken in the ſecond note on this caſe, where he ſays, *by the will the limitation over was expreſsly reſtrained to the leaſehold*; for upon looking into the caſe, it appears that both *freehold* and leaſehold were deviſed by the ſame words; but probably the limitation of *the real* was overlooked, and ſo omitted by the regiſter.

though he ſays the limitation over was reſtrained to the leaſehold, it appears the freehold too was deviſed, and probably the limitation of the real was overlooked by the regiſter.

Some diſtinctions or objections have been made by the defendant's council.

Firſt, That in the preſent caſe there is a limitation in tail, precedent to the limitation by *the ninth* clauſe.

A general limitation may be turned into a particular contingent limitation by ſubſequent words.

If this is admitted, yet a general limitation may be reſtrained or turned into a particular contingent limitation by ſubſequent words, ſuppoſing there are ſubſequent words ſufficient for that purpoſe, as was determined in the caſe of *Lamb* verſus *Archer*, 2 *Salk.* 225.

Another objection was, that in the preſent caſe a real eſtate is joined with a perſonal, and therefore the ſame conſtruction ought to be made of the words.

Though real and perſonal eſtates are joined in a deviſe, yet the ſame words may be taken in a different ſenſe, with regard to the different eſtates, to ſupport the intention of the party.

I do not ſee any reaſon why different conſtructions may not be put on the ſame words; to ſay they cannot, is contrary to the caſe of *Forth* verſus *Chapman*, for there the freehold and leaſehold were given by the ſame words; and yet Lord *Macclesfield* made a different conſtruction, that the intent of the teſtator might prevail; and I think

it very reaſonable to take words in a different ſenſe with regard to the different eſtates to ſupport the intention of the party, *ut res magis valeat quam pereat.*

A third objection was, that the teſtator did not intend to create a particular contingent limitation of the leaſehold eſtate to Mr. *Sheffield*, diſtinct from the freehold.

This is begging the queſtion; poſſibly the teſtator intended a ſtrict ſettlement, and though it cannot have its full effect with regard to one eſtate, if there are words ſufficient for that purpoſe it may have effect with regard to another; the teſtator manifeſtly intended a full diſpoſition of his eſtate, and it ought to be carried into execution as far as may be according to his intention: many caſes have been cited, but I think there are none that come up to the preſent. *Lord George Beauclerk* and *Miſs Dormer*, (before me *June* 17, 1742.—*ſee before, caſe* 212.) was after a general dying without iſſue, and therefore the limitation over could not be good, *Green* verſus *Rod*, *Trin. T.* 2 & 3 *Geo.* 2. *Fitzgibbons* 68. was much the ſame; that was, if a ſiſter ſhould die without iſſue generally; the eſtate was limited over; the council would indeed have brought this caſe to have been like *Pinberry* verſus *Elkin*, by obſerving on the words *after her deceaſe*; but Lord *King* obſerved that to the words after her death were added the words *in manner aforeſaid*, which manifeſtly made it a general dying without iſſue, and upon that ground determined the limitation to be void.

Therefore, upon the whole, I am of opinion that the limitation over in the *ninth* clauſe is warranted by the rules of law.

Another queſtion has been ſtarted whether *the houſe, pictures and ſtatues* do not fall within the fourteenth clauſe, and therefore muſt be ſold, which it is inſiſted defeats the intent of the teſtator as much as the other conſtruction would have done.

I am of opinion that *the houſe, pictures and ſtatues* are not directed to be ſold, the words in this clauſe are, *all my money, and all other my perſonal eſtate not otherwiſe given or diſpoſed of*; I underſtand theſe words to mean that ſuch as he had given away, were not to be ſold; particular eſtates and intereſts in any part of his perſonal eſtate could not be ſold, but the remaining intereſt might be ſold, unleſs ſo ſettled as not to be ſold.

I conceive that *the houſe, pictures and ſtatues* were ſo fettered, as that the remainder after the intereſt of his wife could not be intended to be ſold; the Duke directs the things to be ſold as ſoon as conveniently might be; but they are ſo clogged by the limitations that no ſale could take place in any reaſonable time; therefore I rely

on the ſecond clauſe, as a ſufficient declaration of the teſtator's intention, that this part of the perſonal eſtate ſhould not be ſold.

All I have ſaid is ſtrengthened by ſome general conſiderations: This is an entire manſion-houſe, deſigned for the ſeat of the family; could the teſtator deſign it ſhould be mangled, and cut to pieces, that it ſhould be ſevered from the bulk of the eſtate? Upon failure of his legitimate iſſue, he has directed his natural children to take his name and arms, and therefore nothing can be more oppoſite to the Duke's intentions, than the conſtruction contended for by the defendants.

The plate is given to the Dutcheſs during her widowhood, and is not influenced by any of the clauſes, but falls into the bulk of the eſtate, therefore the reſiduary intereſt might be ſold during the life of the Dutcheſs.

" Lord *Hardwicke* decreed that the defendants, the executors of " the late Dutcheſs of *Buckinghamſhire*, do deliver the poſſeſſion of " *Buckingham-Houſe*, with the two wings adjoining, and all the " outhouſes, gardens, *&c.* thereunto belonging, to Mr. *Sheffield*, " and alſo all the ſtatues, and all the oil and water-coloured pic- " tures upon oath, which belonged to *John* the late Duke of " *Buckinghamſhire*, and were in the houſe at the time of his death, " and to deliver alſo, upon oath, all the deeds and writings to Mr. " *Sheffield*; and as to the plate which belonged to the teſtator at " the time of his death, that ſuch part thereof as is remaining in " ſpecie, and in the cuſtody of the defendants, be delivered upon " oath to ſuch perſon as the Maſter ſhall appoint; and that the " ſame be ſold, and the money ariſing by ſuch ſale be applied in " like manner as the teſtator's perſonal eſtate, not ſpecifically be- " queathed, is by the former decree directed to be applied; and as " to ſuch of the plate as is not now remaining in ſpecie, the Maſter " was to inquire what part thereof hath been converted by the late " Dutcheſs of *Buckinghamſhire*, or the defendants, and take an ac- " count of the value of ſuch part of the plate as hath been ſo con- " verted, and what ſhall be coming on the account for the plate ſo " converted be anſwered by the executors of the Dutcheſs out of her " perſonal eſtate in a courſe of adminiſtration, and that the amount " of the plate ſo converted be applied in like manner as is directed " by the former decree concerning the teſtator's perſonal eſtate not " ſpecifically bequeathed; and as to all the lands in *Pimlico*, admit- " ted to have been part of the freehold eſtate of *John* Duke of " *Buckinghamſhire*, he ordered that the tenants pay the arrears and " growing rents to the plaintiff, and that an account be taken of the " rents accrued ſince the death of *Edmund* late Duke of *Buck-* " *inghamſhire*, which were received by the Dutcheſs in her life- " time, and what ſhall be coming on that account be paid to the " plaintiff by her executors out of her perſonal eſtate in a courſe of admini-

" adminiſtration; his Lordſhip would not allow any coſts to the " Dutcheſs's executors, but directed if they gave Mr. *Sheffield* any " unneceſſary trouble in reſpect to his obtaining the poſſeſſion of the " houſe, ſtatues and pictures, that Mr. *Sheffield* ſhould be at liberty " to apply to the court for the coſts of this ſuit to this time againſt " theſe defendants.

Warrick verſus *Warrick and Kniveton*, *February* 11, 1745. Caſe 103.

A Bill was brought by the plaintiff againſt the defendants, for an account of the rents and profits of his father's eſtate, and for poſſeſſion, and that he may have the full benefit of the marriage articles made on the marriage of his father and mother.

Lord *Hardwicke* inclined to think, that the limitation in a ſettlement to *W. R.* for life, and to the uſe of the heir male of his body, had created an eſtate-tail in him, and that the plaintiff has not the legal title to this eſtate; and if he had, not entitled to come into equity for deeds and writings, till he had eſtabliſhed it firſt at law; and therefore diſmiſſed the bill ſo far as it prays to ſet aſide the mortgage, but left him at liberty to redeem *K.* the aſſignee of the mortgage.

Thomas Warrick the plaintiff's father, by articles before marriage dated the 28th of *December*, 1714. had the eſtate in queſtion limited to him for life, and after his death to *Honor* his intended wife for life, and after her death *to the uſe of the heir male of Thomas Warrick to be begotten on the body of Honor.*

By leaſe and releaſe dated the 28th and 29th of *December* 1714. *and declared to be in part performance of the ſaid articles*, the ſaid premiſſes were conveyed to *Thomas for life*, and to *Honor for life*, and after her death *to the uſe of the heir male of Thomas, begotten on the body of Honor.*

The marriage afterwards took effect, and *Thomas Warrick* died in 1739. leaving the plaintiff his eldeſt ſon, who inſiſts, that *Thomas Warrick* was intended to be tenant for life only, with remainder to his firſt and every other ſon ſucceſſively as tenants in tail, and that he is a purchaſer under the marriage articles, and that they ought to be conſidered in the ſame light as if they had been ſtrictly carried into execution.

The defendant *Kniveton* inſiſted, that *Thomas Warrick* did in his life-time borrow of *Deborah Weſtlake* three hundred pounds, and on the 21ſt of *Auguſt* 1736. conveyed the eſtate in queſtion to her and her heirs, ſubject to a redemption on payment of principal and intereſt, and that the repreſentatives of *Deborah*, in conſideration of three hundred and fourteen pounds paid to them by this defendant, and *Thomas Warrick*, in conſideration of thirty-ſix pounds paid to him likewiſe, did convey his intereſt and the equity of redemption to this defendant on the 25th of *October* 1737. and that neither he nor any concerned for him had any notice of the marriage articles or ſettlement till after the death of *Thomas Warrick*; and inſiſts on his being a purchaſer for a valuable conſideration.

The

The plaintiff's evidence of notice was, that *Hawkins* was in his life-time concerned as attorney for *Deborah Weſtlake* in ingroſſing the mortgage deeds from *Thomas Warrick* to her, and that in the year 1735. he ſaid to one of the witneſſes, that if *Thomas Warrick* could not cut off the entail of his eſtate to raiſe money, he muſt be thrown into gaol, and that he had ſeen the ſettlement, and believed it might be done; and that he drew with his own hand a caſe for the opinion of council, and that he was likewiſe employed as attorney for *Deborah Weſtlake* in ingroſſing the mortgage deed of 1736. and for *Kniveton*, in drawing the aſſignment of the mortgage from *Deborah Weſtlake*'s repreſentatives to *Kniveton*.

The value of the eſtate mortgaged was 25 *l. per ann.*

On the point of conſtructive notice were cited the caſes of *Tovey* verſus *Tovey*, *Biſco* verſus *Earl of Banbury*, 1 *Ch. Caſ.* 287, 291. and *Whitchcock* verſus *Sedgewick*, 2 *Vern.* 156.

The articles and ſettlement were both before marriage.

LORD CHANCELLOR.

The firſt queſtion is, whether the plaintiff has the legal title to this eſtate.

The ſecond queſtion is, whether there was ſufficient proof of notice in this caſe to the defendant *Kniveton*.

As to the firſt, it is not abſolutely neceſſary to determine it, but in thepreſent caſe I rather think he has not.

Becauſe by the releaſe the limitation is to the plaintiff's father for life, and to the uſe of *the heir male* of his body in the ſingular number; ſuch a ſettlement as this would rather create an eſtate-tail in the father, on the words in *Co. Litt.* 22. *a.* where lands were given to a man and to his wife and to *one heir* of their bodies, and to *one heir* of the body of that heir; it was adjudged to be an eſtate-tail in the father. I remember in the argument in the caſe of *Trollop* verſ. *Trollop*, Lord Chief Juſtice *Eyre* cited it, and ſaid it was a limitation in tail by gift, that my Lord *Coke* ſpoke of; but I am of opinion in the preſent caſe that if the plaintiff had a legal eſtate, he is not entitled to come here for deeds and writings.

He ought firſt to eſtabliſh his title at law, unleſs he had ſhewn terms were ſtanding out, ſo that he could not recover at law: there is nothing pretended of this kind, for he has both articles and ſettlement in his cuſtody; nor does he ſuggeſt old terms are ſtanding out, therefore he comes too early for deeds and writings, if this was the whole of the caſe.

The

The more material point, ſuppoſing the legal eſtate was in the plaintiff, is, whether there be ſufficient evidence of notice to the defendant *Kniveton* of the plaintiff's right under the articles.

I do not think there is ſufficient ground to give relief againſt a purchaſer on the circumſtances of this caſe.

Firſt, Whether from the nature of the articles themſelves they will warrant me to decree the legal eſtate from the purchaſer.

It is certainly true from the general principles of this court, that if articles on marriage are to ſettle an eſtate to *A.* for life, to his wife for life, remainder to the heir male of the body of *A.* it is taken here to be in ſtrict ſettlement, and an eſtate for life only in father and mother; and if the ſettlement be made after marriage, it ſhall be rectified by the articles before.

Where by articles an eſtate is to be limited to *A.* for life, to his wife for life, remainder to the heirs of the body of *A.* this is conſidered here as an eſtate for life only in the father, and the ſettlement made after ſhall be rectified by the articles before marriage.

The caſe of *Weſt* verſus *Eriſey*, 2 *P. Wms.* 349. was both upon articles and a ſettlement before marriage; this was the firſt caſe, where the court altered a ſettlement, and made it conformable to articles, and relieved on the head of miſtake, the ſettlement referring expreſſly to the articles.

But this was between the parties to the articles and ſettlement, and their repreſentatives, and *mere volunteers*, and has not been carried into execution againſt a purchaſer.

But though it has been done between parties to the articles and ſettlement, and mere volunteers, yet not againſt a purchaſer.

Secondly, As to the point of notice, whether there is ſufficient proof of notice in fact?

There is no pretence of actual notice, and the defendant is only an aſſignee of a mortgagee.

Mr. *John Hawkins* was agent for Mr. *Warrick* the father, and the original mortgagee, and it was inſiſted that he had notice by making the mortgage in 1735. and by reaſon of his preparing a caſe in which this ſettlement is recited.

Conſider it firſt in the caſe of Mrs. *Deborah Weſtlake* the original mortgagee: A common recovery was ſuffered in *Trinity* term 1735. probably to enable the father of the plaintiff to borrow money, two months before the time Mrs. *Weſtlake* lent her money; the court it is ſaid is to preſume *Hawkins*, ſeeing the ſettlement referred to articles, muſt have looked into the articles likewiſe; but Mr. *Hawkins* had notice *as agent to Mr. Warrick*, for the caſe ſtated for council's opinion was only for *Warrick*, not for the mortgagee; this is only conſtructive notice to Mr. *Hawkins*, and that conſequently

muſt create a conſtructive notice to Mrs. *Weſtlake*; but ſhe is not before the court, for the aſſignee of the mortgagee only is before the court, ſo that Mr. *Kniveton* ſtands only in the ſecond degree.

The proof as to notice upon the aſſignee is ſtill more light; one witneſs ſwears that he believes *John Hawkins* was concerned for this defendant, becauſe he was at that time *clerk to Hawkins*, and ingroſſed the aſſignment.

I take the caſe to be, that *Hawkins* was concerned on both ſides, which is very frequent in the country.

It would be a pretty harſh thing to affect the lender of the money with all kind of knowledge, which the agent may have of the title of borrower; but ſtill I will not lay it down as a general rule, that where the ſame perſon is concerned for the mortgagor and mortgagee, that notice to ſuch perſon will not be good conſtructive notice to the mortgagee.

That notice to affect a purchaſer ſhould be confined to the ſame tranſaction, is a rule which ought to be adhered to.

But conſider what kind of notice the defendant *Kniveton* had: Mr. *Hawkins* had not notice at the time of the aſſignment, nor relative to this buſineſs, but before; even before the original mortgage: In the caſe of *Fitzgerald* verſus *Falconberg*, it was held, the notice ſhould be in the ſame tranſaction: This rule ought to be adhered to, otherwiſe it would make purchaſers and mortgagees titles depend altogether on the memory of their counſellors and agents, and oblige them to apply to perſons of leſs eminence as council, as not being ſo likely to have notice of former tranſactions.

The notice here was clearly ariſing from that caſe ſtated by *Hawkins* at the requeſt of *Warrick*, in order to do ſomething towards ſuffering a common recovery; and it is a year and ſix months after that *Kniveton* is to be affected with this notice.

It is very probable that *Hawkins* might have forgotten it in this length of time, or which is much more likely, did not underſtand the rule of this court, but took the limitation for *an abſolute eſtate-tail.*

The court will not conſtrue words which make a legal eſtate-tail, to be carried into ſtrict ſettlement, except in the caſe where there are articles as well as a ſettlement.

It is true this court has given relief againſt perſons who claim under the ſettlement and their repreſentatives, but no caſe has gone ſo far as to relieve againſt purchaſers; and though it is true, ignorance of the law does not excuſe, yet there is no caſe, but where there are articles as well as a ſettlement, that the court will conſtrue words which make a legal eſtate-tail, to be carried into ſtrict ſettlement.

If

If the ſettlement had been made after marriage, it would have been ſtronger for the plaintiff; but as Lord *Cowper* ſaid in a caſe in *Vern.* where there are two equities, he who has a ſuperior equity ſhall carry it; and I am inclined to think, that as the ſettlement was before marriage, the defendant, as a purchaſer, has a ſuperior equity.

Where there are two equities, he who has a ſuperior equity ſhall carry it; and as the ſettlement here was before marriage, the defendant as a purchaſer has a ſuperior equity.

His Lordſhip diſmiſſed the bill ſo far as it prays to be relieved againſt the mortgage, but decreed that the plaintiff might be at liberty to redeem the defendant *Kniveton.*

Head verſus *Head, February* 12, 1745.

Caſe 104.

THE plaintiff, the Lady of Sir *Francis Head*, brought her bill againſt her huſband to eſtabliſh her ſeparate maintenance, purſuant to an agreement for that purpoſe, and moved to day that ſix hundred pounds ſhould be paid her, being a year and half's arrear, at one hundred pounds a quarter, to maintain her till the cauſe is heard.

The foundation for the motion, is, that Sir *Francis Head* in 1740. wrote a letter to Sir *John Boys*, the father of the plaintiff, and in that letter ſays, that he has a great affection for her, but from her misfortune not her fault, and which neither of them can help, he does not chuſe to be a witneſs of her infirmities, and during the time ſhe lives with her father, will allow her one hundred pounds a quarter.

A huſband in a letter to his wife's father ſaid, he did not chuſe to be a witneſs to her infirmities, and therefore during the time

ſhe lived with her father would allow her 100 *l.* a quarter; the wife having brought a bill for eſtabliſhing her ſeparate maintenance, moved to be paid 600 *l.* being a year and half's arrears, to keep her till the cauſe is heard; the huſband having by his anſwer ſworn, he was deſirous of cohabiting with her, the court in directing for the time paſt a ſum of money to be paid her, would not order it as arrears, but 400 *l.* in groſs, and ſaid they ſhould not direct it for the future.

Sir *Francis Head* by his anſwer to the bill inſiſts, that he has requeſted her to come home and cohabit with him, and is extremely deſirous of it.

Before the anſwer came in, which was in *July* laſt, Lady *Head* upon filing articles of the peace againſt her huſband, obtained an order that he ſhould enter into a recogniſance with ſureties for his good behaviour.

LORD CHANCELLOR.

The two principal grounds for bills of this kind, are an agreement for maintenance, or a truſt for this purpoſe; and in either of theſe

When the huſband, in order to evade a ſentence in the eccleſiaſtical court for maintenance, is going out of the kingdom, this court on a bill filed by the wife will grant a *ne exeat regno.*

caſes

caſes the court will entertain a ſuit for alimony and maintenance, and even after a ſentence in the eccleſiaſtical court for it, when the huſband in order to evade it is going out of the kingdom, will upon a bill filed by the wife, grant a *ne exeat regno*; and I remember a caſe of *Colemore* verſus *Colemore*, before Lord Chancellor *King*, where the huſband had after a ſentence for alimony, made over his whole eſtate to truſtees, and then went to the *Weſt-Indies*; and upon a bill brought by the wife againſt the truſtees, he directed them to pay her a conſiderable maintenance out of the truſt eſtate whilſt the huſband reſided abroad: As to *Whorwood* verſus *Whorwood*, 1 *Ch. Caſ.* 250. it was determined during the uſurpation, and while the juriſdiction of the eccleſiaſtical court was ſuſpended.

It has been ſaid, notwithſtanding articles of the peace have been exhibited, and ſurety given by the huſband, it does not follow that a wife is juſtified in living ſeparate from her huſband.

But it is an excuſe at leaſt for keeping from him for ſome time, till their paſſions might be ſuppoſed to ſubſide, and they had a proſpect from the interpoſition of friends to live happily together; and this in the preſent caſe weighs with me, in directing for the time paſt a ſum of money to be paid her, but I will not order it as arrears, but in a groſs ſum; for as the huſband does by his anſwer ſwear, that he is very deſirous of cohabiting with her, and that he has frequently applied to her to come home, I will not direct it for the future, but only that four hundred pounds ſhall be paid her, which is a year's allowance, according to the offer in the letter to Lady *Head*'s father, for I do not think her entitled to ſix hundred pounds, which ſhe prays by her motion, becauſe the anſwer has been put in above half a year, in which he offers to cohabit with her.

This is not making a decree, as has been ſaid, before the hearing, but only doing what the huſband himſelf is obliged to do, maintain the wife till the cauſe is heard upon the merits; and what I ſay now is abſtracted entirely from any decree the court may think proper to make, if there ſhould not then appear to be a foundation for the agreement ſet up by the bill.

After a decree for a ſeparate maintenance, if a huſband offers to cohabit with his wife, the court have refuſed to continue it.

There are inſtances where, notwithſtanding an abſolut edecree for a ſeparate maintenance, yet afterwards upon the circumſtance of the huſband's conſenting to cohabit with her, and promiſing to uſe her kindly, the court have refuſed to continue the ſeparate maintenance.

Firſt

Firſt Seal after Hilary Term, February 19, 1745. Caſe 105.

THE Marquis of *Powis* (after the plaintiff at law had obtained judgment againſt him, and an award of execution upon the *ſcire facias*, to revive the judgment) obtained an injunction in this court, upon the common terms of giving a releaſe of errors. After the plaintiff at law had obtained judgment againſt *P.* and an award of execution on the *ſcire facias* to revive a judgment; *P.* obtains an injunction on the common term of giving a *releaſe of errors*, and afterwards brings a writ of error in the exchequer chamber; *this is a breach of the order, and a contempt of the court.*

My Lord *Powis* has brought a writ of error in the exchequer chamber, upon the *ſcire facias*; and the defendant in error has pleaded the releaſe of errors given by the plaintiff in error, and has likewiſe moved in this court againſt Lord *Powis* for a contempt, in diſobeying the order of the court for releaſe of errors.

The queſtion is, whether the releaſe of errors ſhall be confined to the original Judgment, or whether it ſhall be extended to errors in the award of execution on the *ſcire facias*.

LORD CHANCELLOR.

I am of opinion, that if it had been given immediately after judgment entered, and before the *ſcire facias* was taken out, the words in the common form of releaſe of errors relating to time paſt, as *had done and ſuffered* muſt be confined to ſuch actions or judgment as are already accrued, and bringing a writ of error, upon an award of execution on a *ſcire facias* to revive that judgment, would not be a breach of the order and a contempt of the court. Where a releaſe of errors is given immediately after judgment entered, and before the *ſcire facias* taken out, the words *had done and ſuffered* in the releaſe, muſt be confined to ſuch actions, *&c.* as are already accrued, and bringing a writ of error on the *ſcire facias* would not be a contempt of the court.

But, in the preſent caſe, as the releaſe of errors is after the *award of execution on the* ſcire facias, there are words in the releaſe, as *warrant*, *proceſs*, *&c.* that will extend to make it a releaſe of errors upon the award of execution.

In the caſe in 1 *Mod.* 79. Lord *Hale* was of opinion, a writ of error would lie in the exchequer chamber of a judgment on a *ſcire facias*, grounded upon a judgment in one of the actions mentioned in 27 *Eliz. c.* 8. becauſe it is in effect a piece or parcel of one of the actions therein mentioned; but in the caſe of *Hartop* verſus *Holt*, 5 *Mod.* 229. the court were of opinion, the deſign of this act of parliament was to give a writ of error upon the merits of the caſe; but here the right is determined, and the writ of error is brought upon the award of execution, ſo that the exchequer chamber After the exchequer chamber have affirmed the firſt judgment, they have no authority, and a writ of error brought there upon the award of execution would be no *ſuperſedeas*.

ber have no authority after they have affirmed the firſt judgment, therefore the writ of error is no *ſuperſedeas*.

The releaſe being in 1731, the court would not conſider it as a contempt, but directed only the proceedings on the writ of error ſhould be ſtayed.

In conſideration of this releaſe being as long ago as 1731, I will not conſider the breach of the order as a contempt of the court, but direct that the Marquis of *Powis*'s proceedings on the writ of error ſhould be ſtayed.

Caſe 106. *Ekin* verſus *Pigot*, *March* 3, 1745.

A modus being worth as much as the manor it ſelf was in queen *Elizabeth*'s time, was thought too rank, and conſequently could not be time out of mind.

THE bill was brought for tithes in kind of the manor of *Dodeſhall* in the pariſh of *Quainton*.

The defendant inſiſts upon a *modus* of forty-eight pounds, in lieu of all tithes for that manor.

The plaintiff's council inſiſted, it was too rank, for the whole rectory was worth but 33*l.* a year in *Hen.* the 8th's time, and the whole demeſne lands of that manor in Queen *Eliz.* time, were worth but 48*l.* *per annum*, ſo that the *modus* was full as much as the manor it ſelf.

Mr. *Mills*, for the defendant, cited *Chapman* verſus *Monſon*, 2 *P. Wms.* 565.

The plaintiff proved as exhibits the value of the firſt-fruits from a return made by the augmentation office, and for the value of the manor an *inquiſition poſt mortem*.

LORD CHANCELLOR.

There muſt be ſome ground of law upon which to ſupport payments in lieu of tithes.

There is no perſon more unwilling then I am to ſet aſide ſuch payments in lieu of tithes, but there muſt be ſome ground of law upon which to ſupport ſuch payment.

The firſt objection was of its being too rank a *modus*, and conſequently could not be time out of mind, for the manor is now but eighty pounds *per ann.* and according to the natural improvement of lands from *Hen.* the 8th's time it ought to have been ten times as much, on account of money ſinking in its value, and lands riſing in theirs.

The returns from the firſt-fruits office, and the inquiſition *poſt mortem*, though they are not concluſive evidence, yet ſufficient upon the circumſtances of this caſe, becauſe the defendant has not produced any evidence to contradict it.

Taking

Taking all the evidence together, this appears to be nothing more than a compoſition upon agreement, which parſons have ſubmitted to in ſucceſſion from time to time, and is merely a perſonal payment, not a compoſition real, which is ſome charge given to a parſon upon lands, under a deed to which himſelf, the patron and ordinary are parties, and of a different nature from this.

This is a mere perſonal payment upon a compoſition, ſubmitted to by the parſons in ſucceſſion from time to time, and differs from a compoſition real, which is a charge upon lands under a deed to which himſelf, the patron and ordinary are parties.

The plaintiff therefore muſt have a decree for tithes in kind.

Androvin and others verſus *Poilblanc and others*, *March* 7, Caſe 107.

1745.

MR. *Henry Poilblanc* by a *French* will, after giving particular legacies, ſays, " as to all the reſt of other goods, moveable " and immoveable, actions, credits, and other effects, which he " ſhall leave behind him, whether in this country, or in *England*, " nothing excepted or reſerved, the ſaid teſtator hath named, inſti- " tuted and eſtabliſhed for his only and univerſal heireſſes Mrs. *Su-* " *ſan Poilblanc* his ſiſter for one third, and Mrs. *Mary Poilblanc*, " widow of the late *John Elin*, his ſiſter alſo, for one third, and " in caſe of her deceaſe before him, her children, or deſcendants " by repreſentation, in her room or place, for them to diſpoſe of " freely at their good pleaſure, and as effects belonging to them; " and as to the laſt remaining third of all his ſaid effects, the teſta- " tor wills and intends, that the amount of that ſhall remain entire " in the hands, power and direction of his ſaid elder ſiſter Mrs. " *Suſan Poilblanc*, for her to enjoy the profits and intereſt thereof " during her life, and after her death, the capital of the laſt third " of his effects ſhall be inherited by the child or children of Mr. " *John Poilblanc* his brother, that ſhall be out of the kingdom of " *France* at the time of the death of his ſiſter Mrs. *Suſan Poilblanc*, " which ſaid child or children of his ſaid brother, which ſhall be " out of the kingdom at the time of the death of his ſaid ſiſter, " he inſtitutes for his heirs, or heir, in the property of the ſaid re- " maining third, and the capital, whereſoever it be, to take and " diſpoſe of in that caſe, at their good pleaſure, as their own pro- " per goods.

S. P. being dead in the teſtator's life-time, what is given to her is a lapſed legacy, and the executor being a truſtee only, it muſt be divided according to the ſtatute of diſtributions; two thirds to the teſtator's two ſiſters, and the remaining third of this third to *S. P.* the only child of the teſtator's brother.

" And laſtly, that his preſent teſtament may be well executed, " the teſtator hath named and appointed for his executor thereof " Mr. *Lewis La Conde* of *London*, merchant, his friend, giving him " in that quality all and as full power and authority as can be given " to a teſtamentary executor."

Mrs.

Mrs. *Suſan Poilblanc* dying in the teſtator's life-time, the plaintiffs, who are the ſiſters of the teſtator, and his next of kin, have brought their bill to have ſo much as was deviſed to her under the will diſtributed, it being a lapſed legacy.

The defendant, the executor, inſiſts, that he is intitled to it both in law and equity, *quaſi* executor.

Mr. Attorney General, council for the plaintiffs, to ſhew that where a legacy is lapſed, the next of kin ſhall have it, and not the executor, cited *Page* verſus *Page*, before Lord Chancellor *King*, 2 *P. Wms.* 489. and *Powell* verſus *Owen* 1738. before Lord *Hardwicke*.

Mr. *Sambourne*, of the ſame ſide, cited *Bagwell* verſus *Dry*, 1 *P. Wms.* 700.

LORD CHANCELLOR.

Executor and reſiduary legatee in our law is, what the civil law calls *univerſal heirs*, and the ſiſters being ſo made, would have been intitled to prove the will, if no executor had been appointed.

What we call executor and reſiduary legatee is, in the civil law, *univerſal heir*, and theſe words, by that law, would have intitled the ſiſters, as being made univerſal heirs of all his goods and chattels, to have proved the will, if no executor had been appointed, which is the ſtrength of the caſe, and makes a very plain one for the plaintiffs.

If a legacy is given to an executor, which ſhews he ſhould not take the whole as he has a part of the eſtate, the next of kin ſhall be intitled to have it diſtributed.

It is certain where an executor is named in a will, and nothing more is ſaid, he is at law intitled, and in this court, to the reſidue; but if a legacy is given him, which ſhews he ſhould not take the whole, as he has a part of the eſtate, the next of kin of the teſtator ſhall be intitled to have it diſtributed upon the foot of the ſtatute of diſtributions.

It is the ground too of all the caſes, of excluding the executor, that he is only named for the ſake of executing the will, and to have the trouble, and not any benefit.

If an executor is conſidered as a truſtee by conſtruction and inference, where a ſpecial or general legacy is given, much more where the teſtator declares him to be a truſtee.

The caſe of *Bagwell* verſus *Dry*, in 1 *P. Wms.* is expreſly in point, and therefore brings it to that queſtion, whether the nominating him executor is not here nominating him in truſt. *

It is true, the ſiſters take it in thirds, but if he had done no more, as he has named them univerſal heirs, they would have been intitled to the probate of the will.

For the proper term in the civil law, as to goods, is, *hæres teſtamentarius*, and executor is a barbarous term unknown to that law, therefore, a perſon named as *univerſal heir* in a will, in my opinion, would have a right to go to the eccleſiaſtical court for the probate.

Hæres teſtamentarius is, as to goods, the term in the civil law, and executor a barbarous expreſſion unknown to that law.

Therefore, by naming other perſons *univerſal heirs*, he has divided the authority from the intereſt, *quoad the executor*.

What is the meaning of this? Why, naming him as nothing but as an inſtrument, and to give him barely the authority of an executor, without any intereſt, and the facts explain it; for, as the ſiſters lived abroad, the teſtator found it neceſſary to veſt the authority in ſomebody in *England*; for what? Why, merely for the purpoſe of executing his will here.

Mr. *Brown*'s objection was, that though he has named them *univerſal heirs*, yet he has named them ſo in thirds only; and being tenants in common it could not ſurvive to the other two, and therefore the executor by general right is intitled.

To be ſure, the law of *England* is ſo, but as the executor, by the words of this will, is clearly only an inſtrument, he can take nothing beneficially, and therefore it goes to the next of kin.

His Lordſhip decreed, that *Suſan Poilblane* being dead in the teſtator's life-time, it is a lapſed legacy as to her, and muſt be divided according to the ſtatute of diſtributions (the executor being only a truſtee) *per capita*, two thirds thereof to the plaintiffs, *teſtator's two ſiſters*, and the remaining third of this third to the defendant *Suſan Poilblane*, one of the children of *John Poilblane*, the teſtator's brother.

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* One deviſes the ſurplus of his perſonal eſtate to four equally, and leaves *J. S.* executor in truſt; one of the four dies in the life of the teſtator; his ſhare, as ſo much of the teſtator's eſtate undiſpoſed of by his will, ſhall go according to the ſtatute of diſtribution, and not to the executor, he being a bare truſtee for the next of kin. *Bagwell* verſus *Dry*, 1 *P. Wms.* 700.

Caſe 108. *Aſton* verſus *Aſton*. *The third ſeal after Hillary Term*, 1745.

A jointreſs had her own part of a marriage ſettlement in her cuſtody, and came to the poſſeſſion of the huſband's as his executor; ordered to be produced before the clerk in court, but would not, upon motion, direct it to be delivered up, it being the very end of the bill.

A Motion was made on behalf of *Harvey Aſton* againſt Lady *Aſton*, to deliver up one part of a marriage ſettlement, ſhe admitting ſhe had two; and that in the ſettlement *Harvy Aſton*'s wife is in the remainder.

She had her own part in her own cuſtody, and came into the poſſeſſion of her huſband's, as his executor, and indorſed with his hand, this is my part of the ſettlement.

LORD CHANCELLOR.

I will order it to be produced before the clerk in court, but cannot, upon motion, direct it to be delivered up, becauſe this is the very end of the bill.

A purchaſer, if he denies notice, need only ſet forth the purchaſe deed, and plead his purchaſe in bar to the diſcovery of the title deeds.

It is like the caſe of a purchaſer, who, if he denies notice, need only ſet forth the purchaſe deed; but may plead his purchaſe in bar to the diſcovery of the title deeds; for a purchaſer may, ſubſequent to his purchaſe, have found out a defect in his title, and if he ſhould produce title deeds, they might make uſe of them to overturn his title at law.

There is no occaſion to offer to confirm her title to the jointure, for they both claim under the ſame deed, and becauſe it muſt appear what their title is, before it can be confirmed, but that will not extend to a precedent title deed, where the perſon had a precedent eſtate-tail.

A jointreſs, or a purchaſer ought to produce their deeds, to ſee if the lands they claim are comprized therein.

A jointreſs ought to produce her jointure deed, and a purchaſer his purchaſe deed, that it may be ſeen whether the lands they claim are comprized in their deeds.

Hankey

Hankey verſus *Simpſon*, *March* 15, 1745. *In the paper of pleas and demurrers.*

Caſe 109.

LORD CHANCELLOR.

WHERE a bill is brought to impeach an account, and the defendant pleads *a ſtated account*, it is not neceſſary in every caſe that the account ſhould be annexed by way of ſchedule to the anſwer, for the plea is ſufficient in caſe it be a fair account between the parties; but, in the preſent caſe, the bill not only impeaches the account, but charges the plaintiff has no counterpart of the account, and prays it may be ſet forth.

Where a bill not only impeaches an account, but charges the plaintiff has no counterpart; if the defendant pleads a ſtated account, he muſt annex it to his anſwer.

The defendant pleads a ſtated account, without annexing it to his anſwer, ſo that if there were errors upon the face of it, the plaintiff could have no opportunity of pointing them out; and for this reaſon, he ordered the defendant's plea to ſtand for an anſwer, with liberty to except.

Hildyard verſus *Creſſy*, *March* 15, 1745.

Caſe 110.

THE defendant pleaded a fine and non-claim to a bill brought by an heir at law, for diſcovery whether the defendant was a purchaſer for valuable conſideration.

The original bill brought for diſcovery only, the amended bill prays relief; the anſwer to this is to be conſidered as a part of the anſwer to the original bill, as much as if ingroſſed in the ſame parchment, and a part of the ſame record.

The plaintiff came of age in *December* 1734, and brought his bill of diſcovery the *June* before; he amended the bill ſeveral times, but did not, till 1745, amend, and pray relief.

Mr. *Creſſy* levied the fine in 1738, and all the deeds were in the hands of this defendant, as attorney to the plaintiff.

LORD CHANCELLOR.

When the defendant put in an anſwer to the amended bill which prayed relief, he could not put in a complete anſwer over again, but only refer to the former anſwer; for if he had done otherwiſe, it would have been referred for impertinence; and therefore this laſt anſwer is to be conſidered as a part of the anſwer to the original bill for diſcovery, as much as if it had been ingroſſed in the ſame parchment, and a part of the ſame record.

If, at the hearing of this cauſe, the defendant ſhould not have ſupported his plea by the anſwer, the plaintiff may counterprove by reading any part of that anſwer, and by that means overturn the plea.

Does it not equally hold at the time of arguing the plea? that the plaintiff may counterprove by reading a paſſage out of the defendant's anſwer, to ſhew he had not ſufficiently ſupported his plea.

Upon reading the paſſages out of the anſwer, Lord Chancellor was of opinion, he had not made a complete anſwer to the diſcovery, and therefore, not having properly ſupported his plea, he ordered the plea to ſtand for an anſwer only, with liberty to except.

Caſe 111. *Hardingham* verſus *Nicholls*, *March* 15, 1745.

To a bill for poſſeſſion, a purchaſe for a valuable conſideration is pleaded, and that the money is *bonâ fide* ſecured to be paid, being only ſecured, may never be paid, and the plea therefore over-ruled.

A Bill was brought to be let into the poſſeſſion of an eſtate, the defendant pleaded a purchaſe for a valuable conſideration, and that the money was paid, or is *bonâ fide ſecured to be paid.*

The fact is, that the conſideration money was never paid, but only ſecured to be paid.

LORD CHANCELLOR.

The defendant has not paid the money yet, and therefore, as he has notice now of the plaintiff's title, the money he has only ſecured to be paid, may never be paid, and conſequently the plea muſt be over-ruled.

Caſe 112. *Smith* verſus *Smith*, *in the cauſe petitions*, *March* 24, 1745.

A mother petitioned, that Mr. *Barry* may be reſtrained from marrying her daughter, being an infant, and a ward of this court; ordered, as he is likewiſe an infant, that his guardian ſhall not permit him to marry the young lady, without the leave of the court.

A Petition was preferred by Mrs. *Smith*, on behalf of her daughter Miſs *Smith*, deviſee of a very large real eſtate under her father's will, againſt Mr. *Barry*, fourth ſon of Lord *Barrimore*, that the court may reſtrain him from marrying her daughter, being an infant, and a ward of this court, or to make ſuch other order as his Lordſhip ſhall think fit.

LORD CHANCELLOR.

This care of infants has been exerciſed by the court in different degrees and inſtances.

The care of infants revert ed to this court on the ceſſure of the court of wards.

Upon the ceſſure of *the court of wards*, the care of the government of infants reverted to this court, to whom it originally belong-

ed, and in reſpect of lunaticks, ideots, and infants, the king is bound to take care of them: It is not a profitable juriſdiction of the crown, but for the benefit of infants themſelves, who muſt have ſome common parent.

This juriſdiction is exerciſed by way of puniſhment, ſometimes on ſuch as have done any act to the prejudice of infants; and likewiſe more uſefully exerciſed to reſtrain perſons from doing any thing to diſparage infants, where the act has not yet been compleated.

Exerciſed ſometimes by way of puniſhment on ſuch as have done an act to the prejudice of infants, but more uſefully, to reſtrain perſons from doing an act to diſparage them, where it has not yet been compleated

The perſon againſt whom this petition is prayed, has not in reſpect of family and quality diſparaged her; but then there is another objection ariſes, from a great inequality of portion and fortune between this young lady and Mr. *Barry*.

Though this is not the material ingredient in the happineſs of the married life, yet parents always take care that ſuch proviſion ſhall be made of this kind, as will enable infants to live in the world ſuitable to that rank to which their birth intitles them.

The crown therefore acts by way of analogy to the care and prudence of the natural parent, and for this reaſon, when infants under the care of this court are upon a treaty of marriage, the court refers it to a Maſter to ſee, whether the ſettlement propoſed is proper; if improper, the court will not give the infant leave to marry.

If the Maſter, to whom it is referred to ſee if a ſettlement propoſed is proper, reports it improper, the court will not give the infant leave to marry.

As the court has then, by great variety of orders, exerciſed this authority, it brings on the preſent queſtion, whether this is a caſe fit for the court to interfere in?

The addreſſes of Mr. *Barry* have been carryed on very improperly, begun when the lady was very young, and even in the lifetime of her father: Complaints made by the father to Lord *Barrimore* of his ſon's behaviour, Lord *Barrimore*, by a letter to Mr. *Smith*, promiſſes his ſon ſhall never attempt an addreſs of this kind for the future.

The father is dead, but has appointed teſtamentary guardians to his daughters, and given this lady and her ſiſter the inheritance of 8000*l.* a year, upon condition, if they marry under age, that it muſt be with conſent of their mother, and the teſtamentary guardians; ſo that the father has not only intruſted them with the common care as guardians, but has ſhewn his intention and deſire they ſhould be conſulted on marriage, and a previous conſent from them obtained.

Notwithſtanding Lord *Barrimore*'s letter to Mr. *Smith*, the young Lady frequently met Mr. *Barry* at Lord *Barrimore*'s houſe, and many meſſages from Mr. *Barry* were carried by Lord *Barrimore*'s ſervants to the young Lady, and the facts are not contradicted by Mr. *Barry*, or Lord or Lady *Barrimore*; ſo that it appears uncontroverted that this was diſapproved of by her father in his life-time, and diſapproved of by Lord *Barrimore* likewiſe; and yet ſince her father's death this affair has been taken up and carried on by Lord *Barrimore*, and not one of the circumſtances charged by the affidavit of Mrs. *Smith* and others in ſupport of the petition denied by Mr. *Barry*, or Lord or Lady *Barrimore*.

The firſt prayer of the petition is for an order on Mr. *Barry* not to marry the young Lady without the leave of the court.

All theſe orders import only during her minority, for to be ſure at the age of twenty-one ſhe is *ſui juris*, and at her own diſpoſal.

A general order of reſtriction affects every body, and whoever ſhould marry the infant afterwards incurs a contempt of the court.

The council for Mr. *Barry* do not object to ſuch an order, and even if it was a general order, yet it would affect every body, and whoever ſhould preſume to marry her, would incur a contempt of the court; but when there is an application againſt any particular perſon to reſtrain him from marrying an infant, it is uſual to inſert his name in the order.

The petition prays ſecondly, that all letters containing or importing any promiſe of marriage ſhould be produced.

It has been inſiſted by Mr. *Barry*'s council, that no ſuch order has ever been made by the court.

I cannot ſay I do remember any ſuch order, but I have no doubt of the court's having a power of making ſuch a one, when a perſon obtains a promiſe in writing to bind down infants, whilſt under the care of the court.

It is very true, a promiſe of an infant under age will not bind the infant; and ſo laid down in the caſe of *Holt* verſus *Ward* in the court of King's Bench, (*vide Fitz-Gibbons's Rep.* 175. and 275.) It was inſiſted there the infant could not ſupport an action on a promiſe of marriage; the court was extremely doubtful, but were convinced by the argument of Mr. *Reeves*, afterwards Lord Chief Juſtice of the court of Common Pleas; and indeed it was a very fine one, and is the beſt report in *Fitz-Gibbons*'s book. *

* *If a man of full age and a female of* 15 *promiſe to intermarry*, and afterwards he marries another, an action lies againſt him: for though ſuch marriage may be ſaid to be voidable as to the infant, yet it ſhall be binding on the perſon of full age, who ſhall be preſumed to have acted with ſufficient caution; otherwiſe this privilege allowed infants of reſcinding and breaking through their contracts, which was intended as an advantage to them, might turn greatly to their prejudice. *New Abr.* 3 *Vol.* 574. *Holt* verſus *Ward*, *Trin.* 5 *Geo.* 2.

As

As to the rules and method of practice in ſuch a caſe in the eccleſiaſtical court, that was not abſolutely determined in the court of King's Bench, but rather taken to be in this manner.

Upon a contract of marriage *in futuro* the eccleſiaſtical court can only puniſh the party, *pro læſione fidei*, but cannot decree a performance of conjugal rights.

But be that as it will, and that it is only voidable; yet does not ſuch a behaviour as Mr. *Barry*'s tend to entangle an infant, and to prevent her from marrying advantageouſly, where a proper match offers? and in ſhort nothing can tend more to her prejudice than ſuffering her to be inſnared and drawn in to enter into ſuch engagements during her infancy, and therefore it is highly incumbent on the court to ſee what ſteps have been taken to inſnare her.

For notwithſtanding a female of twelve years of age is capable of contracting marriage, the canons in 1603. are expreſly againſt infants marrying without conſent of parents, and a licence cannot be had without an oath of the parents or guardians conſent, notwithſtanding infants are capable of entring into contracts of marriage in the notion of law at the age fourteen and twelve.

Though infants at the age of *fourteen* if a male, and of *twelve* if a female, are capable of entring into contracts of marriage; yet by the canons of 1603. it cannot be done without the conſent of parents.

I will order Mr. *Barry* to produce ſuch letters as contain a promiſe of marriage, but not *billet doux* or letters of civility; for as *a letter* may contain as ſtrong a promiſe as a note in writing, therefore it muſt be produced: And Mrs. *Smith* ſhall likewiſe be allowed to examine Mr. *Barry* on interrogatories; it has been offered by Mr. *Barry*'s council, that I ſhall look into them as a private gentleman, but that will not be a knowledge to me in my judicial capacity, and therefore of no uſe.

The court directed Mr. *Barry* to produce ſuch letters as contained a promiſe of marriage. *N. B. It was ſaid by council to be the firſt inſtance of ſuch an order.* Lord *Hardwicke* refuſed the offer of looking into them as a private gentleman, becauſe it would not have been a knowledge to him in his judicial capacity.

The affidavit of Mr. *Barry* mentions other letters of like import and effect, but that is not ſatisfactory, therefore they muſt be produced likewiſe.

It has been objected by Mr. *Barry*'s council, that the letter mentioned in Mr. *Barry*'s affidavit was wrote before the filing of the bill, and therefore is not a matter for the cogniſance of the court: Suppoſing it was before filing of the bill; this is a very nice diſtinction, for if ſuch an affair has been carried on privately and clandeſtinely, without the knowledge of the mother of the young lady, and the teſtamentary guardians, I ſhall take it as one entire tranſaction, in order to draw in the infant to an improper act: It might be done too when there was a proſpect of ſuch a bill; therefore this court ought not to put it upon ſuch a narrow point as this is: And it is very probable too this letter was delivered to Lord *Barrimore* after this petition lodged.

So far as relates to the promiſe of marriage, Lord *Barrimore* has no buſineſs with the letter delivered to him by the ſon's ſolicitor, the cuſtody of the ſolicitor is the cuſtody of Mr. *Barry*; this is a kind of management too I do not approve.

Lord and Lady *Barrimore* are not mentioned in the prayer of the petition, nor ſerved with notice, therefore are not before the court; but though I cannot make an order *nominatim* on Lord *Barrimore*, yet I will make an order as Mr. *Barry* is allowed to be an infant, that whoever has a power over him as guardian, ſhall not permit him to marry the young lady without leave of the court; and do direct that all letters importing a marriage ſhall be produced before a Maſter, and that Mrs. *Smith* be at liberty to examine Mr. *Barry* on interrogatories.

Caſe 113. *In the lunacy of Mr. Roberts, March* 25, 1746.

Not only the lunatick, but the heir of the lunatick is bound upon the traverſe of the inquiſition.

THIS matter came on before the court upon exceptions to the Maſter's report, which approved of the conveyance of the eſtate in *Barbadoes* to Sir *Stephen Anderſon* from Doctor *Finny*, purſuant to Lord Chancellor's order.

Before the laſt order was carried into execution, *Roberts* died.

The conveyance is by leaſe and releaſe to ſuch uſes as ſubſiſted under the will of Mr. *Robert*'s father, in which Sir *Stephen Anderſon* is the laſt remainder-man.

Exceptions are taken by the heir at law of Mr. *Roberts*, and the moſt material is, that the conveyance ought to have been made to *Henry Roberts* the lunatick in fee.

Mr. *Noel* for the exceptant, the heir at law of Mr. *Roberts*.

The intent of theſe exceptions, is to leave the heir at law at liberty without any previous order of the court, to come to a judicial determination of this point, either by traverſing the inquiſition, or in any other manner, whether he is intitled to the fee, or whether Sir *Stephen Anderſon* is intitled as laſt remainder-man under the will of Mr. *Roberts*'s father.

He argued, that this court will not conſider the inquiſition as an abſolute determination of the right of inheritance of the lunatick's eſtate, and though he could not cite a precedent, yet ſubmitted it upon general rules of reaſon and juſtice, that an heir at law may traverſe an inquiſition, and that the court will not bind him down without a judicial determination of the point.

That

That if Doctor *Finny* could not have been bound by the inquiſition, unleſs he had agreed previous to it to be bound, much more the heir at law, who has not entered into any ſuch agreement, cannot be bound. He cited Sir *Geoffry Palmer*, Attorney General on the behalf of *Jerome Smith* againſt *Sir Robert Packhurſt*, 1 *Ch. Caſ.* 112, 113.

In all judgments againſt the anceſtor the heir has the benefit of a writ of error, or appeal; then why ſhould he be barred here, when this is a procceding only found upon the prerogative of the crown?

It was but a limited inſanity found by the jury, *that Mr. Roberts was not of capacity ſufficient to manage his own affairs.*

A great inconvenience would follow, if the property of perſons ſhould be bound in this ſummary way by order of this court, and will be the firſt precedent of this kind; and all that is aſked is to have an opportunity of trying the fact of the lunacy.

Mr. *Wilbraham*, council of the ſame ſide, ſaid, we do not deſire an immediate conveyance to the exceptant the heir at law, but only to ſome officer of the court, to the uſe of ſuch perſons as may hereafter turn out to be entitled.

By the *St. de Prærogat. Regis*, 17 *Edw.* 2. *c.* 10. It is a ſort of office to intitle the King to lay his hands upon the perſon and eſtate of a lunatick; and though the King cannot be properly called a truſtee, yet in this caſe he is *quaſi* a truſtee for the lunatick's benefit only; for it is there ſaid, *the King ſhall take nothing to his own uſe.*

There is nothing in this inquiſition that can affect the right of a lunatick to the eſtate. *Vide Guttini* verſus *Brown*, 1 *Ch. Caſ.* 49. that a fine ſhall not work further than the court intended it; the ſame rule will hold as to the order made in this caſe.

As to the order's being concluſive: Conſider firſt, how it would be in point of law, this concerns freehold.

If a man has a judgment againſt him on demurrer, he is barred in a perſonal action, and can only have attaint or writ of error; but otherwiſe in freehold. *Vide* 6 *Co.* 7. *b.*

He can have no attaint here, becauſe it is in the caſe of the crown. 4 *Leon.* 46. *Anon.*

The common law will not allow a man to be barred of his freehold, till the mere right has been tried.

In the caſe of *Addiſon* verſus *Dawſon*, *June* 24, 1711. as appears by the regiſter's book, for the note in *Vernon's Reports*, 2 *Vol.* 678. is imperfect, It was ſaid that though a perſon is found a lunatick with a retroſpect of ſeveral years back; yet if any conveyances are executed by a lunatick after this time, they ſhall not be ſet aſide as to good uſes; and yet they are looked upon as bad, and the effects of a recovery bad, where the uſes are bad.

LORD CHANCELLOR.

There was a fine in that caſe, and therefore the lunatick was bound, as it muſt be ſuppoſed when he was examined with regard to the fine by the judge, that he was capable of levying.

Mr. Attorney General for the remainder-man under the will of Mr. *Robert*'s father.

Firſt, Whether the exceptant has any right as heir at law.

He can claim it only as heir at law upon the ſuppoſition that Mr. *Roberts* was ſeiſed in fee at the time of his death.

He could not be ſeiſed in fee at the time of his death, and the only reaſon that has been urged to ſhew he was, is, that the ſettlement made by Mr. *Roberts* in 1738. has barred the remainder to Sir *Stephen Anderſon*.

The heir can have no legal right, for either Mr. *Roberts* was or was not a lunatick: If he was, the deed executed by him in 1738. is no bar of the remainder-man; if he was not, Doctor *Finney* has the whole inheritance, and there is no pretence of right in the heir at law.

The proceedings in this lunacy are binding upon the heir at law.

By the ſtatute of *Edw.* 6. *c.* 8. *ſ.* 6. there is a liberty to traverſe, but when that liberty has been once taken, there is an end of it, for the lunatick cannot traverſe it again.

Mr. *Roberts* could never have traverſed it, by ſaying he was not a lunatick at the time the jury have found him one. *Vide Beverley*'s caſe, 4 *Co.* 123. *b.*

It has been finally determined, and there is no way of trying it now, and cannot be controverted over again by the heir at law.

Mr.

Mr. Solicitor General of the ſame ſide.

The general queſtion is upon the order made in *December* 1745.

The ground of the order was not, that Doctor *Finney* really could convey any thing, but only to preclude him from ever trying it over again, that *Henry Roberts* was a lunatick at the time of executing the deed in 1738.

In anſwer to Mr. *Wilbraham*'s obſervation, that a deed of his may be good to good uſes, and bad to bad; he cited *Leach* verſus *Thompſon*, 3 *Mod.* 310. and the ſame in *Shower's Parl. Caſ.* 150.

The ſingle queſtion is, whether a deed executed by a lunatick is void or voidable; Judges have been of opinion it is abſolutely void, and not voidable only.

If the deed is ſo far a void act that it does not grant to Doctor *Finney*, it does not bar an eſtate-tail; for if he was a lunatick at that time, there was no deed at all.

Mr. *Clerk* of the ſame ſide cited *Manfield*'s caſe, 12 *Co.* 124. where there was a fine by an ideot.

" And reſolved in the court of Wards, that for as much as he " was enabled by the fine as a principal, he ſhall not be diſabled to " limit the uſes, which are but as acceſſory; and notwithſtanding " Lord *Dyer* ſaid, that the Judge who took the fine was never " worthy to take another; and although the monſtrous deformity " and ideocy of *Baſhley*, who acknowledged the fine, was apparent " and viſible to the Judges of the Common Pleas, and the jurors, " to whom he was ſent out of the court of wards, yet they cauſed " a juror to be withdrawn, by conſent of parties, and held the fine " to be good.

Mr. *Noel* in reply ſaid, he apprehended the court would not put ſuch a conſtruction upon their order made on Doctor *Finney*, as to conclude the rights between Sir *Stephen Anderſon* and the heir at law of Mr. *Roberts*.

LORD CHANCELLOR.

Lane's Entries 652. is the only traverſe of a lunacy in print; and there is expreſly the traverſe of a perſon ſuppoſed to *be a lunatick* at the time.

The only traverſe of a lunacy in print is in *Lane's Entries*.

I think I may decide on ſome ſure and certain principles on this exception, without prejudicing any perſon's right.

The queſtion is, whether I ſhall leave Doctor *Finney* a power of diſputing it, if he thinks fit, by reaſon of his not having done an act to extinguiſh his right.

The exception is miſtaken, for the courſe of this proceeding was to ſhew, whether Mr. *Roberts* was a lunatick or not, and not whether Doctor *Finney* had any right to the eſtate; for to ſuppoſe that deed was void, and yet in force at the ſame time, would be inconſiſtent; this being the intent of the order to prevent the trying the lunacy over again in *Barbadoes*, it does not imply the court admitted Doctor *Finney* to have a right.

I am of opinion not only the lunatick, but the heir of the lunatick is bound upon *the traverſe of the inquiſition*, or it would have been a very fruitleſs act of parliament.

A trial by inſpection is the proper trial by the Lord Chancellor as to his perſon; when there has been a ſolemn trial in the life-time of a lunatick who is bound himſelf; to ſay, that after his death, when he cannot appear in proper perſon, and cannot be inſpected by the jury, it ſhould ſtill be open to a traverſe by the heir at law, carries a great abſurdity with it.

Where the alienee and the lunatick traverſe, if he is found a lunatick at the time of the alienation, the alienee is bound.

The alienee of a lunatick may traverſe an inquiſition as well as the lunatick himſelf; ſuppoſe both the lunatick and the alienee traverſe, and he is found a lunatick at the time of the alienation, is not the alienee bound? He certainly is.

The alienee it is ſaid ſhall be bound, becauſe he was a party to the ſuit, but the heir at law ſhall not, which would be a manifeſt injuſtice, and ſtill ſtronger in the caſe of ideocy, where the crown grants the cuſtody and profits of his eſtate during his life; the ideot dies, and, according to the doctrine laid down by council, the heir at law may come in and traverſe the ideocy: Shall the executor of an ideot have an account againſt the grantee for the profits incurred during the grant from the crown? No ſurely.

The lunatick it is ſaid would not be bound, becauſe when he recovers his ſenſes he may traverſe it; certainly he could not.

Though I have ſaid all this upon the general point that the heir at law is bound, yet if Mr. *Roberts* was really a lunatick at the time of the deed, it is abſolutely void; if void ſo as not to paſs the eſtate, it is equally void ſo as not to bar the entail.

But ſuppoſe a common recovery might have a diſtinct operation from the deed to lead the uſes, for a common recovery will bar the entail though there is no deed to lead the uſes, becauſe it is in reſpect *of the ſatisfaction of eſtate in value*, which creates the bar; yet if ſuch a deed as this does not paſs the eſtate, then the deed can have no operation as a recovery of an eſtate in ſatisfaction: Here it is quite a diſtinct thing from the common recovery, for it all depends upon *a letter of attorney* executed by the lunatick, which is a deed, and therefore every thing done in purſuance of it is void: and this was determined in the caſe of *Wentworth* verſus *Cholmely* in the court of Common Pleas, *Michaelmas* term 1744.

But I will ſuppoſe *Roberts* was not a lunatick, and that on a future bill brought here, *Roberts* ſhould be found not to be a lunatick but a weak man, and the deed obtained by fraud or impoſition: After the death of Mr. *Roberts*, the court muſt take it exactly in the ſame light as it ſtood before his conveyance; if Doctor *Finney* gained no right by this deed, he can convey nothing to the truſtee under the order of this court, therefore the heir at law is not hurt.

But ſuppoſing the entail is barred, thoſe uſes are not exiſting, and no prejudice can ariſe from the conveyance directed by the Maſter, his Lordſhip over-ruled the exception, but not ſo as to prevent any right the heir at law may appear to have on trial at law.

Anon. Eaſter term 1746.

Caſe 114.

A Bill was brought for a redemption of a mortgage.

Lord Chancellor ſet out with ſaying that he thought the rule in relation to redemptions, which had been eſtabliſhed in this court for ſome time, and which was analogous to the ſtatute of limitations, is a very right and proper rule; that after twenty years poſſeſſion of the mortgagee, he ſhould not be diſturbed, or otherwiſe it would make property very precarious, and a mortgagee would be no more than a bailiff to the mortgagor, and ſubject to an account; which would be a great hardſhip.

The rule in relation to redemptions eſtabliſhed here by way of analogy to the ſtatute of limitations, that after 20 years poſſeſſion a mortgagee ſhould not be diſturbed, is a very right and proper one.

But on the other hand, I never heard of the rules that Mr. *Clark* has inſiſted on for the defendant, that whoever comes for a redemption muſt ſhew a diſability in the owner of the equity of redemption to come ſooner; and Secondly, That if the court ſhould be ſatisfied in this reſpect, yet they will not decree a redemption, where it would ſubject the mortgagee to great inconvenience in taking the account.

I do not know theſe rules have ever been eſtabliſhed here, but if the court decree a redemption, they provide as well as they can againſt laying the mortgagee under inconvenience in paſſing the account.

There never was a judge who has ſat in this court, could be more diſinclined than I am to allow a redemption, where there has been a length of time incurred ſince the poſſeſſion of the mortgagee of the premiſſes in mortgage.

Eſpecially in a caſe like the preſent, where a prowling aſſignee, as the plaintiff is, admits that for a very inconſiderable ſum he bought the equity of redemption, imagining from ſome knowledge of the law, he might be able to unravel a great number of circumſtances, and by that means intitle himſelf to a redemption: And I ſhould be very glad in decreeing a redemption, that I could do it for the ſake of the unfortunate family who were the original borrowers of the money; but though they have conveyed away all their right, yet even in the caſe of an aſſignee of the equity of redemption, if there are circumſtances which would induce the court to decree a redemption in favour of the repreſentative of the mortgagor, the aſſignee who ſtands in his place will have the benefit of it.

I am of opinion that though no ſingle circumſtance abſtracted from the reſt, will be ſufficient to entitle the plaintiff to a decree, yet taking them altogether, they are of weight enough to intitle the plaintiff to a decree.

For in 1723. it was plainly a mortgage, and the bill was brought only in 1738. which is but *fifteen years*, and therefore is not within the bar which has of late years been laid down by the court.

There was a caſe before Sir *Joſeph Jekyll*, where he decreed a redemption upon the circumſtance of the perſon, (who was in poſſeſſion of an eſtate originally in mortgage) calling it by the name *of my mortgaged eſtate* in his will.

A redemption was decreed in this caſe, as the bill was brought after a poſſeſſion of 15 years only, and therefore not within the bar.

But though I decree a redemption, it muſt be upon terms; that the plaintiff before the Maſter in taking the account be confined to ſurcharge and falſify only, and the intereſt upon the mortgage to be computed at 5 *l. per cent*, which his Lordſhip directed accordingly.

Fonereau

Fonereau verſus *Fonéreau*, *Eaſter term* 1745.

Caſe 115.

CLAUDIUS Fonereau by his will deviſed as follows: " I give " and deviſe the ſum of 54000 *l.* to my executors, guardians " and truſtees ſeverally and jointly, in truſt to inveſt the ſame with- " in the term of ſix months next after my deceaſe, in the purchaſe " of ſuch parliamentary funds, or ſuch other real or perſonal ſecu- " rities as they, or the ſurvivor of them, ſhall think fit, in truſt to " pay the yearly intereſt and produce thereof unto all my children " by my late wife *Elizabeth*, and unto thoſe that ſhall be born by " my preſent wife *Anne*, when they ſhall have attained the age of " twenty-one, ſhare and ſhare alike; and that the ſhare of each of " my daughters be paid to each of my daughters during the term " of their natural lives: And I will that the intereſt or yearly pro- " duce of the ſeveral ſums or parts of the ſaid ſecurities which ſhall " belong to my daughters, who are or ſhall be married, be paid to " them upon their ſingle and ſeparate receipts, without the con- " troul or intermeddling of their reſpective huſbands, and without " their being ſubject to the diſcharge of any of their ſaid huſband's " debts. And I will that ſuch my ſaid daughter or daughters re- " ceipt ſingle and ſeparate ſhall be a ſufficient diſcharge to my ſaid " executors, truſtees and guardians aforeſaid, for ſuch yearly intereſt " and produce: and after each and every of their reſpective de- " ceaſes, in truſt to divide to each the part or ſhare of the ſecurities " wherein the ſum ſhall have been inveſted, among the iſſue of " ſuch of my ſaid children who ſhall happen to die, in ſuch man- " ner and proportion as any of my ſaid children ſo dying ſhall re- " ſpectively appoint in and by his or her laſt will and teſtament; " and for want of ſuch appointment, then in truſt to divide ſuch " part or ſhare of the ſaid ſecurity equally among ſuch reſpective " iſſue of any of my ſaid children at their reſpective age or ages of " twenty-one years, and in truſt in the mean time to apply the in- " tereſt of their reſpective ſhare or portion towards their reſpective " maintenance and education: and in caſe any ſuch iſſue ſhall hap- " pen to deceaſe before attaining the age of twenty-one years, " then and in ſuch caſe I will that the ſhare of him or her or " them ſo dying do go to the ſurvivor or ſurvivors of them; and " in caſe all the iſſue of any of my children ſhall happen to die " before attaining the age of twenty-one years, to be divided " equally among all my other children or their children; the " children of any of my children who ſhall happen to be dead " at the time of the deceaſe of the longer liver of the iſſue of my " ſaid children (ſuch iſſue dying all before the age of twenty-one

After the death of *C. F.* the teſtator, *Peter* one of his ſons died, having firſt made his will, and his brother *Philip* executor and reſiduary legatee, who brought his bill againſt the other children of *C. F.* and inſiſted the ſhare of *Peter* in the ſum of 54000 *l.* under the father's will abſolutely veſted in him, and belonged to the plaintiff as his repreſentative, or that it was fallen into the *reſiduum*, and belonged to the reſiduary legatees only. *It cannot belong to Peter's repreſentative, as it never veſted in Peter himſelf, for it is the ſhare only of the yearly produce of the* 54000*l. that is given to any of the children, the principal being intended as a proviſion for the ſeveral* ſtirpes *of each child*; nor *does it belong to the reſiduary legatees, for this is a particular legacy divided from the reſidue, and therefore the ſhare of Peter ought to go among the ſurviving children.*

" years

" years as aforeſaid) to have the ſhare of his or her parent equally " between them: And I will that my ſaid executors, truſtees and " guardians, do until ſuch time as they ſhall have inveſted the " full ſum of 54000 *l.* in the purchaſe of ſecurities for the pur- " poſes aforeſaid, pay to my children out of the reſt and reſidue of " my perſonal eſtate as much as will, together with the intereſt of " the ſecurities which they ſhall purchaſe, as they go on in pur- " chaſing thereof, amount to 4 *l.* for each hundred yearly, for " their reſpective part or ſhare of the yearly produce or intereſt " of ſaid 54000 *l.* I ſay of the 54000 *l.* beforeſaid, to remain " and continue in truſtees aforeſaid; and I do hereby declare, " that I give and deviſe the ſaid 54000 *l.* to my ſaid children by " my former wife, and unto thoſe who ſhall be born by my pre- " ſent wife *Anne* aforeſaid, over and above the ſeveral ſums of " money which I have given them, or obliged myſelf to give " them, either upon marriage, or any otherwiſe, before the ſigning " of this my preſent laſt will and teſtament.

And the ſaid teſtator by the ſaid will, after payment of his debts, funerals and legacies, gave and deviſed the reſidue of his eſtate to his ſons *Thomas*, *Abell*, *Claudius*, *Peter* and *Philip*, to be equally divided between them, and made *Thomas*, *Abell*, *Peter* and *Philip* executors, and died the 5th of *April* 1740.

The 15th of *October* 1743. *Peter* died, having made his will, and *Philip* executor thereof, and reſiduary legatee, who brought his bill againſt the other children of the ſaid *Claude Fonereau*, and inſiſted that the ſhare of *Peter* in the ſaid 54000 *l.* amounting to 6000 *l.* was abſolutely veſted in *Peter*, and ſo belonged to him as his repreſentative; if not ſo, yet the teſtator not having made any proviſion for the contingency of any of his children dying without any iſſue, the ſhare of ſuch child ſo dying fell into the *reſiduum* of the teſtator's eſtate, and belonged to the reſiduary legatees excluſive of the other children.

The daughters by their anſwers inſiſted, that though the contingency of a child's dying without iſſue was not in words provided for, yet it was virtually included in the more remote contingency provided for by the will, (*viz.*) *the iſſue of any of the children dying before twenty-one without iſſue*, and that it might according to the limitation over in that caſe be divided among all the children equally.

The caſes cited for the plaintiff were *Eaſtcourt* verſus *Warry*, *Comberb.* 437. *Newland* verſus *Shepherd*, 2 *P. Wms.* 194. which Lord *Hardwicke* ſaid, he could ſee no reaſon to approve of as reported there. 2 *Ventr.* 363. *Hutton* verſus *Simpſon*. 2 *Vern.* 722. *Hutton* verſus

verſus *Simpſon*. *Harris* verſus *Chaplin*, the 25th of *February* 1735. *Cro. Eliz.* 525. *

For the defendants was cited the caſe of *Jones* verſus *Weſtcombe*, *Mich. term* 1711. *Eq. Caſ. Abr.* 245.

LORD CHANCELLOR.

There are three queſtions in this caſe.

The firſt is, if this ſhare belongs to *Philip Peter*'s repreſentative.

Secondly, if it goes to all the ſurviving children.

Thirdly, If it falls into the general *reſiduum* of the teſtator's eſtate.

As to *the firſt*, I am very clear it cannot belong to *Peter*'s repreſentative, becauſe it never veſted in *Peter* himſelf; for nothing is given to any of the children but the ſhare of the yearly produce and intereſt of the principal ſum of 54000 *l.* which is intended as a proviſion for the ſeveral *ſtirpes* of each child.

As to the ſecond queſtion, I am of opinion it will go according to the deviſe over, and that muſt be according to the intent of the teſtator collected from the ſeveral parts of the will.

Conſider it with regard to the contingency, and as to what diſtinguiſhes it from the caſe of *Jones* verſus *Weſtcombe*: It is inſiſted by the plaintiff that the contingency muſt happen of a child being born, and that child dying without iſſue before the age of twenty-one, or the deviſe over of the ſhare to the other children cannot take effect.

Where there are remainders of a real eſtate, if the perſon to whom the particular limitation is, never has been *in eſſe*, the remainder over takes effect.

In the caſe of a real eſtate, ſuch a conſtruction could not be made, becauſe where there are remainders it has been conſidered as a diſpoſition of the reverſion left in the teſtator, and if the perſon to whom the particular limitation is, never has been *in eſſe*, the remainder over takes effect.

* *J. S.* after the deviſe of ſeveral parts of his real and perſonal eſtates to ſeveral perſons, deviſes the intereſt and produce of the ſurplus of his real and perſonal eſtate to his grandchildren, until their age of 21. *This will paſs the abſolute right and property of the real and perſonal eſtate to the grandchildren after age.* *Newland* verſus *Shephard*, 2 *P. Wms.* 194.
N. B. *Lord* Hardwicke *ſaid, he could ſee no reaſon to approve of this determination as reported there.*

It was ſaid, the diſpoſition of perſonal things differ, becauſe they cannot be diſpoſed of by way of remainder, and are executory, which muſt take effect ſtrictly according to the contingency upon which they are limited.

There may be a difference of expreſſion in wills, though the ſame thing is meant, and to lay weight on ſtrict forms of words, when the meaning is plain, would be conſtruing wills with two great nicety.

Jones verſus *Weſtcomb* is an authority directly contrary, according to Lord *Harcourt*'s opinion; and of that opinion were the court of King's Bench: The ejectment there was for the freehold, and will not determine the judgment of this court with regard to perſonal eſtate: I am of Lord *Harcourt*'s opinion upon the reaſon of the thing: People frequently differ in expreſſion, though they mean the ſame thing; and it would be conſtruing wills by too great a nicety, to lay weight upon ſuch ſtrict forms of words, when the meaning is plain: I never knew a caſe where this court has departed from ſuch a latitude of conſtruction, as the courts at law would have made upon a limitation of a freehold eſtate, in order to defeat a bequeſt over, though it has frequently done ſo to ſupport a deviſe over.

This brings it to the intent of the teſtator, and there is no doubt of that, for there can be no reaſon for a deviſe over in caſe of the iſſue of a child dying, and not in the caſe of a child itſelf dying without any iſſue at all.

The caſe of *Eſtcourt* verſus *Warry* in *Comberbach*, is reported in a book that is very incorrect, and of a very different contingency, and can be no authority in the preſent caſe.

As to the third queſtion, if it falls into the general *reſiduum*, there are ſome circumſtances here which make it a ſtronger caſe than *Jones* verſus *Weſtcomb*, for I think here appears an intent that it ſhould go over abſolutely, from the introductory clauſe of the teſtator's will: It is plain he intended to diſpoſe of his whole eſtate; it is plain this was a fund detached and divided from the general reſidue of his eſtate: And the introductory words of the reſiduary clauſe are, after payment of all debts, *&c.* and legacies, I give the reſidue; this is a particular legacy, and divided from what he intended to be the reſidue: And I am of opinion the ſhare of *Peter* ought to go among the ſurviving children.

Sherman

Sherman verſus *Collins*, *February* 4, 1745. Caſe 116.

JOHN COLLINS by will, dated the 16th of *October* 1733, "gives and bequeaths unto each of his daughters *Ann* and *Mary* "*Collins*, three hundred pounds, to be paid to them by his executor "*John Collins*, when he ſhall attain his age of twenty-ſix; *but in* "*regard my two daughters are already provided for by lands ſettled on* "*them by me, and my late wife, and by legacies left them by their* "*grandfather, and which I have paid unto them; it is my intention* "*that they ſhall not be intitled to any intereſt for the ſaid ſums to* "*them given by me as aforeſaid, before the ſame ſhall become pay-* "*able as aforeſaid*; however, for the better ſecuring the ſaid ſeve- "ral ſums of three hundred pounds given to my two daughters, "my will is, that my two cloſes in *Sutton* ſhall ſtand reſpec- "tively charged with my perſonal eſtate, *and be liable to the pay-* "*ment of the ſaid ſeveral ſums of three hundred pounds to my two* "*daughters at the time abovementioned, with a power to enter and* "*hold till payment of principal and intereſt, from the time it ſhall* "*become due*, and after payment thereof, deviſes the premiſſes to "his ſon *John Collins* in fee, whom he makes executor, and reſi- "duary legatee."

The legacies under the will of *J. C.* are veſted ones, and the time of payment poſtponed merely on circumſtances ariſing from conveniency to the eſtate, and therefore the court decreed them to the plaintiff.

Both the daughters arrived at their age of twenty-one, but died before *John Collins* attained his age of twenty-ſix; one of them married, and left two children, the other is dead unmarried, but by will gave the three hundred pounds to her ſiſter.

The huſband, and the two children, bring the bill for the legacies.

Mr. *Brown*, for the plaintiffs, cited *Powlet* verſus *Dogget*, 2 *Vern.* 86. *Miller* verſus *Warren*, *id.* 207. *Jackſon* verſus *Farrand*, *id.* 424. *Bruen* verſus *Bruen*, 2 *Vern.* 439. *Pitfield's caſe*, 2 *Will.* 513. and *Lowther* verſus *Condon*, before Lord *Hardwicke*, the 1ſt of *June* 1741. *

* See before caſe 111.

It appeared that the perſonal eſtate was not ſufficient.

Mr. *Clark*, of the ſame ſide, cited *Hall* verſus *Terry*, *M. T.* 1738, 1 *T. Atk.* 502. and *King* verſus *Withers*, *Caſ. in the time of Lord Talbot* 117. and *Buckley* verſus *Stanlake*, the 4th of *November* 1719.

Mr. *Robinſon*, of the ſame ſide, cited *Hutchins* verſus *Fitzwater and Foy*, L. C. B. *Cumm.* 716.

Mr.

Mr. Solicitor General, for the defendant, the executor, cited *Bradley* verſus *Powell*, *Caſ. in the time of Lord Talbot* 193. and *Hall* verſus *Terry*, 1 *Tr. Atk* 502. to ſhew that the general rule ſhall prevail if the legatee dies before the contingency happens.

Mr. *Ereſkin*, of the ſame ſide, cited *Swinbourne's 4th part* 317. and *Bright* verſus *Norton*, *before Lord Talbot*, a ſimilar point with *Bradley* verſus *Powell*, and *Tourney* verſus *Tourney*, *Preced. in Chanc.* 290.

LORD CHANCELLOR.

This is a legacy in the firſt place on perſonal eſtate, and if deficient, a right of entry is given upon *real* eſtate, and to hold till ſatisfied.

The reaſons I ſhall go upon are partly reaſons founded on the rules of this court.

Firſt, That this is a legacy given to two daughters generally, *to be paid when his ſon* John Collins *ſhall attain his age of twenty-ſix.*

Where it is a mixed fund of real and perſonal, though conſidered as a veſted legacy in reſpect to the latter, yet it ſhall not be raiſed out of the former, where the legatee dies before the time of payment.

With regard to the perſonal eſtate, it is not diſputed at the bar, but the plaintiffs are intitled; it is true, it has been determined, where there is a mixed fund of real and perſonal, that notwithſtanding it is conſidered as a veſted legacy as to the perſonal eſtate, yet otherwiſe as to the auxiliary fund, and ſhall not be raiſed out of the real eſtate, where legatee dies before the time of payment.

Even this was a caſe of pretty hard digeſtion when *firſt* determined, becauſe, if the duty itſelf was due, where the land was given as a ſecurity, it ſeemed a little harſh, that the land ſhould not be commenſurate to the ſecurity.

This determination was thought a hard one at the time, but has prevailed ever ſince, to prevent unneceſſary burdens being brought upon heirs.

But to prevent bringing unneceſſary burdens upon heirs, the court was prevailed upon to determine it ſo, and it is now ſettled that it ſhould follow the rule of portions and legacies chargeable on real eſtate, and ſink in the land.

Which brings it to the queſtion, what would be the conſequence if theſe legacies had been originally chargeable on real eſtate.

" *But in regard my two daughters are already provided for by* " *lands ſettled*, &c."

It is true, the general rule is, that where a legacy or portion is to be paid at a certain age, or certain time, if the legatee die before that age, or before the time of payment comes, it ſhall ſink into the land, and has been ſo eſtabliſhed ever ſince the caſe of *Powlet* verſus *Powlet*, 2 *Ventr.* 366, 367. and 1 *Vern.* 321.

Where a legacy or portion is to be paid at a certain age, or time, if the legatee die before that age, or time, it ſhall ſink into the land.

It was determined originally upon portions, afterwards was extended to legacies, and taken from circumſtances regarding legatees age, or day of marriage, the court concluding that parents thought if their children did not live to ſuch time, that they would not want their portions or legacies.

Originally determined on portions, afterwards extended to legacies, and taken from circumſtances regarding legatee's age, or day of marriage.

But it cannot be ſaid it holds equally ſtrong where the circumſtances are taken from the conveniency of the eſtate, and not from the perſon of the legatee.

The rule not adhered to, where the circumſtances are taken from the conveniency of the eſtate, and not the legatee's perſon.

King verſus *Withers*, *before Lord Talbot*, was the firſt caſe where a legacy was determined to be veſted, though charged upon land, on *circumſtances ariſing from conveniency to the eſtate*; for his Lordſhip was of opinion there the legacy ſhould be raiſed, the time of payment being poſtponed *for the conveniency of the eſtate*; and though Lord *Talbot* took notice of this diſtinction, in *Bradley* verſus *Powell*, which came before him after *King* and *Withers*, yet there was a material difference, for the perſon died before the time appointed for payment came, and therefore he determined the portion to ſink; the ſtrong reaſoning in *King* verſus *Withers*, was, that the teſtator intended, upon the event of the ſon's dying, to increaſe his daughters proviſion, and her family.

Determined firſt by Lord *Talbot* in the caſe of *King* verſus *Withers*, that the legacy, though charged upon land, ſhould be raiſed, the time of payment being poſtponed only for the conveniency of the eſtate.

If this be the general doctrine, conſider how it ſtands here, the time of payment was moſt manifeſtly poſtponed, in order to prevent the burden of intereſt falling upon the eſtate of the ſon till he attained his age of twenty-ſix; and when he has given this expreſs reaſon, to infer from thence that the daughter ſhould loſe the principal, or her repreſentatives, would be a very forced conſtruction.

If the ſon had died before twenty-ſix, the daughters would not have been intitled to their legacies, as the contingency had not happened.

A dying before the contingency happens, is the reaſon why a legacy that is charged upon land ſhould not be payable, and I do not ſee, if the ſon had died before his age of twenty-ſix, how the daughters could have been intitled.

Where the portion is directed to be raiſed after the death of the mother, there are many caſes where this court has held it ſhall not be raiſed in her life-time.

In the caſe of *Lowther* verſus *Condon*, the ſtrong reaſon which weighs with me was, that the portion was directed to be raiſed after the death of the teſtator's wife, and therefore poſtponed merely from the conveniency to the eſtate and family, and not intended that the daughters ſhould loſe their portions becauſe they died before the mother; and there are a great many caſes where this court has held it ſhall not be raiſed in the mother's life-time.

Therefore, if conſidered ſingly upon the general rules of the court, the legacy would be veſted, and tranſmiſſible.

I do not reſt it here, but am of opinion, on general rules of law, it is a veſted legacy, for the plaintiff might have had a legal remedy by ejectment: The words are, *with a power to enter and hold till payment*, &c. *Vide the will.*

This I take to be a right of entry given them to hold the land in the nature of a tenancy by elegit, and rightly ſaid at the bar, to be a chattle intereſt.

A right of entry differs from a power, for it will go to executors and adminiſtrators.

It has been improperly called a power, for it is a right of entry, which differs from a power; for a right of entry will go to executors and adminiſtrators; for if a chattle intereſt be granted to a man, though his executors are not named, yet they will take it barely as his repreſentatives.

If this be ſo, then there is a legal remedy to enter, and hold the lands till principal and intereſt be ſatisfied.

Now, can it be ſaid, where plaintiff ſhall have a ſatisfaction in his own perſon at law, yet that I ſhould relieve againſt it in this court, merely upon a will, and where all perſons are volunteers?

The caſes have, for the moſt part, ariſen upon equitable charges, where there is no remedy except in this court, and in the caſes of truſts, as it can only be determined here, whether the truſt has ariſen or not.

This is not an equitable charge, but a legal one, and differs from thoſe caſes; ſo that the party having his remedy at law, by ejectment, there are no grounds for this court to take it from him.

But the plaintiff comes here properly to have an account of the perſonal eſtate of the teſtator, in the firſt place, and likewiſe to avoid circuity; for if the plaintiff had recovered at law, then the defendant would have had a right to be relieved here, upon payment of principal and intereſt.

His Lordſhip decreed the legacies to the plaintiff.

Sarah

Case 117.

Sarah Deacon, March 26, 1746. *executrix of the will of Joſeph Smith deceaſed, ſon and heir of Joſeph Smith his late father deceaſed, by Martha, his firſt wife,* —— —— } Plaintiff.

Eleanor Smith, widow of Joſeph Smith, the father, and five of his children, } Defendants.

IN *Eaſter* term 1742, *Joſeph Smith*, the younger, brought his bill againſt *Eleanor Smith*, the widow and adminiſtratrix of *Joſeph Smith* the father, and the other defendants, his children by *Eleanor*, for an account and diſtribution of the father's perſonal eſtate, and for a diſcovery of the real eſtate which he was ſeiſed of at his death, and all mortgages, *&c.* and for an account of rents, and to be let into poſſeſſion.

A man can be no contractor with his heir or executor, for they derive under his will or permiſſion, and therefore it is the intention that governs the court, and turns the balance.

The defendant *Eleanor*, in her anſwer to that bill, ſet forth, that by deed poll, or articles of agreement, dated the 28th of *July* 1716, between *Joſeph Smith*, the father of the plaintiff, of the one part, and *Francis Kidgell*, the defendants father, of the other, *Smith* covenanted for him, his heirs, executors and adminiſtrators, with the ſaid *Kidgell, &c.* that in conſideration of a portion of four hundred pounds, the ſaid *Smith ſhould and would convey and ſettle houſes, lands and tenements, or a rent charge iſſuing thereout, of the yearly value of forty pounds, on truſtees, to the uſe of himſelf for life, and afterwards to* Eleanor *for life, in bar of dower, remainder to the heirs of* Joſeph Smith *on the body of* Eleanor, ſubject to a power to charge the eſtate of forty pounds *per ann.* with three hundred pounds as a proviſion for the younger children of the marriage.

Joſeph Smith, the elder, at the time of his marriage with the defendant *Eleanor*, was not ſeiſed of any real eſtate, whereof he could make a ſettlement purſuant to the articles, but afterwards purchaſed a freehold called *Cheeſeman*'s in *Eaſt Ilſley*, in *Berkſhire*, of the yearly value of nine pounds, and a freehold meſſuage at *Weſt Ilſley*, of the yearly value of forty pounds, ſubject to an eſtate for life of *Mary Smith*, widow, in an undivided moiety thereof: before the laſt purchaſe the ſame eſtate had been mortgaged for 1000 years term, to *Joſeph Smith* the elder, for ſecuring two hundred and fifty pounds and intereſt.

The defendant, *Eleanor*, inſiſted, that her huſband purchaſed the ſame, or ſo much as was in poſſeſſion, in order to enable him to perform the articles.

Soon after *Joſeph Smith* the father's purchaſe of the eſtate at *Weſt Ilſley*, he aſſigned over the mortgage to a perſon, without the defendants joining with him, for the remainder of the term of 1000 years, for ſecuring two hundred and fifty pounds, and intereſt, to that perſon.

The defendant *Eleanor*, ſoon after her huſband's death, obtained letters of adminiſtration, and with his perſonal eſtate paid off the two hundred and fifty pounds, and intereſt, to the mortgagee, who aſſigned the term to one *Stevens*, in truſt for ſuch perſon as ſhould be intitled to the freehold and inheritance.

She entered too upon *Cheeſeman*'s eſtate, and received the profits; and ſhe and her eldeſt ſon, by their anſwers, inſiſt the marriage articles ſhould be carried into execution, and that a ſettlement be made of the real eſtates whereof *Joſeph Smith* died ſeiſed, and in caſe they ſhould not be ſufficient, then other lands to be purchaſed out of the perſonal eſtate, ſufficient to make up a freehold eſtate of the clear yearly value of forty pounds, and ſettled, purſuant to the articles, to the uſe of the defendant *Eleanor*, for life, with remainder to *Francis*, and the heirs of his body, as being the eldeſt ſon of the marriage.

The plaintiff inſiſted, that his father purchaſed theſe freehold eſtates, with an intent that the plaintiff ſhould inherit them, and that the defendant's marriage agreement, if inſiſted on, ought to be made good out of the perſonal eſtate.

The evidence for the defendant was, that *Joſeph Smith*, the father, ſaid, he purchaſed the eſtate called *Cheeſeman*'s, with an intent to build a houſe on part, and that the defendant and his wife ſhould live there after his death.

The cauſe being heard before the Maſter of the *Rolls*, the 25th of *June* 1743, his Honour declared, that *Cheeſeman*'s eſtate in *Eaſt Ilſley*, and ſo much of the *Weſt Ilſley* eſtate as was in poſſeſſion at the time of *Joſeph Smith*'s purchaſe, being an undivided moiety, ought to be conſidered as purchaſed in part performance of the covenant in the marriage articles, for making a jointure of forty pounds *per annum* on *Eleanor*, and a proviſion for the iſſue of the marriage, and ſhould be ſo ſettled; and that the other moiety of the *Weſt Ilſley* eſtate, not being in poſſeſſion at the time of the purchaſe, was not to be conſidered as purchaſed in purſuance of the articles, but belonged to the plaintiff, as heir at law, and decreed accordingly; and if the *Cheeſeman*'s eſtate, and the moiety of the *Weſt Ilſley* eſtates, were deficient to make good the covenant in the articles, the ſame to be anſwered out of the inteſtate's perſonal eſtate.

Before

Before any further proceedings, the plaintiff *Smith* died, but by his will had deviſed to *Sarah Deacon*, her heirs, executors and adminiſtrators, all his real and perſonal eſtate, and appointed her ſole executrix, by virtue whereof ſhe became intitled to the benefit of the ſaid ſuit, and ſtands in the place of *Joſeph Smith* the younger, with reſpect to his title and intereſt in the real and perſonal eſtates of his late father.

Sarah Deacon, in *Hilary* term 1743, brought her bill of revivor, and the proceedings were ordered to ſtand revived.

The defendants, ſoon after the hearing of the original cauſe, procured the decree to be ſigned and inrolled, and thereby prevented any rehearing, or appeal againſt the ſaid decre, which the preſent plaintiff inſiſts is erroneous, and hath therefore exhibited her bill of review, to ſhew the decree is erroneous in the following particulars, *for that the eſtates called* Cheeſeman's, *and ſo much of the* Weſt Ilſley *eſtate in poſſeſſion at the time of the purchaſe did belong, and ought to have been decreed to the plaintiff* Joſeph Smith, *as heir at law to his father.*

That it ought to have been decreed likewiſe, that the rents and profits of ſuch eſtates ſhould have been paid to the plaintiff, and the deeds delivered up to him, and the defendant Eleanor *to procure the mortgage term to be aſſigned to the plaintiff.*

That it ought to have been decreed likewiſe, that the perſonal eſtate of Joſeph Smith, *the father, ſhould be applied to make good the whole arrears of forty pounds* per ann. *from the time of his death, and in the purchaſe of houſes, lands and tenements of* 40l. per ann. *to be ſettled to the uſes in the articles.*

She therefore prays, that for theſe defects in the decree, it may be reverſed.

Lord Chancellor took ſome time to conſider, and this day gave judgment.

The plaintiff's council have relied upon two objections.

Firſt, That here was no ſufficient act appears to be done by *Joſeph Smith* the elder, and covenantor, to affect or ſubject theſe lands to the articles.

Secondly, That it might be prejudicial to purchaſers and creditors, to conſtrue theſe lands to be liable to the articles.

As to the firſt, I am of opinion, that there are not ſufficient reaſons to determine that theſe lands are not bound by the articles.

In all theſe caſes, the court have gone upon the intention of parties, and have not required that ſtrictneſs as in the ſtatute of frauds and perjuries; and many caſes have gone ſo far, as to rely upon a ſtrong preſumption merely, without any poſitive evidence.

What has governed the court is, that a man can be no contractor with his heir or executor, for they all derive under his will or permiſſion; therefore, that the intention ſhould be the rule, and turn the balance.

The caſe of *Lechmere* verſus *Lechmere*, the 13th of *May* 1735, I mention for the ſake of the general ground, for there Sir *Joſeph Jekyl* laid it down, the intention ought to be the rule, agreeable to the judgment of three ſucceſſive Chancellors, Lord *Somers*, Lord *Cowper*, and Lord *Harcourt*.

In the caſes of ſatisfaction, one rule is, that it depends on the intent of the party, and which way ſoever the intent is, that way it muſt be taken.

Lord *Talbot*, on the rehearing, laid down the ſame rule, and ſaid, "the caſes upon ſatisfaction are generally between debtor and creditor; and the heir is no creditor, but only ſtands in his anceſtor's place: one rule of ſatisfaction is, that it depends upon the intent of the party, and that which way ſoever the intent is, that way it muſt be taken; but this is to be underſtood with ſome reſtriction, as that the thing intended for a ſatisfaction be of the ſame kind, or a greater thing, in ſatisfaction of a leſs; for if otherwiſe, this court will compel a man to be juſt before he is generous, and ſo will decree both:" But theſe queſtions, he ſaid, are no ways material in this caſe, *which turns entirely upon Lord* Lechmere's *intent at the time of the purchaſes made. Caſ. in Chan. in Lord Talbot's time* 92.

I cite it, to ſhew, that both the Maſter of the *Rolls*, and Lord *Talbot*, who differed in opinon as to the point only of the fee-ſimple lands, purchaſed ſince the covenant, laid down the ſame general rule as to the intention.

Therefore, I am of opinion, it is not material in this caſe, to require particular acts to be done; but if there is a ſufficient preſumption, it was the intention of *Joſeph Smith* the elder, it ſhould go according to the articles, *the land is bound by the articles.*

The ſecond objection was, that it might be prejudicial to purchaſers and creditors to conſtrue theſe lands to be liable to the articles.

I think

I think no purchaſer, or mortgagee who is a purchaſer *pro tanto*, will be affected; for if the huſband had ſold them or mortgaged them, it would have been evidence of a different intention, and would therefore have taken off all evidence of his intention to bind them by the articles.

It is ſaid the creditors by ſpecialty would be affected by it: I lay no weight on this, for the wife and the iſſue of the marriage are creditors by ſpecialty themſelves, and it is in the power of the owner of the eſtate to prefer one ſpecialty creditor to another, for none of them have any ſpecifick lien upon the lands.

It is in the power of the owner of the eſtate to prefer one ſpecialty creditor to another, for none of them have any ſpecifick lien upon the lands.

In the caſe of *Roundell* verſus *Breary*, 2 *Vern.* 482. the court were of opinion that the articles were a lien on the lands whereof the father was then ſeiſed, though no particular lands were mentioned in the articles.

Now the objection held equally ſtrong there with regard to creditors by ſpecialty; and therefore, as to this part of the preſent caſe, the intention of the huſband ought here to prevail, if it appears by preſumption, he meant the eſtate *ſhould be bound by the articles.*

But another objection has been taken, that admitting there was ſuch an intention, yet there is no ſufficient evidence of ſuch intention.

Firſt, from the nature of the articles themſelves.

Two things were relied on to ſhew, that no intention could from the nature of the articles appear.

Becauſe that there are articles *to convey and ſettle lands*, and not to purchaſe.

Secondly, that here is an option to ſettle lands of forty pounds *per ann.* or a rent-charge out of the lands.

As to the firſt, I am of opinion it is much too ſlight a difference in the preſent caſe to diſtinguiſh it from *Lechmere* verſus *Lechmere*.

Every caſe of this kind muſt be taken according to it's own circumſtances.

Joſeph Smith the elder, when he entered into theſe articles, had no eſtate in land at all, and conſequently he muſt purchaſe lands before he could ſettle them: And amounts to the ſame thing as if the articles had been *to purchaſe* and ſettle.

It has been truly ſaid, he might have done it out of lands purchaſed, or lands deſcended to him, for he was maſter of both.

The firſt act to be done, was to acquire them, and then he was to convey and ſettle; this is too ſlight, therefore to take it out of the caſe of *Lechmere* and *Lechmere*.

As to the ſecond thing, that here is an option to ſettle lands of forty pounds *per ann.* or a rent-charge out of the lands.

Joſeph Smith has made no ſuch ſettlement, and I cannot preſume that he has made the option of that part of the disjunctive of ſettling a rent-charge: For as he was debtor and covenantor, the preſumption lies that he would ſettle in ſuch manner as would be the leaſt burdenſome to himſelf.

There is evidence in the cauſe, to ſhew, that his intention was to ſettle the lands, and not *a rent-charge*, for that he was heard to ſay, that he intended to build a houſe on the *Cheeſman* eſtate for his wife to live in, provided ſhe ſurvived him.

I muſt preſume him juſt before he was generous, and that his meaning was to do what he covenanted before he gave her any thing.

The objections have been carried ſtill further from the nature of the purchaſes themſelves; that the purchaſes were made by driblets and ſmall parcels.

That was an objection which was made in *Lechmere* verſus *Lechmere*, and over-ruled by the court.

As to the *Cheeſman eſtate*, it is not pretended but that was a proper purchaſe to be ſettled in part ſatisfaction of the articles.

As to the *Weſt Ilſley* eſtate, It was ſaid that one moiety being in reverſion would deſcend to his ſon, and the other could only be affected by the articles.

Though the moiety was in reverſion, yet there was but one life upon it, and therefore it might ſtill be his intention it ſhould be bound when it fell in.

Another objection has been taken from the mortgage, that it was antecedent to his purchaſe, and aſſigned over to another perſon for a valuable conſideration.

It was only continuing in effect the ſame mortgage upon the eſtate, becauſe he wanted to take up money to complete the purchaſe.

In *Lechmere* verſus *Lechmere* the purchaſe was agreed to be made within one year after the marriage, but not made till long after, and the covenant being broken, there could not be ſaid to be a performance of it.

Here, this gentleman had his whole life to perform it in: And if Lord *Lechmere*'s purchaſe had been made within the year, it would have been ſtronger.

The ſtrong reaſon in that caſe was, that the Lady's truſtees had no notice, nor the leaſt pretence that they were adviſed with about it.

In the preſent, there is nothing in my opinion ariſing from the nature of the articles, to take off from the preſumption of the huſband's intention, that the land *ſhould be bound by them*; and the evidence likewiſe in this caſe, of his intention ſhe ſhould enjoy them for life, is an additional fact more, than in *Lechmere* verſus *Lechmere*.

The caſe of *Took* verſus *Haſtings*, 2 *Vern.* 97. is a ſaying only of the court, and *dictums* in reports are not greatly to be relied on, without the ſtate of the caſe, and therefore I ſent to the regiſter for the decree which was made in 1688.

Dictums in reports are not greatly to be relied on without the ſtate of the caſe.

It does not appear by the book, whether the eſtate of *Backwell* was purchaſed before or after the bond to ſettle land; if after, to be ſure a very ſtrong caſe.

The other caſe relied upon was *Roundell* verſus *Breary*, 2 *Vern.* 482.

The difference between the two caſes is this;

That here it is, to convey and ſettle lands.

The covenant there was only to ſettle lands of 150*l. per ann.* and therefore not ſo ſtrong as the preſent.

A covenant to convey and ſettle lands, is ſtronger than to ſettle only.

Theſe were the particular caſes relied upon.

For theſe reaſons, and the authority of theſe caſes, I am of opinion, it would be too hard to reverſe the decree, and beſides extremely convenient for families that it ſhould be ſo determined.

The party who is to purchaſe cannot buy the whole at once, but by parcels.

Though the party who is under a covenant to purchaſe and ſettle lands dies before he has compleated it, that is no reaſon why it ſhould deſcend upon the heir at law, and therefore the Maſter of the Rolls did right, in determining upon what appears to be the intention, on preſumptive evidence of that intention; and the decree affirmed.

And becauſe he happens to be cut off by death, before it is compleated, to ſay, for this reaſon, that it ſhould deſcend upon the heir at law, would make great confuſion in families; and therefore the *Maſter of the Rolls* has done extremely right in determining upon what appears to be the intention on preſumptive evidence of that intention; and conſequently I do affirm the decree.

Caſe 118. *Reyniſh* verſus *Martin*, *May* 5, 1746.

A mother by her will ſays, that if her daughter marry with the conſent of truſtees, or the major part of them, and ſignified in writing, before ſuch marriage had, then I give to her, and not otherwiſe, 800 *l.* and directed *M.* to pay her 30 *l.* yearly whilſt ſhe continued ſole, by 15 *l.* each *May* day, and *All Saints* day, and charged all her real eſtate with debts of all kinds and legacies.

The daughter after the death of the mother married the plaintiff without the conſent of the truſtees, and died ſoon after, but before her death the truſtees declared their conſent and approbation in writing. *Lord Chancellor directed the plaintiff ſhould be paid the arrears of the* 30 *l. pro rata till the marriage; and in caſe the perſonal eſtate ſhould be exhauſted by payment of debts, ſo much of the real eſtate to be ſold as will pay the* 800 *l. and arrears of the annuity.*

ELIZABETH Phillips, by her will the 26th of *October* 1734. gave and deviſed unto *Martha Phillips* her eldeſt daughter, all her real eſtate, to have and to hold to her and her heirs for ever, ſubject to ſuch charges as ſhall be therein after expreſſed.

Then follows the clauſe upon which the preſent queſtion aroſe.

" Provided always, and it is my will, if my daughter *Mary* mar-
" ry by and with the conſent of the truſtees (therein particularly
" named) or the major part of them, and ſignified in writing be-
" fore ſuch marriage had, then, and not otherwiſe, I give and
" deviſe unto my ſaid daughter *Mary* the ſum of eight hundred
" pounds; and it is my will that my ſaid daughter *Martha* ſhall pay
" unto my ſaid daughter *Mary* the ſum of 30 *l.* yearly during the
" ſaid *Mary*'s continuing ſole and unmarried, by fifteen pounds
" each *May* day, and *All Saints* day; alſo I do hereby charge all
" my aforeſaid real eſtate with all my debts of all kind, and with
" all my legacies.

The teſtatrix died leaving iſſue two daughters *Martha* and *Mary*; *Mary* married *Thomas Reyniſh* the plaintiff, without the conſent of the truſtees, and died ſoon afterwards, but before her death the truſtees declared their conſent and approbation in writing.

This bill was brought by *Thomas Reyniſh*, as the repreſentative and adminiſtrator of *Mary* his wife, for an account of the perſonal eſtate, and that the ſame might be applied in payment of the ſaid legacy of eight hundred pounds, and ſo much of the arrears of the

annuity of 30 *l. per ann.* as were due to *Mary* before her marriage; but in caſe the perſonal eſtate ſhould not be ſufficient, that then the real eſtate, or ſo muſt thereof as will make good the deficiency, *&c.* might be ſold, and the money ariſing therefrom applied for that purpoſe.

This caſe coming on to be heard at the *Rolls*, the perſonal eſtate not being ſufficient, his honour decreed *the real eſtate* to be ſold for payment of the legacy and arrears of the annuity.

The defendants appealed from this decree, and the cauſe now ſtanding for judgment, *Lord Chancellor* delivered his opinion to this effect.

As *Mary* married without the conſent of the truſtees, their conſent or approbation afterwards was immaterial, and therefore was not inſiſted upon by the plaintiff's counſel, becauſe no ſubſequent approbation could amount to a performance of the condition, or diſpenſe with a breach of it.

The conſent of the truſtees after the marriage immaterial, for no ſubſequent approbation could amount to a performance of the condition, or diſpenſe with a breach of it.

The general queſtion therefore will be, whether under the circumſtances of this caſe the plaintiff as adminiſtrator of *Mary* his wife is entitled to this legacy of eight hundred pounds.

This depends on theſe conſiderations:

Firſt, What the event would be, if this legacy of eight hundred pounds is conſidered merely as a perſonal legacy to be paid out of the perſonal eſtate only.

Secondly, If conſidered as a charge originally laid upon the lands.

Thirdly, Suppoſing this legacy to be merely perſonal, what remedy the plaintiff has in this court, or in what manner the ſame ought to be raiſed.

As to *the firſt*, I apprehend that taking this as a mere perſonal legacy, the plaintiff by the rules of the civil and eccleſiaſtical law, and which have been conſtantly adhered to in this court, will be entitled to the legacy; for it is an eſtabliſhed rule in the civil law, and has long been the doctrine of this court, that where a perſonal legacy is given to a child on condition of marrying with conſent, that this is not looked on as a condition annext to the legacy, but as declaration of the teſtator *in terrorem*.

It has long been the doctrine of this court, that where a perſonal legacy is given to a child on condition of marrying with conſent, that this is not a condition annexed to the legacy, but a declaration of the teſtator *in terrorem* only.

This

The marrying without conſent is not conſidered in the eccleſiaſtical court as a breach of the condition, though the legacy is actually given over, but that rule has not been carried ſo far in this court.

This rule is ſo ſtrictly adhered to in the eccleſiaſtical court, that the marrying without conſent is not conſidered there as a breach of the condition, *although the legacy is actually given over*; but that rule has not been carried ſo far in this court, for in many inſtances here it has been conſidered as a breach of the condition, and the legacy thereby forfeited; but that differs from the preſent caſe, becauſe here the legacy is given to *Mary* only, *without any limitation over*.

But then it was objected, that there is a ſtrong and material difference between a *condition precedent* and ſubſequent, and this being *a condition precedent*, and as the condition was not performed nothing veſted, becauſe the event was not come, on which the legacy was to take effect.

Neither the civil or eccleſiaſtical law make any diſtinction between conditions precedent or ſubſequent, but in both caſes the condition is void.

Undoubtedly this is true in general both in law and equity; but I do not find that the civil or eccleſiaſtical law have made any diſtinction between conditions precedent and ſubſequent, but that in both caſes the condition as ſuch is merely void.

This rule of the eccleſiaſtical court was ſtrongly relied on in the caſe of *Harvey* and *Aſton*, (1 *T. Atk.* 361.) but it was the opinion of all the Judges who aſſiſted in that caſe, that it was not to be carried ſo far in this court; and the diſtinction taken by Lord Chief Baron *Comyns* in his argument in that caſe is extremely right, and very well reconciles the difference. *Vide Com. Rep.* 738. and the reaſon is, becauſe the civil law conſidering the condition, whether precedent or ſubſequent, as unlawful, and abſolutely void, the legacy ſtands pure and ſimple.

Where the condition is precedent, in our law, the legatary takes nothing till the condition is performed, but where it is ſubſequent he has a right, and the court will decree him the legacy; but then this difference only holds where the legacy is a charge on the real aſſets.

But in our law, where the condition is precedent, the legatary takes nothing till the condition is performed, and conſequently has no right to come and demand the legacy; but it is otherwiſe where the condition is ſubſequent, for in that caſe the legatary has a right, and the court will decree him the legacy; but this difference only holds where the legacy is a charge on the real aſſets, and therefore if this had been merely a perſonal legacy, ſhould have been of opinion that as the marriage without conſent would not have precluded *Mary* of her right to this legacy in the eccleſiaſtical court, no more would it have done ſo here: and to this purpoſe ſeveral caſes were cited, which are taken notice of in the caſe of *Harvey* and *Aſton*, and which I ſhall not repeat, but refer to that caſe for them.

The next conſideration is, what the conſequence will be, taking this legacy as a charge originally laid upon the lands, and not merely perſonal?

But

But before I enter upon that point, it will be proper to conſider how this legacy is given, and in what reſpect it may be conſidered as a charge upon the lands.

In the firſt place, this is certainly a perſonal legacy iſſuing out of the perſonal eſtate, and chargeable upon that fund, but then the teſtatrix afterwards at the cloſe of her will charges all her real eſtate with all her debts and legacies.

I will therefore conſider this legacy *firſt*, as if originally charged upon the lands.

Secondly, As if it was not originally a charge upon the lands, but the lands charged only as auxiliary, upon a deficiency of the perſonal eſtate.

As to the *firſt*, If this had been a legacy originally charged on the land, I do not apprehend that the plaintiff could come here to compel truſtees to raiſe the legacy after a breach of the condition, for the legacy being a charge upon the lands, follows the rule of the common law, and is not cognizable in the ſpiritual court.

If it had been a legacy originally charged on the land, the plaintiff could not have compelled the truſtees to raiſe it after a breach of the condition, for being a charge on land, it follows the rule of the common law.

But where the legacy is merely perſonal, the court follows the rule of the civil law, becauſe perſonal legacies are properly cognizable in the eccleſiaſtical court, and equity has always conſidered itſelf as bound to follow the rules of that court, to which the juriſdiction properly belonged.

In perſonal legacies equity has always followed the rules of the eccleſiaſtical court, to whom the juriſdiction properly belongs.

As in the caſe of bond creditors, they are conſidered here as having a priority to ſimple contracts, becauſe they have a priority at common law; and the reaſon is, becauſe the juriſdiction originally and properly belonging to another *forum*, this court will not break in, but will govern themſelves by thoſe rules which have been eſtabliſhed in that *forum*, to which the juriſdiction properly belongs.

Bond creditors are conſidered here as having a priority to ſimple contracts, becauſe they have a priority at common law, for this court govern themſelves by rules eſtabliſhed in that *forum* to which the juriſdiction properly belongs.

For the ſame reaſon, where the legacy is a charge upon the lands to be raiſed out of the real eſtate, as the eccleſiaſtical courts have no juriſdiction, it muſt be governed by the rules of another *forum*, to which the juriſdiction properly belongs.

This diſtinction was taken by Lord Chief Baron *Hales* in the caſe of *Fry* and *Porter*, *vide* 1 *Chan. Caſ.* 142. "That although in the "civil law in the caſe of a mere perſonalty the limitation be void, "yet this is a deviſe of the lands not governed by that law.

This being a good condition it cannot be in law defeated; and if there is a breach of it, as law will not, equity cannot help.

Eſtates governable by the common law of this kingdom, without relation to *another forum*, ought not to be influenced by another law; and this being a good condition, it cannot be in law defeated, and there being a full breach of the condition, as *law* will not, *equity* cannot help.

In the preſent caſe, the lands may or may not be charged; if conſidered as originally charged, the legacy muſt be governed by the ſame rule as a deviſe of the land itſelf would have been, without relation to the rules of another *forum*, or being influenced by another law.

The caſe of *King* verſus *Withers*, *Prec. in Canc.* 348. was a deviſe of 2500 *l.* to the teſtator's daughter at the age of *twenty-one or marriage*; provided ſhe married without the conſent of the mother, then 500 *l.* part of the 2500 *l.* was to ceaſe, and be applied towards payment of debts: That legacy was charged and chargeable on the real eſtate, and therefore my Lord *Harcourt* ſays, it muſt have the ſame conſideration as a deviſe of lands would have; and he ſaid, the rule that had been inſiſted on, *viz.* that where there is no deviſe over, that the condition ſhall be taken only *in terrorem*, was a great deal too wide; but in that caſe the daughter having attained twenty-one, one of the times appointed, his Lordſhip held ſhe was intitled to the legacy of 2500 *l.*

If the legacy is conſidered as a charge originally on the lands, it muſt have the ſame conſideration as a deviſe of lands would have, and there nothing can be clearer than that the legacy could not be raiſed, becauſe nothing veſted before the condition performed.

If the lagacy therefore in the preſent caſe is to be conſidered as a charge originally upon the ſaid lands, it muſt have the ſame conſideration as a deviſe of lands would have; and in that caſe nothing could be clearer than that the legacy could not be raiſed, becauſe nothing veſted before the condition performed.

So held in *King* verſus *Withers*, *Harvey* and *Aſton*, *Fry* and *Porter*.

Reports in Chancery in Lord Nottingham's time, is a book of no authority.

The caſes which have been cited *è contra*, and come the neareſt to the preſent are 1 *Chanc. Caſ.* 58. *Fleming* verſus *Walgrave*, and *Aſton* verſus *Aſton*, 2 *Vern.* 452. and the caſe of *Needham* verſus *Vernon*, reported in a book of no authority, called *Reports in Chan. in Lord Nottingham's time*, *fol.* 62.

But all theſe caſes turned upon different conſiderations from the preſent, and were determined either on the particular manner of penning the condition, or becauſe the condition was ſubſequent, or for ſome peculiarity in the limitation of the truſt.

In

In *Fleming* verſus *Waldegrave*, the condition was, in caſe ſhe marries not contrary to the liking of Sir *Edward Waldegrave* and his lady; and there certainly is material difference between a condition that the legatory ſhall not marry without conſent, and where it is that ſhe ſhall not marry againſt conſent.

A material difference between a condition, that the legatory ſhall not marry without conſent, and where it is that ſhe ſhall not marry againſt conſent.

The caſe of *Aſton* verſus *Aſton*, could not be ſaid to be a decree made by any compulſory power of this court, becauſe the legatory either had, or had not a right; but although the portions were decreed, yet the court requiring ſecurity to refund, if the condition ſhould be broken, ſhews the opinion of the court, that the breach of the condition would be a forfeiture.

Thus the caſe would ſtand; ſuppoſing this to be a legacy originally charged on the lands, but as the real eſtates were not originally charged, but only as *auxiliary* upon failure of the perſonalty, and the charge on the lands depending upon a condition precedent, which never was performed, this cannot be conſidered as a legacy charged, or chargeable on the real eſtate, but merely as a perſonal legacy, chargable upon the perſonalty only, and as ſuch to be governed by the rules of that court, which has the proper juriſdiction in ſuch caſes, and therefore this caſe differs from *Yates* verſus *Fettiplace*, 2 *Vern.* 416: "where a legacy of 3000 *l.* was given, charged "on the real and perſonal eſtate, to be paid at 21, or marriage, if "married with conſent, if not, but 1000 *l.* the legatory died at ſix "years of age, and adjudged that the portion ſhould not be raiſed "for the benefit of her adminiſtratrix;" and very rightly; becauſe, in that caſe, had the legacy veſted, and it had been charged on the perſonalty only, it would have been tranſmiſſible; but being originally a charge upon the lands, and the legatory dying before the day of payment, it became a lapſed legacy, to ſink in the inheritance, for the benefit of the heir, and that is now a conſtant rule in equity, eſtabliſhed ſo long ago as the caſe of *Jennings* verſus *Rooke*: and the legacy, in the preſent caſe depending upon a condition precedent never veſted, ſo far as reſpects the real eſtate, but the lands not being originally charged, but only liable to be ſo, upon performance of the condition, I am of opinion, this caſe muſt be conſidered as a meer perſonal legacy, and as ſuch to be governed by the rules of the civil and eccleſiaſtical law.

As the real eſtates were not originally made liable, but only as auxiliary, and the charge on them depending on a condition precedent which never was performed, this caſe muſt be conſidered as a mere perſonal legacy, and as ſuch to be governed by the rules of the civil and eccleſiaſtical law.

The third conſideration therefore will be, what remedy the plaintiff will be intitled to in this court? And in regard to that, he is certainly entitled to an account of the perſonal eſtate; but as that may be exhauſted by the payment of debts and legacies, the next queſtion will be, whether this court cannot marſhal *the aſſets* in ſuch a manner, as to give the plaintiff a remedy out of the real eſtate; for as the real eſtate is expreſly charged with the payment of all debts and legacies, and this legacy, by the event which has happened,

happened, falls out to be a charge upon the perſonalty only; I am of opinion, that the plaintiff ought to ſtand in the place of ſuch creditors or legatees as have received a ſatisfaction out of the perſonal aſſets, and to order it ſo, is the conſtant rule and practice of this court.

Though the annuity was not expreſly given for the daughter's maintenance, yet it muſt be underſtood ſo, and falls within the caſe of *Hay* verſus *Palmer*.

There is another queſtion in reſpect to the annuity of thirty pounds, *videlicet*, whether the plaintiff is intitled to the arrears *pro ratâ* due to *Mary* before marriage, ſhe marrying before the laſt half year's payment became due? And although this annuity, or half-yearly payment, is not expreſly given for the maintenance of *Mary*, as in the caſe of *Hay* verſus *Palmer*, 2 *Vern.* 501, yet I am clear of opinion that it muſt be underſtood ſo, and therefore falls within the reaſon of that caſe.

Upon the whole, I muſt direct that plaintiff be paid the arrears of the thirty pounds *per ann. pro ratâ*, till the time of the marriage; and in caſe the perſonal eſtate ſhould be exhauſted by payment of debts or other legacies, that the plaintiff ſhall ſtand in the place of ſuch creditors and legatees *pro tanto*, as have received ſatisfaction, and that ſo much of the real eſtate be ſold, as will be ſufficient to ſatisfy this legacy of eight hundred pounds, and arrears of the annuity.

Caſe 119. *Lord Townſend and Horatio Townſend* verſus *Windham Aſh and his Wife*, *May* 13, 1745.

The plaintiffs proper in coming here to have a diſcovery of the deed under which this title ariſes, to have it produced at all trials at law, and to have atteſted copies, and for an account of profits, without firſt eſtabliſhing their title at law.

THE bill was brought for a ſhare in the *New-River* water, and for an account of meſne profits from the death of Sir *James Aſh*, the father of the defendant's wife.

" On the marriage of Sir *James*, a ſettlement was made of two " ſhares in the *New-River* water, and the ſame were limited to " Sir *James* for life, remainder to his wife for life, and after their " deceaſe, one ſhare was limited to ſuch of the younger children " of Sir *James Aſh* as were not his heir at law, or for want of " ſuch iſſue, to the ſiſters of Sir *James*, and their children, as " Sir *James* ſhould limit and appoint; and the other ſhare alſo to " the ſiſters and their children, as Sir *James* ſhould limit and ap- " point; but in caſe of no iſſue of Sir *James Aſh*, or if he ſhould " make no appointment, the ſame was limited to the ſiſters, and " the children of *Catherine*, one of the ſiſters (under whom the " plaintiff claims) in ſuch manner as they were intitled to one " whole ſhare on the death of Sir *James*."

This ſettlement being in the cuſtody of the defendants, they claimed a right to ſuch ſhare, in right of the wife, as the heir of her father, as if no ſettlement had been made.

They alſo levied a fine of the two ſhares in the three counties the waters run through, and received the profits from the death of Sir *James Aſh* in 1733. till the filing of the bill in 1741. when the plaintiffs diſcovering there was ſuch a ſettlement, brought this bill for diſcovery, and to be relieved.

The defendants pleaded the fines and non-claim, which plea was over-ruled, to let in all the proof that could be brought of the nature of this eſtate; and now the whole came on to be heard, the plaintiffs relying on the ſettlement, and the defendants on the fines and non-claim.

The fines were levied in *Hilary* term 1733. but no claim was ſet up, or any kind of entry proved, only that a demand of the profits was made in the office, in the name of the defendants, on the 14th of *February*, and the firſt payment was made of the *Chriſtmas* dividend before due, on the 23d of *February*, which was after the fine levied, and no other ſeiſin appeared: Sir *James Aſh* died in *November*, the firſt half-year became due at *Chriſtmas*, but not received till after the fine was levied as above.

LORD CHANCELLOR.

The defendants have made a great number of objections.

The firſt objection was againſt the plaintiff's remedy for account of the profits, inſiſting they ought to eſtabliſh their title at law, as it is merely legal.

But I am of opinion they are proper in coming here for the remedy, in order to have a diſcovery of the deed under which the title ariſes, to have it produced at all trials at law, and to have atteſted copies.

A bare diſcovery therefore not being ſufficient, ſome relief is then neceſſary; if there was any doubt of the title, I would ſend them to law. But the bill is to have the benefit of the ſettlement, and for proper directions neceſſary to be given concerning it; and therefore though it is a matter of law, yet the court will determine upon it notwithſtanding, for it is not neceſſary for every legal queſtion to be ſent to law.

Though it is a matter of law, yet the court may determine upon it, for it is not neceſſary that every legal queſtion be ſent *to law.*

There is likewiſe another relief prayed, *an account of rents and profits.*

Though ſhares in water-works are a legal eſtate, and corporeal inheritance, yet no one proprietor can receive the profits himſelf; and as there is no other way to get at it, proper to come into this court for meſne profits.

In all caſes where queſtions have ariſen about ſhares in water-works, the parties have conſtantly come into this court for meſne profits; for though it is a legal eſtate, and a corporeal inheritance, yet no one proprietor could receive the profits himſelf, but the company or their officers are the common hand to receive the profits, and there is no other way to come at it.

Where an eſtate is under ſuch a management, though the legal eſtate is in the proprietors, it would be abſurd to ſend the plaintiffs to law, for it would be difficult to bring ejectments for a thirty-ſixth part and bits of land in ſeveral counties, and to bring actions of treſpaſs againſt *the tertenants* would be very extraordinary, as the management is in the company.

Therefore in point of remedy there cannot be a ſtronger caſe, to come here for an account of profits.

The next queſtion will be as to the title.

Firſt, As to the conſtruction of the ſettlement.

Secondly, As to the Fine and non-claim.

As to the conſtruction of the ſettlement, it has been ſaid by the defendant's council, to be for the benefit of the marriage.

I take it in another light; indeed if the eſtate had moved from Sir *James Aſh*, there might have been ſome pretence for ſuch a ſuggeſtion, but it moved from Lady *Aſh*, and manifeſtly ſhe had an intention of acting for the benefit of her daughers, and their iſſue, as ſhe had for the children of that marriage, for they were as much her daughters, and their iſſue as much her grandchildren.

There was no limitation of theſe water ſhares to any ſon or firſt ſon of the marriage, *but to the uſe of all and every child and children other than ſuch as ſhall be heir at law.*

If there had been only one child, it would have been excluded, by the words *other than ſuch as ſhall be heir at law*, or if

So that, as he uſes the ſingular number, if there had been only one child, it would have been excluded; or if there had been ſeveral daughters, as in point of law they would have made but one united heir, they would have been excluded; or if there had been both ſons and daughters, and reduced only to one child, that child could not have taken.

there had been ſeveral daughters, as they would have made but one united heir, they would have been excluded, or if both ſons and daughters, and reduced only to *one child*, that child could not have taken.

A ſiſter of Sir *James Aſh*'s Lady was wife of this Lord *Townſend*'s grandfather, and mother of the plaintiff *Horace Townſend:* Mrs. *Windham*

Windham Aſh being dead without iſſue, a moiety of the two ſhares is come to the iſſue of the other ſiſters.

Secondly, As to the fine.

The objection was, that the parties had no ſeiſin to warrant the fine; and I am of opinion if they had not, courts of law will not preſume, or ſtrain a point to work a wrong, and no favour is allowed in conſtruction in that caſe.

Where the parties had no ſeiſin to warrant the fine, courts of law will not preſume, or ſtrain a point to work a wrong.

Then what kind of poſſeſſion had Mr. *Windham Aſh* and his wife at the time of the fine.

Both ſides agree it to be a legal eſtate, that there was no entry made, and nothing but the perception of rents and profits.

It has been ſaid, the entry ſhould be as notorious as poſſible, but if they had taken out water, or dug the ſoil, it would not do to gain a ſeiſin in a wrong-doer; for in a wrong doer, doing the acts of a rightful owner is not ſufficient to gain a poſſeſſion; for if a man enters on my tenant, he does not gain ſuch a poſſeſſion to levy a fine thereon, unleſs he continues in poſſeſſion; for a wrong-doer to gain a poſſeſſion by diſſeiſin, muſt not ſtep on the land, and withdraw and leave the rightful owner in poſſeſſion, which would be ſufficient to gain a ſeiſin on a feoffment, but not to levy a fine.

A wrong-doer to gain a poſſeſſion by diſſeiſin muſt not ſtep on the land, and then leave the rightful owner in poſſeſſion, which though ſufficient to give a ſeiſin on a feoffment is not to levy a fine.

Next as to the rents and profits, it is ſaid, the perception of them is a ſufficient ſeiſin.

But it is anſwered there was in fact no receipt till after the fine levied; if they had received the rents in the preſent caſe before the fine, it would be a diſſeiſin. *Hob.* 322. in the caſe of *Blunden* verſ. *Baugh. Cro. Car.* 302. held by the court of King's Bench, that a receipt of rent from my tenant may be a diſſeiſin, or not, at my election; but if they go on to receive the rents, and levy a fine, it ſhews *quo animo hoc fecerit*, and is not a receipt as bailiff or receiver.

Evidence of receipt of rent, is a ſufficient poſſeſſion to levy a fine.

The evidence of receipt of rent, if the jury had believed it, would be ſufficient poſſeſſion to levy a fine; and ſo held in *Dormer* verſus *Forteſcue.*

In this caſe it is the ſtrongeſt evidence of poſſeſſion that can be, for none of the rightful owners receive the rents and profits from the tenants, but the corporation only.

But it is ſaid, the company are a kind of ſtewards, a common hand to receive and pay the proprietors, and thoſe profits were received by the company at the time of the fine levied, and that the

payment by the company after the fine, of profits due before, ſhall have relation ſo as to be conſidered as a payment before the levying of the fine.

The law allows of fictions and relations to ſupport a right, but never to work a wrong.

But there is a plain anſwer, the company received for the rightful owner, who were the plaintiffs, and therefore could be no receipt for the defendants at the time of the fine levied; the law allows of fictions and relations to ſupport a right, but never to work a wrong.

If a perſon who has a right is kept out by terror, *a claim is ſufficient.*

Going to the office, and claiming, not ſufficient; but if a perſon has a right, and is kept out by terror, *a claim is ſufficient.*

The fine therefore can have no operation to change the right of the parties.

The next queſtion is as to the relief.

I muſt decree the ſettlement to be produced in any court of law or equity, on reaſonable notice, it relating to other more conſiderable eſtates.

There muſt alſo be a decree of an account for rents and profits from the time the title accrued, becauſe the ſettlement was in the hands of the defendants, and they knew the plaintiffs title, and yet was not diſcloſed by Sir *James Aſh* to Lord *Townſend* in his life-time, which was the ſtrong ingredient in *Dormer* verſus *Forteſcue* to decree the account ſo far back as the title accrued.

Another ſtrong ingredient to decree ſo far back is from the nature of the eſtate.

For none of the parties are in actual poſſeſſion of the lands, the *New-River* company having the profits in perception.

As ſome body muſt account, it would be hard to make the company do it, who have paid it to a wrong perſon, when that very perſon is before the court; and therefore as he is before me, I will decree him to pay it.

Where a bailiff of a manor pays the rents, if it is to a wrong hand, he muſt pay it over again.

Where a reeve or bailiff of a manor pays the rents, if it is to a wrong hand, to be ſure he muſt pay it over again; but to direct the company in this caſe to pay the plaintiffs, would make a circuity, becauſe the defendants muſt be likewiſe directed to reimburſe the company, and therefore the defendants ought to be decreed to pay in the firſt inſtance.

I am of opinion too, the defendants muſt pay the coſts.

I do not go upon the fraud in the concealment, but on their tenaciouſneſs and obſtinacy in carrying on the ſuit, a defence reſting only upon the plea of a fine, on a title gained by diſſeiſin.

There is no colour to ſupport it as a fine and non-claim, as operating upon a diſſeiſin.

Mr. *Windham Aſh* admits by a letter which has been read, that he had the opinion of council he had no right, and whether they were his own, or the purchaſer's council, it is the ſame thing, and yet he perſiſted in it. Lord *Hardwicke* decreed coſts accordingly.

Aſhurſt verſus *Eyres*, *March* 15, 1740. Caſe 117.

IN 2 *Tr. Atk.* 51. *it is ſaid, the bill in this caſe was diſmiſſed,* but on looking into the minutes taken the day and year as above, it is ſtated as follows: That as to ſo much of the bill as ſought any account for what remained owing upon a bond dated the 5th of *November* 1718. the defendant by his plea inſiſted, that no part of the 2000 *l.* for ſecuring the repayment whereof the bond was executed, was paid to or received by *Henry Eyre*, the defendant's late brother, but the whole was paid unto *Auguſtine Woollaſton*, and received by him for his own uſe, and that *Henry Eyre* was a ſurety only for *Woollaſton*, and that the plaintiff had accepted a compoſition for what was pretended to be owing on the bond, without the privity of *Henry Eyre*, or of the defendant, and that no demand had been made on the defendant for any money due on the bond for upwards of 18 years, and that *Woollaſton* died ſeveral years ago ſeiſed of a real eſtate, and poſſeſſed of a perſonal eſtate, and that his heir at law, or the deviſee of his real eſtate, and alſo the repreſentatives of his perſonal eſtate, ought to be, who were not made parties to the bill. Lord *Hardwicke* held the plea to be good and ſufficient, and ordered that the ſame ſhould ſtand and be allowed. *N. B. It does not appear by the minutes his Lordſhip directed the bill to be diſmiſſed.*

Caſe 118. *Franco* verſus *Alvares*, *May* 31, 1746.

A. by will gives to truſtees 312 *l.* and ſeveral jewels in *Vienna*, in truſt to ſell the ſame, and apply it as a compoſition, and towards payment of his ſon's debts, provided the creditors ſhall within *four months* accept of the ſame, and diſcharge his ſon; if they ſhall not, then he deviſes the ſame effects over, to be divided among the children of his ſon.

"MR. *Alvares* by a codicil to his will reciting, that whereas my "ſon *Jacob Alvares* is indebted to me in the ſum of 3000 *l.* "I do hereby releaſe the ſame, *inter al'*, I give and bequeath to "truſtees 312 *l.* and ſeveral jewels in *Vienna*, in truſt that they "ſhall, as conveniently may be, ſell the ſame, and apply the ſame "as a compoſition and towards payment of all the debts my ſaid "ſon ſhall owe, provided always that the ſaid creditors ſhall within "*four months* accept of the ſame, and diſcharge my ſaid ſon, and "if all and every the creditors ſhall not, then he gives the ſame "effects over, to be divided among the children of the ſaid ſon, "and if they ſhall ſo accept and diſcharge as aforeſaid, then I give "to my ſaid ſon for his ſubſiſtence the ſum of 600 *l.* but if they "ſhall not as aforeſaid, then I deviſe the ſame over to his children.

The teſtator died *Deember* 15, 1742. and the ſon's creditors filed their bill *April* 15, 1743. praying to be paid their reſpective demands. *The plaintiffs by bringing their bill within four calendar months, and thereby declaring their acceptance of the legacies towards ſatisfaction of their debts, and offering to releaſe, have performed the condition annexed according to the true intent of the will.*

The teſtator died *December* 15, 1742.

The bill was filed by creditors of *Jacob Alvares* the 13th of *April* 1743.

The plaintiffs brought their bill either to be paid their reſpective demands, or that directions may be given for the taking an account of the debts due from *Moſes Alvares* to them, and that the time for all his creditors coming in to accept the compoſition offered may be enlarged; the plaintiffs declaring their aſſent thereto on the terms in the codicil mentioned, and ſubmitting to give releaſes to *Moſes Alvares*, on receiving what ſhall be due to them of the compoſition, and that the rings and diamonds may be ſold for that purpoſe, and the money ariſing thereby, together with the 312 *l.* may be put out to intereſt.

When this cauſe came on in *Eaſter* term, Lord *Hardwicke* doubted, whether the computation ought not to be by lunar months, and ordered it to ſtand over to aſcertain what was the rule in this reſpect in the eccleſiaſtical court, who have the original juriſdiction in legacies; and this day the cauſe came on again.

Mr. Attorney General for the plaintiffs cited the following caſes, to ſhew that the rule of the eccleſiaſtical court is to go by *calendar months*.

Dig.

Dig. lib. 50. *tit.* 17. *de diverſis regulis juris antiqui, ſec.* 101.

Lord *Co. Comment.* upon the *St. Weſt.* 2. on the word *Semeſtre.* 2 *Inſt.* 361. *Hob.* 179. 2 *Mod* 58.

They prove in the firſt place, what is the rule of the civil and the canon law; and what is now before the court is of ſpiritual cogniſance, for legacies are not properly of original juriſdiction in this court, but ſuits are inſtituted here for an account of aſſets, and therefore there ought not to be different ways of determining the ſame matter.

There are ſtrong circumſtances to ſhew that the words *four months* muſt mean *calendar.*

A ſpecific legacy of jewels is given upon a condition to be performed *in four months,* but it did not depend only upon the legatee, for there is an act to be done by the executor, the delivery of the goods to the legatee, for a legacy is not compleat till the aſſent of the executor.

He inſiſted, the creditors are intitled to have the jewels delivered to them.

Mr. *Yorke* of the ſame ſide for the creditors.

The teſtator, he ſaid, required the plaintiffs to accept of the legacy within four months.

The creditors have declared their readineſs to accept, for the bill is an acceptance upon record.

The queſtion is, whether it is filed within time.

They were obliged to apply to this court juſt in the extremity of time, if *calendar* months are underſtood, it is within the time, if *lunar* out of it.

In proceedings upon the ſame matter, the court will determine according to the rule of the eccleſiaſtical court for the ſake of *uniformity.*

The delay of the executor ought not to prejudice a legatee. *Vide* 4 *B. of Swinburne of Wills, ch.* 8. and *Powell* verſus *Morgan,* 2 *Vern.* 90.

Upon the queſtion whether the deviſe over, or want of compenſation, will make any variation, he cited *Bertie* verſus *Falkland, Salk.* 231. and *Popham* verſus *Bampfield,* 1 *Vern.* 79. and *Dig. lib.* 30. *tit.* 1. *Lex* 40.

Mr. *Wilbraham* for the defendants the grandchildren, the deviſees over in caſe the legatees did not accept the condition within the *four months*, cited likewiſe the caſe of *Popham* verſus *Bampfield*, upon the doctrine of compenſation;

That unleſs the court can give the grandchildren a compenſation, the condition cannot be diſpenſed with, becauſe unleſs the jewels are given them they cannot have amends by way of damages, for the jewels are directed to be ſold.

Lord *Hobart* gives no reaſon why it ſhould be *calendar* and not lunar months; and wherever an act of parliament mentions *months*, it means lunar. *Vide Brown* verſus *Spence*, *Lev.* 101. the two months for reading the articles of religion are to be reckoned by 28 days; and this relates to churchmen. 2 *Rolls Abridg.* 521, 522. under title *Temps* ſays, in acts of parliament wherever months are mentioned it means 28 days. *Vide* 4 *Mod.* 185.

It has been ſaid it muſt be underſtood to be ſuch a month as that court would conſtrue it, who have the original juriſdiction in legacies, which is the eccleſiaſtical court, who reckon by *calendar* months.

They have not of the other ſide cited any caſe to ſhew, that in the eccleſiaſtical court this point has been determined with regard to it's being *calendar* or *lunar* months, even in the very caſe of a legacy.

It has been ſaid to be a caſe of favour, being for payment of debts.

But this is not for the payment of the teſtator's debts, but of another man's, and a perſon is under a greater obligation to provide for his grandchildren of his own houſhold, than to pay another man's debts.

The plaintiffs ought to ſhew that they applied as early as they might have done to the executors: for the executor *at Vienna*, who has the jewels, is ready to ſell them, if authoriſed by this court.

LORD CHANCELLOR.

This is a proviſion made by a father for the benefit of the ſon to relieve him from his creditors, though he might have had in his view the providing for the grandchildren; yet that was only in the ſecond place, for the firſt view was to ſet up his ſon *de novo* in the world, and to enable him to provide for his children, for he gives him ſix hundred pounds.

The performance of the condition depends upon ſeveral facts, for the teſtator takes notice ſome of his jewels are at *Vienna*, and to be ſold by his executors in *England*.

This being the nature of the legacy, I will take notice firſt of what is plain, and not to be controverted.

It has been ſaid this is a condition impoſſible.

Wherever courts of law, or courts of equity, take notice of a *condition impoſſible*, it muſt be a natural impoſſibility ariſing from an act ſubſequent, which the party could not avoid, being become impoſſible by the act of God, as in the caſes put in *Co. Lit.* 206. *a.* & *b.* if a man be bound in an obligation, *&c.* with condition that if the obligor do go from the church of *St. Peter* in *Weſtminſter* to the church of *St. Peter*'s in *Rome* within three hours, that then the obligation ſhall be void; the condition is void and impoſſible, and the obligation ſtandeth good.

No body can ſay but this might be performed in *four* months, for they might have been ſold at *Vienna*, or brought over and ſold here, and therefore is not within the rule of conditions impoſſible.

It has been ſaid to be a caſe of a condition to be performed, which lies in compenſation, and that in many of theſe caſes the court will relieve.

It was truly ſaid by Mr. *Wilbraham*, the queſtion will be about *the object of compenſation*, what will become of the deviſees over? What compenſation will be made to them?

In all caſes every perſon who is intereſted in the thing muſt have an equivalent, and as nothing of that kind can be done here, this muſt be laid out of the caſe.

The principal queſtion will be, whether there has been any performance of the condition; and I am of opinion, taking all the circumſtances together, here has been a performance.

Several acts are to be done by other perſons the executors, and their act is not to make the intereſt of the grandchildren better, or prejudice the intereſt of the plaintiffs.

It appears to this day, that the executors have not yet got the jewels from *Vienna*, nor ſold them; and it was not the view of the teſtator that the creditors ſhould give a releaſe for their debts till ſatisfied, but meant only that they ſhould do an effectual act to declare their acceptance of the deviſe, and alſo effectually to releaſe.

By bringing a bill in this court, declaring that upon receiving their ſeveral proportions they are ready to give a diſcharge, is an acceptance upon record, and is a releaſe in equity.

Though the executors have ſuffered the time to lapſe, yet if legatees have brought their bill within the time preſcribed, the court have in ſeveral caſes determined it to be a ſufficient performance of the condition.

There have been ſeveral caſes in this court, of legacies given upon condition of releaſing, and though an executor has ſuffered the time to lapſe, yet if legatees have brought their bill for the legacy within the time, the court have determined it to be a ſufficient performance of the condition.

Months ought to be conſidered here as *calendar* ones.

I am of opinion here they have done it in the time limited, and that in this caſe months ought to be conſidered as *calendar ones.*

The word *months* in acts of parliament means lunar, except in the caſe of *Tempus Semeſtre* with regard to lapſe of livings, and the other inſtance of the ſix months allowed in reſpect to *prohibitions.*

It has been truly ſaid in acts of parliament the word months means lunar, except in the caſe of *Tempus Semeſtre* with regard to lapſe of livings, and the other caſe of the *ſix months* allowed in reſpect to prohibitions, both upon the ſame reaſon, becauſe relative to and according to the computation of time in the eccleſiaſtical court.

This is extremely different from the caſe cited by Mr. *Wilbraham* in *Levinz*, for that only concerned eccleſiaſtical perſons.

The rule in the eccleſiaſtical court is not, that it ſhall take place wherever eccleſiaſtical perſons are concerned, but only where it relates to their proceedings.

This court has a concurrent juriſdiction with the eccleſiaſtical court in legacies, who determine according to the rule of the civil law.

If I did not follow their rule, It has been truly ſaid, there would be no uniformity in proceedings, and would leave it to the power of the party to make it juſt as he pleaſes.

It has been objected that the creditors have been guilty of laches, in letting ſo much of the four months run out before they brought their bill.

The time incurred in the life of the anceſtor ſhall run upon the infant.

Now where time runs againſt an anceſtor, and then the right deſcends upon the infant, the time incurred in the life of the anceſtor ſhall run upon the infant.

But in this caſe no laches are to be imputed to the plaintiffs, becauſe here were acts to be done by others the executors.

The

The bill was an expreſs acceptance, and in the conſideration of this court a releaſe, and therefore I muſt decree an account to be taken of the plaintiffs debts.

Lord Chancellor declared, that the plaintiffs by bringing their bill within *four calendar months*, and thereby declaring their acceptance of the legacies given by the teſtator's will towards ſatisfaction of their debts, and offering to releaſe on payment of their reſpective proportions, have performed the condition annexed to the legacies according to the true intent of the will; and decreed the executors to make ſale of the jewels given by the will to them for the truſts therein mentioned, and that the money ariſing by ſuch ſale, together with the 312 *l.* be applied by them in payment of the ſeveral debts due from *Moſes Alvares* to the plaintiffs reſpectively in average, and after an equal pound rate, in proportion to their reſpective debts, and on ſuch payment that the ſeveral creditors do execute releaſes to *Moſes Alvares* of their reſpective debts.

Trafford verſus *Trafford*, *June* 3, 1746. Caſe 119.

" SIGISMUND *Trafford* being ſeiſed in fee of divers ma-
" nors, lands, tenements, on the 26th of *May* 1715. made his
" will, and thereby deviſed all his manors, *&c.* to the uſe of *T. W.*
" his heirs and aſſigns, that he might ſtand ſeiſed of the ſame in
" truſt for *Sigiſmund Boehm*, eldeſt ſon of *Ann Boehm*, for life, re-
" mainder in truſt for his firſt and other ſons in tail male, remainder
" in truſt for *Clement Boehm*, the plaintiff's father, the ſecond ſon
" of *Ann Boehm*, for life, remainder in truſt for his firſt and other
" ſons in tail male, remainder in truſt for the defendant *Charles*
" *Boehm*, third ſon of *Ann Boehm*, for life, remainder in truſt for
" his firſt and other ſons in tail male, remainder in truſt for the
" teſtator's right heirs. The teſtator alſo deviſed all his *plate*, *books*,
" *pictures and houſhold goods*, of what nature ſoever, to ſuch male
" perſon (when he ſhould attain twenty-one,) who ſhould then be
" entitled to the truſt in poſſeſſion of the real eſtates therein before
" deviſed, and directed that till ſuch male perſon ſhould attain
" twenty-one, the ſaid *plate*, *books*, *pictures and houſhold goods*,
" ſhould be kept at *Dunton-Hall*, and be uſed in the mean time
" by ſuch male perſon reſiding there; the teſtator declaring it to be
" his expreſs will and deſire, that the ſaid *plate*, *books*, *pictures*
" *and houſhold goods*, might in the nature of heir-looms go with his
" ſaid eſtate, and be uſed therewith, as long as the laws of this
" realm would permit. He appointed *Thomas White* executor, and

S. T. deviſed all his books, pictures and houſhold goods, to ſuch male perſon when he ſhould attain 21, who ſhould then be entitled to the truſt in poſſeſſion of his real eſtates before deviſed, and till then directed they ſhould be kept at *Dunton-Hall*, and be uſed in the mean time by ſuch male perſon reſiding there, declaring it to be his will and deſire, that they might go in the nature of *heir-looms*, with his eſtate,

and be uſed therewith as long as the laws of this realm would permit. *The pictures, books and houſhold goods ought to go as heir-looms, in as full a manner as the law will allow, for the deviſe here is a diſpoſition only of* the uſe, *till ſome perſon who is entitled to the inheritance ſhould come into poſſeſſion by attaining* 21.

" bequeaths

" bequeaths the reſidue of his perſonal eſtate to ſuch perſon " (when of the age of twenty-one,) as by his will ſhould be inti- " tled to the truſt in poſſeſſion of the lands.

September 6, 1722. The teſtator made a codicil, whereby he deviſed to *Ann Beveridge*, ſince deceaſed, the uſe of all his plate for life; and thereby declared that all his pictures at *Dunton-Hall* ſhould at all times go and be enjoyed with his manſion-houſe and eſtate at *Dunton* by the perſons who by his will ſhould ſucceſſively hold his eſtates. And by the codicil he makes *Sigiſmund Boehm* joint executor with *Thomas White*.

The bill was brought for the heir-looms by the plaintiff, who is tenant in tail of the eſtate, but not of age.

LORD CHANCELLOR.

The queſtion upon the will and codicil of the teſtator, is, as to the extent of the bequeſts, and that will depend upon the conſtruction of the will and codicil.

I really think the true conſtruction of the will muſt put an end to the queſtion.

The diſpoſition of real eſtate only among males I mention for the ſake of an obſervation afterwards.

Here is a plain intention by the will to conſtitute heir-looms, therefore the teſtator by the will has added this clauſe, all my plate, *&c.* to go in the nature, *&c.*

The conſtruction the plaintiff's council put upon it, is, that by the penning of this clauſe, and particularly by the operation of the latter words, theſe things are to go as heir-looms as far as by law they may.

The conſtruction of the defendant's council is, that it ought not to have this large conſtruction, of going in ſucceſſion as heir-looms from perſon to perſon, but ſhould veſt in the firſt taker, whether tenant for life or tenant in tail, and he ſhall have the abſolute property at twenty-one.

But I am of opinion that the expoſition ought to be, that it ſhould go in ſuch kind of ſucceſſion as I directed in the caſe of *Lewſon* verſus *Groſvenor*.

The firſt clauſe, I allow, would give the abſolute property if it ſtopped there, but I am not warranted to reſt there, for the whole clauſe

clauſe muſt be taken together, ſo as that it may be intirely conſiſtent.

As to the laſt clauſe, ſuppoſe that had been the ſingle one, it would have been ſufficient to make all theſe go as heir-looms, and to wait the contingency; and of that opinion I was in *Lewſon* verſus *Groſvenor*, for the words there were extremely like them, though not exactly the ſame.

The firſt words therefore muſt be conſtrued as a diſpoſition only of *the uſe*, until ſome perſon who is intitled to the inheritance ſhould come into poſſeſſion by attaining twenty-one.

It has been objected, that the teſtator has diſtinguiſhed between the property and the uſe, for there is a meſne diſpoſition: And if there had been no more than the gift, and their remaining at *Dunton*, it would have been a right conſtruction; but then he ſays *to go in ſucceſſion as far as the law will permit*.

There is a direction to executors, whom by virtue of this laſt clauſe he has made truſtees for this purpoſe; what ſhould be done in the mean time, and not to hinder them of the uſe before they come of age.

To ſay they ſhould only go as *heir-looms*, till a tenant for life attain twenty-one, is a forced conſtruction; for what is there then of the nature of inheritance in theſe heir-looms if they ſhould ſtop there?

It has been ſaid, he has made the gift of his reſidue equally an heir-loom, and that the plaintiff might as well contend this ſhould go to him.

By no means, for the deviſe of the reſidue wants the very clauſe, which conſtitutes and makes the other go as heir-looms.

Therefore I am of opinion they ought to go as heir-looms, in as full manner as the law will allow; and this court is now eſtabliſhed to be the law of the land, as much as any other juriſdiction.

If this be the true conſtruction of the will, the next queſtion is, whether the codicil has made any change.

The will conſiſted of four parts, plate, pictures, books, and houſhold goods.

By the codicil he deviſes the uſe of all his plate to Mrs. *Beveridge* for life, conſequently the will is varied ſo far, and taken out of the gift of heir-looms.

What is there that makes any alteration as to the books and houſhold goods? theſe are not mentioned in the codicil, and therefore remain as they were.

It is ſaid the word *reſidue* includes them.

If the word *reſidue* was to include the whole perſonal eſtate not ſpecified in the codicil, it would deſtroy the will, becauſe it would revoke the other legacies, and ſeveral other ſpecific things, as annuities, *&c.* are given under the will.

I am of opinion too, as the teſtator had made ſuch an accurate diſpoſition of his *goods and books*, and the codicil was made only ſeven years after the will, that it is ſtrong to ſhew he ſtill intended furniture of ſuch a recent date ſhould go *as heir-looms.*

" And therefore I declare, the teſtator's pictures, books, and " houſhold goods, ought to be conſidered as heir-looms, and to go " along with his real eſtate, as far as by the rules of law or equity " they may, and that the plaintiff will be intitled to the property " thereof, in caſe he ſhall attain his age of twenty-one years, and " in the mean time is intitled to the uſe and enjoyment thereof; " and ordered that the Maſter do inquire what pictures, books and " houſhold goods of the teſtator are now remaining in ſpecie, and " that two ſchedules be made thereof, and one of them depoſited " with the Maſter, and the other with the defendant *Charles Boehm*, " and that ſuch pictures, books and houſhold goods, do remain in " teſtator's manſion-houſe at *Dunton-Hall*, purſuant to the directions " in his will; but as to any pictures, books and houſhold goods " which belonged to *Sigiſmund Trafford*, the huſband of *Elizabeth*, " I declare they do belong to her, and order that they be delivered " to her.

Caſe 120. *Anon. June* 5, 1746.

The owners of two privateers ſeiſed upon the ſhip called the *Diligence* as lawful prize, upon its appearing by her captain's papers ſhe had carried proviſions to the enemy, and he ſigned a note, by which he acknowledged that they had very juſtly confiſcated his cargo; the captain of the *Diligence* brings a bill here for an injunction to the court of Admiralty to ſtay a ſuit depending there on the lawfulneſs of this tranſaction, ſuggeſting that ſome of the papers are loſt, and that if the note ſhould be produced which he was obliged to give, he muſt certainly be caſt at law. *The injunction denied, for if it was to be granted upon ſuch pretences, it would intirely defeat the act of parliament relating to prizes.*

MR. *Brown* moved for an injunction to the court of Admiralty, to ſtay the proceedings there in a ſuit for the condemnation of a ſhip called the *Diligence.*

She had made a voyage to *Euſtaſia* from *Ireland*, and lying afterwards in the *Downs*, where the *Eagle* and *York* privateers were at anchor, they ſent perſons on board to ſearch her, and looking upon

her as a lawful prize, for carrying, as they pretended it appeared by the captain's papers, proviſions to the enemy, they ſeized upon her cargo, and all his papers, and kept the captain in cuſtody for ſome days, and before they releaſed him, made him ſign a note, by which he acknowledges that they had very juſtly confiſcated the cargo, for the reaſon aforeſaid, and then gave him leave to go to *Rotterdam*, it being ſtormy weather, and not ſafe for the ſhip to lie there; the captain of her returned to the *Downs*, and the ſame privateers boarded her again, and took away her cargo a ſecond time.

There is a ſuit now depending upon the lawfulneſs of this tranſaction, in the court of Admiralty, and the captain and the owners of *the Diligence* have brought their bill here, ſuggeſting that ſome of their papers are loſt, or refuſed to be produced, and that if the defendants ſhould proceed on the trial there, and be allowed to produce the note which they obliged the captain to ſign, he muſt certainly be caſt in the ſuit.

Lord Chancellor denied the injunction, and ſaid if he was to grant it upon ſuch pretences, it would intirely defeat the act of parliament in relation to prizes, for upon every man of war's, or privateer's taking a ſhip, the owners of it would immediately come into this court, and pray an injunction to ſtay the proceedings in the Admiralty, in order to prevent her being condemned, eſpecially if the captains of the men of war, or privateers, as is the preſent caſe, ſhould be gone out again on another cruiſe.

He ſaid beſides, the ſuggeſtions in this bill were not a ſufficient foundation for the injunction, becauſe if they were true, the court of Admiralty could by their own rules, as well as this court, put it into a method of inquiry, both as to the facts which is charged with regard to the ſinking and concealing ſome of the papers, and likewiſe as to the note, which the plaintiff pretends was extorted from him, and if upon examination they found it was owning to dureſs and impriſonment, they could by virtue of their own power and authority ſuppreſs it, and not ſuffer it to be given in evidence.

If upon examination the court of Admiralty find the ſigning the note was owing to dureſs and impriſonment, they can by their own authority ſuppreſs it.

His Lordſhip therefore denied the injunction.

Edgell

Caſe 121. *Edgell* verſus *Haywood and Dawe*, *June* 9, 1746.

J. D. being indebted to *C.* by bond in 200 *l.* the plaintiff, the adminiſtratrix of *C.* brought an action againſt *D.* who pleaded the act for relief of inſolvent debtors, and that he was duly diſcharged; the plaintiff took judgment for the 200 *l.* and 5 *l.* damages: *W. M.* by will gave *D.* 1000 *l. to be paid to him by his executor in a month after the teſtator's death*; the plaintiff ſued out a *fieri facias* on his judgment, and lodged it with the ſheriff, and took a warrant to levy the debt out of the legacy, and brings his bill againſt the executor of *W. M.* to admit aſſets to ſo much of the legacy as the plaintiff's debt amounts to, &c. *The plaintiff has purſued a proper remedy, and what ſhall be found due for principal, intereſt and coſts at law and in equity, ought to be ſatisfied out of what is due to* D. *on account of his legacy.*

JOHN *Dawe* by bond dated *December* 6, 1726. became bound to the plaintiff *Elizabeth*'s father, *Richard Chaffin*, in 200 *l.* conditioned for payment of 100 *l.* and intereſt, who died inteſtate before the 100 *l.* or any intereſt for it, was paid, and adminiſtration was granted to the plaintiff *Elizabeth* his only child, whereby ſhe and her late huſband became intitled to have what was due on the bond, for which they brought their action at law in the court of Common Pleas againſt *Dawe*, and in *Michaelmas* term 1741. *Dawe* pleaded thereto, and admitting the bond was his deed, and that he owed *Richard Chaffin* at his death the ſaid 200 *l.* and that he did detain the ſame from the plaintiffs, but that they ought not to have execution againſt his perſon; for according to an act of parliament for relief of inſolvent debtors, he was beyond the ſeas on the firſt of *January* 1736. and returned and ſurrendered himſelf to the keeper of the King's Bench priſon, and on the 11th of *July* 1738. was duly diſcharged by virtue of the act, whereby he became intitled to the benefit thereof; the plaintiffs replied and confeſſed the plea, and took judgment for the 200 *l.* debt and 5 *l.* damages, to be levied on the lands, tenements, goods and chattels of *Dawe*. *William Madox* by will dated the 27th of *June* 1737. gave *Dawe* 1000 *l.* to be due and payable to him, by his executor therein named, in one month after the teſtator's death: The plaintiff and her huſband, in order to get a ſatisfaction for the debt, ſued out a *fieri facias* on their judgment againſt the goods and chattels of *Dawe*, and the legacy being then due, but unpaid, and in the hands of the defendant *Haywood*, the executor of *William Madox*, they lodged *their fieri facias* with the ſheriff of *Middleſex*, and took a warrant thereon to levy their debt and damages out of the legacy in his hands, which he refuſed to pay; and as the plaintiffs could not levy the ſame on the legacy in *Haywood*'s hands, or compel him by law to pay the ſame, or diſcover the aſſets that were liable to pay it, or ſtay the defendant *Dawe* from receiving the money till he ſhould pay the debt, they have brought their bill for an injunction againſt *Dawe* to reſtrain him from receiving it, and that *Haywood* the executor may either admit aſſets to ſatisfy ſo much of the legacy as the plaintiffs debt amounted to, or account for the real and perſonal eſtate of *William Madox*, and pay the plaintiffs their debt thereout.

The defendants, and particularly *Haywood*, inſiſted on two points, Firſt, that the plaintiffs were improper in equity to attach *Dawe*'s legacy, being a *choſe in action*, not reduced into the poſſeſſion of the debtor.

debtor. Secondly, if they were proper in their relief as to that point, yet the legacy was no charge on the real eſtate, but on the perſonal only, which was a deficient fund: This laſt point depended on the words of the will, which were;

" I *William Madox* of, *&c.* do make this my laſt will and teſtament in manner and form following; Firſt, I give and bequeath to Mrs. *Suſannah Rhodes* the ſum of 1000 *l.* to be due and payable unto her by my executor, whom I ſhall herein appoint, after the expiration of one month next after my deceaſe; alſo I give to her all my houſhold goods, plate, *China* ware, linen, woollen, and wearing apparel: Alſo I give to my couſin *John Dawe* the ſum of 1000 *l.* to be due and payable to him by my executor, whom I ſhall herein appoint, after the expiration of one month next after my deceaſe; Alſo I give unto *Richard Weſt* and his brother *Thomas Weſt* the ſum of 100 *l.* in truſt nevertheleſs for the ſole uſe of *Rebecca Hunt*, wife of *James Hunt*, excluſive of any right the ſaid *James Hunt* her huſband ſhall or may claim the ſame, to be due or payable to them, after the expiration of one month next after my deceaſe, by my herein appointed executor: Alſo I give, deviſe and bequeath to Mr. *Thomas Haywood* of, *&c.* and to his heirs for ever, whom I do hereby make, ordain, conſtitute and appoint my only whole and ſole executor of this my laſt will and teſtament, all my goods, land and chattels, except what is herein before given, and I do hereby revoke, diſallow and diſannul all other legacies heretofore willed or made by me.

As to the firſt point, the council for the plaintiff relied on the 20th *ſect.* of the *St.* 10 *Geo.* 2. *c.* 26. whereby a remedy is provided for the creditor on *the future effects* of the debtor.

" Provided, *&c.* that notwithſtanding the priſoner's diſcharge as to his perſon, all prior debts and judgments ſhall ſtand and be effectual to all intents againſt the lands, tenements, goods and chattels of the priſoner, which he or any in truſt for him at the time of the diſcharge had, or at any time then after ſhould be any ways ſeiſed or poſſeſſed of, intereſted in, or intitled unto, either in law or equity, and the creditors may take out a new execution againſt the lands, goods, *&c.* in the ſame manner as they might have done had the priſoner never been taken in execution.

It was ſaid, that if a court of equity did not give relief in this caſe by ſubjecting this legacy to the plaintiffs demand; the intent of the ſtatute would be evaded, ſince if *Dawe* got the money into his hands as they could not take his perſon, and thereby compel him to pay the debt, they would be abſolutely without remedy.

That they had loſt their remedy at law by this ſtatute, where they might attach this very legacy by proceeding to an outlawry; and then bringing an information in the name of the Attorney General in a court of revenue, and ſo attach this by the interpoſition of the crown for their demand, which, though a matter of grace, is by conſtant cuſtom grown into a right in creditors, which a court of equity ought to take notice of; but ſince this ſtatute, that remedy could not be had, becauſe they could not proceed to an outlawry; there is therefore no remedy but this, to anſwer the plain intent of the act, and preſerve the future effects for the creditors.

As to the other point, the council for the plaintiff cited Lord *Warrington* verſus *Langham*, *Prec. in Chan.* 89. that the executor here is named a deviſee, which is always a ſtrong circumſtance in making a conſtruction to ſatisfy the will; that by the laſt clauſe the lands, goods and chattels are blended together as one fund, and given ſubject to an exception of what was given before, which they contended amounted to the ſame thing, as if he had given him the reſidue of both eſtates after what he had given before.

For the defendants it was argued as to the firſt point, that the reſtrictive words at the end of the clauſe, ſhewed that it was the intent of the act only to exempt the perſon of the debtor, and leave all other remedies which the creditors might have juſt in the ſame ſtate they were before the act was made, and not to give the creditor a new and different remedy on theſe effects.

That the reaſon why this court did not give a ſpecific lien to creditors, further than the law did, was, becauſe ſuch creditors did not truſt upon the faith of ſuch lien, but on the general credit, and therefore this court never gave a ſpecific lien on *choſes in actions* to one creditor more than another, except only where there was an actual aſſignment of ſuch *choſe in action* as a ſecurity, and going farther was breaking in upon that equal ſatisfaction which all creditors have a right to over the effects of the debtor, not ſubject to any legal or equitable lien.

If a court of equity was therefore, by reaſon of this inconvenience ſuggeſted, to give any farther remedy to creditors on account of this ſtatute, ſuch new remedy muſt be agreeable to the principles of equity, and co-extenſive with that inconvenience, which the remedy of giving ſpecific execution to a particular creditor is not; for to which creditor ſhould this belong? For ſuppoſe an aſſignment made of this legacy after the judgment, or even after the *fieri facias*, would equity take away the benefit of that ſpecific lien which the aſſignee has by the rules of this court, and give it to a general creditor by judgment merely by force of this ſtatute?

This

This would be changing the rights of parties, and not barely giving a further remedy; ſuppoſe all the other creditors brought bills, thoſe not by judgment, as well as thoſe by judgment, to which would equity give the preference? Since all general creditors cannot have preference in equity over aſſets, further than the law gives it them, equality of diſtribution being what equity aims at where the rules of law do not prevent it. The *fieri facias* is not returned *nulla bona*, nor is it charged that there are no other effects upon which it ought to have been executed; there is no neceſſity therefore to reſort to this remedy, and the leſs reaſon to aſſiſt the plaintiffs than any other creditor, who cannot attach his other goods, nor yet get at his perſon.

It was therefore inſiſted, that a court of equity in this caſe could not give relief to a particular creditor, further than the law does, without infringing its general principles, and altering the rights of others: That an executor is intitled to a releaſe from the legatee, but if by this act every little creditor can in equity charge his debt on the legacy, he will be unavoidably ſubject to a variety of ſuits till the whole is exhauſted.

Either therefore equity muſt give this new ſpecific remedy over *choſes in action*, to creditors in general of an inſolvent debtor, and not to one only: or elſe the creditors muſt take this privilege (which in moſt inſtances creditors of bankrupts are deprived of,) of taking out execution againſt future effects, ſubject to the inconvenience and difficulties which the law has left them under in that reſpect, and which the legiſlature perhaps did not foreſee.

As to the ſecond point, is was ſaid, that the courts of equity had of late been very favourable in their conſtructions to charge debts on land, or debts and legacies, where both are coupled together, and one could not be held to be a charge without holding the other to be ſo at the ſame time; yet that in the caſe of legacies only, a plain intent was required, becauſe *primâ facie* and independent of the intent, there was no more reaſon in equity to charge legacies on lands deviſed, where the general eſtate was inſufficient, than to charge perſonal legacies in favour of a deviſee of land, if his land was evicted, both being ſpecifick, and independent bounties to each other.

There is no general declaration that the legacies ſhould be paid in the firſt place, or even that they ſhould be paid at all, as in that caſe cited in *Prec. in Chan.* the being executor and deviſee has never been held ſufficient to charge an executor with legacies, though poſſibly it may be an ingredient in ſuch a conſtruction, and *Guillim* verſus *Holland* in *July* 1741, and *Corfield* verſus *Lingen* the 4th of *March* 1739, were cited, where the executor was alſo deviſee, and in

the laſt caſe the land was given as a reſidue, and yet the legacies were not charged on the real eſtate.

That with reſpect to the exception, the utmoſt force of it could only be conſidered as putting him in the ſame light as if the bequeſt had been by way of reſidue, and then that would not have charged the lands according to the authority of the caſe laſt cited.

But the plain intent of the exception was, an unneceſſary caution to prevent the ſpecific legacies given before from paſſing by the word *chattels* to which the exception is ſubjected, but as no lands were given before in the will, to apply the exception to the lands, is to make the will nonſenſe.

LORD CHANCELLOR.

As to the firſt queſtion, it is a new caſe, and as far as it is a general queſtion, I am of opinion the plaintiff, as a judgment creditor, could not come into this court for a ſatisfaction out of this legacy, and ſo I apprehend it has often been determined: there are very few caſes where it is neceſſary for this court to give relief to creditors over perſonal chattels in poſſeſſion, becauſe aſſignments of them to defeat creditors are void and fraudulent at law.

Choſes in action are not liable to an execution, but the creditor may either compel ſatisfaction, by ſeizing the perſon, or where that cannot be taken, by proceeding to an outlawry, and taking the lands as well as effects, by a *capias utlagatum*.

But, as to *choſes in action*, according to the general rules of this court, they are not liable to executions, not for the reaſons given by the defendants council, but becauſe the court takes notice that the creditor has a method, by the ordinary rules of law, either by compelling ſatisfaction by ſeizing the perſon, or where that cannot be taken, by proceeding to an outlawry, and taking the lands as well as effects, by a *capias utlagatum*, which, though a proceeding by the crown, and at firſt a matter of grace, yet now is the ordinary courſe of proceeding in the king's court of revenue, where grants of ſuch things to creditors are conſtantly given, and that has been the chief ground upon which this court has proceeded in denying a ſpecifick remedy.

This brings me to the queſtion made on the ſtatute for relief of inſolvent debtors.

This ſtatute was intended to be beneficial to creditors as to the *ſubſequent effects*, and to diſcharge the perſon of the debtor only.

The ſtatute for relief of inſolvent debtors, is for the benefit of creditors, and muſt be ſo conſtrued, as to give them effectually all the benefit intended them over future effects.

Though it has been called a privilege, it is none, but a reſervation to the creditor of his right in every reſpect, except that of ſeiz-

ing the perſon, and it differs from the caſe of bankrupts, where the future effects cannot be diſcharged without the conſent of four-fifths of the creditors; as the act is therefore for the benefit of creditors, it muſt be conſtrued beneficially, and ſo as to give them effectually all the benefit intended them over the future effects.

This has been treated as a ſaving clauſe, but I am of opinion that it is an enacting one, giving the creditor a competent remedy upon *the future effects*, as the ſtatute precluded him from ſeizing or outlawing the perſon; and it could never intend, that though the debtor had ever ſo large a property *in choſes in action*, the creditors ſhould have no remedy to come at them.

With regard to the words relied on in the latter part of the clauſe by the defendants, to ſhew the remedy was to be the ſame as before the ſtatute;

It is plain there are two different proviſions made in the clauſe, by the firſt part as to creditors in general who had not ſued execution before the ſtatute; where the words as to the remedy over the future effects are general; the latter part as to creditors who had already ſued out an execution, and the latter words relate to ſuch new execution only, and do not run through the whole clauſe.

It is objected, that this is a ſuit by one creditor only, and ought to be by all; but the perſon who firſt ſues has an advantage by his legal diligence in all caſes, and of chattels in poſſeſſion, the firſt ſuit has the firſt ſatisfaction, and the act has made no ſuch general proviſion for all creditors.

In all caſes of chattels in poſſeſſion, the firſt ſuit has the firſt ſatisfaction.

The court does not proceed in this caſe on the ground of a ſpecific lien, but only conſiders it as a part of the property of the debtor, which the creditor cannot come at without the aid of this court.

If, therefore, after the judgment, or even after the *fieri facias*, the debtor had aſſigned this *bona fide*, and for a valuable conſideration, and without notice, it would be good and prevail againſt this creditor.

If after the *fieri facias* the debtor had aſſigned the legacy for a valuable conſideration, and without notice, it would have been good againſt this creditor.

But after a bill brought, and a *lis pendens* created as to this thing, ſuch aſſignment could not prevail; I am therefore of opinion, that the court ought to interpoſe in this caſe, and that the plaintiff has purſued a proper remedy.

The next queſtion will be as to the right?

I am of opinion that this legacy is a charge upon the real eſtate.

I think this will not depend upon the authority of thoſe caſes, where debts and legacies are charged in the firſt place, but depends on the particular wording of the will.

Suppoſe the executor was not deviſee, but another perſon, and the teſtator had directed the legacies to be paid by him, it would be a clear charge on the eſtate, and calling him executor in the clauſe where the legacy is given is only deſcriptive of his perſon, and not of his office, and amounts to the ſame as if he had ſaid to be paid by Mr. *Thomas Hayward.*

The legacy is a charge on the lands, for the words, *ſubject to the exception of what was given before*, amounts to the ſame as if the teſtator had given his goods, lands, and chattels, ſubject to what was given before.

The goods, *lands* and chattels are given altogether as one fund, and lands are inſerted in the middle, and the whole are ſubject to the exception of what was given before; this, I think, amounts to the ſame, *as if he had given them ſubject to what was given before*; therefore, I think this legacy is a charge on the lands.

His Lordſhip ordered the Maſter to take an account of what is due to the plaintiff for the principal ſum of 100*l.* with intereſt at 5 *per cent.* and for her coſts at law, and in this court, and declared, that what ſhall be found due to her for principal, intereſt and coſts, ought to be ſatisfied out of what is due to *Dawe* for principal and intereſt of his legacy of 1000*l.* given by the will of *William Madox*, and the Maſter to take an account of what is ſo due to *Dawe*, with intereſt at 4 *per cent.* from one month after the death of *William Madox*, and in caſe *Haywood* ſhall not pay the plaintiff as above within ſix months after the maſter's report, the real eſtate of *William Madox*, or ſo much as ſhall be ſufficient to pay the plaintiff, ſhall be ſold, and the money ariſing therefrom to be applied, in the firſt place, towards ſatisfaction of the plaintiff's debt in the manner as is already directed.

Caſe 122. *Seymore* verſus *Treſilian*, *July* 16, 1737.

A Bill was brought by a wife for her *paraphernalia.*

A huſband cannot deviſe away a wife's *paraphernalia*, he can only bar her by acts done in his life time.

The huſband by his will had given her ten thouſand pounds, upon condition ſhe gave up her right of dower, and likewiſe deviſed to her "all her wearing apparel, and ornaments of her perſon, her gold watch, and all her jewels, except ſome round a picture, *and deviſed the reſidue* of his eſtate to the defendant.

Afterwards, by a codicil, he revokes the deviſe of *his* jewels, and *her* pearl necklace, which he gives away to *A.* then by a ſecond codicil he gives her *a pair of diamond ear-rings*; upon this, the defendant inſiſted ſhe could not claim theſe *paraphernalia*, becauſe it is plainly contrary to the will and codicil under which ſhe claims

the 10000*l.* and equity will not permit one to claim under one part of a will, and controvert another.

That by the deviſe of the reſidue, the revocation of the deviſe of the jewels, and the gift of the ear-rings only, it appeared to be the teſtator's intention that the reſt of the *paraphernalia*, except the ear-rings, ſhould go *to the defendant* as the reſidue of his eſtate.

LORD CHANCELLOR.

It is plain the *paraphernalia* are included in the deviſes in the will, but a huſband cannot deviſe away a wife's *paraphernalia*, he can only bar her by acts done in his life-time.

The revocation is of the deviſe of *his* jewels, which ſeem to be contradiſtinguiſhed from *hers* in the will, which are there called the ornaments of *her* perſon, and the diamond ear-rings do not appear to have been ever worn by her, and therefore might not be part of her *paraphernalia*.

But ſuppoſe the teſtator had completely revoked the deviſe, it is only a revocation of a deviſe void in it ſelf, and therefore it is too much ſtrained to infer from thence an intention that her rights ſhould paſs by the deviſe of the reſidue of his eſtate; his Lordſhip decreed for the plaintiff. *Vide the caſe of Tipping* verſus *Tipping*, 1 *P. Wms.* 722.

Tucker verſus *Phipps*, *July* 10, 1746. Caſe 123.

THE bill was brought by the plaintiff ſuggeſting, that his wife's father had by his will left a legacy of fifteen hundred pounds to the plaintiff's wife, his daughter; and that the defendant *William Phipps* had deſtroyed or concealed the ſaid will, and therefore prayed he might be decreed to pay the plaintiff fifteen hundred pounds, and intereſt.

The *ſpoliation* in this caſe being clearly proved, is ſufficient to intitle the plaintiff to come here in the firſt inſtance for a decree, without putting him to the trouble and expence of citing the defendant into the ſpiritual court.

The defendant put in three anſwers; in the firſt, he admitted the will as ſet forth in the bill, but made no mention of any inſanity in the teſtator; in the third anſwer, denies he ever had any ſuch will, and ſays, if there ever was any ſuch, he cannot ſay whether his father was, at the time of making ſuch will, of ſound mind; and for the defendant it was inſiſted, that the plaintiff came here too ſoon, for that he ought to have cited the defendant into the eccleſiaſtical court, where he might have the benefit of a diſcovery equally as well as here.

LORD

LORD CHANCELLOR.

The point of inſanity creates the only difficulty, for the *factum* of the will is not only proved, but alſo admitted.

In this court the rule is not to allow a ſuit againſt an executor for a legacy, before a probate of the will, but, in the preſent caſe, the plaintiff ought not to be put to the difficulty of going into the ſpiritual court to cite the defendant, becauſe that would be giving the defendant a great advantage from his own bad acts in deſtroying or ſuppreſſing the will, for here the *ſpoliation* is, I think, proved ſo ſufficiently, as to intitle the plaintiff to come here in the firſt inſtance for a decree.

Though in a perſonal legacy, where the will is deſtroyed or concealed, the rule is to cite the executor into the eccleſiaſtical court, yet the legatee may properly come here on the head of *ſpoliation* and *ſuppreſſion*.

As to *the ſpoliation*, conſider it generally as a perſonal legacy, where the will is deſtroyed or concealed by the executor, and I think, in ſuch a caſe, if the *ſpoliation* is proved plainly (though the general rule is to cite the executor into the eccleſiaſtical court) the legatee may properly come here for a decree upon the head of *ſpoliation* and *ſuppreſſion*.

There are ſeveral caſes, where if *ſpoliation* or *ſuppreſſion* are proved, it will change the juriſdiction, and give this court a juriſdiction which it had not originally; as in the caſe of Lord *Hunſdon*, *Hob.* 109.

Though it was a title merely at law, yet there being a ſuppreſſion of the deeds under which the title accrued, the plaintiff, in Lord *Hunſdon*'s caſe, had a decree in equity for poſſeſſion.

" Where the title was a title merely at law, yet there being a " ſuppreſſion of the deeds under which that title accrued, the " plaintiff had a decree here for poſſeſſion, and quiet enjoy- " ment."

As the juriſdiction may be changed with regard to a court of law, why may it not with regard to the ſpiritual court; and I think the caſe of *Weeks* verſus *Weeks*, which came before me ſome time ago, an authority that it may: here the *ſpoliation* or *ſuppreſſion* is certainly fraudulent, voluntary, and malicious, and therefore differs from the caſe of *Paſcall* verſus *Pickering*, where the *ſpoliation* did by no means appear to be fraudulent or malicious, but rather inadvertently done, and without any bad deſign.

I think in ſuch caſes of malicious and fraudulent *ſpoliations*, the court will not put the plaintiff under the difficulty of going into the eccleſiaſtical court, where he muſt meet with much more difficulty than proving the contents of a deed at law, which has been loſt or ſecreted.

For in the ſpiritual court the plaintiff muſt prove it a will in writing, and muſt likewiſe prove the contents in the very words, which will be a difficulty almoſt inſuperable, and which courts of law do not put a perſon upon doing; the plaintiff muſt alſo prove the whole will, though the remainder of it does not at all belong to, or regard his legacy.

The plaintiff in the ſpiritual court muſt have proved it a will in writing, and the very words, and alſo the whole will, though the remainder does not at all regard his legacy, and which courts of law do not put a perſon upon doing.

I think, if this had been a mere perſonal legacy, the court, under the circumſtances of this caſe, ought to interpoſe, and the rather, becauſe in bringing ſuits againſt an executor, this court goes further in requiring a probate than courts at law.

But here the caſe is ſtronger to intitle the plaintiff to a decree, becauſe the legacy is out of real and perſonal eſtate both, and as to the real eſtate, there is no occaſion to prove the will in the ſpiritual court to intitle the legatee to recover his legacy out of the real eſtate.

There is no occaſion to prove a will in the ſpiritual court to intitle a legatee to recover his legacy out of the real eſtate.

This would be clearly the caſe, where the charge is only upon the real eſtate, and though the heir is intitled to have the perſonal eſtate exonerate his real, yet if he is made executor, and has, by a voluntary and fraudulent act, put the legatee under ſuch difficulties as make it almoſt impoſſible for him to prove the will, it is reaſonable to let in the legatee to have his legacy, and leave the executor to pay himſelf out of the perſonal eſtate.

As to *the inſanity*, the defendant's proofs ſpeak in general terms only, to the teſtator being in a weak condition; but compare this with the plaintiff's evidence, and the manner of the defendant's introducing the inſanity in his anſwer, and the acts he has done under the will.

The inſanity is not mentioned till the third anſwer, and then very tenderly; the plaintiff's proofs are very poſitive as to the ſanity of the teſtator, they are the three ſubſcribing witneſſes, whoſe teſtimony is by no means impeached; the will a reaſonable one, not made in ſecret, but ſeveral perſons were preſent; the defendant has brought actions, and ſworn himſelf ſurviving executor, and has acted ſeveral years under the will without ever making any pretence of inſanity in the teſtator.

I am therefore of opinion, that under the circumſtances of this caſe, it is not proper to direct a trial at law as to the ſanity or inſanity of the teſtator, but that the plaintiff is intitled to an immediate

Not neceſſary in this caſe to direct a trial at law as to the teſtator's ſanity, for the plaintiff is clearly intitled to an immediate decree for the payment of his legacy, though the probate of the will has not been granted.

diate decree for payment of his legacy by the defendant, notwithſtanding the probate of the will has not been granted.

Caſe 124. *The Weavers Company qui tam* verſus *Hayward*, *June* 12, 1746.

An action brought on the Callico act, in which the plaintiff ſerved the defendant with a copy of a writ, inſtead of a ſpecial *capias*, and afterwards got the curſitor to alter the return of the original: the alteration is erroneous, and the writ muſt be ſuperſeded.

THIS came on upon the motion of the Attorney General, who moved to ſtay proceedings upon an original writ, teſted the 22d of *November*, returnable the *octave* of St. *Hilary*; the teſte was within the ſix months, limited by 7 *Geo.* 1. *c.* 7. *ſec.* 4. *the Callico* act, for the bringing of the action on that ſtatute.

Inſtead of ſummons and *pone*, or ſpecial *capias*, which pays no ſtamp duty, they ſerved the defendant with a copy of the writ, and afterwards applied to the Curſitor to alter the return of the original.

The firſt objection made by the defendant was, that this alteration was erroneous, and that it was of conſequence to the ſtamp duty.

Mr. *Noel*, for the plaintiff in the original action, cited the caſe of *Loan* verſus *Coveney* in 1738, to ſhew this court conſidered it ſelf as an *officina brevium*, and that it would not enter into the queſtion, whether this writ was executed or not.

Treblecock's caſe, *March* 23, 1736, *vid.* 1 *Tr. Atk.* 633. a *homine replegianda* iſſued out of this court, and was returnable in the court of King's Bench, and being returnable there, the court would not enter into the irregularity.

Philips verſus *Philips*, *December* 15, 1737, there an application was made to this court for an original writ, to warrant a judgment upon the ſtatute of bribery and corruption after a verdict, and where error was brought for want of that original; and though this caſe was ſaid to be excepted out of the ſtatute of jeofails, yet held, that though the ſtatute of jeofails were material in applications to this court, as *an officina brevium*, the objection in point of revenue was not of weight in a mere matter of diſcretion, as this was, where the party would be totally deprived of his action.

Mr. *Clark* cited *Finch* upon judicial proceſs, that where an original is returned *tarde*, an *alias* or *pluries* original will go; but if no return, then it muſt iſſue out of this court; and for this purpoſe mentioned *Dyer* 211.

LORD

LORD CHANCELLOR.

I am of opinion it ought to be ſuperſeded; I cannot quaſh it unleſs error appear on the face of the writ, and then the propereſt way would be by plea in the court where it was returnable.

Where error appears on on the face of the writ, the propereſt courſe is by plea in the court where it is returnable.

I will take up the ſecond objection firſt, in order to lay it out of the caſe, for this is not a motion to cenſure the attorney, or the party, but to ſuperſede the writ only.

If it was nothing more than an offence againſt the ſtamp act, it would be no ſufficient ground to ſuperſede the writ; the officer and party would be liable to penalties, as in the caſe of a deed which is not to be made uſe of till the duty paid, and yet it is the deed of the parties.

However I am of opinion, it is ſuch an original writ as the ſtamp duties are payable on; for I underſtand the exception to be of ſuch an original, as the *capias* neceſſarily iſſues on; nay, of one, on which it is at the party's election to take out a *capias*, and there the duties ought to be paid.

It was in order to preſerve the juriſdiction of this court, and *the Curſitor's office*, that this exception was taken, for otherwiſe it would be paying double duty both on the original and *capias*.

The ſtamp acts did not intend to exclude all amendments of writs, for that would be grievous.

The firſt clauſe of the ſtamp acts relate to where another writ is written on the ſame piece of vellum, or parchment; and I am of opinion, that on an information, or action, it muſt appear to be another writ, and the other part relating to eraſures refers to a fraudulent one.

If the officers of the ſtamp duties think this practice contrary to law, they ought to apply for a general regulation.

As to the other queſtion, I am of opinion this writ ought not to have been ſo altered.

If nothing had been done on this writ it would have brought it to the queſtion, concerning its being done by writing it over *de novo*, or by interlineation or eraſure, in which practice it is admitted, that if an original writ has been executed it cannot be done.

Now what is ſuch an execution as to prevent an alteration of it.

If

If it had been lying in the attorney's hands, and ſo in the party's power, that would be one thing. And if the ſervice of this copy being void, is to be looked on as no ſervice, a party may always avoid an irregular execution of his own writ, and get it altered.

Suppoſe it had been carried to the ſheriff, and he had returned it improper, would that have been an execution? To be ſure it would.

The copy, though an irregular ſervice, is ſtill an execution of the writ.

This has not been carried to the ſheriff, yet this copy, though an irregular ſervice, becauſe not warranted by 12 *Geo.* 1. is ſtill an execution of this writ: nay, it is actually ſpecified in the copy what the return of this writ is, can he afterwards alter the return?

Suppoſe the plaintiff had declared upon this proceſs, and had obtained judgment, all the proceedings were ſubject to be ſet aſide; yet by this doctrine, he may reſort to the office for an alteration.

As to the caſe of *Philips* verſus *Philips*, the proceſs was not by original, but by *capias*, and he afterwards wanted an original to warrant his judgment; and held there was no difference as to actions *qui tam*, and other actions as to this point.

There he had begun his action in time, here the plaintiff would take out an original out of time.

His Lordſhip directed the writ to be ſuperſeded.

Caſe 123. *Wheeler* verſus *Bingham*, *June* 14, 1746.

If the teſtator himſelf had in this caſe abridged the legacy, it would have been no more than *in terrorem*, and delegating it to another to do it will carry it no further, and conſequently this not amounting to a deviſe over, the plaintiff is intitled to the legacy.

MR. *Pottinger* by his will, *inter alia*, gave to each of his granddaughters that ſhould be living and unmarried at the time of his deceaſe, on their reſpective days of marriage, the ſum of fifteen hundred pounds, and he did deſire that none of his granddaughters ſhould marry without the conſent of the father and mother, or the ſurvivor of them; and therefore if any or either of them ſhould marry without ſuch conſent, then by his will he revoked what was thereby directed to be paid to ſuch grandaughter or grandaughters, and ſuch of them ſhould not be intitled to any benefit by virtue of ſuch his will, further than what the father and mother, or the ſurvivor of them, ſhould direct; and he afterwards directs, that after the ſeveral legacies and ſums directed to be paid are ſatisfied, if any ſum of money ſhould remain in the hands of the truſtees, the ſurvivors or ſurvivor of them, the ſame ſhould be paid to his daughter *Philadelphia* for life, and after her deceaſe to the defendant *Bingham* and his heirs.

The

The plaintiff, one of the grandaughters, has married without conſent of the father and mother, and has brought her bill for the legacy.

The mother of the plaintiff has appointed truſtees of the legacy for the plaintiff for her ſeparate uſe for life, and to her iſſue, but if ſhe has no iſſue, then to the defendant Mr. *Bingham*.

Mr. Solicitor General for the plaintiff cited the caſe of *Paget* verſus *Haywood*, *November* 1733. at the *Rolls*: Where it was held, that a general deviſe of the *reſiduum*, or a deviſe to the perſon intitled to the *reſiduum*, were the ſame as if there was no deviſe over at all.

Mr. Attorney General for the defendant cited *Harvey* verſus *Aſton*, *Paſch.* 13 *Geo.* 2. with regard to Lord Chief Baron *Comyns*'s opinion on the effect of a deviſe over. *Comyns's Reports* 746. and alſo *Eq. Caſ. Abr. Amos* verſus *Horner* 112. and *Creagh* verſus *Wilſon*, 2 *Vern.* 572. to ſhew that the plaintiff's wife is not entitled to the legacy of fifteen hundred pounds under the grandfather's will.

Mr. Solicitor General in reply ſaid, the caſe of *Amos* verſus *Horner* was reported in no other book, and Sir *Joſeph Jekyll* ſaid in the caſe of *Harvey* and *Aſton* he had ordered ſearch to be made for it, but it could not be found. 1 *Ch. Caſ.* 22. *Bellaſis* verſus *Sir William Ermin*, was determined directly contrary, and *Garret* verſus *Pritty*, 2 *Vern.* 293.

Lord Chief Baron *Comyns* refers to theſe two caſes, as having ſettled theſe diſtinctions uncontrovertedly.

Wherever this court exerciſes a juriſdiction with another court, they have adopted their rules, and never vary in their determinations from the eccleſiaſtical court, but where the intereſt of a third perſon is concerned.

The defendant's council have conſtrued it to be the ſame thing under the words of the will, as if the teſtator had given it to the mother of the plaintiff to diſpoſe of abſolutely.

Which is by no means the caſe; it is only leaving it to the father and mother to give it totally or partially, to ſuch child as has married without conſent.

LORD CHANCELLOR.

In the preſent caſe the direction the grandfather has given by his will, that the grandaughter ſhould take the advice of parents was a very wiſe one, and what the mother has done appears ſo reaſon-

able, that if I could conſiſtently with determinations of this court, and the matter was *res integra*, I would go as far as poſſible to ſupport it.

But notwithſtanding ſuch inclination, I cannot hold this portion to be in the power of the mother, to be diſpoſed of in the manner ſhe has done, for it would ſhake the ſettled rules of the court.

The firſt queſtion is, whether this condition is an effectual condition, or *in terrorem* only.

Secondly, Whether here is that which amounts to a bequeſt over of the legacy.

As to the *firſt*, in order to prove it is a condition that ought to have it's effect, it is ſaid by the defendant's council it amounts to the ſame thing as a condition precedent, and therefore the party claiming muſt ſhew it performed.

Two anſwers may be given to this.

It is clearly a perſonal legacy, and the perſonal eſtate is ſufficient to ſatisfy the whole, and conſequently is no charge on the real eſtate; it has been laid down in *Harvey* and *Aſton*, by Lord Chief Baron *Comyns*, that the civil law makes no difference between conditions precedent or ſubſequent, but hold it to be a void condition equally in both.

There have been ſeveral caſes in this court of a perſonal legacy, where, if it has not been given over, though a condition precedent, yet it will not be effectual to defeat the legacy.

But I take this to be a condition ſubſequent, for when the event happens, it is veſted.

A diſtinction has been attempted here that the breach of the condition happening, *eo inſtante* the legacy veſts, it is therefore void.

But though they meet together at the ſame time, yet they are conſidered in point of law as ſubſequent in the order of things.

It has been truly ſaid ſhe need not ſhew in the eccleſiaſtical court any thing but the marriage, and the objection muſt come from the other ſide, and *primâ facie* it was ſufficient for her to ſhew the legacy, and that ſhe is ſuch a grandaughter as is deſcribed in the will.

Therefore I am of opinion the attempting a diſtinction from former caſes, to make this a condition precedent, will not prevail.

But it has been ſaid, if there is not a condition precedent, but ſubſequent, yet it amounts to the ſame thing as a deviſe over, by reaſon of the ſtrength of evidence of the teſtator's intent that the legacy ſhould ceaſe.

I am of opinion this is not the reaſon that has governed the court.

There have been abundance of caſes here, where the intention of the teſtator was full as ſtrong that the legacy ſhould ceaſe, as in the caſe of *Garret* verſus *Pritty*, and yet the intention only did not prevail.

The true ground upon which this court has ſuffered the condition *to effectuate*, is not the intention, but the right of a *third perſon*, the being given over, and veſting in that third perſon, if the condition is not performed.

It is the being given over, and veſting in a third perſon, has induced the court to ſuffer the condition to effectuate, and not the intention.

If that be ſo, the next conſideration is, whether here is in the preſent caſe what amounts to a deviſe over to a third perſon in point of right.

I am of opinion there is not.

The gift to the truſtees is not of a particular fund, but of his perſonal eſtate in general: then afterwards follows, *it is my deſire that none of my grandaughters ſhould marry without the conſent of the father or mother, &c.*

Then comes another clauſe, which ſays, *that after the ſeveral legacies and ſums directed to be paid and ſatisfied, if any ſum of money ſhould remain in the hands of the truſtees, &c. the ſame ſhould be paid to his daughter Philadelphia for life, &c.*

Upon theſe two clauſes, and the clauſe of revocation, the queſtion of *bequeſt over ariſes.*

It has been inſiſted on by the council for the defendant, that the plaintiff not having any further benefit than what the father or mother or ſurvivor of them ſhould direct, amounts to a deviſe over.

But I am of opinion it does not.

If it had been ſaid upon her marrying without conſent, I revoke that legacy, and give the fifteen hundred pounds to the father or mother to diſpoſe of, it would have been a deviſe over: But this is only putting it in the power of father or mother, or the ſurvivor, to *abridge* the legacy given to the daughter, and when it ſhould be ſo abridged, the remainder would have fallen into the reſidue.

The

The authorities are moſt clear in the caſe of *Garret* verſus *Pritty* and *Bellaſis* verſus *Ermin*, to this purpoſe.

If the teſtator himſelf had abridged this legacy, it would have been no more than *in terrorem*, and conſequently delegating it to another to do it will carry it no further.

The clauſe (" If any ſum of money ſhould remain in his truſ- " tees hands, the ſurvivors or ſurvivor, he directs the ſame ſhould " be paid to his daughter *Philadelphia* for life, and after her deceaſe " to the defendant *Bingham* and his heirs") has been made uſe of on both ſides; the firſt part of it by the plaintiff, and the latter by the defendant's council.

The words preceding, when the ſeveral legacies *ſhall be fully paid and ſatisfied*, ſay the plaintiff's council, mean, when all the ſums before given ſhall be paid, and therefore nothing is given over till all the ſums are paid.

That can never be the meaning, but what the defendant's council have ſaid is the right conſtruction, when they ſhall be paid *according to the directions of the will beforementioned.*

The other words made uſe of on the part of the defendant are, *particular declarations of particular ſums of money.*

If this had been a particular fund, which is given to his truſtees, as certain ſtocks, or certain mortgages, and the will had ſaid the legatee ſhall have no more than the father and mother ſhould appoint, then I think it would have been a gift over of the remainder of that particular fund: but this is only a deſcription of the *reſiduum* of the perſonal eſtate in the hands of his truſtees.

An expreſs deviſe, that if legatee ſhould not perform the condition, the legacy ſhall ſink into the *reſiduum*, amounts to a deviſe over, but there is no ſuch direction here; and however prudent what the mother has done may be, I cannot conſtrue it to be a forfeiture without ſhaking the authority of all the other caſes.

Then the obſervation I have made brings it to the rules of this court; and I am of opinion an expreſs deviſe, that if legatee ſhould not perform the condition, the legacy ſhall ſink into the *reſiduum*, amounts to a deviſe over; but there is no ſuch direction here, and therefore though there is nothing unreaſonable in the reſtriction, and though what the mother has done is prudent, yet I cannot conſtrue it to be a forfeiture of the legacy without ſhaking the authority of all the other caſes, and conſequently muſt decree the legacy to the plaintiff.

Snelſon

Snelſon verſus *Corbet and Delves*, *June* 16. 1746. Caſe 124.

SIR *Brian Broughton* by his will ſays, all my freehold of any kind or nature whatſoever, which at preſent is in my power to diſpoſe of, I give to my wife.

B. by his will ſays, *all my freehold of any kind or nature whatſoever, which at preſent is in my power to diſpoſe of, I give to my wife.*

The queſtion was, what intereſt paſſed to the wife, whether for life or in fee?

The teſtator was ſeiſed of a freehold eſtate in fee, and likewiſe of a reverſionary eſtate in fee, and of a copyhold eſtate.

Mr. *Wilbraham*, for the defendant the deviſee, inſiſted the words carried the fee, and cited 1 *Lutwich* 764. and *Ibbetſon* verſus *Beckwith*, *Caſ. in Ch. in Lord Talbot's time* 157.

Lord *Hardwicke* thinking it a point of ſome difficulty, directed a caſe to be made for the opinion of the court of King's Bench.

Lord Chancellor directed a caſe to be made for the opinion of the court of King's Bench, for, he ſaid, it was hardly to be preſumed the teſtator intended to give the reverſion of this great eſtate to his wife.

There was a queſtion likewiſe in the cauſe as to *paraphernalia*, whether it ſhall be liable to the payment of ſimple contract creditors and legacies.

LORD CHANCELLOR.

At law, where the huſband dies indebted, the widow cannot have her *paraphernalia*; but this court does not determine ſo ſtrictly, for if the perſonal eſtate has been exhauſted in payment of ſpecialty creditors, ſhe ſhall ſtand in their place as to ſo much upon the real aſſets of the heir at law, for ſhe has a prior right, and a ſuperior one to legatees, who take only from the bounty of the teſtator.

Where the perſonal eſtate has been exhauſted in payment of ſpecialty creditors, the widow ſhall ſtand in their place, as to the amount of her *paraphernalia*, upon the real aſſets of the heir at law.

The perſonal eſtate muſt be applied in payment of debts, legacies and funerals, in a courſe of adminiſtration; he directed, in caſe the perſonal eſtate, or any part, has been exhauſted by ſpecialty creditors, then the ſimple contract creditors to ſtand in their place, to receive a ſatisfaction *pro tanto* out of teſtator's real eſtate; and declared that the plate which belonged to Sir *Brian Broughton*, and which is given to the ſon after the death of the widow, is to be conſidered as part of his perſonal eſtate.

Paraphernalia ſhall be applied towards ſatisfaction of ſimple contract creditors, but is not liable to ſatisfy the teſtator's legacies.

He declared alſo, that in caſe the ſimple contract creditors of the teſtator ſhall not receive a ſatisfaction for their debts out of the perſonal eſtate, or out of his real eſtate, by ſtanding in the place of ſpecialty creditors in manner before directed, then the *paraphernalia* claimed by the defendant, or ſo much thereof as will make good the deficiency, ſhall be applied towards ſatisfaction of the ſimple contract creditors, but that the *paraphernalia* will not be liable to ſatisfy teſtator's legacies, or any of them.

Sir *Brian Broughton* by his will deviſes all *his plate* to his wife, and by his codicil he only gives the uſe of his *houſhold goods* to her for life.

LORD CHANCELLOR.

If he had given by his will all his houſhold goods and plate, I ſhould have had ſome difficulty, but the queſtion now is, whether he meant to include plate in the words *houſhold goods*.

Plate will paſs by a deviſe of houſhold goods.

There is evidence of the plate being uſed in the teſtator's houſe; and I am of opinion therefore houſhold goods does include plate, and that after the death of the wife it paſſes to the ſon.

Caſe 125. *Goodwin* verſus *Goodwin and others*, *July* 3, 1746.

After a cauſe is ſet down, you can only amend by making parties, and cannot introduce new charges, or put a material fact in iſſue, which was not ſo in the cauſe before, but ſhould have preferred a ſupplemental bill in this reſpect.

ONE queſtion in the cauſe aroſe upon the will of *Henry Framingham*, dated *September* 1, 1704.

" My eſtate in *Norfolk*, after the deceaſe of my wife, I give and " bequeath unto *Joan Seaman*, wife of *Peter Seaman*, for her life, " and afterwards I give it to her children, to be equally divided " amongſt them ſhare and ſhare alike; and for want of ſuch chil- " dren I give it all to my right heir on the ſide of the *Framinghams*.

One child of *Joan Seaman* was born in the life-time of *Framingham* the teſtator, and two others were born after his death.

Mr. Solicitor General inſiſted on the authority of *Wild*'s caſe, 6 *Co.* 16. *b.* and *Stanley* verſus *Baker*, *Moor* 220. that theſe two children, though not *in rerum natura*, yet took an eſtate for life in remainder, but not in fee, becauſe there is an expreſs limitation to the right heir of the ſide of the *Framinghams*.

An objection was taken by the council of *Nelthrop*, a defendant in the cauſe, of irregularity, for that the plaintiffs after publication paſt, and the cauſe ſet down, amended their bill, by inſiſting on this right as children of Lady *Joan Seaman*, under the will of *Framingham*.

LORD CHANCELLOR.

After publication paſt, and the cauſe ſet down, you can only amend by making parties, and cannot introduce new charges, or put a material fact in iſſue, which was not ſo in the cauſe before, but ſhould have preferred a ſupplemental bill in this reſpect; and as they have not amended defendant *Nelthrop*'s copy as to this fact, it is irregular, and as this is the moſt intangled cauſe I ever ſaw, I will not determine it without having the fundamental point, the conſtruction of *Framingham*'s will, properly in iſſue before me.

His Lordſhip ordered it to ſtand over, and the plaintiff to be at liberty to bring the will of *Henry Framingham* regularly before the court, by ſupplemental bill, or otherwiſe, as they ſhall be adviſed.

Hart verſus *Middlehurſt*, *July* 4, 1746.

Caſe 126.

BY articles of agreement bearing date the 9th of *September* 1719. upon the marriage of *John Middlehurſt* with *Mary Bagley*, in conſideration of a portion of two hundred pounds, *John Middlehurſt* covenants with *Mary*'s father to convey the lands then in his poſſeſſion to truſtees, in truſt for *John Middlehurſt* during his life *ſans waſte*, and afterwards to the uſe of *Mary* during ſo long as ſhe ſhall happen to live; and after the determination of theſe eſtates, *then to the iſſue of this match in ſuch ſort, manner and form, and ſubject to ſuch charges for younger children, as John Middlehurſt ſhall hereafter by deed or will order, bequeath and appoint.* And laſtly, *it is hereby mutually agreed by and between the parties, that all further needful and neceſſary covenants, proviſoes, limitations and agreements whatſoever for the further and better explaining, ſettling and aſſuring of all the premiſſes and eſtates for the uſes aforeſaid, or ſuch other as ſhall be agreed on by all the parties to be more neceſſary, ſhall be contained in the intended conveyances.*

The bill was brought by the daughter and only child of the firſt marriage of *J. M.* for a ſpecific performance of articles previous thereto, inſiſting ſhe ought to be tenant in tail of the lands therein mentioned. *Iſſue in the articles means* female *as well as male, and conſequently the plaintiff is intitled to have a ſettlement of theſe lands in tail, and when the defendant, the ſon of the ſecond marriage, comes of age, he muſt convey to her.*

By a ſettlement made in 1722. ſaid to be in purſuance of articles, *John Middlehurſt* ſettled the eſtate to himſelf for life, to the wife for life, to truſtees to preſerve contingent remainders, then to truſtees for a term of years, then to firſt and every other ſon in tail, the term to raiſe ſix hundred pounds in the firſt place to pay his debts, and the remainder to be equally divided among the children of the marriage, in ſuch proportions as *John Middlehurſt* ſhould by deed in his life-time, or will at his death, appoint.

In 1728 *John Middlehurſt* ſuffered a recovery, and gained the fee of this eſtate, and by the recovery ſettled it to himſelf for life, remainder

remainder to truſtees to preſerve contingent remainders, remainder to them for 500 years, remainder to his firſt and every other ſon in tail male, the truſt of the term declared to be for younger children; and therein alſo was contained a power for *John Middlehurſt* to ſettle a rent-charge of twenty pounds *per annum* on any wife he might hereafter marry.

In the *May* following he married a ſecond wife, and by ſettlement on that marriage, recites the deed to lead the uſes of the recovery: The ſecond wife had no notice either of the articles in 1719. or ſettlement in 1722. and the very ſame eſtate is limited to her and the iſſue of that marriage, and the defendant *Middlehurſt*, is the ſon of that marriage.

The bill was brought by the plaintiff, the daughter and only child of the firſt marriage, for a ſpecific performance of the articles, and inſiſted ſhe ought to be tenant in tail of theſe lands, or if not, that the recovery lets in the charge in the articles upon the land.

Mr. Attorney General for the plaintiff cited the caſe of *Hanbury* verſus *Hanbury* the 24th of *April* 1735. before Lord *Talbot*, to ſhew the liberal conſtruction of marriage articles in favour of the iſſue.

Mr. *Sambourne* of the ſame ſide cited *Roundhill* verſus *Brerely*, 2 *Vern.* 482. to ſhew that a covenant to ſettle lands, though no particular lands are mentioned in the articles, will be a lien on the lands whereof the father was then ſeiſed.

Mr. *Brown* for the defendant.

Firſt, Whether theſe articles have been reaſonably carried into execution.

Secondly, Whether the plaintiff has a right to be relieved againſt the ſon of the ſecond marriage, who has indiſputably the legal eſtate in him, or whether ſhe ought not to be contented with a ſuitable proviſion out of this eſtate.

The father of the huſband had no knowledge of the firſt marriage, and was tenant for life of the greateſt part of the eſtate, and did not die till 1727.

The articles are of a very great latitude, and ſeem to intend to give as great a power to the huſband over this eſtate as could be.

That this is not to be conſidered as a ſtrict agreement, to ſettle it on the father for life, and if no ſons, then on daughters in tail, but

but was intended only to ſecure to the younger children a reaſonable proviſion out of the eſtate of the father, and to be anſwered by pecuniary portions.

One hundred and ſixty pounds he had with his ſecond wife.

The ſon of the marriage, if this is determined againſt him, will be undone, for there is a mortgage for nine hundred pounds, and the whole eſtate which paſſed by the recovery in 1722. is but eighty pounds a year, and only twenty-five pounds a year was ſettled by the articles; for the father of *John Middleburſt* had at that time the power over the reſt of the eſtate.

Mr. *Wilbraham* of the ſame ſide.

The mortgage was made in 1738. ſince the death of *John Middlehurſt*, by his executors and truſtees to pay his debts.

In *Powell* verſus *Price*, 2 *P. Wms.* 535. There, after a remainder to the heirs male of the body of the huſband by any wife, was a remainder to the heirs of the body by the firſt wife, and only a daughter of that marriage; in the ſettlement there was a proviſion for this daughter; and it was held the recovery barred the entail to daughters.

He mentioned the rule with regard to copyhold eſtates, where if an heir at law is totally diſinherited, the court will not decree a proviſion made by the father for younger children, where there was no ſurrender to the uſes of the will.

Here the heir at law will be totally diſinherited, who has indiſputably the legal right, and for the benefit too of a perſon who has a dormant equity only under articles, of which the defendant's mother had no notice at the time of the marriage.

LORD CHANCELLOR.

In the ſettlement upon the recovery was compriſed the reſt of the eſtate which came to *John Middleburſt* on the death of his father, amounting to ſixty-five pounds *per annum* more.

The firſt queſtion will be, what is the true and proper conſtruction of the articles?

Secondly, Whether the articles are properly carried into execution by any ſubſequent ſettlement?

Thirdly, If not, whether the plaintiff has a right to have theſe articles carried into execution in the extent prayed by the bill?

The plaintiff inſiſts ſhe is entitled to have the whole eſtate ſettled for her benefit.

The defendant contends it is ſufficient, if ſhe has a reaſonable proviſion made for her out of the eſtate, and which has been provided for by the father's ſecond ſettlement.

But I muſt take the articles as they are, and the plain meaning of the words.

I am of opinion it was the intention of the articles the iſſue, whether male or female, ſhould have the whole of this eſtate amongſt them.

The father admits he received ſix hundred pounds with the wife of the firſt marriage, and therefore what he covenanted to do is not diſproportionable to the fortune.

What are the words of the articles?

To convey this eſtate to truſtees to the uſe, *&c.* and after the determination of thoſe uſes, then to the iſſue of this match, *&c.* (*vide the words.*)

What does *iſſue* of the marriage mean?

Upon the words iſſue of the marriage, the court on a bill brought for carrying articles into execution, have frequently directed the ſettlement to be *to all the iſſue*, to the firſt and other ſons, and for default of ſuch iſſue, to the daughters, with proper remainders following one another.

Iſſue female, as well as male; and therefore if it had gone no farther than to the iſſue of the marriage, and a bill had been brought for carrying the articles into execution, the ſettlement muſt have been to all the iſſue, to the firſt and every other ſon, and for default of ſuch iſſue to the daughters, with proper remainders following one after another.

I have known ſeveral decrees of this kind upon the words *iſſue* of the marriage.

But then the other ſubſequent words, *in ſuch ſort, manner and form, and ſubject to ſuch charges for younger children as John Middlehurſt ſhall hereafter by deed or will order, bequeath and appoint*, are relied on by the defendant; and it has been inſiſted that this leaves a power in the father, as to the manner and quantity of intereſt, the children ſhall take out of the eſtate.

I agree it does as to the manner, but not as to the intereſt.

To be ſure the father might have divided the eſtate amongſt the children, a different part among the ſons if he pleaſed, and another part by way of proviſion for the daughters: But ſtill the whole of the eſtate muſt have been divided, though the proportion was left to the father.

But it has been ſaid, if there was a ſole daughter of the firſt marriage only, he might limit the eſtate to the ſons of the ſecond marriage, upon leaving a charge for the benefit of the daughter of the firſt marriage.

The caſes which have been cited do by no means come up to the preſent.

For upon the original conſtruction of the articles, where the thing is open to the court, it is too much to ſay that *an eldeſt and only child* ſhall be conſidered as a younger by the court.

Another objection has been ſtarted, that this conſtruction is contrary to the uſual courſe of marriage ſettlements; for it is not cuſtomary to limit to the daughters, without an intervening limitation to the father in tail, ſo as to put it in his power to poſtpone daughters of a *firſt*, to ſons of a *ſecond* marriage.

I allow this to be the moſt prudent way, and the articles in the caſe of *Weſt* verſus *Eriſey*, in 2 *P. Wms.* 349. was in this manner, and decreed to be carried into ſtrict ſettlement; but there was a ſettlement of the whole eſtate, here there is no intervening limitation to the father in tail, and 25 *l. per ann.* at moſt, is the eſtate compriſed in the articles.

The ſecond queſtion is, whether the articles are properly carried into execution by any ſubſequent ſettlement.

I am of opinion they have not been properly carried into execution.

There are two ſettlements, one of the 18th of *April* 1722.

There is no colour to ſay this is in purſuance of the articles.

The next ſettlement is dated the 12th of *March* 1728. upon which a common recovery was ſuffered after the death of the firſt wife.

Moſt clearly this is no performance of the articles, for there is no certain proviſion for daughters, though it comprehended the whole of his eſtate.

After this he intermarried with a ſecond wife in *May* 1728.

I am of opinion there is no reaſonable performance of articles in either of theſe ſettlements.

The third queſtion is, whether the plaintiff has a right to have theſe articles carried into execution in the extent prayed by the bill.

I am of opinion the plaintiff has a right. Take

Take it as it ſtood originally, if the conſtruction I have put upon theſe articles be right, then to be ſure this was the original right for the plaintiff to have a ſpecific performance from the general nature of the thing.

Some bars have been ſet up againſt it.

The *firſt* thing inſiſted on was, that *John Middlehurſt* the father of the plaintiff was only a tenant in tail at the time of the articles, and that if he had continued ſo, this eſtate would have gone over to the ſon as heir in tail.

But then the anſwer is, *John Middlehurſt* ſuffered a common recovery, and the conſequence of that is, it let in a prior charge and incumbrance, which he had thought fit to lay upon it.

Though the council for the defendant have attempted to make a difference between a legal and equitable charge upon an eſtate, I think there is none.

In the firſt place, what is the reaſon the recovery by tenant in tail lets in his legal charges? becauſe the tenant in tail is conſidered as owner of the eſtate.

Some books ſay, common recoveries are impliedly excepted out of the ſtatute *de donis*.

Common recoveries deliver the eſtate from the fetters and trammels impoſed upon it by the ſtatute *de donis*, and that was the opinion in Lord *Derwentwater*'s caſe, *Hil.* 5 *Geo.* 1. *Modern Caſes in Law and Equity*, 2 *part*, *p.* 172. 3 *Vol. of New Abr. of the Law* 796.

If tenant in tail confeſs a judgment, *&c.* and ſuffer a recovery to any collateral purpoſe, that recovery ſhall enure to make good all his precedent incumbrances.

All the uſes declared by this conveyance are derived out of the eſtate of *tenant in tail*, and as it was his old eſtate, it is reaſonable it ſhould let in this charge. In *Goddard* verſus *Complin*, 1 *Ch. Caſ.* 120. it was declared, "that if tenant in tail confeſs a judgment, "*&c.* and ſuffer a recovery to any collateral purpoſe, that recovery "ſhall enure to make good all his precedent acts and incumbrances.

Though a conuſee of a judgment has neither the legal eſtate, nor a legal lien, yet a common recovery will let in this judgment.

Has a conuſee of a judgment any eſtate in the lands? None at all, neither legal eſtate, nor legal lien, and yet when a common recovery is ſuffered it lets in this judgment.

It would be a moſt abſurd thing to ſay, a common recovery ſuffered by tenant in tail ſhould let in his leaſe, ſhould let in a prior judgment, and yet not let in a charge under marriage articles, and therefore there is no difference between a legal and equitable eſtate.

A common recovery will let in a charge under marriage articles, and whether it is a legal or equitable eſtate it makes no difference.

Another objection was, that the defendant ought to be conſidered as a purchaſer for a valuable conſideration without notice of theſe articles, and therefore ought not to be affected by it; that undoubtedly the mother was ſo, and if ſhe had been living, could not have been hurt, and that the recovery and ſettlement in 1728. were in contemplation of the ſecond marriage, and extended further; that this marriage was had, and portion paid upon the credit of this ſettlement, and that her ſon will be entitled to the uſes under this ſettlement.

Take it by ſteps.

If the mother, the wife of the ſecond marriage, had been before the court, I do admit ſhe ought to have been conſidered as a purchaſer for a valuable conſideration: And it cannot be doubted where a power is executed under a voluntary ſettlement, if that power is afterwards executed for a valuable conſideration without notice to the perſon who takes under that power, then ſhe ſhall have the benefit of it.

But the ſecond wife is dead, and her jointure is determined.

Next as to the ſon. The only proof was, that during the courtſhip with the laſt wife, ſhe deſired the witneſs to adviſe her about the matter of the marriage, who ſwears he does not believe ſhe had notice of the articles.

This does not at all prove that there was any agreement for making the ſettlement in 1728. or that it was in contemplation of the marriage, neither is it conſiſtent with the uſes of the deed itſelf.

Then the whole of the defence is, that this marriage was had on the credit of this ſettlement.

I think ſo far the evidence does go, that the ſettlement in 1728. was produced to the friends of the wife, and that this was the grounds of the marriage, then the queſtion will be, whether that will make the ſon a purchaſer for a valuable conſideration.

The caſe of *Fitzgerald* and *Lord Falconbridge*, in *Fitzg. Rep.* 207. is a caſe in point; nay a ſtronger caſe, for it was ſaid by the court there, whoever will make himſelf a purchaſer for a valuable conſideration, muſt take by contract, and under an actual conveyance.

Whoever will make himſelf a purchaſer for a valuable conſideration, muſt take by contract, and under an actual conveyance.

There was no contract here to ſupport this conſideration, and the iſſue of the marriage were to take their chance.

Conſider how it operates upon the preſent caſe; there is no recital here in the deed for ſettling a jointure on the wife, or that the wife's portion was, in conſideration of the eſtate ſettled upon the ſons of the marriage.

Shewing a ſettlement to parties before marriage, and their relying upon the credit of it, will not make the iſſue of the marriage purchaſers.

It would be extremely dangerous to ſay, that the ſhewing a ſettlement to parties before marriage, and their relying upon the credit of it, will make the iſſue of that marriage purchaſers for a valuable conſideration.

But that is quite different from the doctrine of the court in *Fitzgerald* and Lord *Falconbridge*, which was determined by the Houſe of Lords, and the court muſt take things as they find them; and conſequently the plaintiff is intitled to have a ſettlement of the eſtate in tail, and muſt hold and enjoy till the defendant comes of age, and then he muſt convey; and therefore his Lordſhip decreed the plaintiff was intitled to a ſpecific performance of the articles in 1719.

Caſe 126.

Smith verſus *Cooke*, *July* 14, 1746.

S. who was tenant in tail of the eſtate in queſtion, letts a leaſe of it in 1741, to the plaintiff his ſon, who was to enjoy it at the rent of 25 *l. per ann.* the father was an inſolvent debtor, and in *October* 1743. was diſcharged under 16 *Geo.* 2. the bill is brought againſt the defendant for an account of profits, and of timber felled: *The plaintiffs intitled to ſuch account from the time only of the father's diſcharge, for they could have no right till their title to the eſtate accrued.*

THE father of the defendant, who was tenant in tail of the eſtate in queſtion, letts a leaſe of it in 1741 to his ſon, who was to enjoy it at the rent of twenty-five pounds *per ann.* and who covenanted to maintain his mother, and to pay the land tax.

The father being an inſolvent debtor, was cited in by one of his creditors, to deliver in a ſchedule of his eſtate and effects according to the form of the act of parliament in the 16th year of *George* the Second, and in *October* 1743, the father of the defendant was diſcharged under this act.

The bill is brought againſt the defendant, for an account of profits, and of timber felled.

LORD CHANCELLOR.

I am of opinion the plaintiffs are intitled to it from the time of the diſcharge of the father, *the inſolvent debtor*, but not before, for they could have no right till their title to the eſtate accrued, which was not till *October* 1743.

As to the leaſe in 1741, no body can ſay it was made fraudulently, either upon the act of parliament, or againſt this particular ſet of creditors; for the making the ſon covenant to pay the land tax is not an unreaſonable thing, nor was the covenant ſo to maintain the mother, who appears to be a lunatick, and wanting ſuch care and ſupport; and therefore upon the foot of the father's contract, I am of opinion, the plaintiffs are not intitled to an account from the time the ſon entered into poſſeſſion, by virtue of this leaſe.

But the material queſtion is, whether this eſtate veſted in the aſſignee of the inſolvent debtor by virtue of the compulſory clauſe in this act.

The defendant inſiſted, that as his father was cited in by a creditor, and did not himſelf claim the benefit of the act, the eſtate-tail did not veſt in the aſſignee.

Though the father, when cited in by the creditor, did not claim this eſtate-tail, it veſted equally in the aſſignee as if the father had done it, and if I had any doubt, would have ordered a caſe for the opinion of the judges.

I am of opinion it did veſt in the aſſignee equally as if the inſolvent debtor had claimed it himſelf, and if I had any doubt, would have made a caſe for the opinion of the judges, but I have none.

It is a moſt juſt clauſe, and almoſt a reproach to former acts of parliament, that it was not inſerted in them; before this, a debtor would lie in gaol four or five years, and waſte his ſubſtance, and if his conſcience would digeſt it, by his oath get diſcharged under an act for relief of inſolvent debtors.

The creditor had no remedy, could not go to a juſtice of peace and deſire the debtor might deliver up his effects, and let him be diſcharged upon ſo doing.

Whether the clauſe in this act is ſo penned as to obtain that end, is another conſideration.

The general words in the firſt clauſe take in eſtates-tail.

The great objection ariſes on the words in the 32d clauſe; " whereas it may happen, that ſeveral perſons, *who may claim and* " *be intitled* to the benefit of this act, are ſeiſed of an eſtate-tail " in any freehold or copyhold lands, *&c.* Be it enacted, that in " every ſuch caſe, ſuch perſon or perſons ſo ſeiſed as aforeſaid, " *and who ſhall be intitled unto, and claim* the benefit of this act, " ſhall, to all intents and purpoſes whatſoever, in law, be deemed " and taken, and is and are hereby declared to be ſeiſed of ſuch " lands in fee-ſimple.

It has been ſaid that this clauſe relating to eſtates-tail, is confined to ſuch perſons as may claim or are intitled to the benefit of this act, and that the claim is by the voluntary petition of the debtor himſelf.

The foundation for the relief given by this act was, that it would be no prejudice to a third perſon; for whatever property a man had, which he could by any conveyance diſpoſe of, it was but juſt his creditors ſhould have the benefit, as of an eſtate-tail for inſtance by a recovery, and therefore the legiſlature thought it juſt that an eſtate-tail ſhould be for their benefit.

Where is the difference, if a creditor is obſtinate, and thinks fit to lie in gaol, and not apply for the benefit of the act, and his creditors apply for him?

" And whereas ſeveral perſons who are priſoners for debt, choſe " rather to continue in priſon, and ſpend their ſubſtance there, " than diſcover, and *deliver up* to their creditors, their eſtate and " effects, in order to the ſatisfaction of their juſt debts, *&c.* ſuch " priſoner ſhall, before the juſtices at the quarter ſeſſions, at the de- " ſire of one or more of his creditors, be obliged to deliver in upon " oath, and ſubſcribe the like ſchedule of his eſtate and effects, " *to be veſted, aſſigned, and equally divided,* for the benefit of his " creditors, *&c.*" clauſe the 37th.

What is the meaning of *deliver up?*

Why, that he ſhall make a ſchedule of his eſtate and effects.

It was ſaid for the defendant, that the act meant he ſhall deliver up *in like form.*

But, I am of opinion, the act did not mean he ſhould deliver up in like form, but in ſubſtance the ſame.

Then to what intent?

To be veſted, aſſigned, and equally divided.

Where an inſolvent perſon is ſeiſed of a remainder in tail, reverſion in fee in himſelf, with an eſtate for life in a ſtranger, he will be obliged to inſert this in his ſchedule.

Suppoſe the inſolvent perſon was ſeiſed of a remainder in tail, reverſion in fee in himſelf, with an eſtate for life in a ſtranger, he would be obliged to inſert this in his ſchedule; if this was not to be the conſtruction, the act would do more hurt than good, and it ought to be expunged in the next act.

Upon

Upon the whole of this clauſe, I am of opinion, the intent of the act is to make the remedy to the creditor equal and co-extenſive, for the words, though ſhort, are relative to all former deſcriptions under other acts.

The intent of the act is to make the remedy to the creditor equal and co extenſive, for the words are relative to all former deſcriptions under other acts.

The ſtatutes relating to bankruptcy are all *compulſory*; there is no reaſon, in point of juſtice, to exempt debtors under theſe acts of parliament, but they ought to be equally *compulſory*; it would make ſtrange work to ſay there was any difference between creditors.

The inſolvent debtor ſtatutes are equally compulſory on the debtor with the ſtatutes which relate to bankrupts, for it would be pernicious to make any difference between creditors.

" And if any *ſuch priſoner, ſo brought up as aforeſaid*, ſhall neglect or refuſe to deliver in, and ſubſcribe ſuch ſchedule within ſixty days, he, ſhe, or they, ſo neglecting or refuſing, ſhall upon conviction thereof be adjudged guilty of felony, and ſhall ſuffer death as a felon without benefit of clergy;" the laſt part of the 37th clauſe.

Such priſoner, ſo brought up as aforeſaid, is the perſon claiming, and intitled to the benefit of this act.

Upon the whole of this clauſe, the intention is to make debtors eſtates liable in the one caſe, juſt as they would have been in the other.

If a debtor claim the benefit of this act *after* his diſcharge, it is equally within the meaning, as if he had claimed a *parte ante* his diſcharge, and may as properly be ſaid to claim, and be intitled.

I am of opinion clearly, the aſſignee is intitled to the remainder in tail.

The next queſtion is, whether he has a right to an account of timber felled?

As he is intitled to the eſtate, conſequently he is intitled to the timber.

But then, it is ſaid, they muſt take their remedy at law.

After the eſtate of the leſſee is determined, and a new leſſee is in poſſeſſion, a perſon, merely for an account of timber felled by way of wrong, could not come into a court of equity.

But where the perſon continues in poſſeſſion, and conſequently in a condition of committing more waſte, there a perſon is proper to come into equity for an injunction to ſtay waſte: And though the plaintiffs have not actually moved for an injunction, they might re-

ſerve that relief till the hearing of the cauſe, if they thought proper, and I am of opinion it is incident to their eſtate, and they are intitled to an account for ſuch waſte.

A remainder-man in tail, or a reverſioner in fee, may come into this court to have the title deeds ſecured for their benefit, though an eſtate for life is ſtanding out; and the plaintiffs in this caſe may equally come here to pray a ſale of the eſtate.

There are a great many caſes where a remainder-man in tail, or a reverſioner in fee, may come into this court to have the title deeds ſecured for their benefit, though an eſtate for life is ſtanding out; and I do not ſee why the plaintiffs here may not as well come into this court, to pray a ſale of the eſtate, and it has been done under commiſſions of bankruptcy.

Upon the whole I am of opinion, the plaintiffs are proper in their remedy, and proper in their right.

" And declare that the plaintiffs, as aſſignees of the eſtate and " effects of *John Cooke*, under the 16th of the preſent King, for " the relief of inſolvent debtors, are intitled by virtue of that act to " have the remainder of the eſtate in queſtion, which was veſted " in *John Cooke*, to be applied towards payment of the debts of " the creditors; but the defendant *John Cooke*, the eldeſt ſon and " heir of *John Cooke* the inſolvent debtor, now preſent in court, of- " fering to pay off all ſuch debts of his father as remain due and " unſatisfied, together with the coſts of the execution of the truſt; " I order that it be referred to Maſter *Holford*, to take an account " of all the debts at and before the time of his diſcharge, and of the " plaintiffs expences in the execution of the truſt, and to tax their " coſts of this ſuit, and all the creditors are to come in before the " Maſter, and prove their debts within a time to be limited for that " purpoſe, or, in default thereof, they are to be excluded the bene- " fit of this decree: And I decree that the defendant *John Cooke* do, " purſuant to his ſubmiſſion, pay to the plaintiffs the ſurplus of " what ſhall be found due for ſuch debts, which ſhall not be ſatisfied " by the application of the eſtate and effects of *John Cooke*, together " with what ſhall be found due to the plaintiffs for the expences " of the execution of the truſt, and for their coſts of this ſuit; and " upon ſuch payment, I do order that the plaintiffs convey all their " eſtate, right, title and intereſt, in the premiſſes in queſtion, to " ſuch perſon as ſhall be appointed by the defendant *John Cooke*, " and this decree to be without prejudice to any queſtion that may " ariſe between the defendant *John Cooke*, as iſſue in tail, or heir " at law of his father, and the repreſentatives of his father's per- " ſonal eſtate."

Buxton

Buxton verſus *Liſter and Cooper, July* 15, 1746. Caſe 127.

THE defendants entered into an agreement for the purchaſe of ſeveral timber trees, marked and growing at the time it was reduced into writing; and, on the firſt of *November* 1744, the following memorandum was ſigned by the parties.

" *Matthew Liſter* and *John Cooper* have agreed with *Joſeph Bux-*
" *ton* for the purchaſe of all thoſe ſeveral large parcels of wood,
" conſiſting of oaks, aſhes, elms, and aſps, which are numbred,
" figured, and cyphered, ſtanding and being within the townſhip
" of *Kirkby*, for the ſum of 3050*l.* to be paid at ſix ſeveral pay-
" ments, every *Lady Day* for the ſix following years; and *Liſter*
" and *Cooper* to have eight years for diſpoſing of the ſame; and
" that articles of agreement ſhall be drawn and perfected as ſoon
" as conveniently can be, with all the uſual covenants therein to be
" inſerted concerning the ſame."

In general this court will not entertain a bill for a ſpecific performance of contracts for chattels, or which relate to merchandiſe, but leave it to law, where the remedy is much more expeditious; but, in the preſent caſe the agreement not being final, but to be made complete by ſubſequent acts, a bill to carry it into execution will be allowed.

There were two parts of the agreement.

The plaintiff ſigned one, and the defendants the other; one was left in the cuſtody of the plaintiff, and the other in the cuſtody of the defendants.

The bill was brought by the vendor for the ſpecific performance of the agreement.

Lord Chancellor, upon the opening, ſaid, he did not know any inſtance of a bill of this nature, where it is a mere chattel only, and nothing that affects the realty.

That a bill might as well be brought for compelling the performance of an agreement for the ſale of a horſe, or for the ſale of ſtock, or any goods or merchandiſe.

Sir *Joſeph Jekyl* did, in *Cud* verſus *Rutter*, 1 *P. Wms.* 570. decree a ſpecific performance in the caſe of a chattel, but Lord *Macclesfield* reverſed it, and it has been the rule of the court ever ſince, not to retain ſuch a bill.

The proper remedy is an action at law, where you may recover damages for the non-performance of the agreement.

The defendants council, to ſhew the impropriety of ſuch a bill, and that the parties ought to be left to law, cited *Rolt's Reports* 493. and *Latch's* 172.

After hearing what the plaintiff's council could alledge, in order to take this caſe out of the general rule of the court, *Lord Chancellor* delivered his opinion as follows:

The general queſtion is, as to the decree for ſpecific performance, and this divides it ſelf into two ſubordinate ones.

Firſt, Whether the plaintiff is intitled to ſeek his remedy in a court of equity for a ſpecific performance.

Secondly, Whether, as to the merits of his caſe, he is intitled to ſuch a decree.

As to the firſt, I am of opinion, that this is ſuch an agreement, though for a perſonal chattel, that the plaintiff may come here to have a ſpecific performance.

To be ſure, in general this court will not entertain a bill for a ſpecific performance of contracts of ſtock, corn, hops, *&c.* for as thoſe are contracts which relate to merchandize, that vary according to different times and circumſtances, if a court of equity ſhould admit ſuch bills, it might drive on parties to the execution of a contract, to the ruin of one ſide, when upon an action, that party might not have paid, perhaps, above *a ſhilling* damage.

Therefore the court have always governed themſelves in this manner, and leave it to law, where the remedy is ſo much more expeditious.

As to the caſes of contracts for purchaſe of lands, or things that relate to realties, thoſe are of a permanent nature, and if a perſon agrees to purchaſe them, it is on a particular liking to the land, and is quite a different thing from matters in the way of trade.

But, however, notwithſtanding this general diſtinction between perſonal contracts, and for goods, and contracts for lands, yet there are indeed ſome caſes where perſons may come into this court though merely perſonal, and the plaintiff's council have cited a caſe in point, *Taylor* verſus *Neville*.

That was for performance of articles for ſale of eight hundred ton of iron, to be paid for in a certain number of years, and by inſtallments, and a ſpecific performance was decreed.

Such ſort of contracts as theſe, differ from thoſe that are immediately to be executed.

There are ſeveral circumſtances which may concur.

A man may contract for the purchaſe of a great quantity of timber, as a ſhip-carpenter, by reaſon of the vicinity of the timber, and this on the part of the buyer.

On the part of the ſeller, ſuppoſe a man wants to clear his land, in order to turn it to a particular ſort of huſbandry, there nothing can anſwer the juſtice of the caſe, but the performance of the contract in *ſpecie*.

In the caſe of *John* Duke of *Buckinghamſhire* verſus *Ward*, a bill was brought for a ſpecific performance of a leaſe relating to *Alum Works*, and the trade thereof, which would be greatly damaged if the covenant was not performed on the part of *Ward*.

The covenants lay there in damages, and yet the court conſidered if they did not make ſuch a decree, an action afterwards would not anſwer the juſtice of the caſe, and therefore decreed a ſpecific performance.

This is ſomething of the like kind; the memorandum appears not to be the final contract, but is to be made complete by ſubſequent articles.

I am doubtful, whether at law the plaintiff would not have been told this was an incomplete agreement.

Suppoſe two partners ſhould enter into an agreement by ſuch a memorandum as is in the preſent caſe, to carry on a trade together, and that it ſhould be ſpecified in the memorandum, that articles ſhould be drawn purſuant to it, and before they are drawn, one of the parties flies off, I ſhould be of opinion, upon a bill brought by the other in this court, for a ſpecific performance, that notwithſtanding it is in relation to a chattel intereſt, yet a ſpecific performance ought to be decreed.

On the circumſtances of the preſent caſe, ſuch a bill ought to be entertained, but at the ſame time I will add that courts ought to weigh with great nicety caſes of this kind, before they determine the bill proper, where it is a mere perſonal chattel.

The court ought to weigh with great nicety caſes of this kind, before they determine the bill proper, where it is a mere perſonal chattel.

Secondly, If the plaintiff, on the merits of the caſe is intitled to a decree.

Every agreement of this ſort ought to be *certain, fair* and *juſt* in all its parts, or this court will not decree a ſpecific performance.

Nothing is more eſtabliſhed in this court, than that every agreement of this kind ought to be certain, fair and juſt in all its parts.

If any of thoſe ingredients are wanting in the caſe, this court will not decree a ſpecific performance.

For it is in the diſcretion of the court, whether they will decree a ſpecific performance, becauſe otherwiſe, as I ſaid before, a decree might be made which would tend to the ruin of one party.

One objection made by the defendant's council to the decreeing a ſpecific performance was *miſrepreſentation.*

This depends upon the evidence of *John Cooper*, ſon of the defendant *Cooper*, that his father offered the plaintiff 2800 *l.* but he inſiſted on 3500 *l.* and ſaid *Fenwick and Clark*, two timber merchants, had valued it at ſo much, and that this was true on his honour, and when he ſaid a thing on his honour, the defendant ought to believe it.

Afterwards the defendants agreed to give 3050 *l.* for the wood, on the opinion they had of *Fenwick and Clark's judgment.*

If this be true, it is an ingredient which will induce a court of equity not to decree a ſpecific performance, for it comes out now that *Fenwick and Carter did not ſet any greater valuation than* 2500 *l. upon the timber, and this miſrepreſentation* was the ground which induced the defendants to come into the agreement.

This fact is very particularly put in iſſue, and yet the plaintiff, who examined *Okey and his wife* that were preſent when this diſcourſe paſſed, do not aſk them as to this fact.

There is nothing inconſiſtent therefore in their depoſition from *Cooper*'s.

The next point is, as to the preparation of the articles.

Whether there are defects or omiſſions which ought to have been inſerted.

It has been inſiſted by the defendants, that they would have had the uſual clauſe inſerted in the articles relating to the buyer's horſes being permitted to graze on the land, where the timber ſtands, and likewiſe would have had a covenant for indemnifying the defendants in falling the timber, becauſe as it grows in hedge-rows, one ſide belongs to a ſtranger, but the plaintiff refuſed it.

Therefore, if it is moſt natural to ſuppoſe it would fall on that ſide, the defendants ought to have been indemnified from actions which might have been brought for a treſpaſs on the ſtranger's land.

But then the council differ as to the conſequences.

The plaintiff inſiſts, the articles ought to be ſent to the Maſter, to ſee if there are uſual covenants.

In caſe of land the plaintiff's council would have been right.

But a perſonal contract is quite different, becauſe when the defendants ſaw that the plaintiff would not inſert theſe covenants, they had no occaſion to wait the event of a Chancery ſuit, but might go to another market to ſupply themſelves.

Upon the whole, I am of opinion the bill muſt be diſmiſſed, and if it was to be diſmiſſed upon *the miſrepreſentation* it ought to be with coſts: but what I would propoſe is, that if the plaintiff will conſent to give up the agreement, I will diſmiſs it without coſts; but if he will bring an action, then with coſts.

The plaintiff waving the agreement, his Lordſhip decreed accordingly.

Berney verſus *Eyre*, *July* 22, 1746. Caſe 128.

THE only material queſtion upon the rehearing was, whether the heir at law is intitled to coſts.

Where a deviſee brings a bill merely *in perpetuam rei memoriam*, and the heir at law only croſs-examines the witneſſes, he is intitled to his coſts, but if to encounter the will, he ſhall not.

Lord *Hardwicke* laid down the following general rules:

That if a deviſee brings a bill merely *in perpetuam rei memoriam*, and the heir at law does nothing more than croſs-examine the witneſſes, who are produced to confirm the will, he is entitled to his coſts.

If he examines witneſſes to encounter the will, then he ſhall not have his coſts.

This is, where the bill does not pray relief, or is not brought to a hearing.

But when the cauſe is brought to a hearing, if the heir at law has an iſſue directed to try the will, and the will is eſtabliſhed, as he has a right to be ſatisfied how he is diſinherited, he ſhall have his coſts.

As an heir has a right to be ſatisfied how he is diſinherited, though he has an iſſue directed to try it, and the will is eſtabliſhed, yet he ſhall have his coſts.

If

If the heir ſets up a diſability againſt the perſon who made the will, and fails, he ſhall not have his coſts.

If he ſets up inſanity, or any other diſability againſt the perſon who made the will, and fails, he ſhall not have his coſts.

The court will give coſts againſt an heir in a caſe of ſpoliation or ſecreting of a will.

But it muſt be a very ſtrong caſe, which will induce the court to give coſts againſt him, as *ſpoliation* or ſecreting the will.

I ſhould have decreed the defendant the heir his coſts, notwithſtanding one witneſs has ſworn poſitively to an attempt of concealing the will, becauſe it is as poſitively denied by the defendant's anſwer; but then it appears likewiſe, that after the heir was informed that the will was in the hands of a particular perſon, he went and took out adminiſtration upon the oath uſual on thoſe occaſions, without ever making any inquiry after the perſon whom he was informed by letter had the will in his cuſtody.

This is ſuch an improper behaviour in the heir, that I will not give him his coſts.

Caſe 129. *Joynes* verſus *Statham*, *October* 29, 1746.

A bill brought to carry an agreement into execution for a leaſe of a houſe which was ſigned by the defendant the leſſor only, who by his anſwer inſiſted it ought to be inſerted in the agreement that the tenant ſhould pay the rent clear of taxes, the plaintiff who wrote the agreement having omitted to make it ſo, and offered to read evidence to ſhew this was a part of the agreement. *The evidence ought to be admitted, for if there has been any omiſſion, the defendant ought to have the benefit of it by way of objection to a ſpecific performance.*

THE bill was brought to carry an agreement into execution for a leaſe of a houſe during the life of the defendant's wife, which was ſigned by the defendant the leſſor only: upon the face of the agreement the plaintiff was to pay a rent of nine pounds a year.

The defendant inſiſts by his anſwer, that it ought to have been inſerted in the agreement that the tenant ſhould pay the rent clear of taxes, but the plaintiff having written the agreement himſelf, had omitted to make it clear of taxes, and that the defendant, unleſs this had been the agreement, would not have ſunk the rent from fourteen pounds to nine pounds, and offered to read evidence to ſhew this was part of the agreement.

The plaintiff's council inſiſted, that the defendant ought not to be admitted to parol proof, to add to the written agreement, which is expreſly guarded againſt by the ſtatute of frauds and perjuries.

The caſes cited for the plaintiff were *Cheyney*'s caſe, 5 *Co.* 68. *a.* and *Selwin* verſus *Brown*, *Caſ. in Lord Talbot's time* 248.

For the defendant was cited *Walker* verſus *Walker*, *December* the 10th and 11th 1740. before Lord *Hardwicke*. (*Vide ante* 2 *Tra. Atk. Caſe* 92. *pa.* 98.

LORD CHANCELLOR.

I permitted this point to be debated at large, becauſe it is deciſive in the cauſe, for I am very clear this evidence ought to be read.

This has been taken up by way of objection to the plaintiff's bill.

The conſtant doctrine of this court is, that it is in their diſcretion, whether in ſuch a bill they will decree a ſpecific performance, or leave the plaintiff to his remedy at law.

In the diſcretion of this court, whether they will decree a ſpecific performance, or leave the plaintiff to his remedy at law.

Now has not the defendant a right to inſiſt, either on account of an omiſſion, miſtake or fraud, that the plaintiff ſhall not have a ſpecific performance?

It is a very common defence in this court, and there is no doubt but it ought to be received, and quite equal, whether it is inſiſted on as a miſtake, or a fraud.

It appears the agreement was drawn and written by the plaintiff himſelf; the defendant too cannot write, but is a *markſman* only; if there has been an omiſſion, ſhould not the defendant have the benefit of it by way of objection to a ſpecific performance?

There have been many caſes in this court, where ſuch evidence has been admitted.

Suppoſe an agreement for a mortgage drawn by the mortgagee, the mortgagor being a markſman, and the mortgagee omits to inſert a covenant for redemption, and then brings a bill to foreclоſe, ſhall not the mortgagor be at liberty to inſiſt in this court upon reading evidence to ſhew the omiſſion?

A mortgagee in an agreement for a mortgage omits to inſert a covenant for redemption, the mortgagor ſhall be permitted to read evidence to ſhew the omiſſion.

So in a caſe which has happened, of the mortgage being drawn in two deeds, one an abſolute conveyance, the other a defeaſance, and the mortgagee omits to execute the defeaſance, the mortgagor ſhall be admitted to ſhew the miſtake.

A mortgage drawn in two deeds, one an abſolute conveyance, the other a defeaſance, which mortgagee omits to execute, the mortgagor ſhall be admitted to ſhew the miſtake.

Suppoſe the defendant had been the plaintiff, and had brought the bill for a ſpecific performance of the agreement, I do not ſee but he might have been allowed the benefit of diſcloſing this to the court.

Becauſe it was an agreement executory only, and as in leaſes there are always covenants relating to taxes, the Maſter will inquire what the agreement was as to taxes, and therefore the proof offered here is not a variation of the agreement, but is explanatory only what thoſe taxes were: I am of opinion to allow the evidence of the omiſſion in the leaſe to be read.

Caſe 130. *Framlingham* verſus *Brand*, *November* 7, 1746.

S. by her will ſays, I deviſe my houſe, &c. to my ſon *Robert*, and his heirs and aſſigns for ever; and in caſe he ſhall happen to die in his minority, and unmarried, or without iſſue, I give it to my ſon *Harry* and his heirs. *The eſtate is to go over only upon one contingency of* Robert's *dying during his minority, and the eſtate veſted in him upon his coming of age, and is ſubject to his debts on ſpecialty.*

THE teſtatrix, who was the mother of the plaintiff's huſband, and the defendant, by two *venters*, by her will ſays, I deviſe my houſe, &c. to my ſon *Robert*, (the plaintiff's huſband) and his heirs and aſſigns for ever; *and in caſe he ſhall happen to die in his minority, and unmarried, or without iſſue, I give it to my ſon Harry (the defendant) and his heirs.*

The mother died ſoon after ſhe made the will; *Robert came of age*, and married, but died without iſſue, having left debts by ſpecialty.

The caſes cited for the defendant were *Soule* verſus *Gerrard*, *Cro. Eliz.* 529. *Woodward* verſus *Glaſsbrooke*, 2 *Vern.* 358. *Hanbury* verſus *Cockrill*, *H. T.* 1650. See *Viner's Abridg.* title *Deviſe* 210. *pl.* 4. Lord *Vaux*'s caſe, *Cro. Eliz.* 267.

LORD CHANCELLOR.

The queſtion is, if this was a deviſe of n eſtate-tail in the plaintiff's huſband, with remainder over to *Henry*; or if a fee with an executory deviſe to *Henry* on theſe contingencies.

I am clearly of opinion this is a fee with an executory deviſe, and agreeable to all the caſes.

The firſt words give a fee; but it has been ſaid, it may be by explanatory words controuled to an *entail*; the queſtion is, if that has been done.

The defendant's council ſay, that to make it an entail, the teſtatrix need have done no more than have ſaid, if *Robert* dies without iſſue, I give it to my ſon *Harry*, and all the reſt is immaterial, *and that this would* have turned the general heirs into heirs of the body; but inſiſt ſtill that what follows are three diſtinct contingencies, *if Robert dies in his minority, if he dies unmarried, or if he dies without iſſue.*

Should this conſtruction prevail, had *Robert* married and had iſſue, and had died under age, if there are three ſeveral contingencies,

cies, the child would have been diſinherited, and the eſtate gone over to another.

This would be contrary to the meaning of the will, and all the rules, which endeavour to make a conſtruction agreeable to the intention of a teſtator, which is in this caſe confined to *Robert*'s dying unmarried, or without iſſue, during his minority.

This is not like the caſe of *Soule* verſus *Gerrard*, *Cro. Eliz.* 529. and beſides at that time the doctrine of executory deviſes was not well ſettled.

Here it is one contingency of *Robert*'s dying under age, attended *with two qualifications*, of his being unmarried, or dying without iſſue.

The word *or* has a reference to the different qualifications that may happen during the minority, which are all tied up to *Robert*'s dying under age; and though the expreſſion *unmarried* was unneceſſary, yet the mother intended to expreſs her deſire, that if he married under age, the eſtate ſhould veſt ſo as to entitle the wife to dower, therefore is different from Lord *Vaux*'s caſe in *Cro. Eliz.* 267. becauſe there it appears by what the teſtator clearly expreſſed, that he deſigned by the words to make the ſeveral ſentences ſo many contingencies.

But it is not a general rule, that *a disjunctive* at the end of a period ſhall make all the preceding ſentences disjunctives, if the intention appears againſt it.

A disjunctive at the end of a period ſhall not make all the precedent ſentences ſo, if the intention appears againſt it.

Upon the whole, I think the eſtate is to go over only upon one contingency of *Robert*'s dying during his minority, ſubject to the qualifications of his being unmarried, and without iſſue at his death; and conſequently the eſtate veſted in the plaintiff's huſband, *upon his coming of age*, and is ſubject to his debts on ſpecialty.

Mary Phillips verſus *Conſtantia Phillips alias Muilment.* Caſe 131. *November* 6, 1746.

MR. *Evans*, on behalf of *Conſtantia Phillips*, moved to refer to the Maſter, to whom the cauſe ſtands referred, the affidavit of her ſolicitor for impertinence, it being full of *Conſtantia Phillips*'s going to maſquerades, and balls, and was made in the courſe of the inquiry before the Maſter, about his bill of coſts.

The court made an order to refer to a Maſter the affidavit of the plaintiff's own ſolicitor for impertinence.

Mr. Baron Clark ſitting for Lord Chancellor, ſeemed to doubt whether it could be done; but Mr. *Evans* informing him that there had

had been ſuch motions, *Mr. Baron Clark* aſked the regiſter *Mr. Rainsford*, what was the practice, who ſaid, there had been ſuch orders; and upon that *Mr. Baron Clark* directed it accordingly.

Caſe 132. *Worſley* verſus *the Earl of Scarborough, November* 15, 1746.

LORD Chancellor ſaid, that where a ſum of money in truſt is already laid out upon a real ſecurity, and afterwards the ſaid ſum is laid out by the truſtees upon another eſtate, it is a very different caſe, and ſtands upon very different principles, than where a ſum of money is intended to continue as it is in the hands of truſtees, and they lay out that ſum in the purchaſe of an eſtate; becauſe here the nature of the property is altered, and it is become quite another thing; but in the former caſe the nature of the property is the ſame, and continues unaltered, though it is transferred to another eſtate. *Vide Ryal* verſus *Ryal, February* 4, 1739. 1 *Tra. Atk.* 59.

A decree is not an implied notice to a purchaſer after the cauſe is ended, but it is the pendency of the ſuit that creates the notice; for as it is a tranſaction in a ſovereign court of juſtice, it is ſuppoſed all people are attentive to what paſſes there.

Secondly, That there is no ſuch doctrine in this court, that a decree made here ſhall be an implied notice to a purchaſer after the cauſe is ended; but it is the pendency of the ſuit that creates the notice; for as it is a tranſaction in a ſovereign court of juſtice, it is ſuppoſed all people are attentive to what paſſes there, and it is to prevent a greater miſchief that would ariſe by people's purchaſing a right under litigation, and then in conteſt; but where it is only a decree to account, and not ſuch a one as puts a concluſion to the matters in queſtion, that is ſtill ſuch a ſuit as does affect people with notice of what is doing.

Thirdly, No caſe has gone ſo far, and it would be very inconvenient, if where money is ſecured upon an eſtate, and there is a queſtion depending in this court upon the right of or about that money, *but no queſtion relating to the eſtate, upon which it is ſecured, but is wholly a collateral matter, that a purchaſer of the eſtate pending that ſuit ſhould be* affected with notice by ſuch implication as the law creates by the pendency of a ſuit.

Notice to an agent or council who was employed in the thing by another perſon, or in another buſineſs, and at another time, is no notice to his client who employs him afterwards.

Fourthly, It is ſettled, that notice to an agent or council *who was employed in the thing by another perſon, or in another buſineſs, and at another time*, is *no notice* to his client, who employs him afterwards; and it would be very miſchievous if it was ſo, for the man of moſt practice and greateſt eminence would then be the moſt dangerous to employ.

Graham verſus *Londonderry*, *November* 24, 1746. Caſe 133.

THERE was a queſtion in the cauſe between Mr. *Graham* and Lord *Londonderry*, whether Lady *Londonderry*, now the wife of the plaintiff, but originally the wife of the late Lord *Londonderry*, was entitled in her own right, or as *paraphernalia*, to particular jewels hereafter mentioned.

Diamonds given to the wife by the huſband's father, on her marriage with his ſon, are conſidered as a gift to the ſeparate uſe of the wife, and ſhe is entitled to them in her own right.

Firſt, as to diamonds given her by Governor *Pitt* her huſband's father, and which were a preſent to her on the marriage with his ſon.

LORD CHANCELLOR.

This court of latter years have conſidered ſuch a preſent as a gift to the ſeparate uſe of the wife; and I am of opinion ſhe is entitled in her own right.

The next queſtion was as to four diamonds ſet about the picture of the late regent of *France*.

Lord *Londonderry* returned from *France*, and delivered this picture to Lady *Londonderry*, and ſaid at the ſame time it was a preſent ſent her by the regent of *France*.

A preſent by a ſtranger to the wife during the coverture muſt be conſtrued as a gift to her ſeparate uſe, though not ſo clear a caſe as the other.

If this be conſidered as a preſent from the regent of *France*, it falls under the ſame rule, for being a preſent by a ſtranger during the coverture muſt be conſtrued as a gift to her ſeparate uſe, though I do not think it ſo clear a caſe as the other.

There have been ſeveral caſes.

Mrs. Hungerford's caſe, which was money appropriated for her ſeparate uſe, and decreed to her.

Trinkets given to a wife by a huſband in his life-time, determined to be her ſeparate eſtate.

Another caſe of the late Counteſs *Cowper*, before Sir *Joſeph Jekyl*, ſeveral trinkets were given her by Lord *Cowper* in his life-time, and determined to be her ſeparate eſtate.

Two caſes in my time; the firſt was *Lucas* verſus *Lucas*, *July* 2, 1738. 1 *T. Atk.* 270. there were two queſtions, one in reſpect of one thouſand pounds *South-Sea* annuities, which the huſband had transferred in the name of his wife, the other as to jewels, *&c.* given by the plaintiff's wife's father to the wife.

I was of opinion ſhe was intitled both to the *South-Sea* annuities and the jewels, becauſe I conſidered them as given to her ſeparate uſe.

The ſecond caſe was heard upon the 19th of *November* 1740. *Brinkman* verſus *Brinkman*.

Certain pieces of plate were given to the wife immediately after the marriage by the huſband's father; I was of opinion they were to be conſidered as gifts to the wife for her ſeparate uſe.

Next as to the diamond necklance that underwent ſeveral alterations, but muſt be confined to ſuch diamonds as were in it at the time of Lord *Londonderry*'s death.

This is not to be conſidered as a gift merely to the ſeparate uſe of the wife.

Where a huſband expreſly gives a thing to a wife to be worn as ornamaments of her perſon only, they are to be conſidered merely as *paraphernalia*.

I have indeed admitted a huſband may make ſuch gifts, but where he expeſſly gives any thing to a wife to be worn as ornaments of her perſon only, they are to be conſidered merely as *paraphernalia*, and it would be of bad conſequence to conſider them as otherwiſe; for if they were looked upon as a gift to her ſeparate uſe, ſhe might diſpoſe of them abſolutely, which would be contrary to his intention.

But this will be the ſame thing as to Lady *Londonderry*'s intereſt, if it can be proved ſhe wore them as the ornaments of her perſon.

It is not neceſſary to prove ſhe wore them all times, but only upon birth days, and other publick occaſions, which it has been proved ſhe did.

I am therefore of opinion ſhe is intitled, unleſs the objection ſhould prevail, of the alienation by the huſband in his life-time.

A huſband may alien the jewels a wife wears for the ornament of her perſon.

For whatever jewels a wife wears for the ornament of her perſon, the huſband may alien in his life-time.

But I am of opinion the act Lord *Londonderry* did amounted not to an alienation.

The diamond necklace was pledged as a collateral ſecurity for a thouſand pounds borrowed by Lord *Londonderry*, of Mr. *Middleton*, and a bond given at the ſame time, which ſhews it was intended as a perſonal ſecurity from himſelf; a power likewiſe was given to Mr. *Middleton*, whilſt Lord *Londonderry* was out of *England*, to ſell the necklace for 1500 *l.*

This

This does not amount to a ſale, but only a neceſſary power in order to reimburſe Mr. *Middleton*, when ſold, his principal and intereſt.

But it was not ſold, and therefore at his death ſtood only as a pledge.

I am of opinion, if a huſband pledges the wife's *paraphernalia*, and dies leaving a ſufficient eſtate to redeem the pledge, and pay all his debts, ſhe ſhall be entitled to have it redeemed out of the huſband's perſonal eſtate.

If a huſband pledges the wife's *paraphernalia*, and leaves a ſufficient eſtate to redeem the pledge, ſhe is entitled to have it redeemed out of his perſonal eſtate.

The caſe of *Tipping* verſus *Tipping* in 1 *P. Wms.* 730. is a much ſtronger caſe; that the right of the wife to *paraphernalia* is to be preferred to that of a legatee; a leading caſe, and has been followed by the court ever ſince.

The right of the wife to *paraphernalia* is to be preferred to that of *a legatee*.

Suppoſe Lord *Londonderry* had given this necklace to a legatee ſpecifically, the legatee would have been entitled to come into this court to have it diſincumbered, and the right of the wife is ſuperior to that of any legatee; and therefore I declare ſhe is entitled to the necklace, and as it has been ſold ſhe is entitled to an account according to the value at which it has been ſold.

As the diamond necklace has been ſold, Lady *Londonderry* is entitled to an account according to the value at which it has been ſold.

Benſon verſus *Gibſon*, *November* 26, 1746. Caſe 134.

A Bond was given by the plaintiff to the defendant, who was a hair-merchant, as a ſecurity for his ſervice and behaviour in *Flanders* as an agent for the defendant in buying hair there; the plaintiff was to ſtay abroad till a certain ſeaſon, and as a ſecurity for his performance of the agreement he depoſited a hundred pounds in the hands of the defendant.

A bond given by the plaintiff to the defendant, who was a hair merchant, as a ſecurity for his ſervice and behaviour in *Flanders* as an agent for buying hair, and as a ſecurity for his performance of the agreement depoſited 100 *l.* in the defendant's hands. He bought only 5 *l.* worth of hair, and returned to *England* before the time agreed. *This penalty cannot be decreed here, becauſe this is a bond* for ſervice *only, and different from* a nomine pœnæ *in leaſes to prevent a tenant from plowing.*

The plaintiff bought but *five* pounds worth of hair for the defendant, and returned to *England* before the time agreed between them.

The bill was brought for fifty pounds a year agreed to be paid by the defendant for the plaintiff's trouble, and alſo for *the depoſit*.

It

It was inſiſted for the defendant this was a breach of the plaintiff's duty, and a forfeiture of the bond, and that the defendant has a right to retain the hundred pounds in ſatisfaction of the penalty; and that this court will not relieve againſt it, for it is the ſtated damages between the parties; and they cited the caſe of *Ray* verſus *the Duke of Beaufort*, *(ſee before caſe* 154.*)* before Lord *Hardwicke*, *June* 5, 1741. and likewiſe compared it to the caſes of *nomine pœnæ* in leaſes.

LORD CHANCELLOR.

I cannot decree this penalty here, becauſe this is a bond for ſervices only, and different from a *nomine pœnæ in leaſes*, to prevent a tenant from plowing, becauſe that is the ſtated damages between the parties.

Where a perſon is guilty of a breach of a bond given as a ſecurity not to defraud the revenue, this court will not relieve againſt it, becauſe it is conſidered in law as a crime.

Nor is it like the caſe of bonds given as a ſecurity not to defraud the revenue, becauſe there, where a perſon is guilty of a breach, it is conſidered in law as a crime, and this court will not relieve for that reaſon.

The court in this caſe can only direct an action at law upon a *quantum damnificatus*, to try how far the defendant has been damnified.

Here I cannot decree the penalty, but muſt direct an action at law upon *a quantum damnificatus*, to try how far the defendant has been damnified by the plaintiff's non-performance of the ſervice.

Lord Hardwicke recommended it to the parties to agree it upon the following terms; that the defendant ſhould pay back only ninety pounds of the depoſit, and the bill to be diſmiſſed without coſts of either ſide; which was agreed to accordingly.

Caſe 135. *Lampley* verſus *Blower*, *November* 27, 1746.

A. H. by her will ſays, I give to my nieces *F. L.* and *A F.* each one half of the produce of bank ſtock *and to their iſſue*, and if either ſhall happen to die before the legacy become due to her, *and leave no iſſue*, the ſhare of her ſo dying ſhall go to the ſurvivor. *F. L.* died before the teſtatrix, leaving a ſon, who has brought his bill for a moiety of the produce of the bank ſtock. The words leave no iſſue confines it to *F. L.'s leaving no iſſue* at the time of her death, and are relative to any child the legatee might have at her death, and therefore a moiety of the produce of the bank ſtock was decreed to the ſon of *F. L.*

ANN Hough by her will ſays, " I give to my nieces *Frances* " *Lampley*, the wife of *Lampley*, and *Ann Blower*, both " in *Barbadoes*, each one half of the produce of bank ſtock, *and* " *to their iſſue*, and if either of them ſhall happen to die before the " legacy become due to her, *and leave no iſſue*, the ſhare of her ſo " dying ſhall go to the ſurvivor.

Frances Lampley had a ſon at the time of the deviſe, and died before the teſtatrix, leaving a ſon, the now plaintiff, who brings his bill for the moiety of the produce of the bank-ſtock.

Mr. *Browning* for the plaintiff cited *Wild*'s caſe, 6 *Co.* 16. *b.* and inſiſted a deviſe to the mother and her iſſue makes it a jointenancy, and that, as he has ſurvived his mother, he is become entitled to her whole ſhare.

Mr. Solicitor General for the defendant, who is the reſiduary legatee, inſiſted, that the conſtruction muſt be the ſame, as if Mrs. *Lampley* had ſurvived the teſtatrix.

There is no bequeſt to the anceſtor for life, and therefore the children cannot take by way of remainder, and conſequently it would be contrary to the meaning of the teſtator the iſſue ſhould take.

As it is to both the nieces, and their iſſue, the word *iſſue* can be a word of limitation only.

In caſe ſhe die *and leave no iſſue*, muſt mean to go to iſſue generally.

That the rule laid down by the plaintiff's council is wrong, and inſiſted that a deviſe to *A.* and his iſſue, though *A.* has iſſue at the time, is an eſtate-tail.

LORD CHANCELLOR.

Such a conſtruction muſt be made, as that the plain intention may take place, ſo as it be conſiſtent with rules of law, and ſuch a conſtruction may be made as is not at all repugnant to the rules of law.

The word *iſſue* is capable of three ſenſes.

In one ſenſe, as a word of deſcription to take in jointenancy.

In another, as a word of limitation.

And in a third, as a deſcription of the perſon in remainder.

I am of opinion it is not the *firſt*, to take in jointenancy, becauſe the deviſe is *to them and their iſſue*.

It is true in *Wild*'s caſe the word *child* was conſtrued to give him a jointenancy with the parent, but that determination was before it had been fully ſettled, that the word iſſue was as proper a word of limitation as heirs of the body; as in the caſe of *King* verſus *Melling*, 1 *Ventr.* 214, 225. the ground of the judgment in *Wild*'s caſe was, that there were no words to ſhew they ſhould take by limitation.

But in the preſent caſe here are words to ſhew the iſſue ſhould take after the death of the mother.

The words *leave no iſſue*, are relative to any child the legatee might have at the time of her death.

If it ſtood barely upon the words to *A.* and her iſſue, or to *A.* and her heirs of the body, the firſt taker would have the whole, but it is not meant in that ſenſe.

" *And if either of them ſhall happen to die before the legacy becomes* " *due to her, and leaves no iſſue, the ſhare of her ſo dying ſhall go to the* " *ſurvivor.*

What is the meaning of this contingency?

The will was made in *England*, and the legatees lived in *Barbadoes*; and the teſtatrix could not know at that diſtance but both might have iſſue.

The legacies veſted immediately, and therefore was intended to ſecure it to the iſſue, if the parents died in the teſtatrix's life-time.

This was a contingent limitation to *A. B.* if *F. L.* died without iſſue, and the whole did not veſt in the firſt taker; but according to the reſolution in *Forth* verſus *Chapman* ought to be conſtrued *leaving no iſſue at the time of the death.*

Suppoſe Mrs. *Lampley* had died without leaving iſſue, would not this have been a good deviſe over to the ſurvivor of the nieces? therefore I am of opinion this was a contingent limitation to the other niece *Ann Blower*, if Mrs. *Lampley* died without iſſue, and the whole did not veſt in the firſt taker; and according to the reſolution in *Forth* verſus *Chapman*, 1 *Wms.* 663. ought to be conſtrued *leaving no iſſue at the time of the death.*

In that caſe it was a mixed fund of both real and perſonal eſtate, the preſent is ſtronger, as it is merely a perſonal chattel.

The word *leave* explains the word *iſſue* in the firſt part of the deviſe to mean ſuch as was left at the time of the death.

A. deviſes to a man and his heirs, and afterwards ſays, if he ſhall die without heirs of his body, this controuls it to an eſtate-tail.

There is nothing more common than that ſubſequent words deſcriptive of the contingency explain the former; as a deviſe to a man and his heirs, and afterwards teſtator ſays, and if he ſhall die without heirs of his body, controuls it to an eſtate-tail; ſo here the ſubſequent words, if ſhe ſhall happen to die, *&c. and leave no iſſue*, confines it to leaving no iſſue at her death, and not generally: his Lordſhip decreed a moiety of the produce of the bank ſtock to the plaintiff, the ſon of Mrs. *Lampley*.

Darley

Darley verſus *Darley*, *December* 6, 1746.

Caſe 136.

A Bill was brought by the plaintiff for two legacies of 50*l.* and 50*l.* left to himſelf and his ſiſter under the will of their grandfather, and for the intereſt that has been made thereof.

A bill was brought by the plaintiff for two legacies of 50*l.* left to himſelf and his ſiſter under their grandfather's will, and for the intereſt made of them; the defendant, who is executor to the plaintiff's father, inſiſted on being allowed 105*l.* for putting out the plaintiff apprentice, and 50*l.* for the maintenance and cloathing the ſiſter. *A father cannot apply a legacy left by a relation to a child in the maintenance of ſuch child, nor can he put him out an apprentice with the money ariſing from the legacy.*

The ſiſter's legacy he claims by aſſignment from her.

The defendant inſiſts he is not obliged to account to the plaintiff for principal or intereſt, one hundred and five pounds being expended for putting him out apprentice, and much more than fifty pounds in the maintenance and cloathing the ſiſter.

LORD CHANCELLOR.

Where legacies are given to a child by a relation, a father cannot make uſe of it in the maintenance of ſuch child, but muſt provide for him out of his own pocket; nor can he ſet him out in the world, or put him out an apprentice, or clerk, with the money ariſing from the legacy, and if he does it, he ſhall not be allowed it.

There is another queſtion in relation to an eſtate given to a huſband for the *livelihood* of the wife, whether this ought to be conſidered as a ſeparate truſt for the uſe of the wife.

Where an eſtate is given to a huſband for the livelihood of the wife, he may be conſidered as a truſtee for her ſeparate uſe.

I am of opinion that, where an eſtate is given to a huſband for the uſe of the wife, he may be conſidered as a truſtee for her ſeparate uſe.

To make a ſeparate truſt technical words are not neceſſary.

Technical words are not neceſſary to make it a ſeparate truſt, for the word *livelihood* is ſufficient to ſhew the intention of the giver, that it ſhould be *to her ſole and ſeparate uſe*.

The huſband in his life-time, by note under his hand, dated the 22d of *April* 1715. or in the nature of a certificate, declared his wife might diſpoſe of the ſum of two hundred pounds in ſuch manner as ſhe thought proper.

She ſurvived the huſband, and by will diſpoſes of all ſuch goods, chattels, *&c.* as ſhe had a power to diſpoſe of.

No caſe where it has been held, that a mere voluntary promiſe of a huſband to a wife, and executory only, ſhall be carried into execution by this court.

I do not know of any caſe where it has been held, that a mere voluntary promiſe of a huſband to a wife, and executory only, has been carried into execution by this court, for it is a *nudum pactum*, and would not be carried into execution between ſtrangers; and therefore his Lordſhip ſeemed to think it ought not, where it is a promiſe only from a huſband to a wife.

" *Lord Chancellor* ordered that the bill, ſo far as it ſeeks relief for " the ſum of 200*l.* mentioned in the paper dated the 22d of *April* " 1715. do ſtand diſmiſſed; and further ordered, that it be referred " to a Maſter to compute intereſt on the legacies of 50*l.* each, given " by the will of *John Vincent* to the plaintiff *Theodore Darley*, and " *Elizabeth Darley* his ſiſter, from the time they reſpectively at- " tained their ages of 21, at 5 *per cent. per ann.* and that what ſhall " be found due for principal and intereſt of theſe legacies, be paid " by the defendant *Vincent Darley* to the plaintiff, he having ad- " mitted aſſets of the father for that purpoſe; and alſo to take an " account of ſuch intereſt as was received by *Theodore Darley* the " father in his life-time, on any of the principal ſums, part of the " truſt eſtate; and the defendant *Vincent Darley*, executor of *The-* " *odore Darley*, is to be charged with ſo much as ſhall appear on " the ſaid inquiry to have been got in by *Theodore Darley* the father, " and anſwer the ſame, and alſo the intereſt received by the ſaid " *Theodore Darley* belonging to the truſt eſtate; and the defendant " *Vincent Darley* is to be charged with intereſt for ſo much of the " principal ſums of the truſt money as was received by *Theodore* " *Darley*, and not applied according to the truſt; and the Maſter " is to diſtinguiſh and aſcertain what was due, and in arrear for " intereſt of the truſt money at the time of the death of *Sarah Dar-* " *ley* the plaintiff's mother, and what was ſo due upon arrear at " her death to be paid to the plaintiff *Darley*.

Caſe 137. *Wicks* verſus *Marſhall and others*, *December* 6, 1746.

Where a cauſe ſtands over for want of making ſome defendants parties, you cannot proceed againſt any other, unleſs the plaintiff will ſubmit to diſmiſs his bill, as to thoſe defendants who are improperly brought before the court.

THE bill was brought by the plaintiff, as aſſignee of *Knott* a bankrupt, againſt the defendants, to account for a ſum of money, which the bill charges they have received of *Knott* ſince his bankruptcy.

Some of the defendants being agents only, and not principals, the cauſe was ordered to ſtand over in order to make the principals, parties.

Mr. *Wilbraham* council for the plaintiff, would have gone on againſt another defendant, as it was a diſtinct claim from the reſt of the defendants, but Lord *Hardwicke* ſaid, where a cauſe ſtands over for want of making ſome defendants parties, you cannot proceed againſt any other defendant, unleſs the plaintiff will ſubmit to

diſmiſs his bill, as to thoſe defendants who are improperly brought before the court.

His Lordſhip ſaid, that it was not uſual to bring a bill here for a demand of this nature, when you may recover at law, provided you can prove the perſon who received the money of the bankrupt had notice of his being a bankrupt; but it muſt not be in an action for money had and received to the uſe of the aſſignee under the commiſſion, becauſe that would affirm the contract; but an action of trover would lie for this money.

It is not uſual to bring a bill againſt a perſon for money received of a bankrupt ſince his bankruptcy, when you may recover at law, provided you can prove the perſon who received the money of the bankrupt had notice of his bankruptcy, and an *action of trover* is the proper one for this money.

Barret verſus *Gore and Umfreville, December* 15, 1746. Caſe 138.

THE bill was brought for a ſpecific performance of an agreement, which was depoſited in the hands of the defendant *Umfreville*, by the mutual conſent of the plaintiff, and the defendant Sir *Samuel Gore*, *Umfreville* too was the attorney who drew up the agreement; ſome diſputes ariſing afterwards between the plaintiff and the principal defendant, the plaintiff ſent his agent to *Umfreville*, to deſire a copy of the agreement; he told him he would not give him one, for it was no agreement as he had not been paid for it; at another time threatned he would burn it; and at a third that he would deſtroy it; and afterwards in breach of his truſt delivered it up to the defendant Sir *Samuel Gore*.

At law you may in an action of treſpaſs examine a defendant in favour of another defendant, where he is not intereſted in the event of the cauſe, but there he cannot be examined for the plaintiff.

At the hearing of the cauſe, the defendant Sir *Samuel Gore* offered to read the depoſition of the defendant *Umfreville*, in order to prove it a conditional agreement only, and for other purpoſes.

The plaintiff's council objected to his evidence, as ſwearing to excuſe himſelf, and being likewiſe to prove facts directly contrary to his anſwer.

Lord *Hardwicke* allowed the objection, and ſaid, to be ſure, even at law, you may in an action of treſpaſs examine a defendant in favour of another defendant, where he is not intereſted in the event of the cauſe, but there he cannot be examined for the plaintiff, becauſe by making him a party to the action, the plaintiff has precluded himſelf from the benefit of his evidence.

This court goes farther, and you may not only read the depoſition of one defendant for another, but for the plaintiff likewiſe.

In this court you may read the depoſition of a defendant for the plaintiff likewiſe.

If the defendant may by poſſibility only be liable to coſts, this is always a reaſon for refuſing his evidence, becauſe he is ſwearing to excuſe himſelf.

Yet if the defendant, who is offered in evidence for another defendant, may not neceſſarily, but by poſſibility only be liable to coſts, this is always a reaſon for refuſing his evidence; becauſe he is intereſted ſo far as to be ſwearing to excuſe himſelf.

If a perſon will ſo act as to make himſelf a proper party to the cauſe, and liable *primâ facie* to the coſts, though the only one preſent at the agreement, yet the rule muſt prevail againſt his depoſition being read as evidence.

And though it is objected here by Sir *Samuel Gore*'s council, that this is bringing him before the court with his hands tied, for no other perſon was preſent at the time of the agreement, between *Barret* and *Gore*, but *Umfreville*; yet I do not think even this is ſufficient to entitle the defendant Sir *Samuel Gore* to read this depoſition, for if a perſon will act in ſuch a manner as to make himſelf a proper party to the cauſe, and liable *primâ facie* to the coſts, though he was the only perſon preſent at the agreement, yet the rule muſt prevail againſt his depoſition being read as evidence, and his Lordſhip determined accordingly.

Caſe 139. *Moore* verſus *Moore*, *Rehearing*, *December* 16, 1746.

Where legacies are charged upon perſonal eſtate, and intereſt directed to be paid, the court in this caſe always allows the legal intereſt.

A Perſon by his will in 1713. gives legacies chargeable upon a leaſehold eſtate determinable at the end of ninety-nine years, and directs intereſt to be paid upon thoſe legacies from the year 1720.

At the time of making the will intereſt was at ſix *per cent.* and reduced to five at *Michaelmas* 1714.

At the hearing of the cauſe, there being mortgages upon the leaſehold, the Maſter of the Rolls, ſitting for the Chancellor, decreed the legatee's intereſt only at the rate of *four per cent.* upon a ſuggeſtion it was a deficient eſtate.

It was reheard as to this point only.

Lord Chancellor altered the decree ſo far, and directed *five per cent. intereſt upon the legacies*; and ſaid, though charged upon leaſehold eſtate, yet is the ſame thing as if it was to come out of the perſonal eſtate at large, and the court in this caſe always allows the legal intereſt.

Where legacies are charged on the real eſtate, the rule of the court is to give one *per cent.* leſs than the legal intereſt, as it is a good ſecurity for the principal.

But if legacies are charged upon the real eſtate, the court directs four *per cent.* only, on account of its being a good ſecurity for the principal, and the rule they have conſtantly gone by in this latter caſe is to give one *per cent.* intereſt leſs than the legal.

Brett verſus *Forcer and others*, *February* 3, 1746. Caſe 140.

PREVIOUS to the marriage of *George Savage* with *Frances Forcer*, articles were executed bearing date the 11th of *October* 1740. between *Francis Forcer* and *Frances* his daughter on the one part, and *George Savage* on the other part; and it was thereby covenanted by the father of the intended wife, that at the ſolemnization of the marriage he would pay one thouſand pounds to the huſband, and that his heirs, executors and adminiſtrators ſhould pay likewiſe to the huſband, his executors, adminiſtrators or aſſigns, ſix months after the death of the father, the further ſum of five hundred pounds, as the remainder of the marriage portion of the wife; and by the ſame deed the huſband contracted that he would give ſecurity by ſpecialty, covenant or obligation, that in caſe his wife ſurvived him, his heirs, executors or adminiſtrators, within ſix months after his death, ſhould pay her one thouſand pounds, and likewiſe that ſhe ſhall be intitled to ſuch ſhare of his perſonal eſtate as the wife of a freeman of *London* would be.

Previous to the marriage of *G. S.* the father of the intended wife covenants to pay 1000 *l.* to the huſband on the marriage, and that his heirs, executors, &c. ſhould pay likewiſe to the huſband, his executors, &c. ſix months after the father's death 500 *l.* as the remainder of the wife's portion. After the father in law's death, the huſband being indebted to the plaintiff, aſſigns the 500 *l.* to him as a ſecurity for the debt. *The executrix of the wife's father directed to account for the* 500 *l. to the plaintiff, as it never was the money of the wife, but a debt due to the huſband himſelf.*

The marriage took effect on the 11th of *November*, and the huſband gave his bond three days afterwards.

George Savage is now a bankrupt, but before the bankruptcy, and after the death of his father-in-law, being indebted to the plaintiff, aſſigned the five hundred pounds to him as a ſecurity for the debt.

The bill is brought by the aſſignee of the five hundred pounds, againſt the executrix of the wife's father, againſt *Savage* the bankrupt and his wife, and the aſſignees under the commiſſion, for this five hundred pounds.

Mr. Solicitor General council for the plaintiff, inſiſted that this is out of the common rule, *that whoever comes here for the wife's fortune muſt firſt make a proviſion for her*, becauſe that rule has been confined to perſons who ſtand exactly in the ſame light with the huſband; but the court has diſtinguiſhed where the plaintiff has been a creditor of the huſband for a valuable conſideration, and have decreed for him without obliging him to make any proviſion for the wife.

That there is likewiſe this favourable circumſtance for the plaintiff, the five hundred pounds was not to be paid to the wife, for her ſeparate uſe, but to the huſband himſelf.

He

He cited *Jewſon* verſus *Moulſon*, the 27th of *October* and 6th of *December* 1742. as a caſe in point. (*See* 2 *Tr. Atk.* 417.)

Mr. *Holford* of the ſame ſide cited *Squib* verſus *Wynn*, 1 *P. Wms.* 378. and *Bennet* verſus *Davis*, 2 *P. Wms.* 316. and *Milner* verſus *Colmer*, *id.* 639. and *Cleland* verſus *Cleland*, *Prec. in Chanc.* 63.

Mr. Attorney General, council for the wife of *George Savage* the bankrupt, ſaid, that it was an agreement previous to marriage, and entered into for a valuable conſideration, and executory only.

On the foot of a contract it is a mutual conſideration, and therefore the court will conſtrue it to be ſtrictly carried into execution: And though it is no debt due to the wife, yet moves from the father merely in conſideration of the daughter, and therefore was a proviſion for the benefit of the daughter and her children.

Mr. *Smith* of the ſame ſide ſaid, it was a rule in equity, the court will not decree a hardſhip, and if it ſhould be determined againſt the wife in this caſe, ſhe muſt in all probability ſtarve; that this therefore is a reaſon for the court to ſtand neuter, and not interfere in favour of the huſband.

For the defendant was cited the caſe of *Turton* verſus *Benſon*, *Prec. in Chan.* 522.

LORD CHANCELLOR.

This may be an unfortunate caſe; but notwithſtanding the council for the defendant the wife ſay, I ſhould not interpoſe at all, I cannot in this caſe refuſe to make a decree; for if the court was to ſtand neuter, the legal intereſt would be in the aſſignees under the commiſſion, and they would run away with it who have a leſs equity than the plaintiff, and therefore I think the court ought to make ſome decree.

Conſider it as if the agreement of the 11th of *October* and the execution of the bond on the 7th of *November* were all one agreement, and all before marriage.

Then it would have ſtood as an agreement by the wife's father, in conſideration of acts to be done on the part of the huſband, to pay, *&c.* (*Vide the words.*)

The firſt thing inſiſted on for the wife is, this ought to be conſidered as part of the eſtate of the wife, and that the court would not let a huſband have it, unleſs he firſt makes a proviſion for her, nor

nor conſequently the plaintiff, he ſtanding only in the huſband's place.

Thoſe caſes are, where the wife has a demand in her own right, and the huſband applies to the court in her right, they will then take care of *femes covert* where there is no agreement previous to the marriage on their behalf; but this never was the money of the wife, for her father has covenanted to pay it abſolutely to the huſband, therefore is no part of the wife's eſtate, but a debt due to the huſband himſelf.

Where the wife has a demand in her own right, and the huſband applies in her right, if there is no agreement previous to the marriage on her behalf, the court will take care of her intereſt.

The queſtion will depend upon the other objection, with regard to the agreement on the part of the huſband in the articles previous to the marriage, that it is an executory contract, and the whole muſt be decreed to be carried ſtrictly into execution for the benefit of the wife.

I will put this caſe; ſuppoſe the huſband had not been a bankrupt, and had brought a bill againſt the executrix of the father for a performance of his covenants under the articles, the court could not have compelled the huſband to have done more than give the bond, and the wife muſt have taken her chance as to the ſhare of her huſband's perſonal eſtate, as any other widow of a freeman, ſubject to the accidents of trade and bankruptcy; and the huſband might have ſaid, I gave a bond three days after marriage, and you have acquieſced in it, and therefore nothing is left executory, for I have performed the whole on my part.

If the huſband had not been a bankrupt, and had brought a bill for the performance of the father's covenants under the articles, the court could not have compelled him to do more than give the bond, and the wife muſt have taken her chance as to the ſhare of her huſband's perſonal eſtate, and his aſſignee ſhall not be in a worſe condition than himſelf.

Then, if the huſband would have been intitled, ſhall an aſſignee for a valuable conſideration be in a worſe condition than the huſband, the aſſignor? there are many caſes where he has been held to be in a better condition, but none where he has been held to be in a worſe.

So, that however unfortunate the caſe of the wife may be, there muſt be a decree in favour of the plaintiff; for, as I ſaid before, if I ſtood neuter, the aſſignees under the commiſſion, who barely ſtand in the place of the huſband, would take the whole from an aſſignee for a valuable conſideration.

Therefore his Lordſhip decreed the executrix of the wife's father to account for the five hundred pounds to the plaintiff.

Caſe 141. *Madox* verſus *Jackſon*, *February* 4, 1746.

Three obligors in a bond, the obligee brings the principal, and the repreſentative of one of the ſureties before the court, and by his bill ſtates the third is dead inſolvent; on the circumſtances of this caſe, the objection for want of parties overruled.

IN the preſent caſe, there were three obligors in a bond.

The plaintiff, the obligee, has brought only one obligor before the court, and the repreſentative of another, but not of the third, becauſe the bill ſtates that he is dead inſolvent.

An objection was made for want of parties by one of the defendants, who inſiſted that the repreſentative of *Watſon*, the third obligor, ought to have been made a party; for it is poſſible he might have paid off the bond, or at leaſt, if before the court, might contribute his part towards payment of the bond.

The plaintiff's council in anſwer ſay, that all the defendants believe, that *Watſon*, the deceaſed obligor, died inſolvent, and that it appears in the cauſe, the defendant *Jackſon* was the principal obligor in the bond, ſo that the other two were only ſureties.

LORD CHANCELLOR.

Where a debt is joint and ſeveral, the plaintiff muſt bring each of the debtors before the court.

The general rule of the court, to be ſure, is, where a debt is joint and ſeveral, the plaintiff muſt bring each of the debtors before the court, becauſe they are intitled to the aſſiſtance of each other in taking the account.

Debtors are intitled to a contribution.

Another reaſon is, that the debtors are intitled to a contribution, where one pays more than his ſhare of the debt.

Where the debt is a ſpecialty, make both the heir and executor parties.

A further reaſon is, if there are different funds, as where the debt is a ſpecialty, and he might at law ſue either the heir or executor for ſatisfaction, he muſt make both parties, as he may come in the laſt place upon the real aſſets.

Where the obligors are only ſureties, it is not neceſſary to bring them before the court.

But there are exceptions to this, and the exception out of the firſt rule is, that if ſome of the obligors are only ſureties, there is no pretence for the principal in the bond to ſay, that the creditor ought to bring the ſurety before the court, unleſs he had paid the debt.

The exception out of the ſecond rule is, that if there are no perſonal aſſets at all, and this fact appear plainly in the cauſe, there is no occaſion to bring the repreſentative of that co-obligor before the court.

But this is a ſpecial excepted caſe, and therefore not within the rule.

But ſuppoſe it was a common caſe, and the bill had been brought by the repreſentatives of *Manby*, one of the ſureties in the bond, whether it is neceſſary to make the repreſentative of *Watſon* a party.

As to taking of the account, it is quite out of the caſe, by admiſſion of the defendants, that the bond is not paid, nor any part of the principal and intereſt, ſo that here is no ground to make the repreſentative of *Watſon* a party, in order to aſſiſt him in taking the account.

The other pretence is, in order for a contribution.

It is admitted by all the anſwers, that *Watſon* is dead inſolvent, and therefore differs from the caſe of *Aſhurſt* verſus *Eyre*, determined before me upon a plea.

For though there was an admiſſion of inſolvency, in that caſe, yet it did not appear whether the principal or intereſt might not have been paid by the co-obligor, who was not before the court, and that was the reaſon of allowing the plea.

There can be no particular adminiſtration to *Watſon* here, for that muſt be to a particular ſubject belonging to the eſtate of the inteſtate, but as he is dead inſolvent, there can be nothing but a general adminiſtration; and therefore, on the circumſtances of this caſe, Lord *Hardwicke* over-ruled the objection for want of parties.

Only verſus *Walker*, *July* 19, 1746, *before the Maſter of the Rolls*, *ſitting for Lord Chancellor*. Caſe 142.

THE bill was brought by the plaintiff as the reſiduary deviſee of Mr. *Dyer*, for a ſpecific performance of an agreement.

On evidence of an agreement's being confeſſed by the defendant, decreed to be carried into execution, though the agreement was proved by one witneſs only, and poſitively denied by the defendant's anſwer.

Mr. *Dyer* being an incumbered man, had, in his life-time, compounded with ſeveral of his creditors, and after his death, the plaintiff, as he ſtates it by his bill, came to an agreement with the defendant, to pay him twenty-nine pounds, as a compoſition for a bond debt of eighty-four pounds, and indorſed it upon the back of the bond.

The agreement was proved by one witneſs only, and poſitively denied by the defendant's anſwer, but there was the circumſtance of the defendant's confeſſing the agreement, proved in the cauſe, and

and ſome other circumſtances to corroborate the evidence of the ſingle witneſs.

The Maſter of the Rolls offered to direct an iſſue to try the agreement, if the defendant deſired it, but the defendant's council declined it, unleſs his Honour would make an order that his anſwer ſhould be read upon the trial.

Where it is oath againſt oath, and an iſſue thereupon directed to try the agreement, the court will order the defendant's anſwer to be read at law, as it is a means of trying by the jury the credit of the witneſs and of the party.

Two caſes were mentioned where ſuch an order had been made, one in 2 *Vern.* 554. *Ibbetſon* verſus *Rhodes*, and likewiſe reported in *Eq. Caſ. Abr.* 229. there the defendant denied notice of the plaintiff's title; the plaintiff proved it by one witneſs; Lord *Cowper* directed it to be tried at law, but that the plaintiff ſhould admit the defendant's anſwer to be read at the trial, not as evidence, for, that he ſaid, it could not be, nor ſhould they admit it to be true, but ſo that the defendant might have the benefit of his oath at law, as in this court, if it would weigh any thing with the jury; the other caſe was before Lord *Hardwicke*, *Cant* verſus *Lord Sidney Beauclerk*; whereas it was oath againſt oath only; the anſwer was directed to be read at the trial, and the reaſon is, becauſe it is a means of trying by the jury the credit of the witneſs and the party.

Where it does not reſt ſingly on the witneſſes oath, but circumſtances corroborate what he ſwears, the court would not direct the defendant'sanſwer ſhould be read at law.

In the preſent caſe, his Honour ſaid, it does not reſt ſingly upon the oath of the witneſs, for ſeveral circumſtances confirm and corroborate what he ſwears, and therefore is not within the rule of theſe caſes, and conſequently he could not give any directions here, that the anſwer of the defendant ſhould be read at law.

The defendant refuſing to try it upon any other terms, his Honour decreed the agreement to be carried into execution by the defendant's delivering up his bond to the plaintiff, on payment of the twenty-nine pounds, the ſum he had agreed to take in compoſition for his debt, and gave no coſts of either ſide.

Caſe 143. *Dobbins* verſus *Bowman*, *Michaelmas Term* 1746.

H. R. ſuffers a recovery, and declares it ſhall enure to the uſe of himſelf, his heirs and aſſigns, *and* to ſuch uſes, &c. as by his will, &c. he ſhould appoint; the word *and* may be underſtood disjunctively for the word *or*, to ſatisfy the intention of the teſtator, who by will appointed the recovery ſhould enure to the uſe of *J. C.* and *J. D.* and their heirs, on truſt, &c.

HENRY REYNALLS covenants to ſuffer a recovery, and declares that ſuch recovery ſhould be and enure to the uſe and behoof of himſelf, his heirs and aſſigns; *and to* and for ſuch uſes, intents and purpoſes, as by his laſt will, or by any inſtrument in writing by him duly executed, he ſhould limit and appoint.

The recovery was ſuffered.

Henry

Henry Reynells by will (reciting the deed and recovery) in purſuance and execution of, and according to the power reſerved to him by the ſaid deed, and by virtue thereof, and of all other powers and authorities belonging to him in that behalf, limits and appoints, that the ſaid recovery ſo by him ſuffered, ſhall enure to the uſe of *James Clitherow* and *Joſeph Dobbins*, and their heirs, upon truſt, *&c.*

It was argued by Mr. *Wilbraham*, that a uſe could not be limited upon a uſe; and as it was declared that the recovery ſhould enure to the uſe of the covenantor, his heirs and aſſigns, that this ſubſequent limitation was void, and conſequently that he had no power to limit any uſes by his will, and as the will was intended to operate as an execution of a power which he had not, and there were no deviſing words to paſs the eſtate as owner, that the eſtate was not veſted in *Clitherow* and *Dobbins*.

LORD CHANCELLOR.

It is certain that a uſe cannot be limited upon a uſe, but I think the word *and* muſt be underſtood disjunctively for the word *or*, which is frequently done, to comply with the intention of parties; but if it was to be underſtood conjunctively, I think the will would be ſufficient to paſs the eſtate to *Clitherow* and *Dobbins*.

For in a will there are no particular words required to paſs the eſtate, but any words that ſhew the intention of the teſtator are ſufficient, and the words in this will plainly manifeſt that the teſtator intended that *Clitherow* and *Dobbins* ſhould have the eſtate upon the truſts of the will.

Any words in a will that are ſufficient to ſhew the intention of a teſtator, are ſufficient to paſs an eſtate.

Jerningham verſus *Glaſs*, *January* 24, 1746. Caſe 144.

A Motion was made for a *ne exeat regno*, againſt the wife of *Glaſs*, who was executrix of her former huſband; *Glaſs* was already gone out of the kingdom, and it was doubted by *Lord Chancellor*, whether it could be granted, as ſhe was *a feme covert*, and could give no ſecurity; and it was adjourned to this day to ſearch for precedents.

Where a wife is executrix of a former huſband, the court will grant a *ne exeat regno* againſt her alone, if her ſecond huſband ſhould be gone out of the kingdom.

LORD CHANCELLOR.

One precedent has been produced to me of *Moor* verſus *Meynell*, *May* 8, 1719. There a bill was brought againſt baron and feme, who was executrix of her former huſband: the huſband and wife both reſided at *Antigua*; the wife returned into *England* alone, and an order had been obtained from Lord *Cowper* for a *ne exeat regno* againſt the wife; ſhe this day moved Lord *Macclesfield* to diſcharge

the order, as ſhe was *a feme covert*; but he rejected the motion, and afterwards ſhe put in her anſwer, and then moved the court again to diſcharge the order; but the court a ſecond time rejected the motion, unleſs ſhe would give ſecurity to abide the event of the account.

Upon this precedent, his Lordſhip granted the motion in the preſent caſe.

Caſe 145. *White* verſus *Sanſom*, *February* 9, 1746.

N. the mother of *A. S.* was ſeiſed in tail *ex proviſione viri* of the eſtate in queſtion, reverſion in fee to her huſband, *A. S.* and *W. S.* her huſband created a mortgage term of 1000 years on this eſtate, and joined in levying a fine to the mortgagee, remainder to ſuch uſes as *W. S.* ſhould appoint. *W. S.* before the levying the fine, on ſale of an eſtate belonging to him, covenants with *J. S.* the purchaſer for quiet enjoyment, and afterwards makes an appointment to truſtees for particular purpoſes of the wife's eſtate. *J. S.* being evicted of the lands he purchaſed, brings his bill againſt *A. S.* and her four children, to ſubject her eſtate to the plaintiff's demand under the covenant of *W. S.* *It being a doubtful caſe whether the plaintiff's debt accrued by breach of covenant, till after the appointment of* W. S. *in execution of the power,* Lord Hardwicke *diſmiſſed his bill.*

MRS. *Neale*, the mother of the defendant *Ann Sanſom*, the widow of *William Sanſom*, was ſeiſed in tail *ex proviſione viri* of the premiſſes in queſtion, reverſion in fee to her huſband: *Ann* and *William Sanſom* in his life-time, created a mortgage term on this eſtate of 1000 years, Mrs. *Neale* joins in levying a fine to the uſe of the mortgagee, the remainder to ſuch uſes, and in ſuch ſhares and proportions as *William Sanſom* ſhould appoint, and in default of ſuch appointment, to the uſe of the huſband *William Sanſom* and his heirs; and the conſideration recited are for the barring all eſtates-tail, and ſettling the premiſſes to the uſes after mentioned.

The huſband, before the levying the fine, on ſale of an eſtate, covenants with *J. S.* the purchaſer, for quiet enjoyment; afterwards in 1742, he makes an appointment to truſtees, in the firſt place, by ſale of the wife's eſtate, to raiſe money, and pay the principal and intereſt of the mortgage, and the reſidue in purſuance of the power, for the benefit of his wife and children.

J. S. is evicted of the lands he purchaſed; *William Sanſom* dies, leaving his widow *Ann Sanſom* and four children; then Mrs. *Neale*, the mother of the defendant *Ann Sanſom* the wife, dies, and this bill was brought by *J. S.* againſt the wife and children of *William Sanſom*, to ſubject the premiſſes in queſtion to the plaintiff's demand, under the huſband's covenant.

Mr. *Talbot*, for the plaintiff, cited *Shirley* verſus *Ferrars*, before Lord *Talbot*, and *Baynton* verſus *Ward*, before Lord *Hardwicke*, *April* 24, 1741. (*See* 2 *Tr. Atk.* 172.)

Mr. *Huet*, for the defendant, cited Sir *Edward Clere*'s caſe, *Co. Rep.* 6, 17. *b.*

LORD CHANCELLOR.

I think the plaintiff has a right to come here for the mortgage term, ſtanding out is a ſufficient ground for ſo doing; and there are caſes where, though even at law it would be deemed fraudulent, yet, notwithſtanding they may come here for the ſake of further relief.

And ſo far I am of opinion for the plaintiff.

As to the queſtion, whether this appointment may be conſidered as fraudulent againſt creditors, it has been ſaid, that though it ariſes under an appointment, yet by the plaintiff's council the whole eſtate would be conſidered at law as derived under the fine, and eſteemed as a fraudulent conveyance within the ſtatute.

For the words of the ſtatute, it was ſaid, are not confined expreſſly to the eſtate of the grantor, but makes void every alienation by which creditors may be defrauded.

And that what has been done here amounts to an alienation; for whether it is taken as the eſtate of the huſband or of the wife, or derived under the fine, it is ſtill an alienation.

That the huſband had a power over it with a reverſion, ſo that it is a power over his own eſtate: and if he had not aliened the reverſion it would have been aſſets, ſo that it is an alienation to the prejudice of creditors; and if held otherwiſe, it would be, eaſy to defraud creditors, merely by a different method of conveyancing.

That it was not a bare naked power, but an ownerſhip, and therefore is an alienation to the prejudice of creditors.

There has been another queſtion ſtarted, that here the mother of *Ann Sanſom*, and grandmother of the reſt of the defendants, was tenant in tail with reverſion in fee to herſelf, and being *ſo ex proviſione viri*, *Ann Sanſom* had no power to alien, the mother dying after the death of *William Sanſom*; and though the fine would be a bar by the ſtatute of the eſtate-tail, when it is deſcended, yet as to the reverſion in fee if it was in the mother, it could only be by way of eſtoppel; and if this had been the caſe, I ſhould have been of opinion, that this eſtate would not have paſſed to the huſband *William Sanſom* ſo as to be his aſſets, becauſe there was nothing deſcended to the defendant *Ann Sanſom* at the time of the fine, and therefore could make no conveyance of it.

But that is not the caſe, for the reverſion in fee is to Mrs. *Neale's* huſband, and conſequently in the defendant *Ann Sanſom*, the only child of Mr. *Neal*.

But ſtill I am of opinion that this would not be a fraudulent conveyance at law, and if it was ſo held, would be an extreme hard caſe.

The truſt created by the huſband of the wife's eſtate would not at law have been deemed fraudulent againſt creditors, nor even againſt a ſubſequent purchaſer; and if ſo, this court will not carry it further.

This was the entire eſtate of the wife, who joins with her huſband in raiſing a mortgage term (*ut ſupra*) with a power of appointing to the huſband in ſuch parts and proportions, *&c.* (which ſeems to have an eye to ſome family ſettlement hereafter to be made, though I lay no ſtreſs on that,) and in default of appointment to the huſband and his heirs.

Voluntary conveyances in general are held fraudulent againſt purchaſers.

Nothing therefore could be more juſt than for the huſband to provide for his wife and children out of her eſtate, and the firſt truſt is to ſell the eſtate, and raiſe two hundred pounds to pay off the mortgage, which truſt could never at law be called fraudulent; and if ſo, that would extend itſelf over the whole, for the proviſion of the wife and children is out of the ſurplus, ſo that at law they would not deem it fraudulent againſt creditors; nay, even againſt a ſubſequent purchaſer, which is ſtronger, becauſe I hardly know an inſtance where a voluntary conveyance has not been held fraudulent againſt a ſubſequent purchaſer.

If not fraudulent at law, what ground is there for this court to carry it further.

I agree, if the law would deem it fraudulent, this court would aſſiſt in removing the mortgage term out of the way.

But here is another circumſtance, for the plaintiff's debt does not appear to have accrued by breach of covenant till after the conveyance in execution of the power.

I have heard it ſaid in this court, that there are reaſonable voluntary ſettlements, which they will not interpoſe to diſturb upon the conſtruction of theſe ſtatutes.

There are words in the proviſo of the ſtatute, which ſeem to admit ſuch conſtruction, 13 *Eliz. c.* 5. *ſec.* 4. " Provided always " and be it enacted, *&c.* that whereas ſundry common recoveries " of lands, *&c.* have heretofore been had, and may hereafter be " had, againſt tenant in tail, *&c.* the reverſion or remainder, *&c.* " then being in any other perſon, *&c.* that every ſuch common " recovery, *&c.* ſhall as touching ſuch perſon which then had any " remainder

" remainder, &c. and againſt the heirs of every of them, ſtand, " remain and be of ſuch like force, as if this act had never been " made."

As it is a doubtful caſe, whether the plaintiff's debt accrued till after the conveyance in execution of the power, I muſt diſmiſs the bill, but it ſhall be without coſts; and decreed accordingly.

Maynwaring verſus *Maynwaring and Lee*, *February* 11, 1746.

Caſe 146.

A. conveyed 1000 *l.* to truſtees to be laid out in the purchaſe of freehold land within 22 computed miles of *Cheſter*.

A. By deed conveys the ſum of one thouſand pounds to truſtees, to be laid out in the purchaſe of freehold land within twenty-two computed miles of *Weſt Cheſter*, and after limiting the eſtate to ſeveral perſons for life, gives the firſt remainder in tail to the plaintiff, who is now of age, and the laſt remainder-man is the defendant *Lee*.

The plaintiff, the firſt tenant in tail under a limitation from *A.* ſuggeſting no ſuch purchaſe as the deed directs can be found, but a convenient one might be had in *Lancaſhire*, prayed that the truſtee might be directed to purchaſe accordingly. *Lord Hardwicke made an order for the truſtee to look out for a purchaſe within the terms of the deed, and if after a convenient time allowed, it ſhould appear no ſuch purchaſe is to be met with, ſaid, he ſhould be inclined to deviate in this particular from the ſtrict terms of the truſt.*

It being convenient for the firſt tenant in tail, that it ſhould be immediately inveſted in land, that he may be enabled to ſuffer a recovery, and bar the ſubſequent remainders, he brings his bill againſt the truſtee of the deed, and the laſt remainder-man, ſuggeſting that the truſtee has been endeavouring to find out ſuch a purchaſe as the deed directs, but no ſuch is to be found, and that a very convenient purchaſe may be made in the county of *Lancaſter*, and prays the truſtee may be directed to purchaſe accordingly.

The truſtee by his anſwer ſubmits to the court, that he is tied up by the terms of the truſt, and cannot ſafely purchaſe any where but within the limits preſcribed him.

It was ſaid by the plaintiff's council, that the defendant *Lee*, the laſt remainder-man, endeavours to hinder and entangle the affair as much as poſſible, in order to prevent his contingency from being barred; and that as the laying out the money in a purchaſe within twenty-two miles of *Cheſter*, was a circumſtance only, and not eſſential at all to the rights of the parties, the court might diſpenſe with it; and that this court has in the caſes of wills (where the teſtator has directed a purchaſe of freehold to be made) allowed the truſtees to purchaſe, notwithſtanding part has been copyhold, where the freehold cannot be had without it.

LORD CHANCELLOR.

The truſtee might have borrowed ſome eſtate within the 22 miles of *W. C.* for the purpoſe of inveſting the money in land, and after the end of ſuffering a recovery in order to get the 1000*l.* was anſwered to the firſt tenant in tail, it might have been reſtored again to the original owner.

As the words of the deed are not directory only to the truſtees, with reſpect to the purchaſing of the eſtate within twenty-two miles of *Cheſter*, but incorporated with the very truſt itſelf, I cannot deviate from the intention of the donor under the deed, nor is the court to pay any regard to the convenience of the firſt tenant in tail and his family, or to the difficulties the laſt remainder-man may create in order to prevent his intereſt from being barred, but the truſtee might have borrowed ſome eſtate within this diſtrict, for the purpoſe of inveſting the money in land, and after the end was anſwered to the firſt remainder-man in tail of ſuffering a recovery in order to get the money into his own hands, the eſtate might have been reſtored again to the original owner.

I can do nothing more in this caſe, than direct the truſtee to look out for a purchaſe within the terms of the deed, and if after a convenient time allowed for that purpoſe it ſhould appear no ſuch purchaſe is to be met with, the parties may apply to the court, who would then be inclined to deviate in this particular from the ſtrict terms of the truſt, and in the mean while ordered a ſearch to be made for precedents of the court's diſpenſing with ſuch a truſt, where after a proper time allowed no ſuch purchaſe is to be found.

But as to what has been mentioned with regard to the court's allowing of a purchaſe where the eſtate has been part copyhold, it has been in ſuch caſes, where it was merely directory, and not incorporated with the very truſt itſelf.

Sir *W D.* by his will directed his truſtees to lay out a ſum of money in the purchaſe of freehold land only, as they could not without great diſadvantage purchaſe the freehold of an eſtate, unleſs they took along with it a college-holding, the court diſpenſed with the ſtrict directions of the will.

N. B. Lord Chancellor made ſuch an order in the cauſe of *Goſſelin & al'* verſus *Dodwell & al'*, where Sir *William Dodwell* by his will directed his truſtees to lay out a ſum of money in the purchaſe of freehold land only, and yet upon a petition of the truſtees, ſuggeſting that they could not without great diſadvantage purchaſe the freehold of an eſtate unleſs they took along with it a college-holding, his Lordſhip diſpenſed with the ſtrict directions of the will, and approved of the truſtees purchaſing the college-holding at the ſame time with the freehold.

Hamond

Hamond and others, aſſignees of Myers a bankrupt, verſus *Myers and Murray, February* 16, 1746. *at the Rolls.* Caſe 147.

THE bill was brought againſt the defendant *Murray* to ſet aſide a fraudulent aſſignment of an annuity from *Myers* to *Murray*, as being made for no conſideration, and ſubſequent to an act of bankruptcy.

The aſſignees under a commiſſion of bankruptcy brought a bill to ſet aſide an aſſignment of an annuity from the bankrupt to *M.* as being made for no conſideration, and as an evidence of the fraud, offered to read the examination of *M.*'s attorney, taken before the commiſſioners; the court would not admit it, unleſs he had been examined in chief in the cauſe.

The plaintiff's council offered to read the examination of *Boſon*, the defendant *Murray*'s attorney, taken before the commiſſioners, who acted in the commiſſion againſt *Myers*, as an evidence of the fraud, and of an act of bankruptcy by *Myers*, previous to the aſſignment of the annuity to *Murray*.

Maſter of the Rolls. I cannot allow the examination of *Boſon* to be read to affect the intereſt of a third perſon, and am of opinion the plaintiff could not be entitled to this evidence, unleſs *Boſon* had been examined in chief in the cauſe.

But his Honour permitted the plaintiff to read the examination of the defendant *Murray* taken before the commiſſioners, becauſe the anſwer having ſet up a different right to the annuity from what he had before inſiſted on in his examination, the examination may in ſuch a caſe be read to ſhew the contrariety and inconſiſtence between the anſwer of the defendant *Murray*, and his examination taken before the commiſſioners.

M. having by his anſwer ſet up a different right to the annuity than what he had done in his examination before the commiſſioners, the court allowed the latter to be read to ſhew the certainty.

February

Caſe 148. *February* 20, 1746. *Lyon and Lady Catherine his wife, one of the daughters of the late Marquis of Carnarvon, by Lady Catherine, now Marchioneſs Dowager of Carnarvon,* —— } Plaintiffs.

The Duke of Chandos and others, Defendants.

On a ſettlement previous to a marriage, the truſt of a term was, in caſe the huſband ſhould have no iſſue male, and there ſhould be iſſue daughters, &c. to raiſe, if two daughters, 25000 *l.* to be paid to them when they attain 21. or are married, but not to be raiſed till after the death of their grandfather. The father died, and left iſſue two daughters only, the grandfather ſince is dead; the bill is brought by the plaintiff in the right of his wife, one of the daughters, for 12500 *l.* with intereſt for the ſame from the time of the marriage. *Lord Hardwicke held the portion veſted on the marriage upon the words of the ſettlement, and that intereſt was due from the time of the marriage.*

IN a ſettlement made previous to the marriage of the late Marquis of *Carnarvon*, there was a term of 1000 years created, which was declared to be "upon truſt in caſe the Marquis ſhould "have no iſſue male by Lady *Catherine Tallmaſh*, and that there "ſhould be iſſue a daughter or daughters, then the truſtees ſhould "out of the profits of the manors, &c. or by ſale, mortgage, "or other diſpoſition thereof, for the term of 1000 years, raiſe "for the portion of ſuch daughter or daughters, if one, 15000 *l.* "if two, 25000 *l.* to be paid to ſuch daughter or daughters when "they ſhould reſpectively attain twenty-one years, or be married, "which ſhould firſt happen."

By the ſettlement, a maintenance was provided for the daughters of the marriage, but not to be raiſed till after the death of the late Duke of *Chandos*.

The Marquis of *Carnarvon* died three years after the marriage without iſſue male, and left two daughters, the plaintiff Lady *Catherine*, and Lady *Jane Bridges*.

On the tenth of *January* 1743. the plaintiffs intermarried, and thereupon Mr. *Lyon*, in the right of Lady *Catherine*, became intitled under the ſettlement above mentioned to the ſum of twelve thouſand five hundred pounds, and they have brought their bill for this ſum, with intereſt for the ſame from the time of the marriage.

Upon the ninth of *Auguſt* 1744. the late Duke of *Chandos* died.

Lord Chancellor upon the opening of the caſe for the plaintiffs thought it very ſtrong in their favour, and therefore put it upon the defendants council to ſtate their objections.

Mr. *Brown*, council for the defendants, inſiſted, as this is a reverſionary term, that did not take effect in poſſeſſion till after the death of the Duke of *Chandos*, and therefore the plaintiffs were not intitled to the portion or intereſt thereon in his life-time; and cited the caſe of *Brome* verſus *Berkeley*, 2 *P. Wms.* 484.

In the preſent caſe the ſame circumſtance as in that, an intervening eſtate for life in the late Duke of *Chandos*, which did not drop till ſeveral months after the marriage, and the portion too directed to be raiſed out of the rents and profits, which ſeems to ſhew the intention of the parties that no intereſt ſhould be paid till after the death of the Duke, as he was during his life entitled to the rents of the eſtate charged with the portion.

Mr. *Noel* of the ſame ſide ſaid, the ſettlement directs that the maintenance of the daughters ſhall not be raiſed till after the death of the late Duke, and therefore it cannot be preſumed the parties intended the capital of the portion ſhould be raiſed till the term took effect in poſſeſſion by the death of the late Duke; he cited *Evelyn* verſus *Evelyn*, 2 *P. Wms.* 591. to ſhew that though no time was limited for payment of the portion, yet the court would not raiſe it out of a reverſionary term, as the daughters were ſo very young.

LORD CHANCELLOR.

I am in general extremely unwilling to exerciſe the authority of this court in raiſing portions or intereſt upon them out of reverſionary terms, and therefore wherever caſes have been brought before me to raiſe them upon conſtruction or implication only, I have always refuſed to do it.

The court very reluctantly raiſe portions or intereſt upon them out of reverſionary terms, eſpecially upon conſtruction or implication only.

But in the preſent caſe the truſt of the term is ſo penned, that I cannot avoid decreeing it to be raiſed.

Upon the firſt part of the term the great objection is, that this is to be raiſed out of a reverſionary one.

It is plainly put in the power of the Marquis of *Carnarvon* the father, to raiſe it out of the reverſionary term, if he thought proper; if the Marquis had died, and the Duke of *Chandos*, it is not controverted on the wording of this ſettlement, but that the truſtees might raiſe it even in the life-time of the jointreſs.

Then the only queſtion is, whether it could be raiſed in the life-time of the late Duke of *Chandos*.

It has been inſiſted, that though there are no words to ſuſpend it, yet *by implication* the raiſing of the portion ought to be poſtponed till his death, by the rules of the court.

But what warrant has the court to inſert *by implication and conſtruction* what the parties themſelves have not expreſſed; for, as they have ſaid, it may be raiſed in the life-time of the Marquis and jointreſs, and have ſaid nothing to ſuſpend it till after the death of the Duke; *expreſſio unius eſt excluſio alterius.*

It makes it ſtronger too, when in the very next clauſe, the parties had in contemplation the death of the Duke of *Chandos.*

An argument was drawn in favour of the defendants from the clauſe relating to maintenance, which is not to be raiſed till after the death of the late Duke, and ſupported by the caſe of *Brome* verſus *Berkley.*

It was ſaid that *maintenance* does in its nature precede the portion, and as it is not to be raiſed in the life-time of the Duke, therefore the portion ſhall not.

In that caſe there were no words to govern the conſtruction, but in this here are expreſs words that do govern it, and intirely diſtinguiſhable from the caſe of *Brome* and *Berkley*, becauſe there is no power there of raiſing it in the life-time of the jointreſs. *

Though it is not uſual for conveyancers, and they are extremely cautious of raiſing portions for daughters in the father's life-time without his conſent; yet where there are great eſtates, it is common to direct that upon the death of the father the portions for the daughters ſhall be raiſed in the life-time of the grandfather, and not ſuſpend the raiſing them till after two lives.

To conſtrue this ſettlement otherwiſe, I muſt inſert words, and go *by implication* only, when there is an expreſs direction to raiſe it even in the life-time of the Marquis himſelf, if he thought fit.

I am of opinion therefore the portion veſted on the marriage of Lady *Catherine*, from the words of the ſettlement, and that intereſt

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* Upon a marriage ſettlement lands are limited to the uſe of the huſband and wife for their lives, remainder to the firſt and every other ſon in tail, and in default of iſſue male of the marriage, to truſtees, in truſt to raiſe 2500*l.* for daughters, payable at 21, or marriage, which ſhall firſt happen, and out of the profits to pay 100*l. per ann.* for maintenance; the firſt payment of the maintenance to commence after the eſtate of the truſtees ſhall have come into poſſeſſion: the huſband dies without iſſue male, leaving a daughter, and a wife who is jointured, in the premiſſes; the portion ſhall not be raiſed in the mother's life-time, becauſe the maintenance, which is naturally to precede the portion, is not to be paid till the truſtees are in poſſeſſion. *Brome* verſus *Berkley*, 2 *P. Wms.* 484.

was

was due from the time of the marriage; and his Lordſhip decreed it to be raiſed at four *per cent.* accordingly.

Lee verſus *Cox and D'aranda, February* 23, 1746. Caſe 149.

THE queſtion in this cauſe aroſe upon the covenants in a deed, previous to the marriage of the defendant *Martha Cox* with her firſt huſband *Charles Henry Lee.*

L. previous to his marriage with *D.* covenanted that he would by will, or by ſome good aſſurance in the law, grant to *D.* or *E. D.* the mother, or her executors, *&c.* in truſt for *D.* and for her ſeparate uſe, 1000 *l.* to be paid to *D.* after his deceaſe; and in caſe he ſhould not by will or otherwiſe aſſure to *D.* the 1000 *l.* then his executors, *&c.* ſhall within ſix months after his deceaſe pay *D.* the 1000 *l.* *L.* is dead without making any will or deed in regard to the 1000 *l.* *D. is not entitled to the* 1000 *l. and the diſtributive ſhare likewiſe of L.'s perſonal eſtate, being meant only to ſecure a proviſion for the wife, without any intention of the huſband to leave it as a debt.*

" In conſideration of the intended marriage, and of the marriage " portion of *Martha D'aranda*, and for the making a proviſion for " the ſaid *Martha*, *Charles Henry Lee* doth covenant that he will " in his life-time, either by his laſt will or by ſome good and ſuffi- " cient aſſurance in the law, grant to *Martha* or *Elizabeth D'aranda* " the mother, or her executors or adminiſtrators, in truſt for the " ſaid *Martha*, and for her ſole and ſeparate uſe, one thouſand " pounds, to be paid to the ſaid *Martha* after the deceaſe of *Charles* " *Henry Lee*, in caſe ſhe ſhall ſurvive him.

" And in caſe *Charles Henry Lee* ſhall not by will or otherwiſe " in his life-time aſſure to *Martha* the ſaid thouſand pounds, that " then the executors or adminiſtrators of *Charles Henry Lee*, ſhall, " within the ſpace of ſix months next after the deceaſe of *Charles* " *Henry Lee*, pay to *Martha D'aranda* the ſum of a thouſand pounds " to and for her own uſe and benefit.

Mr. *Lee* is dead, without making any will or deed, in purſuance of his power with regard to the thouſand pounds.

Mr. Solicitor General for the plaintiffs, the children of the defendant *Martha Cox* by her firſt huſband inſiſted, that as he knew he ſhould leave ſufficient to pay one thouſand pounds, ſhe ſhall not have both the thouſand pounds and her ſhare of his perſonal eſtate under the ſtatute of diſtributions.

That the court always leans againſt double proviſions.

He cited *Wilcocks* verſus *Wilcocks*, 2 *Vern.* 558. *A.* covenants on his marriage to purchaſe lands of 200 *l.* a year, and ſettle them for the jointure of his wife, and to the firſt and other ſons of the marriage; he purchaſes lands of that value, but makes no ſettlement,

and on his death the lands deſcend on the eldeſt ſon; on a bill brought by him for a ſpecific performance, Lord *Cowper* decreed the lands deſcended to be a ſatisfaction of the covenant.

This is a caſe of real eſtate, but *Blandy* verſus *Widmore*, 2 *Vern.* 709. and 1 *P. Wms.* 324. is of perſonal eſtate: One covenants to leave his wife 650 *l.* he dies inteſtate, and the wife's ſhare on the ſtatute of diſtribution comes to more than the 650 *l.* this is a ſatisfaction.

The perſonal eſtate in the preſent caſe amounting to two thouſand three hundred pounds, is more than ſufficient to ſatisfy the covenant in the deed, and therefore ſhall be deemed a ſatisfaction; and the caſe of *Blandy* verſus *Widmore* is in point, for either the huſband in his life-time, or his executors or adminiſtrators might pay; ſo that the covenants are not broken by the huſband's dying inteſtate, as his adminiſtrator may within ſix months perform.

Mr. Attorney General for the defendant Mrs. *Cox*.

The rule upon the ſtatute of diſtributions is, that the debts muſt be firſt taken out, before the clear perſonal eſtate can be ſeen.

Is there any grounds to ſay, that the huſband did intend ſhe ſhould not have the diſtribution which he knew the law would give her?

There is nothing upon the face of the deed to exclude her: The contract does not mention the caſe of an inteſtacy, but if the huſband ſhould not direct it to be raiſed, conſiders it as a debt, and ſhe may claim her diſtributive ſhare of his perſonal eſtate in another right, *under the ſtatute of diſtributions*.

He cited the caſe of *Oliver* verſus *Brickland*, *December* 3, 1732. before Sir *Joſeph Jekyll*, where the proviſion for a wife, and a diſtributory ſhare of the huſband's perſonal eſtate, were decreed to her.

In *Blandy* verſus *Widmore*, the wife was adminiſtratrix herſelf, and could immediately apply the perſonal eſtate of her huſband, but the defendant *D'aranda*, the mother of the defendant *Cox*, is adminiſtratrix here *durante minore ætate* of her daughter, and therefore the perſonal eſtate could not be applied till a twelvemonth after the inteſtate's death.

Mr. *Brown* council of the ſame ſide.

The huſband's leaving it to the adminiſtrator to pay is not a performance of the covenant, but a neglect in him, becauſe it would

would have been much more beneficial if he had raiſed it in his life-time, as it would have been to her ſeparate uſe, diſtinct from her ſecond huſband, the event which has actually happened.

If the adminiſtratrix here was at liberty to pay within ſix months it would be like the caſe of *Blandy* verſus *Widmore*; but as it cannot be paid till after the ſix months are expired, it is a breach of the covenant, and ſhe ought therefore to have both.

LORD CHANCELLOR.

I am of opinion upon the ſtrength of the authorities which have been cited, that the defendant *Martha Cox* is not entitled to the thouſand pounds and the diſtributive ſhare likewiſe of *Charles Henry Lee*'s perſonal eſtate.

I am of this opinion too from the reaſoning of the thing: It is natural to think this was only to ſecure a proviſion to the wife, without any intention of the huſband to leave it as a debt.

I go likewiſe upon the foundation of the court's leaning againſt double proviſions, and double ſatisfactions, in ſuch a caſe they conſider the intention of the parties; for where it is left to ariſe out of his eſtate after his death, and meant only to ſecure a proviſion for the wife, the court will regard it in no other light.

There have been caſes that are ſtronger, where the court has conſidered as a ſatisfaction for a debt to an eldeſt ſon, a proviſion for him out of real eſtate, and would not draw out of the perſonal eſtate to the prejudice of the widow, and younger children, a ſum of money which would be a double proviſion for ſuch eldeſt ſon, and this was the ground of the determination in the caſe of *Wilcox* verſus *Wilcox*.

The court have conſidered a proviſion out of real eſtate as a ſatisfaction for a debt to an eldeſt ſon, and not draw a ſum out of the perſonal eſtate, which would be a double proviſion for him, to the prejudice of younger children.

The council for the defendant Mrs. *Cox* obſerved upon the covenants, that the original intention was the huſband ſhould in his life-time ſet apart this proviſion for the wife.

If there were any words in the deed which confined it to this ſenſe, it would be very ſtrong in favour of the wife, becauſe at his death it would then have been a breach of the covenant, and within the caſe cited by Mr. Attorney General.

But the covenant is not ſo, for it is a power of leaving it by will, or letting her take it out of his eſtate after his death.

In caſe Charles Henry Lee ſhall not by will or otherwiſe in his life-time aſſure to Martha one thouſand pounds, that then the executors or adminiſtrators of Charles Henry Lee ſhall, &c. (*Vide the words before.*)

There is no breach of the covenant therefore, and no obligation on the huſband to perform it in his life-time, and he has left a perſonal eſtate more than ſufficient to ſatisfy the thouſand pounds.

The ſtatute of diſtributions is the legiſlature's making a will for a man, if he makes none for himſelf.

Is this then a ſatisfaction? I am of opinion it is; and it has often been ſaid, that the ſtatute of diſtributions, is *the legiſlature's* making a will for a man, if he makes none for himſelf.

The caſe of *Blandy* verſus *Widmore* is exactly in point, and though more fully ſtated in 1 *P. Wms.* yet it is to the ſame effect in *Vern.* Lord *Cowper* took the covenant not to be broken, becauſe the wife was adminiſtratrix, and had it in her power to pay herſelf.

The material thing too in the preſent caſe is, that the covenant was not broken at the huſband's death.

It has been ſaid that the perſonal eſtate need not be diſtributed till a twelvemonth after the huſband's death; no more it need not, but the adminiſtratrix might notwithſtanding have paid the thouſand pounds, if ſhe pleaſed, within ſix months.

It has alſo been ſaid, the defendant *Cox* not being of age, the mother has taken adminiſtration *durante minore ætate*, and therefore differs from *Blandy* verſus *Widmore*, becauſe the defendant *Cox* cannot pay herſelf as ſhe is not adminiſtratrix.

Though the mother took out adminiſtration during her daughter's minority, yet the moment ſhe comes to the age of *ſeventeen* ſhe is *ipſo facto* adminiſtratrix, and ſo conſidered by relation from the beginning.

But the defendant *D'aranda*, the mother of the defendant *Cox*, took out adminiſtration as guardian only during her daughter's minority, and from the moment the daughter comes to the age of *ſeventeen* ſhe is *ipſo facto* adminiſtratrix, and is ſo conſidered by relation from the beginning, and conſequently is not diſtinguiſhable from *Blandy* verſus *Widmore*.

As to the caſe before Sir *Joſeph Jekyll* it is clearly diſtinguiſhable; for there the covenant was to lay out a ſum of money as a proviſion for the wife in two years in the life-time of the huſband; the two years lapſed without any thing done of that kind, and therefore was a plain breach of the covenant.

Whether *Blandy* verſus *Widmore* be properly ſtated or not in *Vernon*, yet this is truly within the reaſoning of that caſe, and it would be the ſtrangeſt thing in the world for a court of equity to determine upon ſuch nice diſtinctions, and very ſlight arguments, which would never ſtand with the reaſon of mankind without doors.

Lord *Hardwicke* declared, that the defendant *Martha Cox* is not entitled to a diſtributory ſhare of her huſband's perſonal eſtate, in caſe it ſhall amount to more than the ſum of one thouſand pounds.

Steadman verſus *Palling*, *February* 27, 1746. Caſe 150.

A bill brought after an acquieſcence of five years, and after a mother's death againſt her repreſentative, to ſet releaſes aſide, as unduly obtained by her, and for an account of his father's and grandmother's eſtates, and to be paid his full ſhare thereof: *The procuring releaſes from a perſon immediately upon his coming of age is always a circumſtance to create a ſuſpicion of unfairneſs, but as there is no particular impoſition charged through means of the defendant, the court would not determine the queſtion as to the unfairneſs of the releaſes till the Maſter has taken the account of the father's perſonal eſtate only.*

THE plaintiff's grandfather by his will gave to the plaintiff's late mother, then the wife of *Thomas Steadman*, and her heirs, ſeveral houſes in *Yarmouth*; in 1721. *Thomas Steadman*, the plaintiff's father died inteſtate, leaving *Elizabeth* his widow, and the plaintiff and *Elizabeth Steadman* his only children very young; the mother took out adminiſtration, and being ſeiſed of ſuch real eſtate, and poſſeſſed as adminiſtratrix alſo of a conſiderable perſonal eſtate, in 1728. ſhe married the defendant *William Palling*; on the 30th of *Auguſt* 1728. articles of agreement were entered into between the defendant and the plaintiff's mother, whereby *Elizabeth Steadman* " did give " and grant unto *William Palling* during her natural life, the in- " tereſt of all her money, and the rents of all her eſtates, and this " for the maintaining the houſe, and educating our children, until " *Thomas Steadman* and *Elizabeth Steadman*, ſon and daughter of " the above *Elizabeth Steadman*, ſhall come of full age, or be mar- " ried, which ſhall happen firſt, then the ſaid *Thomas* or *Elizabeth* " ſhall receive their juſt portions of money or eſtates as is or ſhall " be due to them *as lawful heir to their father*; but if it ſhould ſo " happen that the ſaid *Elizabeth Steadman* ſhould die before the " above children come to their ſeveral fortunes, then ſhe may diſ- " poſe of all her eſtates and fortunes as the ſaid *Elizabeth* ſhall think " proper.

At the beginning of the articles *Elizabeth Steadman* agreed to pay to *William Palling* five hundred pounds on the day of marriage for her portion, " which is to remain in the hands of *William Palling* " during his natural life, *and after his deceaſe*, if there be no heirs " lawfully begotten by *William Palling* upon the body of *Elizabeth* " *Steadman*, then the five hundred pounds to return to the ſaid *Eli-* " *zabeth*, *or her heirs*, and the wife is to have no claim to *Palling's* " real eſtate.

The articles were drawn by the defendant, and of his writing, and the plaintiff's mother took no advice thereon, nor laid them before council.

On the 22d of *February* 1730. the plaintiff's grandmother made her will, and gives to *Elizabeth Palling* (the plaintiff's mother) " all her houſhold goods, *&c.* bonds, mortgages, ſecurities for " money, and all other her perſonal eſtate to be ſold and diſpoſed " of by ſuch parcels, and at ſuch times, and in ſuch manner, as " ſhe ſhall think fit, and out of the money ariſing by ſale thereof " to pay her debts, *and the reſidue thereof ſhe wills ſhall be equally* " *paid* and divided, to and between *Thomas Steadman* and *Elizabeth*

" *Steadman*

" *Steadman* her two grandchildren, at ſuch time as they ſhall ſe-
" verally attain their reſpective age of twenty-one, *or ſooner*, if my
" daughter ſhall think fit, and appoints her daughter ſole executrix.

The mother of the plaintiff's proved the will, and ſhe and the defendant poſſeſſed the teſtatrix's perſonal eſtate; the plaintiff's ſiſter died inteſtate, and the plaintiff claims a moiety of her perſonal eſtate.

The plaintiff came of age on the 10th of *June* 1737. but no inventory was ever exhibited in the eccleſiaſtical court of his father's perſonal eſtate, and no account thereof laid before him by his mother, but ſhe repreſenting that his ſhare amounted to no more than five hundred and forty pounds of his father's perſonal eſtate, and to ſixty pounds only of his grandmother's, he was prevailed on ten days after he came of age to ſign two ſeveral releaſes to the defendant for the five hundred and forty pounds and the ſixty pounds.

Elizabeth, the plaintiff's mother, had five children by the defendant, but they all died under age in her life-time, and in 1742. ſhe died herſelf.

The bill was brought to ſet aſide the releaſes as unduly gained, and for an account of the plaintiff's father's and grandmother's perſonal eſtate, come to the hands of the plaintiff's late mother, and that the defendant may pay the plaintiff his full ſhare thereof, and that the five hundred pounds, agreed by the articles to return to the plaintiff's mother or her heirs, may be ſecured for the plaintiff's benefit, and that he may be let into the poſſeſſion of his mother's real eſtates.

The defendant inſiſted, that as he had children by *Elizabeth* born alive, he is by the curteſy of *England* intitled for life as well to the real eſtate his wife was ſeiſed of in fee at the time of the marriage, as to the real eſtate which after her marriage came to her, and of which ſhe died ſeiſed in fee.

He further inſiſted, that by the articles, the reverſionary intereſt expectant on the defendant's death in the five hundred pounds veſted in the defendant's children, and that he as adminiſtrator and repreſentative of the laſt ſurviving child, is intitled to the principal of the five hundred pounds.

He inſiſted too both the releaſes were executed in the preſence of the plaintiff's own attorney, and that the plaintiff acquieſed in the account, and never complained of it till after his mother's death, being above five years, and therefore the account ought not now to be opened.

Mr.

Mr. Attorney General for the plaintiff inſiſted he was impoſed upon by the defendant, and that the two releaſes were unduly obtained, and drawing him in to execute them juſt after he came of age, is ſuch a ſtrong *badge* of fraud, a court of equity will ſet them aſide.

That the articles were drawn by the huſband himſelf, without allowing the wife to conſult with any perſon; and as he has expreſſly excluded her from *his* real eſtate; it is therefore natural to ſuppoſe, ſhe intended to exclude him from any part of her real eſtate; and that he cannot in point of law be tenant by the curteſy, becauſe the articles have given him during the coverture the eſtate of the wife for his life, and ſhe has only a remainder, and a huſband can only be tenant by the curteſy of ſuch eſtate as the wife is ſeiſed of in poſſeſſion at the time of the marriage.

That as to the five hundred pounds, as the deed is drawn inaccurately, by a perſon not converſant in the law, the court will put ſuch ſenſe upon it as is moſt agreeable to the intention of the parties; and it cannot be preſumed they meant any thing more by the words, *or her heirs*, than her children.

That the plaintiff is entitled to a moiety of his ſiſter's ſhare under the grandmother's will; for he inſiſted that it was a veſted legacy in her at the death of the teſtatrix, and the time of payment was only poſtponed to twenty-one, and therefore tranſmiſſible to the plaintiff as one of her next of kin.

Mr. Solicitor General for the defendant.

The releaſe was given juſt after his mother's ſecond marriage, upon an account ſettled between the plaintiff and his mother, and the defendant very prudently declined meddling with it, as he knew nothing of her firſt huſband's affairs; and the plaintiff's acquieſcing all the mother's life-time for five years together, is ſo ſtrong in the defendant's favour, that the court will not oblige him to open the account.

As to the queſtion, whether the defendant, notwithſtanding the articles, is intitled to be tenant by the curteſy, he ſaid, the articles only intended to ſecure the profits of the wife's real eſtate and intereſt of her perſonal, to maintain the houſe, and educate their children, and therefore both the real and perſonal were blended together as one fund; and there is no proviſo that the huſband ſhall depart from his right, which in conſequence of the marriage he is intitled to by operation of law.

As to the five hundred pounds, the contingency was, *if there ſhall be no children begotten*; but as there were ſeveral children who lived many years, it veſted in them, expectant upon the death of the father, and is ſuch an intereſt as was tranſmiſſible.

But if he is not entitled as their repreſentative, yet the defendant has a juſt claim to it in his own right, for with regard to perſonal eſtate the word *heir* means that perſon who takes for want of the wife's diſpoſition, and that muſt be the defendant, for as her huſband, he is by the civil law conſidered as the heir, and is the perſon likewiſe who takes under the ſtatute of diſtributions.

As to the queſtion upon the grandmother's will, he inſiſted, according to the rules of the court, the legacies to the plaintiff and his ſiſter did not veſt till twenty-one, for the teſtatrix *eodem ictu* gives and directs the time of payment, for it is not by the words an expreſs gift till twenty-one to the grandchildren, being given in the mean time, until they come of age, to their mother.

LORD CHANCELLOR.

There are ſeveral demands compriſed in this bill.

Some relating to the perſonal eſtate of the plaintiff's father, and ſome of his grandmother, and ſome to the real eſtate of his mother, and likewiſe to what he is entitled at the death of the defendant; and this ariſes upon the conſtruction of the articles, which will depend firſt on the plaintiff's equity to be relieved againſt the releaſes given by him at his coming of age.

The caſe ſtands in a good deal of obſcurity with regard to the demand of an account of his father's perſonal eſtate.

The father died in 1727. ſeven years after the widow intermarries with the defendant her ſecond huſband, and articles are entered into at that time.

Nothing more was done till the plaintiff came of age in 1737. when a few days after releaſes are executed, conſequently obtained from him immediately upon his coming of age; this is always a circumſtance which gives the court a ſuſpicion of the unfairneſs of ſuch releaſes, and there is no proof at all of any account ſettled at the time, or of any account in writing laid before the plaintiff of his father's or grandmother's eſtates: but only the defendant in the ſchedule to his anſwer ſays, it amounted to a groſs ſum in the whole of 540 *l.* and 60 *l.*

At the time of the father's death he left a widow and two children; why then was not an inventory kept by the mother his ex-

ecutrix, for it is a great imputation on executors or adminiſtrators that no inventory is kept, or account delivered in to children when they come of age.

It is true, with reſpect to the defendant, there is no particular impoſition or fraud charged through his means, for he did not interfere at all, but left it to the plaintiff's mother to ſettle accounts with him, and the plaintiff beſides acquieſed for five years after the releaſes, and until after his mother's death, without ever making any objections to the fairneſs of this tranſaction, which affords a preſumption that the plaintiff did not think himſelf aggrieved.

But it appears doubtful, whether the plaintiff had any allowance f what he was intitled to, on the ſhare of his ſiſter under the g ndmother's will.

The latter words relied on in the releaſe, to ſhew the plaintiff intended to diſcharge the demand he had in right of his ſiſter, are too general to be applied to this particular demand of the plaintiff, and the releaſe muſt be confined *ſecundum ſubjectam materiam*, and ought not to be extended further.

What I am inclined to do, is to direct the Maſter to take an account of ſuch parts of the perſonal eſtate of the plaintiff's father, as the wife was poſſeſſed of at the time of her intermarriage with *William Palling* only, for it would be too hard to extend it as far back as to the death of the firſt huſband; and think it right there ſhould be this inquiry before I ſet aſide *the releaſes*, for though there are circumſtances that induce ſuſpicion, yet are not at all ſatisfactory to ſhew there was any fraud in the defendant.

The next queſtion is as to the grandmother's eſtate, and alſo in regard to the plaintiff's ſhare as the repreſentative of his ſiſter.

This is a very doubtful point.

The rule and diſtinction is, that if a legacy be deviſed to one generally, to be paid or payable at the age of twenty-one, or any other age, and the legatee die before that age, yet this is ſuch an intereſt veſted in the legatee, that the executor or adminiſtrator may ſue for and recover it; for it is *debitum in præſenti*, though *ſolvendum in futuro*, the time being annext to the payment, and not to the legacy itſelf.

If a legacy be deviſed generally to be paid at 21. and legatee die before, yet it is ſuch a veſted intereſt in the legatee, that the executor may ſue for it, and recover it, for it is *debitum in præſenti*, though *ſolvendum in futuro*.

But if a legacy be deviſed to a perſon at twenty-one, or if or when he ſhall attain the age of twenty-one, and the legatee dies before that age, the legacy is lapſed.

If a legacy be deviſed to *A.* at 21. or when he attains 21. and he dies before, it is lapſed.

It

It has been truly ſaid by the defendant's council, that there is no bequeſt made to the grandchildren, but what is contained in the direction of payment.

The reſidue directed to be paid equally between his two grand children, at ſuch time as they ſeverally attain 21. or ſooner, if his daughter thinks fit; the words, or ſooner, &c. make it a veſted legacy, and tranſmiſſible.

" The reſidue thereof I will ſhall be equally paid and divided to " and between my two grandchildren at ſuch time as they ſhall " ſeverally attain their reſpective age of twenty-one, *or ſooner, if my* " *daughter ſhall think fit.*

If it had reſted upon the words, *at ſuch time as they ſhall ſeverally attain twenty-one*, I ſhould have been of opinion for the defendant that the legacies did not veſt till then, and that it would have been the ſame thing as if the teſtator had ſaid, I give it them at the age of twenty-one.

But what is the meaning of the teſtatrix's ſaying *or ſooner, if my daughter ſhall think fit*, not to hinder the legacies from veſting; but ſhe conſidered her daughter as the natural guardian of her children, and left it to the mother's diſcretion to accelerate it, if ſhe thought proper.

And as the teſtatrix, by the whole tenor of her will, has left the mother a truſtee only for the children, without giving her any power over the capital of the legacies, I am of opinion the legacy veſted in the ſiſter of the plaintiff at the death of the teſtatrix, and tranſmiſſible to him.

As to the point of *tenant by the curteſy*, all the arguments of the huſband's ſtanding ſeiſed for the uſe of the wife under the agreement previous to the marriage, muſt be laid out of the caſe, becauſe it is merely executory, and an agreement to be carried by this court into execution.

" *Elizabeth Steadman* doth give and grant unto *William Palling*, " during her natural life, the intereſt of all her money, and the rents " of all her eſtates, and this for the maintaining the houſe and edu- " cating our children until *Thomas Steadman* and *Elizabeth Stead-* " *man*, ſon and daughter of the above *Elizabeth Steadman*, ſhall " come of full age, or be married, *&c.*

The ſcope and intent of the articles was only to regulate the whole eſtate of the wife, in right of her firſt huſband, as well the produce of the perſonal as rents of the real, for the maintenance of the houſe and education of their children, and the words ſhew it intended to compriſe the ſhare of the wife's children likewiſe till they arrived at twenty-one, but the eſtate given to the wife was to determine upon their coming of age.

In ſhort this is nothing more than a contract, in what manner the ſeveral funds ſhould be applied of which their eſtates conſiſted,

and was never intended to abridge the huſband's rights by law; and therefore I am of opinion the defendant *William Palling* is intitled to be tenant by the curteſy of the eſtate his wife was ſeiſed of at the time of the marriage, and likewiſe of the real eſtate which came to her after the marriage.

As to the five hundred pounds *Elizabeth Steadman* by the articles agreed to pay to *William Palling*, (*vide the words before.*)

The firſt queſtion (in order to determine the meaning) is, what the parties underſtood by the word *heirs*.

Moſt certainly, they intended children by it throughout the whole articles, for in a former part of the articles, the words *as lawful heir to their father* are uſed in this ſenſe.

" And *after his deceaſe, if there be no heirs* lawfully begotten by " *William Palling upon the body of Elizabeth Steadman*, then the " five hundred pounds to return to the ſaid *Elizabeth or her heirs.*

What are theſe heirs of the body? *Children*, and it would make it all void, if I was to conſtrue it according to the legal ſenſe, for that would be heirs *in infinitum.*

The meaning of the words, *after his deceaſe if there be no heirs lawfully begotten, &c.* is, if there be no children in being and exiſting of their two bodies at the time of the death of *William Palling*, then the five hundred pounds *to revert to the ſaid Elizabeth or her heirs.*

But the defendant's council ſay, the words *to Elizabeth or her heirs* mean, it ſhould go to *Elizabeth* if living at the huſband's death, but if dead in his life-time, to the huſband himſelf, he being entitled to the wife's effects.

But I am of opinion they uſe the words, *or her heirs*, in the ſame ſenſe as when before, they mention them as heirs to the father, and mean children throughout the agreement.

Lord Chancellor made the following order: " Firſt, That the " plaintiff's bill, ſo far as it ſeeks to exclude the defendaut from " being tenant by the curteſy of his late wife's real eſtate, and like- " wiſe ſo far as it ſeeks any account of the defendant's late wife's " clothes, which ſhe had at the time of her death, be diſmiſſed: " *And* declared, that the plaintiff is intitled to a moiety of his " ſiſter's ſhare of the perſonal eſtate of the plaintiff's grandmo- " ther, after the death of his ſiſter; and it appearing that the ſhare " amounted to ſixty pounds, his Lordſhip ordered that the defen-

" dant do pay to the plaintiff thirty pounds, as his moiety thereof:
" *And*, as to the relief ſought by the plaintiff's bill, to ſet aſide
" the releaſe executed by him to the defendant, and his late wife,
" adminiſtratrix of the plaintiff's father, of his ſhare and intereſt in
" his father's perſonal eſtate, either in his own right, or in right
" of his ſiſter; *His Lordſhip* ordered, that it be referred to a Ma-
" ſter, to inquire and take an account of what perſonal eſtate and
" effects the plaintiff's mother was poſſeſſed of at the time of her
" intermarriage with the defendant, and the amount thereof at that
" time. *And his Lordſhip* declares, that what ſhall appear ſhe was
" ſo poſſeſſed of, is to be conſidered as the produce of the perſonal
" eſtate of the plaintiff's late father, and ordered that the Maſter do
" ſtate what was the value of the plaintiff's ſhare thereof, to which
" he was intitled either in his own right, or as one of the next of
" kin to his ſiſter. *And* declared, that according to the true in-
" tent and meaning of the marriage agreement between the defen-
" dant and his late wife, he is intitled to the intereſt of five hun-
" dred pounds therein mentioned as his late wife's portion, or ſo
" much thereof as her ſhare of her late huſband's perſonal eſtate
" amounted to during his life, and that after his deceaſe, the prin-
" cipal thereof belonged to the plaintiff; *and* ordered that the Ma-
" ſter ſtate how much the defendant's late wife's ſhare of her for-
" mer huſband's perſonal eſtate amounted to at the time of the in-
" termarriage between her and the defendant. *And* reſerved the
" conſideration of the relief ſought by the bill for ſetting aſide the
" ſaid releaſe, till after the Maſter's report."

Caſe 151. *Incledon and others* verſus *Northcote*, *March* 2, 1746.

If a father marries a daughter without requiring a ſettlement, though it may appear a hardſhip, yet the court can give no relief, for it is eſtabliſhed now, that a huſband may diſpoſe of a wife's term, or the truſt of her term, and prevent any thing ſurviving to the wife.

SIR *Henry Northcote*, in 1732, intermarried with the defendant, the only child of Mr. *Stafford*; at the time of the marriage both were under age, and therefore no jointure or ſettlement were made by the huſband, nor had he any portion with the wife, nor any articles entered into, but ſhe was then intitled, under a ſettlement made by her father on his marriage, to five thouſand pounds, to be raiſed after his death, by virtue of a term of five hundred years, veſted in truſtees, whereof Sir *William Drake* was the ſurvivor, out of part of her father's eſtate, called the *Stafford* eſtate, and the defendant, Mrs. *Northcote*, was alſo tenant in tail, expectant on the death of her father, in lands whereof her grandfather, by the mother's ſide, died ſeiſed, called the *Kelland eſtate*.

Mr. *Stafford* being ſeiſed of the *Stafford* eſtate, ſubject to the term for raiſing five thouſand pounds, mortgaged part of it to *Thomas Troyte* and others, for 1000 years, for ſecuring four thouſand pounds, in truſt for Sir *Thomas Ackland*, then an infant, and charged it afterwards with the further ſum of thirteen hundred pounds, making

king together five thouſand three hundred pounds, and before he paid any part of the principal ſum he died, but by will deviſed this eſtate upon truſt to be ſold, for payment of debts and legacies, and as to what remained unſold, in truſt for his daughter in tail, with remainders over.

Mr. *Stafford*, at his death, was indebted in the ſum of nine thouſand pounds, by bond and otherwiſe, over and above the five thouſand three hundred pounds ſecured by mortgage, which, with the five thouſand pounds charged on the *Stafford* eſtate for the defendant's portion, exceeded the value of that eſtate; whereupon the truſtees under his will declining to act, the defendant, Sir *Henry Northcote*, at her requeſt, (being deſirous all her father's debts and legacies ſhould be ſatisfied) did agree to ſubject the *Kelland* eſtate, together with the *Stafford* eſtate, to the payment thereof, and thereupon, by indenture of bargain and ſale, dated the 29th of *September* 1734, and by fine levied by Sir *Henry Northcote* and the defendant of the *Kelland* eſtate, both eſtates were, by the truſtees in Mr. *Stafford*'s will, and by Sir *Henry Northcote*, the defendant, conveyed to Sir *Henry Northcote*, *Francis Kirkham*, and the plaintiff, and their heirs, on truſt by the profits or ſale of both eſtates, or any part thereof, to raiſe money ſufficient to pay off the incumbrances on the *Stafford* eſtate, and all other debts and legacies of Mr. *Stafford*.

In purſuance of the truſt, with money ariſing by profits of the *Kelland eſtate*, and by mortgage of part, and ſale of ſeveral parts of this eſtate, and of a ſmall part of the *Stafford* eſtate, and by money advanced by Sir *Henry Northcote*, the truſtees paid off three hundred pounds, part of the mortgage of five thouſand three hundred pounds, and all the other debts and legacies of Mr. *Stafford*, except the five thouſand pounds remainder of the mortgage money, and except a bond debt of one thouſand and fifty pounds to Sir *Henry Northcote*.

And for the better ſecuring the five thouſand pounds, reſidue of the principal and intereſt on the mortgage, by indenture dated the 16th of *June* 1735. *William Kirkham*, repreſentative of the ſurviving truſtee of the 500 years term, by the direction of Sir *Henry Northcote*, together with the plaintiff, *&c.* aſſigned the truſt term to *Thomas Troyte* and others, ſubject to redemption on payment of the five thouſand pounds and intereſt, and Sir *Henry Northcote* did thereby extinguiſh the five thouſand pounds portion; and *Troyte* and the other mortgagees did aſſign the mortgage term on part of the mortgaged premiſſes freed from ſuch mortgage, upon truſt for Sir *Henry Northcote* the plaintiff, *Incledon*, and others, and their heirs, upon truſt, as by the will of Mr. *Stafford*, and by the ſame deed, Sir *Henry Northcote*, the plaintiff, *&c.* did, in lieu thereof, demiſe the other part to *Troyte* and others the mortgagees for ſix hundred years, ſubject to redemption, with the other lands comprized in the

five hundred years term, ſo aſſigned to *Troyte*, *&c.* on payment of the five thouſand pounds mortgage money, and intereſt.

Afterwards, by a common recovery, in which Sir *Henry Northcote* and his wife, the defendant, were vouchees, and by indenture of leaſe and releaſe, dated the 29th and 30th of *April* 1740, executed by them, and the ſurviving truſtees; ſuch part of the *Stafford* eſtate as remained unſold was ſettled as to a rent of forty ſhillings *per ann.* to Sir *Henry Northcote* and his heirs; and as to the reſt of the eſtate of the value of nineteen thouſand pounds, to the uſe of two truſtees for three hundred years, in truſt for raiſing one thouſand pounds by mortgage or ſale, for reimburſing Sir *Henry Northcote* the money he advanced in payment of the debts and legacies of Mr. *Stafford*, and ſubject to the term to the uſe of Sir *Henry Northcote* for life, to the defendant for life, remainder to their ſons in tail, remainder to their daughters in tail, remainder to the ſurvivor of them in fee.

And ſuch part of the *Kelland* eſtate as remained unſold, and which was of the value of twelve thouſand pounds, was by leaſe and releaſe dated the 29th and 30th of *July* 1740, conveyed ſubject to a mortgage for ſecuring one thouſand pounds, to the uſe of the ſame truſtees, in truſt for Sir *Henry Northcote* and his heirs.

That afterwards, by leaſe and releaſe, dated the 20th and 21ſt of *April* 1743, the eſtate ſo in mortgage for one thouſand pounds was, by the mortgagees and Sir *Henry Northcote*, conveyed to the uſe of *Robert Helyar*, Eſquire, and his heirs, by mortgage for two thouſand pounds, which was borrowed by Sir *Henry Northcote*, in order to diſcharge the thouſand pounds then due on the mortgage, and the reſidue of the two thouſand pounds was to ſupply ſome particular occaſions of Sir *Henry*, and by him applied accordingly, except only four hundred pounds thereof which remained with Sir *Henry* in his houſe, or ſeat, at *Pynes*, at the time of his death.

Sir *Henry Northcote* having, by the deed of the 16th of *June* 1735, extinguiſhed the five thouſand pounds for his lady's portion, and being ſeiſed of ſuch part of the *Kelland* eſtate as remained unſold, for payment of debts of Mr. *Stafford*, and being entitled to a thouſand pounds, to be raiſed by the term of three hundred years, out of the *Stafford* eſtate; and being ſeiſed of ſeveral manors and lands in *Devonſhire*, the inheritance of his anceſtors, of the value of twenty thouſand pounds, did make his will, and a codicil dated the ſame day, as follows:

" I give all my eſtate, real and perſonal, unto *Robert Incledon*, " and others, their heirs, executors, *&c.* in truſt as to ſo much of " my perſonal eſtate as ſhall be and remain on my ſeat at *Pynes* at

" my death, that they ſhall ſuffer my wife to uſe and enjoy the " ſame for ſo many years as ſhe ſhall live; and as to my real " eſtate, and alſo the reſt of my perſonal eſtate, I deviſe it in truſt " for payment of all my debts, and ſubject thereunto for raiſing " five thouſand pounds for ſuch child or children of my body iſ- " ſuing as ſhall attain twenty-one, to be paid to ſuch child or " children, if but one, but if more than one, equally to be divi- " ded between them; then, as to my real eſtate, the ſame ſhall re- " main to the uſe of the firſt and every other ſon and ſons of my " body, and the heirs of the body of ſuch ſon and ſons, and in " default of ſuch iſſue, then to the uſe of the daughter and daugh- " ters; and in default of ſuch iſſue, then to the uſe of my wife " for her life, and appointed *Incledon* and others executors."

A codicil to be annexed to my will.

" *Item*, My will is, that the truſtees within named do ſell the " *Kelland* eſtate, and apply the money ariſing from ſuch ſale to the " diſcharge of the mortgage due thereon to *Robert Helyar*, and af- " ter that is ſatisfied, to apply ſuch other money ariſing from it, " to the diſcharge of the mortgage, to Sir *Thomas Ackland*'s truſ- " tees on the *Stafford* eſtate, to the intent that the *Stafford* eſtate " may be free and clear to my dear wife, and after the two mort- " gages are fully paid, my wife ſhall be intitled to receive the " rents of the overplus of the *Kelland* eſtate during her life, and " after her death, to go in ſtrict ſettlement in the manner I have " ſettled my lands in the body of my will."

Sir *Henry Northcote*, at his death, had iſſue living *Stafford*, now *Sir Stafford Northcote*, *his eldeſt ſon*, *an infant*, and the plaintiffs *Bridget*, *Maria Northcote*, *Henry*, *Hugh* and *Charles Northcote*, and was at his death poſſeſſed of a conſiderable perſonal eſtate, conſiſting, among the reſt, of chattel, corn, houſhold goods and plate, at his ſeat called *Pyne*, (which was part of the *Stafford* eſtate) of the value of about twelve hundred pounds, over and above the dreſſing plate and jewels uſed by Lady *Northcote* in his life-time, and alſo over and above four hundred pounds in caſh remaining at *Pynes*.

The defendant Lady *Northcote* inſiſts, that (by virtue of the clauſe in the will of Sir *Henry Northcote*, whereby the truſtees are to permit her to uſe and enjoy, for her life, ſo much of his perſonal eſtate as ſhould remain at *Pynes* at his death) ſhe is intitled to the uſe not only of the goods and plate then in Sir *Henry Northcote*'s dwelling houſe at *Pynes*, but alſo to the uſe of the four hundred pounds remaining in the houſe, and of all the cattle, ſheep, horſes, corn, grain, and live and dead ſtock, upon the farm of *Pynes*.

And that ſhe is intitled, to her own uſe, abſolutely, to many pieces of plate, rings, diamonds, *&c.* as her *paraphernalia*.

And alſo inſiſts, ſhe is intitled to her dower of the *Northcote* eſtate.

It was inſiſted on behalf of Sir *Stafford Northcote*, the ſon of the teſtator Sir *Henry*, that the defendant, Lady *Northcote*, is not intitled to the uſe of the four hundred pounds, or any of the dead or live ſtock on the farm at *Pynes*, nor of any goods, plate or perſonal eſtate at *Pynes*, other than what was in the dwelling-houſe or ſeat there.

And that the plate and jewels, claimed as *paraphernalia*, ought to be applied for the payment of the debts of Sir *Henry Northcote*, in eaſe of his real eſtate.

And inſiſted likewiſe, that Lady *Northcote* having, ſince the death of Sir *Henry Northcote*, entered upon the *Stafford* and *Kelland* eſtates, and become ſeiſed thereof for life, by virtue of the ſeveral conveyances, will and codicil, is thereby debarred from all right of dower of the *Northcote* eſtate.

And alſo inſiſts, that one fifth part of the five thouſand pounds, directed by the will of Sir *Henry Northcote*, to be raiſed for ſuch child or children of his body as ſhould attain the age of twenty-one, doth belong to him in caſe he attains twenty-one, and that, in the mean time, his brothers and ſiſter are not intitled to any intereſt for the five thouſand pounds, or any allowance out of the profits of the eſtate charged therewith, for maintenance and education.

That in regard of theſe differences and doubts, the truſtees in Sir *Henry Northcote*'s will, cannot ſafely execute the truſts without the direction of the court, and therefore, that an account may be taken of the perſonal eſtate deviſed to the truſtees, and applied towards the debts of Sir *Henry Northcote*; and that the claim of dower by Lady *Northcote* out of the *Northcote* eſtate, and the other diſputes may be determined by the court, and that the plaintiffs, the younger children of Sir *Henry Northcote*, may have a reaſonable allowance for their maintenance and education, till their portions ſhall become payable, was the end of the bill.

Lady *Northcote*, by her anſwer, makes another point, that as ſhe has ſurvived Sir *Henry Northcote*, the reſidue of the term of five hundred years, for raiſing the defendant's portion, ſhall be deemed to be a ſecurity for one fourth part only of the mortgage money, and to ſink no more than one fourth part of the defendant's portion of five thouſand pounds, but that upon payment of the five thou-

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ſand pounds to *Twyte* and others, by ſale of part of the *Kelland* eſtate, or part of the *Stafford* eſtate, the reſidue of the term of five hundred years ſhall be a ſecurity for raiſing the remaining three parts of the defendant's portion; and the rather, for that Sir *Henry Northcote*, by his will and codicil, hath directed the mortgage of five thouſand pounds on the *Stafford* eſtate, to be diſcharged by ſale of part of the *Kelland* eſtate, to the intent that the *Stafford* eſtates might be free and clear to the defendant.

Lord Chancellor took a week's time to conſider of the caſe, and this day gave judgment.

One queſtion is, as Lady *Northcote* has ſurvived Sir *Henry Northcote*, whether the five thouſand pounds has ſurvived to her as *a choſe in action*, or whether it ſhall be conſidered as part of her huſband's perſonal eſtate.

And, I am of opinion, it ought to be taken to be part of his perſonal eſtate.

The great objection is this, that no ſettlement was made upon her, either on the marriage, or ſince, and ſhe has gained nothing out of Sir *Henry Northcote*'s family, and therefore it is hard this ſhould be taken from her.

To be ſure, it is a matter of hardſhip, but if her father married her without requiring a ſettlement, the court can give no relief, and ſhe might marry too in expectation of dower.

But I rely upon the acts which have been done by Sir *Henry Northcote* and his Lady, and whether there has been a ſufficient diſpoſition of the five hundred years term by Sir *Henry Northcote*.

Nothing is clearer, ſince Sir *Edward Turner*'s caſe, 1 *Vern.* 7. and *Pitt* verſus *Hunt*, 1 *Vern* 18. that a huſband may diſpoſe of the wife's term, or the truſt of her term, and prevent any thing ſurviving to the wife.

The *Stafford* eſtate coming to Sir *Henry Northcote* in the life-time of Lady *Northcote*, ſubject to the mortgage made by Mr. *Stafford* for five thouſand pounds, he had a right, in any ſhape, to make it his own, and has aſſigned over this five hundred years term, and ſo have the truſtees, by his direction, as a further ſecurity for the very ſum.

It has been objected, that if a huſband raiſes money on the wife's freehold, and covenants to pay it, that his aſſets muſt be liable to exonerate the wife's eſtate.

Where a husband is but tenant by the curteſy, and has only an intereſt for life in the wife's eſtate, he cannot affect that eſtate without her joining.

That is the rule, but in what caſe? Why, where he cannot affect the wife's eſtate without her joining, as where he is but tenant by the curteſy, or has only an intereſt in it for her life; but here it was his own, and he could at any time, during his life, aſſign the term.

A wife having the truſt in a term in her, joining with her huſband in a common recovery, ſhe comes in by voucher, in privity of all her eſtate legal and equitable, and is therefore barred of any claim to it afterwards.

But it does not reſt here, for the deed in which Sir *Henry Northcote* and Lady *Northcote* have joined, has put this queſtion quite out of all doubt, for they have ſuffered a common recovery, and declared the uſes of it, and that they intended to make a new ſettlement of this *Stafford* eſtate; and Lady *Northcote* having the truſt of the term in her, and coming in by voucher ſhe comes in, in privity of all her intereſts both legal and equitable, and therefore has barred herſelf of any ſort of claim whatſoever, and conſequently has no right to the five thouſand pounds.

The next queſtion is, as to the defendant's claim of dower out of the real eſtate of Sir *Henry Northcote*? She inſiſts ſhe has done nothing to bar her, of her dower in the eſtate Sir *Henry Northcote* left at the time of his death.

Though the huſband by his will gives the wife the very eſtate in remainder from which ſhe demands her dower, yet on all the circumſtances of her caſe, ſhe is intitled to her dower out of it notwithſtanding.

I am of opinion, ſhe is intitled to dower; for it would be very hard if no ſettlement was made on her marriage, and ſhe is barred too of her five thouſand pounds, that ſhe ſhould alſo loſe her dower: All ſhe has given by his will to the defendant, Lady *Northcote*, is a ſpecific legacy of perſonal eſtate at his ſeat at *Pynes*, and a remainder to her for life in his real eſtate, in default of iſſue male, and female, by himſelf.

Lady *Northcote* inſiſts, not only on her dower, but on the benefit of ſuch legacies likewiſe as are deviſed to her by the will.

It has been objected, by the council for Sir *Stafford Northcote*, that the deviſes by the will do, in ſome meaſure, claſh with her claim of dower, and are intirely inconſiſtent with it, becauſe the teſtator gives her the very eſtate in remainder, out of which ſhe demands her dower, and therefore ſhe muſt either take totally under the will, or totally reject it.

I do agree, this has been the general rule ever ſince the caſe of *Noys* verſus *Mordaunt*, 2 *Vern.* 581. which was decreed in *Hilary* term 1706. but the queſtion is, whether Lady *Northcote*, upon the circumſtances of the caſe, is to be excluded; and I am of opinion, upon the authority of *Lawrence* verſus *Lawrence*, 2 *Vern.* 365. ſhe is not, which was finally determined ten years after *Noys* verſus *Mordaunt*, and ſeems to me to be a caſe in point; the decree was

firſt made by Lord *Somers* againſt the wife, reverſed by Lord Keeper *Wright*, and the decree of reverſal affirmed in the Houſe of Lords, and determined too by them upon the merits of the caſe in *May* 1716; for though Lord *Cowper* ſaid, he would only enter upon the point relating to the account, yet he certainly was not precluded from examining into the claim of dower likewiſe; but it appears by a note that I have of this caſe, that the Houſe of Lords did not think themſelves confined to any particular part, but decreed upon the whole caſe.

This preſent caſe ſtands diſtinguiſhed from *Noys* verſus *Mordaunt*, upon the reaſon of the thing likewiſe, for the claim there would have overturned the will *in toto*.

But Lady *Northcote* does not claim to overturn the will *in toto*, but merely a temporary intereſt, and is only taking out that *excreſcent* intereſt for a time, and afterwards it will go on as the teſtator intended it.

The wife taking out of the eſtate only an excreſcent intereſt for a time, does not overturn the will.

The third queſtion is, what paſſed to Lady *Northcote* by the words perſonal eſtate on my ſeat at *Pynes* for her life.

It was inſiſted, by her council, that ſhe is intitled to all the houſhold goods and furniture, ſtock upon the ground, and the four hundred pounds in money in the houſe at Sir *Henry Northcote*'s death.

But the council on the other ſide have ſaid, it is to be taken more ſtrictly, and that it ought to be confined to the goods in the houſe and garden at *Pynes only*.

But this is too ſtreight a conſtruction.

As to the four hundred pounds, I am of opinion it did not paſs by this deviſe, nor is within the meaning of the words, it might as well have paſſed *choſes in action*; but I think that all the ſtock on the farm, *live* and *dead*, and *all ſtores* on the lands held in hand, which were enjoyed at *Pynes*, for the uſe and accommodation of the houſe and ſeat, will paſs to the wife, for ſhe was to reſide there with her children, and were plainly intended for her uſe in carrying on the farm.

Indeed it is ſaid for her life, and therefore it was objected ſhe ought only to have the uſufructuary intereſt.

But then all bequeſts of goods for life are ſubject to contingencies, reaſonable wear and conſumption, and an inventory muſt be made of them.

Where perſonal eſtate has been exhauſted by a huſband's creditors, and there is a truſt eſtate charged with payment of debts, the wife intitled to come upon that eſtate to be reimburſed the value of her *paraphernalia*.

A fourth queſtion is, as to Lady *Northcote's paraphernalia*, and ſhe muſt have them in ſome ſhape or other, but, to be ſure, not to the prejudice of creditors, yet, as here is a truſt eſtate, charged with payment of debts, which is ſufficient for that purpoſe, ſhe may come round upon the truſt eſtate to be reimburſed to the value of her *paraphernalia*, if the perſonal has been exhauſted by her huſband's creditors; and determined ſo in ſeveral caſes.

A deviſe of 5000 *l.* out of an eſtate equally to teſtator's children, with remainder in the ſame eſtate to his firſt and other ſons, *the eldeſt ſon ſhall have a ſhare.*

The laſt queſtion is, whether by the deviſe of five thouſand pounds out of his eſtate, equally to be deviſed between his children, with remainder in the ſame eſtate to his firſt and other ſons, Sir *Stafford Northcote* the eldeſt ſon ſhall have a ſhare.

It has been objected, that though there is the general word children in the will, yet it cannot be conceived, that he intended his eldeſt ſon by it, for he is to take the eſtate it ſelf, and it would be abſurd that he ſhould provide for him out of the eſtate, and yet give him the eſtate.

But I am of opinion, that the words are too ſtrong to ſay, that Sir *Stafford Northcote* is not a child, and though the eſtate is given to him as the firſt ſon, yet it is given likewiſe to every other ſon, and therefore it might as well be ſaid to take away the ſhare of a ſecond ſon.

The children have inſiſted upon intereſt on their ſhares for their maintenance, though the five thouſand pounds is given to ſuch children of his body as ſhould attain the age of twenty-one, and conſequently is not veſted.

Where legacies are given to a ſtranger, either payable at twenty one, or not till twenty-one, they can have no intereſt in the mean time, but where given to children, in either of theſe caſes, they ſhall have intereſt immediately.

In the caſe of ſtrangers, whether the legacy be given abſolutely, and payable at twenty-one, or not given until twenty-one, they can have no intereſt in the mean time; but in either of theſe deviſes, where they are given to children, the court will direct intereſt for their portions immediately; and it has been ſo done frequently.

Though no more had been allowed for many years than four *per cent.* for maintenance, yet, in conſideration of mortgages being then at four and a half, and ſeveral at five *per cent.* the court ordered the children ſhould have four and a half *per cent.* intereſt on their ſhares of the 5000 *l.*

It being inſiſted, that the younger children, in regard that the eldeſt ſon is intitled to one ſhare of the five thouſand pounds, ought to be allowed intereſt at five *per cent.* for their maintenance, their proviſion being ſo ſcanty; *Lord Hardwicke* ſaid, at firſt, as no more had been allowed for many years than four *per cent.* for maintenance,

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he did not care to break through the rule; but afterwards, in conſideration of the intereſt of money being altered within theſe two years, mortgages being then at four and a half, and ſeveral at five *per cent.* his Lordſhip ordered the children ſhould have four and a half *per cent.* intereſt upon their ſhares of the five thouſand pounds.

Roſe verſus *Gannel*, *March* 3, 1746. *Second ſeal after Hilary Term.* Caſe 152.

A Bill was brought for diſcovery, and perpetuating the teſtimony of witneſſes; the plaintiff ſtruck out the diſcovery, and all the relief; but in praying of proceſs, prays that the defendant may abide ſuch order and decree as the court ſhall think proper to make.

In praying of proceſs upon a bill brought for a diſcovery, and for perpetuating the teſtimony of witneſſes, the plaintiff prayed the defendant might abide *ſuch order and decree* as the court thought proper to make; a demurrer on ſuch a bill allowed, for it is praying relief as well as a diſcovery.

The defendant moved that he might be paid the coſts of the ſuit, and that it might be referred to a Maſter for that purpoſe.

LORD CHANCELLOR.

The words *order* and *decree*, in the prayer of the proceſs, make it a bill for relief, and regularly ought to be diſmiſſed; but I will not direct the coſts of ſuit to the defendant, till the precedents are ſearched of bills for perpetuating the teſtimony of witneſſes, to ſee whether it is uſual in praying the proceſs of the court, to inſert the words, that the defendant may abide ſuch order and decree as the court ſhall think proper to make.

N. B. Some conſiderable practiſers at the bar ſaid, that there was a caſe before Lord *Talbot* of a bill for diſcovery, with theſe words, *in the prayer of the proceſs*; and upon the defendant's *demurring*, his Lordſhip ſaid, it was praying relief, as well as a diſcovery, and allowed the demurrer.

Barley verſus *Pearſon*, *March* 3, 1746. *Second ſeal after Hilary Term.* Caſe 153.

MR. *Ord* moved, at a former ſeal to ſuppreſs an anſwer returned upon a commiſſion out of the country, for want of being ſigned by the party: it ſtood over till to day, to give the regiſter an opportunity of ſearching precedents, who certified, that they are both ways, ſome ſigned, and ſome not ſigned by the party.

The regiſter certifying that there are precedents of anſwers returned upon a commiſſion out of the country, which have not been ſigned by the party; Lord *Hardwicke* would not ſuppreſs the anſwer for want of it, but ſaid, he would conſider of a rule to make the proceedings in this matter uniform for the future.

The council for the motion ſaid, there was one great inconvenience in the parties not ſigning them; that if he ſhould be guilty of perjury, it would be a difficult matter to convict him, becauſe they muſt prove the identity of the perſon who ſwore the anſwer; and there was a caſe before Lord Chief Juſtice *Lee*, where the defendant was acquitted, becauſe the Maſter, before whom the anſwer was ſworn, would not venture to ſwear it was the ſame perſon.

LORD CHANCELLOR.

The old rule of the court, before the ſtatute for amendment of the law, was to ſend the tenor of the bill to the commiſſioners, but this was done ſo looſely in the office, that it did not anſwer the end of aſſiſting them in framing the anſwer, and therefore the act took away the practice of ſending with the commiſſion *tenorem billæ*.

The old rule of the court before the ſtatute of 4 & 5 *Ann. ch.* 16. for amendment of the law, was, to ſend to the commiſſioners the tenor of the bill, and they examined the defendant, in taking his anſwer by this tenor, in the ſame manner as if they had been examining him upon interrogatories, and in the return of the commiſſion, certified the method in which they took his anſwer; ſo that there was no occaſion either for the council, or the party to ſign the anſwer; but, by degrees, the inſerting the tenor of the bill in the commiſſion, was done in ſo looſe a manner, in the office, that it became a mere ballad, and was of no real uſe to the parties, and did not at all anſwer the end of aſſiſting the commiſſioners, in framing the anſwer, but was a fruitleſs and unneceſſary expence; ſo that the act of parliament for amendment of the law, very judiciouſly took away the practice of ſending with the commiſſion *tenorem billæ*.

And therefore, as this is now omitted, it is neceſſary the party, as well as the commiſſioners, ſhould ſign an anſwer taken in the country, but not material it ſhould be ſigned by a council.

But as, at preſent, the precedents are both ways in the office, and in ſome counties in *England*, they follow the old practiſe ſtill, in omitting to make the party ſign the anſwer, it would be too hard in one particular caſe, to ſuppreſs the anſwer; but his Lordſhip ſaid, that he would conſider of ſome rule to make the proceedings in this matter uniform, for the future, throughout the kingdom.

Caſe 154. *March* 7, 1746, *this day the cauſe of Trafford* verſus *Boehm ſtood for judgment, Lord Hardwicke having taken a few days to conſider of it.*

BY indenture of the 30th of *November* 1692, between *Clement Boehm* of the firſt part, *Ann Dilke* of the ſecond, and two truſtees of the third, reciting a marriage, intended between *Clement* and *Ann*, and that ſhe was ſeiſed of lands in *Hackney*, ſhe, with the privity of *Clement*, for the better proviſion for her, and her iſſue by

Clement, granted and releaſed the lands to the truſtees and their heirs.

To the uſe of *Clement* and *Ann* during their lives, and the life of the ſurvivor.

Remainder to the truſtees, to preſerve contingent remainders: Remainder to the firſt ſon of *Clement* by *Ann* in tail male: Remainder to the ſecond, and every other ſon, in tail male: Remainder to the daughters in tail general: Remainder to the ſurvivor of *Clement* and *Ann* in fee.

And by the ſame deed *Ann* aſſigned twelve hundred pounds in money to the truſtees, to be laid out in purchaſing lands in fee-ſimple, with the conſent of *Clement* and *Ann*, and the ſurvivor, to the ſame uſes as were limited of the lands releaſed by this deed, and a proviſo that the truſtees, if required, ſhould lay out ſix hundred pounds, part of the twelve hundred pounds, in the purchaſe of a houſe, to remain to *Clement* and *Ann*, or the ſurvivor.

And by the ſame deed *Ann* aſſigned to the truſtees two thouſand pounds due to her from the chamber of *London*, to be laid out in lands to the ſame uſes.

Clement covenanted to leave *Ann* ſuch part of the perſonal eſtates as ſhe ſhould be intitled to by the cuſtom of *London*, in caſe he was a freeman at his death.

There was iſſue of the marriage *Sigiſmund Boehm*, (afterwards called *Trafford*) the eldeſt ſon, and the plaintiff's late huſband, and ſeveral other children.

Upon the marriage of the plaintiff with *Sigiſmund Trafford*, her fortune was to be laid out by *Henry Heathcote* and *Charles Boehm*, the truſtees under the ſettlement before marriage, in the purchaſe of lands to be ſettled to ſeveral uſes, with an expreſs proviſo that *Heathcote* and *Boehm*, till a proper purchaſe of lands could be found, ſhould by *Sigiſmund*'s direction or conſent inveſt the truſt money *in goverment funds or other good ſecurities.*

And there was a recital in this ſettlement, that *Sigiſmund*, by virtue of his father's marriage ſettlement, was ſeiſed in remainder of the land in *Hackney*, to him and the heirs male of his body, and to the reverſionary intereſt in the ſix hundred pounds, part of the twelve hundred pounds, and in eighteen hundred and fifty-five pounds fifteen ſhillings and nine pence, produced from the two thouſand pounds orphan ſtock, and that he covenanted to convey (if he ſurvived his father) the land in *Hackney*, the ſix hundred

and eighteen hundred and fifty-five pounds fifteen ſhillings and nine pence to the truſtees, for the more effectual raiſing ſo much, as with the plaintiff's fortune would purchaſe lands of four hundred pounds a year, for particular purpoſes.

Henry Heathcote died, and all the truſt money remained in the hands of *Charles Boehm*.

The plaintiff's fortune lying dead, and no proper purchaſe then offering, eight thouſand five hundred eighty-five pounds thereof was, by the direction of her father and her huſband, inveſted in the purchaſe of ſeven thouſand pounds *South-Sea* ſtock.

Three years afterwards, *South-Sea* ſtock being greatly fallen, and the plaintiff's father and huſband apprehending a further fall, it was ſold by *Charles Boehm*, and the ſum of thirteen hundred ſixty-nine pounds five ſhillings *was loſt by the difference of price in buying and ſelling the* South-Sea *ſtock*.

Clement Boehm, the father of *Sigiſmund*, by his will dated the 8th of *July* 1725, deviſed to *Sigiſmund* the land in *Hackney*, *and the two thouſand four hundred fifty-five pounds fifteen ſhillings and nine pence*, viz. *the one thouſand eight hundred fifty-five pounds fifteen ſhillings and nine pence, and the ſix hundred pounds above mentioned*, and gave to his ſon *Clement Boehm* two thouſand pounds, and to his other children divers legacies, and the reſidue of his eſtate to his ſons *Charles* and *Edmund*, whom he appointed executors, and declared he had given all his children more than was coming to them by the cuſtom of *London*, and therefore willed, that upon payment of every legacy, a full diſcharge ſhould be given to his executors, and in caſe of refuſal of ſuch diſcharge, he or ſhe refuſing ſhould have no more of his eſtate than was due by the cuſtom.

The teſtator died in *June* 1734, and the two following receipts were given by *Sigiſmund* and *Clement*.

Received *May* the 19th 1735, of my brothers *Charles Boehm* and *Edmund Boehm*, executors to my father deceaſed, the 2455*l.* 15*s.* 9*d.* purſuant to my father's laſt will, and in full of all claims and demands whatſoever upon my father's eſtate by virtue of his marriage contract, or otherwiſe, acknowledging this receipt to be a full releaſe and diſcharge to his executors.

Sigiſmund Trafford.

Received the 2d of *November* 1734, of my brothers *Charles* and *Edmund Boehm*, executors to my father deceaſed, the full ſum of 2000*l.* purſuant to my father's laſt will, and accordingly I quit claim for ever to any and all demands whatſoever upon the eſtate of

my father, acknowledging and declaring this to be a full diſcharge to his executors.

Clement Boehm.

The plaintiff's huſband died the 1ſt of *February* 1740, without iſſue, leaving his brother *Clement Boehm* his heir at law.

By his will dated the fourth of *March* 1739, *Sigiſmund* gave all his real eſtate to the plaintiff for life, without impeachment of waſte, and after her death, and failure of iſſue by him, and payment of debts, to his ſiſter *Theodoſia Hopfer* for life, with remainder to ſeveral other perſons for life, remainder to his own right heirs, and taking notice of the ſettlement made on his marriage, and that the truſtees were to lay out the plaintiff's portion in lands, and that he had no iſſue, he charges the reverſion in fee of the lands purchaſed, or to be purchaſed with her portion, (expectant on the deceaſes of the teſtator and the plaintiff, and failure of their iſſue) with his debts, and after payment thereof, deviſes the ſame to his brothers and ſiſters, in ſuch manner and for ſuch eſtates as he had before deviſed his real eſtate, with remainder to his own right heirs.

Clement Boehm, the brother of *Sigiſmund* died the 30th of *September* 1741, leaving the defendant *Clement Trafford* an infant, his only child, and heir at law.

LORD CHANCELLOR.

I am extremely well ſatisfied with the opinion I am going to give, and therefore did not think I ought to delay the parties by putting it off to a further time.

The end of Mrs. *Trafford*'s original bill is to have the benefit intended for her from her portion, and her huſband's covenants in the ſettlements previous to her marriage.

The end of *Charles Boehm*'s croſs bill (third ſon of old *Clement Boehm*, and ſurviving truſtee under his brother's marriage ſettlement) is to have the truſts of that ſettlement performed, and to have all juſt allowances, and in particular to be diſcharged of the 1369*l.* 5*s.* part of the truſt money loſt by the fall of the *South-Sea* ſtock, and that the 600*l.* and 155*l.* 15. 9*d.* making together 2455*l.* 15*s.* 9*d.* may either be applied to make good the truſts of the ſettlement of the 30th of *November* 1692, made on the marriage of old *Clement Boehm*, or to make good the truſts of his brother *Sigiſmund*'s ſettlement, as the court ſhall direct.

Under theſe covenants, and theſe truſts, ſeveral of the queſtions ariſe.

One

One queſtion is, upon whom the loſs of the 1369 *l.* 5 *s.* ſhall fall, and whether that loſs has ariſen from a diſpoſition of the truſt money according to the terms of the truſt?

I am of opinion the loſs has not happened from a diſpoſition of the truſt money according to the terms of the truſt, but that it has been laid out in a different manner from what was intended by the truſt.

To be inveſted, till a purchaſe of lands could be found, in government funds, or other good ſecurities.

Laying out the money in *South-Sea* ſtock, *not a good ſecurity* according to the terms of the truſt, as it is ſubject to loſſes; for the directors may trade away their whole ſtock whilſt they keep within the terms of their charter.

Neither *South-Sea* ſtock nor Bank ſtock are conſidered as a good ſecurity, becauſe it depends upon the management of the governors and directors, and are ſubject to loſſes; for inſtance, it is in the power of the *South-Sea* company to trade away their whole ſtock while they keep within the terms of their charter.

South-Sea annuities and Bank annuities are only and properly *good ſecurities*, for it is not in the power of the directors to bring any loſs upon them.

But *South-Sea* annuities and Bank annuities are of a different conſideration; the directors have nothing to do with the principal, and are only to pay the dividends and intereſt till ſuch time as the government pay off the capital, and it is not in their power to bring any loſs upon them, and therefore are only and properly good ſecurities.

The word *funds* does not alter it, becauſe it muſt relate to ſuch funds as are a good and undoubted ſecurity.

This court will endeavour to deliver *a truſtee* from a miſapplication of truſt money.

There is no doubt but this court will endeavour to deliver a *truſtee* from any miſchief that may happen from a miſapplication of truſt money, which brings it to the conſideration how this loſs is to be made good to the truſt eſtate.

Now, as to the manner of making it good to the truſt eſtate, it muſt firſt come out of the eſtate of *Sigiſmund Trafford*, becauſe done either with his concurrence, or ſubſequent aſſent; for he has paſſed the account with his brother *Charles*, and conſtantly received the dividends of the *South-Sea* ſtock.

Where a truſtee errs in the management of the truſt, yet if he goes out of it with the approbation of the *ceſtuy que truſt*, it muſt be firſt made good out of the perſon's eſtate who conſented.

The rule of the court in all caſes is, that if a truſtee errs in the management of the truſt, and is guilty of a breach, yet if he goes out of the truſt with the approbation of the *ceſtui que truſt*, it muſt be made good firſt out of the eſtate of the perſon who conſented to it.

Therefore *Sigiſmund*'s eſtate muſt be applied in the firſt place.

The next queſtion is, and the principal one in the cauſe, as to the ſum of 2455 *l.* 15 *s.* 9 *d.* ariſing out of the funds which were part of the portion of old Mr. *Clement Boehm*'s wife, whether it ſhall be conſidered as real or perſonal eſtate upon the circumſtances of the caſe.

It muſt be admitted that it was to be laid out in land, and conſequently on the foot of the ſettlement in 1692. muſt be taken *primâ facie* as land, and go as real eſtate would have done.

The queſtion will be then, whether the acts ſince done are ſufficient to bar the entail as it is called, or to diſcharge the *tranſubſtantiated* real quality given it in the conſideration of this court.

It is a tranſaction of fifty years ſtanding; and it appears too that the money, though veſted in truſtees, was in the hands of old Mr. *Clement Boehm*; *Sigiſmund* had an expectation of this money coming to himſelf, and by his ſettlement covenants that (in caſe he ſurvives his father) he will aſſure and make over the 2455 *l.* 15 *s.* 9 *d.* to the truſtees, for the more effectual raiſing ſo much as with the plaintiff's fortune would purchaſe lands of 400 *l. per ann.* this is not made a part of the fund to be laid out, but a further ſum for the purchaſe of lands for the plaintiff's benefit.

Old Mr. *Clement Boehm* on the 8th of *July* 1725. executes a will, and takes upon him to make a diſpoſition of his eſtate among his children, and gives the 2455 *l.* 15 *s.* 9 *d.* to *Sigiſmund Trafford.*

After his death the children accept their legacies, and *Sigiſmund* and *Clement* ſign receipts and diſcharges to the executors of old Mr. *Clement Boehm*, and the other ſons give diſcharges for their legacies likewiſe.

Upon this it has been inſiſted on the part of the plaintiff Mrs. *Trafford*, that it is not now to be conſidered as a debt, and ſubject to be laid out for the benefit of the remainder-men in tail, under the deed of 1692. becauſe *Sigiſmund Trafford*, the firſt tenant in tail, took the money with the conſent of his other brothers, and therefore is diſcharged from the entail.

Two objections have been made on the part of the defendant *Clement Trafford*, the ſon and only child of *Clement Boehm* the younger, and conſequently if a remainder exiſts in this money, is intitled to it.

The firſt objection was, that theſe acts were done by the parties ſubſequent to the ſettlement in 1692. and are not ſufficient to ſhew

the intention of the parties that the entail of this money ſhould be barred.

The ſecond objection, if ſufficient to ſhew the intention, yet cannot be a bar without a decree of this court.

I am of opinion the acts done by the parties are ſufficient to ſhew it was their intention, particularly of *Clement* the father, to bar that analogy to the real, or that entailed quality in the money.

Old *Clement* gives this very ſum to *Sigiſmund*, and apprehended that he was diſpoſing of his own eſtate, and unleſs he has given him this, he has given nothing to *Sigiſmund*; then follows the clauſe in the will, relating to the releaſes.

It has been objected that this is to be confined to the diſpoſition of his perſonal eſtate according to the cuſtom of *London*.

But it ought not to be narrowed in this manner, for he intended clearly to bar his children of all the claims to every part of his eſtate by the legacies given to them.

What is done ſubſequent?

A payment is made by the executors to Mr. *Sigiſmund Trafford* of the 2455*l.* 15*s.* 9*d.* in ſatisfaction of all his claims he might have under the marriage ſettlement, and he has given a receipt in full of all claims, and all the children with notice of their father's will do the ſame.

Therefore I am of opinion it was the intention of the parties that *Sigiſmund Trafford* ſhould have this money as his abſolute property, taking in the circumſtances ariſing from the conſent of the remainder-man.

The next queſtion is, whether the acts done have diſcharged this money from *the tranſubſtantiated real quality*, which the high power of this court gives to money.

This court conſiders things contracted to be done, as actually done, and let them have all the conſequences as if formally executed.

What governs the court in this reſpect is, that they conſider things contracted to be done, as *actually done*, and let them have all the conſequences as if formally executed, therefore if there be an agreement to purchaſe land, the court looks on it *as done*.

But if the parties intereſted have agreed that the money ſhall not have this quality, that is *to be entailed*, it diſcharges it of *the entail*.

If

If a man is entitled to have money to be laid out in land to be ſettled to the uſe of him and his heirs, there he ſhall be entitled to the money in this court, and if the party in his life-time ſhews any intent to have it in money and dies, then the court will give it to his executor, and not to the heir.

Money to be laid out in land to the uſe of *A.* and his heirs, will intitle *A.* to the money in this court.

If money is directed to be laid out in land, and limited to *A.* in tail, remainder to *B.* in tail, remainder to *C.* in tail, the court will direct it to be laid out in land, if nothing has been done to bar the remainder.

Money directed to be laid out in land and limited to *A.* in tail, with ſeveral remainders in tail, the court will order it to be laid out, if nothing has been done to bar the remainders.

But if a perſon is tenant in tail, reverſion in fee to himſelf, the court will give him the money, becauſe by a common conveyance he may bar the entail and reverſion; and therefore the court will not put him to the circuity of having recourſe to a legal bar. *

Where a perſon is tenant in tail, reverſion in fee to himſelf, the court will give him the money, becauſe by a common conveyance he may bar the entail and reverſion.

In *Edwards* verſus *the Counteſs of Warwick*, 2 *P. Wms.* 171. Lord *Macclesfield* has laid down the rule of the court in theſe caſes.

The limitations here, were to *Sigiſmund Trafford Boehm* in tail, remainder to his brothers in tail, remainder in fee to himſelf: This money has been paid to him with the conſent of his brothers.

Was there then any entailable quality remaining in this money?

Suppoſe a bill had been brought by *Sigiſmund Trafford Boehm* to have the money paid to him, inſtead of being laid out in land, and his brothers had by their anſwers ſubmitted this money ſhould be paid to *Sigiſmund*, could the iſſue of the brothers have inſiſted it ſhould be laid out in land? Moſt clearly not, for their iſſue are equally barred, as if the brothers had received a part of the money themſelves.

If a bill had been brought by *S.* to have the money paid to him, and the brothers by their anſwers had ſubmitted to it, their iſſue would have been equally barred as if the brothers had received a part of the money themſelves.

But it was objected there is no inſtance of this being done without a decree of the court for that purpoſe.

* Money covenanted to be laid out in land ſhall deſcend as land, but he that is entitled to the fee of the land when purchaſed may diſpoſe of it by a will, though not atteſted by three witneſſes: alſo a parol direction for the payment of it ſeems to be good. So if the money is ordered or deviſed to be laid out in lands, and ſettled to the uſe of *A.* in tail, remainder to himſelf in fee, equity will order the money to *A.* otherwiſe if the remainder thereof be limited to a third perſon. Alſo though by a voluntary contract money is agreed to be laid out in lands, the court will execute ſuch agreement in favour of the heir. *Edwards* (*and Lady Elizabeth his wife*) verſus *Counteſs Dowager of Warwick*, 2 *P. Wms.* 171.

Where the tenant in tail, &c. is a feme covert, ſhe muſt come into this court, that they may aſk her whether it is with her conſent that the money is to be paid inſtead of being laid out in land.

It is the firſt time I have heard it laid down that the decree of this court is neceſſary, and that the parties muſt come here to have the ſanction of the court; indeed if the tenant in tail, or remainder in tail, had been a *feme covert*, ſhe muſt have came here, that the court might have aſked her the queſtion, whether it is with her conſent, that the money is to be paid inſtead of being laid out in land, as in the caſe of a fine.

It was ſaid there is no precedent, and indeed I cannot ſay that I have known this court decree acts of this kind to be good, but I will make a precedent.

Vide Chaplin verſus *Horner*, 1 *P. Wms.* 483. *

Bills are generally brought in caſes of this nature for the ſatisfaction and ſecurity of truſtees.

A judgment at law, or a decree of this court, is in affirmance of the rights of parties, but does not give them a right that they had not before; and it is on this ground they decree the money to the parties.

The court purſues the rights of parties, and whatever a court of common law does by a judgment or this court by a decree, is in affirmance of the rights of parties, and does not give them a right which they had not before.

Why do the court decree the money? Becauſe the perſon was entitled to it; and the court being of opinion the parties have the right, is the ground on which the decree is made.

But where the money is in the hands of tenant in tail, with remainder in fee in himſelf, if he was to bring a bill to have a declaration of the rights of the parties, it would be diſmiſſed, for this court does not make a declaration of the rights of parties, but decrees upon the rights of the parties as they appear in themſelves.

All the court does is in conſequence of an antecedent right, and there is no occaſion for a decree, except there is an incapacity of the perſon, as in the caſe of a feme covert.

I mention this to ſhew, that all the court does is in conſequence of an antecedent right of the parties, and there is no occaſion for a decree in this court, unleſs there is an incapacity of the perſon, as I ſaid before in the caſe of a feme covert.

It has been ſaid that the money ſtill retains the real quality, and therefore muſt be laid out in land.

Sigiſmund Trafford Boehm ſhewing his election to have it in money, deſtroys that *tranſubſtantiated real quality*, for he has accepted

* Where money is covenanted to be laid out in a purchaſe of land, and to be ſettled on *A.* in fee, the heir and not the executor of *A.* ſhall have it. But if *A.* himſelf has received any of this money, this is a good payment, and ſhall not be repaid by *A.*'s executor to his heir. Alſo if *A.* in this caſe dies, *A.*'s heir ſhall recover the remainder of the money not received by *A.* So if *A.*'s heir is an infant, and the remainder of the money is decreed to be brought into court, it ſhall be looked on as land. *Chaplin* verſus *Horner & ux'*, 1 *P. Wms.* 483.

it

it as money under the will, and given a diſcharge for it to the executors, and by a ſubſequent ſettlement in 1725. has taken upon him to make a ſecurity of it as money.

I am of opinion therefore this ſum is not liable to any entail, nor to be laid out in land, or conſidered as a debt upon the eſtate of *Sigiſmund Trafford Boehm.*

The next queſtion is as to the limitation of *Sigiſmund Trafford*'s eſtate under his will, whether the limitation to his ſiſter, in failure of iſſue by him be a good limitation.

The limitation under the will of *S.* in failure of iſſue by him, to his ſiſter for life, is good in point of law.

I had a good deal of doubt with myſelf in this point; but there is a plain reference to the deed of ſettlement executed before, and ſhews he intended to give this as a reverſion, after the limitation of his ſettlement were determined.

But ſuppoſe there had been no reference, if a man limits ten thouſand pounds, in failure of iſſue of the body of huſband and wife to any other perſon in tail, the remainder would have been void as an executory deviſe, being too remote, as it is upon a dying without iſſue generally of the huſband and wife; but here, as was juſtly obſerved in the cauſe, all the limitation by *Sigiſmund* are for life, therefore it is a reaſonable conſtruction to confine it to a failure of iſſue during the lives in being, which has been held in the caſe of executory deviſes to be a reaſonable conſtruction if it falls within the compaſs of ever ſo many lives in being at the ſame time.

A. limits 10000 *l.* in failure of iſſue of the body of a huſband and wife to *B. in tail*, the remainder is void as an executory deviſe, being too remote, otherwiſe where the limitations are for life, for that confines it to a failure of iſſue during the lives in being; and in the caſe of executory deviſes it has been held to be a reaſonable conſtruction, if it falls within the compaſs of ever ſo many lives in being at the ſame time.

His Lordſhip decreed therefore the limitation under the will of *Sigiſmund* to his ſiſter *Theodoſia Hopfer*, one of the defendants in the cauſe, to be a good limitation.

As to the ſeven acres of land in *Hackney*, the eſtate of old Mr. *Clement Boehm*'s wife before her marriage, and limited to ſeveral perſons under the deed of 1692. his Lordſhip was of opinion that no conſent or agreement of the remainder-men, where there is a feme covert, unleſs there had been a fine, can bar the entail, nor is it in the power of a court of equity to carry ſuch agreement into execution, as to a legal eſtate; and therefore muſt take its courſe according to the legal intent, and go to the perſon who is entitled at law.

Where a feme covert has an intereſt in real eſtate, no conſent of a remainder man can bar the entail, unleſs there had been a fine; nor can this court carry ſuch agreement into execution as to a legal eſtate.

Caſe 155. *Heard before the Maſter of the Rolls, ſitting for Lord Chancellor, March* 5, 1746.

Hume and Elizabeth his wife, younger daughter of Nathaniel Rokeby, } Plaintiffs.

Edwards executor of Rokeby and Mary his wife, eldeſt daughter of Rokeby, and others, } Defendants.

Sums of money given to the daughter of a freeman of *London* after her marriage, by the father; where they do not appear to be on account of the marriage and as an advancement, will not bar her of a ſhare in the orphanage part of his eſtate.

Nathaniel Rokeby about fifty years ago became a freeman of *London*, and had iſſue by his wife only two children, the defendant *Mary* and the plaintiff *Elizabeth*.

In 1731. the plaintiffs intermarried without the conſent of *Elizabeth*'s father or mother, but the father was ſoon after thoroughly reconciled to the plaintiffs.

Elizabeth never had any advancement from her father, but the defendant *Mary* had upon her marriage with *Edwards* two thouſand pounds paid to him, in part of her portion and advancement, and a bond was entered into by *Rokeby* previous to this marriage, conditioned that his executors ſhould upon his death, or ſooner after, pay the further ſum of two thouſand pounds, to be laid out in land, or otherwiſe, as a proviſion for *Mary and her iſſue*.

The bill was brought for *Edwards* to account with the plaintiffs for the perſonal eſtate of *Nathaniel Rokeby*.

It was inſiſted for the plaintiff, that *Mary* having been advanced by her father with 2000 *l.* and 2000 *l.* ſhe ought to bring the ſame into hotchpot, and the orphanage part of the teſtator's eſtate ſhould be divided into moieties, between *Mary* and *Elizabeth*.

It was inſiſted likewiſe by the plaintiffs, that notwithſtanding after their marriage *Nathaniel Rokeby* did in his life-time give the plaintiffs ſome ſmall ſums of money by way of preſents on particular occaſions, and ſome other ſums, as a recompence and ſatisfaction for his own, his wife's friends and families boarding and lodging with the plaintiffs, and being entertained by them very often for a conſiderable time together, (the whole of which preſents amounted only to 434 *l.*) yet that they were free gifts only of the father, and ought not to be conſidered as an advancement.

On the other ſide it was ſaid for the defendant *Edwards* and his wife, that as *Nathaniel Rokeby* did after the intermarriage of *Hume* with his daughter *Elizabeth*, give to them ſeveral conſiderable ſums of money, and a great quantity of houſhould and other furniture, amounting to more than 700 *l.* He deſigned it as an advancement of his daughter *Elizabeth Hume*, and therefore are not entitled to an account of *Rokeby*'s perſonal eſtate, *Elizabeth* being fully advanced in his life-time.

And it was inſiſted further, that if the account is decreed, they are not obliged to account for four *Eaſt-India* bonds of *Nathaniel Rokeby*, becauſe in his life-time he wrote a letter on the 11th of *November* 1743. to the defendant *John Edwards*, and deſired he would diſpoſe of four *India* bonds the defendant then had by him of *Nathaniel Rokeby's, and buy the houſe in Savage Garden, which he thereby wrote he made a preſent to* (the defendant) *Mary his daughter*; that the four bonds were accordingly diſpoſed of on the 16th of *December* following for 428 *l.* 9 *s.* 11 *d.* and the houſe agreed for and purchaſed by the defendant, and conveyed to truſtees for the uſe of the defendant and his heirs in caſe his wife died in his life-time, but if ſhe ſurvived him, then to her and her heirs.

The defendants inſiſted, that as this was directed to be laid out in the purchaſe of a particular freehold eſtate by the father *Nathaniel Rokeby*, and was laid out accordingly; from the time of its being inveſted in land, it was no longer ſubject to the cuſtom of *London*, and therefore are not obliged to account for theſe *Eaſt-India* bonds.

The council for the plaintiff as to the *India* bonds argued it was giving only ſo much money to *Mary*, and the ſubſequent words, *buy the houſe in Savage Garden, &c.* was a deſignation only by *Nathaniel Rokeby*, but not a poſitive direction to lay it out in land, and therefore the property was not altered, but continued perſonal eſtate, and dividable according to the cuſtom.

Maſter of the Rolls, (*William Forteſcue*, Eſq;) The bill is brought by *Hume* and *Elizabeth* his wife to be let into the orphanage ſhare of *Nathaniel Rokeby*'s eſtate: when he married *Elizabeth*, it was againſt her father's conſent, which is itſelf a bar to the orphanage ſhare, if the father had not been reconciled, but as that appears fully in proof, the only queſtion is, whether the ſums received by the plaintiff the huſband after marriage ſhall be conſidered as an advancement, and bar her of her orphanage ſhare.

If the daughter of a freeman marries againſt her father's conſent, it is of itſelf a bar to the orphanage ſhare, unleſs he be afterwards reconciled.

Whereſoever there is an advancement in marriage, it ſhall be an advancement in full, unleſs the father of the child by his laſt will

An advancement in marriage is an advancement in full, unleſs the father by will, *&c.* written by him and ſigned, ſhall declare the value of ſuch advancement.

and

and teſtament, or ſome other writing by him written, and ſigned with his name or mark, ſhall declare or expreſs the value of ſuch advancement. *Eq. Caſ. Abr.* 155. *Chace* and *Box*.

Sums given by a freeman of *London* to a daughter, if not given as a portion, or in purſuance of a marriage agreement, is no advancement.

In the caſe of *Fouke* verſus *Lewen*, 1 *Vern.* 88. there is a *quære*, "Whether any proviſion made by the father for his child be an "advancement, or whether only ſuch a proviſion as is made on the "marriage of the child; but held in the caſe of *Jenks* verſus *Holdford*, 1 *Vern.* 61. that ſums of money given by a freeman of *London* to a daughter, if not given as a marriage portion, or in purſuance of a marriage agreement, is no advancement.

In the caſe of *Chace* verſus *Box*, *Eq. Caſ. Abr.* 154. the certificate mentions, that an advancement to exclude a child muſt be in conſideration of marriage; and there is no caſe that a ſum of money given by a freeman to his daughter upon any other conſideration, is a bar of the orphanage ſhare.

Therefore the plaintiffs are not barred by any of the ſums given after marriage, as it does not appear to be on account of the marriage, and as an advancement.

The next queſtion is, what the plaintiffs ſhall bring into hotchpot: now upon the authority of *Jenks* verſus *Holford*, whatever the father gives to ſuch child muſt be brought into hotchpot.

The general rule is, that whatever a freeman of *London* gives to a child ſhall be brought into hotchpot.

But there is an exception in this caſe to the general rule, becauſe the father lived frequently a fortnight or three weeks with the plaintiff and his wife.

Preſents made by a freeman to his child after frequently living with her for ſeveral weeks at a time, ſhall be conſidered only as a ſatisfaction for her trouble, and not as a gift, to be brought into hotchpot.

It is reaſonable they ſhould be allowed ſomething for the father's living with them for ſome time; it is a ſort of natural debt from him to a child, and therefore I ſhall not ſend it by way of *quantum meruit* to a Maſter, becauſe I think what preſents the father made ſhould be conſidered only as a recompence and ſatisfaction for their trouble, but refer it to him only to ſee what the ſums were that was given by way of ſatisfaction and compenſation for the expence that the father put them to.

The next conſideration is, what muſt be brought by the defendants *Edwards* and his wife into hotchpot?

The 2000 *l.* given in marriage, and the 2000 *l.* ſecured by bond, muſt unqueſtionably be brought into hotchpot.

The only queſtion then is, whether the 400 *l.* *Eaſt-India* bonds ſhall be brought in.

It is a general rule, that ſettling lands by a freeman on a child is not ſuch an advancement as ſhall be brought into hotchpot.

It was inſiſted upon by the plaintiffs, that this is the ſame as giving money, and not an abſolute direction of the freeman to inveſt it in land, and therefore muſt be brought into hotchpot.

On the other hand it was inſiſted by the defendants, and very rightly, that this ſhall be looked on as a purchaſe; for the eſtate was bought in the life-time of the freeman, and though ſettled on one of the children, yet it ſhall not be brought into hotchpot, for the money was the father's, and laid out by his direction in the purchaſe of land.

The ſame rule, which makes it liable while money to be divided according to the cuſtom, takes it out of the cuſtom, when inveſted in land.

Another objection was, that this land ſo purchaſed is not ſettled according to the father's intention, who deſigned it for his daughter's benefit, and her ſeparate uſe.

But whether ſo, or not, is of no avail, becauſe being laid out in lands, takes it out of the cuſtomary eſtate, and therefore not ſubject to be brought into hotchpot; and if improperly ſettled, the court will take care to ſee it carried into execution according to the intention of the parties.

Money directed by a freeman to be laid out in lands for the benefit of a daughter, takes it out of the cuſtomary eſtate, and is not ſubject to be brought into hotchpot.

His Honour decreed an account of the teſtator *Nathaniel Rokeby*'s perſonal eſtate.

Boteler verſus *Marmaduke and Henry Allington*, *March* 24, 1746.

Caſe 156.

THE bill ſtates that *Philip Boteler* being ſeiſed in fee of ſeveral manors, &c. and of the advowſon of *Aſton* in *Hertfordſhire*, by his will deviſed the firſt and next preſentation of the ſaid church after his deceaſe, to *Marmaduke Allington* and *William Allington*, their executors, &c. and all his manors, lands, &c. to the ſame perſons, and their heirs, in truſt for the plaintiff for life, remainder to his ſon *Philip Boteler* for life, remainder to his firſt and every other ſons in tail male, remainder to his own right heirs.

The defendant, as to ſo much of the bill as ſought to diſcover whether after inſtitution, &c. to *A.* he was not preſented to two other livings, and inſtituted, &c. demurred, as ſuch diſcovery tends to ſhew an avoidance of *A. The demurrer allowed, becauſe he is not obliged by a diſcovery to ſubject himſelf to a forfeiture, or any thing in the nature of a forfeiture.*

The teſtator died without iſſue, leaving *Elizabeth Neville* his only ſiſter and heir at law, who became ſeiſed of the reverſion and inheritance of the premiſſes, expectant on failure of iſſue male of the plaintiff and his ſon.

Elizabeth Neville by her will deviſes this reverſion to *Henry Allington* for life, with remainder to his firſt and other ſons in tail, remainder to *Marmaduke Allington* in fee.

On the 9th of *May* 1743. the living of *Aſton* becoming vacant, the defendant *Marmaduke Allington* preſented the defendant *Henry*, who claims the eſtate in reverſion under Mrs. *Neville*'s will, and he was inſtituted and inducted on the 4th of *Auguſt* 1743. to this living, which is upwards of 200 *l. per annum.*

On the 2d of *July* 1745. the plaintiff diſcovered that *Henry Allington* had accepted the livings of *Staingote* and *Swinhope*, by which the living of *Aſton* became vacant; and the plaintiff by his bill inſiſted he had a right to nominate; but that the defendant *Marmaduke* never informed him that the living was become vacant, and in breach of his truſt on the 17th of *October* 1744. preſented the defendant *Henry* a ſecond time to the living of *Aſton*, and he was admitted by the biſhop of *Lincoln* to *Aſton*, vacant by his ceſſion, and inſtituted and inducted the 29th of *October* following.

The plaintiff likewiſe by his bill inſiſts, that *Marmaduke Allington* had no right to preſent a ſecond time, and that the defendant *Henry Allington* knew *Marmaduke* had a right only to preſent on the firſt vacancy after the death of the teſtator *Philip Boteler*, as he had ſeen the wills of *Philip Boteler*, and *Elizabeth Neville.*

And therefore the bill prayed, that *Henry Allington* might ſet forth, whether he was not inſtituted and inducted to *Aſton* the 4th of *Auguſt* 1743. and whether he did not afterwards, and when, accept of the living of *Staingote* and *Swinhope*, and was not duly inſtituted and inducted thereto.

And in regard the time for bringing a *quare impedit* was lapſed, before the plaintiff heard of *Henry*'s being preſented a ſecond time to *Aſton*, ſo that he has no legal method of coming at the living of *Aſton*, prays that the defendant may be compelled to reſign the living, and that ſuch perſon may be preſented as he ſhall nominate.

The plaintiff annexed an affidavit to his bill, that he had not heard till the 2d of *July* 1745. that the defendant *Henry* had accepted of the living of *Staingote* and *Swinhope*, and that he never knew till that day the defendant *Marmaduke* had preſented *Henry* a ſecond time to *Aſton.*

The defendant *Henry Allington*, as to ſo much of the bill as ſeeks to diſcover whether, after his inſtitution and induction to *Aſton*, he was not preſented to *Staingote* and *Swinhope*, and inſtituted and inducted thereto, demurs, as ſuch diſcovery tends to ſhew an avoidance of *Aſton*.

And as to ſo much as ſeeks to compel the defendant to reſign *Aſton*, *&c.* pleads that in *October* 1744. *Marmaduke Allington* preſented him thereto, and that in the ſame month he was duly admitted, inſtituted and inducted, and that he has ever ſince quietly held the living of *Aſton*, without any diſturbance from the plaintiff, till the filing the bill the third of *May* 1746. by means whereof *Aſton* was full of an incumbent for the ſpace of more than *eighteen* months, before the filing the bill, or commencement of any ſuit, concerning the preſentation, and therefore pleads ſuch *plenarty* in bar to the relief.

By his anſwer denies he ever ſaw either the original, or a copy of *Philip Boteler*'s will, or was informed of the contents, till ſince the bill was filed.

The living of *Aſton* ſtated to be worth 170 *l. per ann.* and *Staingote* and *Swinhope* together 42 *l.* only.

Mr. Solicitor General for the defendant *Henry Allington.*

The living of *Aſton* is above the value of eight pounds in the King's books, and therefore the acceptance of a ſecond living is a forfeiture of the firſt; and as the defendant, if he ſhould make a diſcovery of this fact, would ſubject himſelf to a forfeiture, he is within the common rule of this court, and may demur to ſuch diſcovery.

Mr. *Brown* of the ſame ſide ſaid, there never was any inſtance of coming into this court, to have ſuch a queſtion anſwered, where the perſon is in the actual poſſeſſion of the living.

LORD CHANCELLOR.

I take the rule to be, that if a clergyman is in poſſeſſion of a living of above eight pounds a year in the King's books, and accepts of a ſecond living under that value, it is an abſolute avoidance of the firſt; or if a perſon in poſſeſſion of a living under eight pounds a year in the King's books, takes a ſecond living without a diſpenſation, *the firſt* is voidable at the election of the patron.

If a clergyman in poſſeſſion of a living above 8 *l.* a year *in the King's books* accepts of a ſecond under that value, it is an abſolute avoidance of the firſt; if in poſſeſſion of a living under 8 *l.* in, *&c.* takes a ſecond without a diſpenſation, *the firſt is voidable* at the election of the patron.

Mr.

Mr. *Wilbraham* of the ſame ſide cited *Jones* verſus *Meredith* in the Exchequer. Lord Ch. B. *Comyns*'s *Rep.* 661. where to a diſcovery ſought by the bill whether defendants were educated in the popiſh religion, *&c.* and thereby incurred the incapacities in the ſtatute of 11 & 12 *W.* 3. they pleaded that act, and it was allowed.

He likewiſe cited *Monnins* verſus *Monnins*, *Reports in Chanc.* 2*d part* 36. where the defendant's demurring to the diſcovery of her marriage ſince the death of her huſband, as it amounted to a forfeiture, was held good.

Mr. Attorney General for the plaintiff ſaid, this is a diſcovery of the fact upon which the very right to the preſentation muſt depend, and therefore the demurrer of the defendant ought not to be allowed.

LORD CHANCELLOR.

The queſtion as to the demurrer is immaterial, except as to the conformity to the rules of this court, becauſe it is a very eaſy matter to fix the preciſe time of admiſſion, inſtitution and induction.

The plea is of more conſequence, becauſe I know of no inſtance where upon an equitable right to a preſentation, after the preſentee has been in poſſeſſion ſix months, which makes a plenarty, that the *ceſtui que truſt* may come into this court to ſet aſide ſuch preſentation, upon the general doctrine, that there is no ſtatute of limitations which can affect a truſt. The cauſe was ordered to ſtand over till the 30th of *March* to look into caſes in the mean time.

On that Day Mr. *Brown* for the defendant *Henry Allington* cited *Gardiner* verſus *Griffiths* in 2 *P. Wms. fol.* 404. the mortgagee of an advowſon preſented, the mortgagor brought his bill againſt the preſentee ſeven months after inſtitution to compel him to reſign; Lord Chancellor *King* held the bill muſt be within ſix months in the ſame manner as a *quare impedit*, and therefore diſmiſſed the bill as to that part, which ſeeks to compel the defendant to reſign his living.

Mr. Attorney General, council for the plaintiff, obſerved that was a caſe between a mortgagor and a mortgagee, and the ſingle point of equity was, that the mortgagor is entitled to preſent.

Here *Marmaduke Allington*, by virtue of the will of Sir *Philip Boteler*, had preſented to the *firſt turn*, after the deceaſe of the teſtator, who had given him ſo far a beneficial intereſt, but upon any other avoidance he had a mere legal right only as a truſtee, and the

defendant *Henry Allington* knew his uncle was no more, and that he had no right to preſent, and yet accepted of a preſentation from him with notice thereof, and has not denied theſe facts in his anſwer.

And there is not a ſingle inſtance where a truſtee is guilty of a breach of truſt, but it has been held he ſhall communicate that breach of truſt to the perſon who takes an advantage from it.

LORD CHANCELLOR.

I am extremely well ſatisfied with the determination I ſhall make in this caſe.

There are two matters in queſtion, one upon *the demurrer* as to the diſcovery of the acceptance of the ſecond living, and as to that, I am of opinion the defendant had a right to demur, not becauſe it is of any conſequence to the plaintiff, for the fact of which he ſeeks a diſcovery may very eaſily be aſcertained by the biſhop's regiſter, but for the ſake of the rule of the court, that a defendant is not obliged by a diſcovery to ſubject himſelf to a forfeiture, *or any thing in the nature of a forfeiture.*

And therefore in all bills to ſtay waſte, a plaintiff is not entitled to a diſcovery, unleſs he waves the double penalty, which is treble damages by the ſtatute of *Glouceſter*.

In a bill to ſtay waſte, a plaintiff is not intitled to a diſcovery, unleſs he waves the double penalty.

Nor is a plaintiff intitled to a diſcovery upon the popiſh acts, touching the diſability of papiſts; it was objected that it ought not to be conſidered as a penalty, under theſe acts, but as a limitation over in favour of a proteſtant heir, but held notwithſtanding, the party ſhall not be obliged to diſcover, becauſe theſe acts create an incapacity, which has the ſame effect with a forfeiture.

Upon the popiſh acts the plaintiff is not intitled to a diſcovery, becauſe theſe acts create an incapacity, which has the ſame effect with a forfeiture.

A diſtinction was attempted here, that by 21 *Hen.* 8. *ſec.* 9. there is no penalty fixed, but ſays only that *the firſt benefice ſhall be adjudged in the law* to be void.

It has been compared to caſes where an eſtate for life has been determined on the breach of a condition; as where a woman holds only *durante viduitate*, and if ſhe marries, *limited over*, ſo the acceptance of a ſecond, is the determination of the eſtate in the former living.

The court have made great difference between a determination by the party himſelf, and a determination by an act of parliament.

If the 21 *H.* 8. had ſaid, by accepting a ſecond living the firſt ſhall be abſolutely void, it would have been a penalty; but though the act does not ſay it in words, yet it amounts to the ſame thing, and the defendants obliged to make a diſcovery.

Suppoſe the ſtatute of 21 *Hen.* 8. had ſaid, if he accepts a ſecond living, the firſt ſhall be abſolutely void; this would have been a penalty; but though the act of parliament does not ſay ſo in words, yet it amounts to juſt the ſame thing, and therefore I think the defendant is not obliged to make a diſcovery, in order to preſerve the rule of the court intire.

Lord *Hardwicke* allowed *the demurrer.*

The next matter in queſtion is as to a plea of a plenarty of ſix months, and upwards.

This goes to the point of right.

Marmaduke Allington was intitled to one turn in the preſentation of the living of *Aſton*, and was a general truſtee likewiſe of the advowſon, and whole eſtate to which it was appendant; and therefore in his own right might preſent to the firſt turn; but as to all the reſt the *ceſtui que truſt* was entitled to preſent.

After *Henry Allington* had reſigned *Aſton*, to accept of two other livings, he was preſented a ſecond time to the living of *Aſton* by *Marmaduke Allington.*

The bill was not brought till above eighteen months after *Henry Allington*'s ſecond preſentation to the living of *Aſton*, and as a *quare impedit* cannot be ſued out after *ſix months*, where a parſon has been preſented to a living by one who has not a right; for it is the ſtatute of *Weſtminſter* the 2d. 13 *Ed.* 1. *c.* 5. that makes it a bar; the queſtion is whether the ſame rule ought to hold in equity.

As a *quare impedit* cannot be ſued out after ſix months, where a parſon has been preſented to a living by one who has not a right, is a rule very proper to be adopted in equity, becauſe it is the general one, that equity follows the law, be it originally a reſolution of the common law, or introduced by ſtatute.

I am of opinion in general it ought, for that act was made for the ſake of preſerving the peace of the church; a very uſeful law, and rigidly adhered to ever ſince, and very proper to be adopted in equity, becauſe it is the general rule, that equity follows the law, whether originally a reſolution of the common law, or introduced by ſtatute.

* The caſe in 2 *P. Wms.* 404. is a ſtrong caſe for this purpoſe, and a very clear authority.

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* One mortgages a manor with an advowſon appendant, and the church becomes void, the mortgagee though in poſſeſſion ſhall not preſent to the church till the mortgage is foreclоſed: but if the mortgagee of an advowſon preſents, the bill by the mortgagor muſt be brought within ſix months after a *quare impedit*. So determined by Lord Chancellor *King* in *Gardiner* verſus *Griffith*, 2 *P. Wms.* 404. *N. B. The bill was diſmiſſed as to that part which ſought to compel the defendant to reſign his living. Gardiner* verſus *Griffith*, 2 *P. Wms.* 404.

Then

Then the queſtion will be, if there is any diſtinction between that caſe and the preſent.

The diſtinction inſiſted on by Mr. Attorney General, is, as to *Henry Allington*'s notice of *Marmaduke*'s being only a truſtee at the time he accepted of the ſecond preſentation *to Aſton*.

A man might know that *Marmaduke Allington* was a truſtee, without knowing that he was guilty of fraud, or a breach of truſt, for *Henry* might conceive that *Marmaduke* had a right to preſent in the capacity of a truſtee, and therefore the notice is of no conſequence.

But conſider how far it would extend if this diſtinction was to prevail, that where a man has been guilty of a breach of truſt in preſenting a perſon to a living, no length of time ſhall avail the preſentee to quiet his poſſeſſion.

It is true, the ſtatute of limitations cannot be pleaded againſt a breach of truſt, nor can a perſon who has taken a conveyance from the truſtee ſhelter himſelf under a plea of that ſtatute.

A perſon who has taken a conveyance from a truſtee cannot ſhelter himſelf under a plea of the ſtatute of limitations.

But if the rule ſhould hold as to a plenarty, then after the defendant had been in poſſeſſion twenty or thirty years, the plaintiff might ſet aſide this preſentation.

For if the ſtatute of *Weſtminſter* the ſecond, which is conſidered here as a ſtatute of limitation, ſhould not be admitted as a bar of an equitable right, as well as a legal, there is no period when you can ſtop, therefore this doctrine would be of miſchievous conſequence, and ſubvert the intention of the ſtatute of *Weſtminſter* the ſecond, which was to ſecure the peace of the church; and for this reaſon I am of opinion the rule of law ought to prevail in this court.

Weſtminſter the ſecond was intended to ſecure the peace of the church, and being conſidered as a ſtatute of limitation, is a bar of an equitable as well as a legal right, and therefore the defendant's plea of a plenarty of ſix months and upwards was allowed.

Having ſaid this with regard to the rules of law and equity, I will go a little further as to the circumſtances of this caſe, that this is not ſuch a one as a court ought to ſtrain in favour of the plaintiff, for his chance of preſenting is exactly the ſame, as *Marmaduke*'s firſt preſentation was undoubtedly good, and there is no prejudice to the plaintiff in his preſenting *Henry* a ſecond time, becauſe upon the death of *Henry*, the plaintiff's right of preſenting accrues equally as if *Henry* had never been preſented but once to this living. *Lord Hardwicke allowed the plea.*

Weſtfaling

Caſe 157. *Weſtfaling* verſus *Weſtfaling and others*, *March* 5, 1746.

An advowſon in groſs will not paſs by the word *lands*, but by the words tenements and hereditaments it will.

HERBERT Rudhall Weſtfaling deceaſed, had ſeveral kinds of eſtates of inheritance, conſiſting of freehold and copyhold, *and alſo the advowſon in groſs of* Linton, *and likewiſe eſtates pur auter vie*, and was poſſeſſed of a conſiderable perſonal eſtate; ſome of the eſtates were in ſettlement, and others ſubject to his diſpoſition, and being ſo ſeiſed made his will, and thereby deviſed all his leaſehold land, ſituate at *Hampton Biſhop*, to truſtees and their heirs, on truſt to permit the defendant *Philip Weſtfaling* to receive the rents during his life, and after his death, the firſt and other ſons of *Philip* to receive the rents thereof, and for want of ſuch iſſue, to the defendant *Herbert Weſtfaling* and his heirs, and by his will deviſed to the truſtees all his freehold lands not under ſettlement, and whereof he was any way ſeiſed or poſſeſſed of, or any way intereſted in law or equity, either in poſſeſſion, reverſion, or remainder, *which he had any power to deviſe or diſpoſe of, and alſo all and ſingular his leaſehold eſtates* and lands whatſoever, excepting only ſuch as are herein before deviſed, that they ſhould by mortgage, or otherwiſe, of all or any part of the leaſehold or freehold eſtate, ſecure to his daughter 3000*l.* and intereſt, and ſubject to this to *Herbert Weſtfaling* for life, remainder to his firſt and other ſons in tail male.

The teſtator at the time of his death was indebted in large ſums of money, by ſpecialty and otherwiſe.

The bill was brought by the teſtator's daughter for her legacy, and by *James Clarke*, a creditor by ſimple contract, for an account of the perſonal and real eſtate of the teſtator, and that the perſonal eſtate may be applied in a courſe of adminiſtration, and if not ſufficient, that the real aſſets may be ſold, and applied in ſuch proportion, order and priority, as in juſtice to all the defendants it ought to be applied, for payment of the teſtator's debts.

Mr. *Brown*, for the plaintiffs, argued, that by the words *all his freehold lands*, the advowſon, though an incorporeal inheritance will paſs, and cited two caſes, *How* verſus *Conney*, 1 *Leon.* 180. where it was held a reverſion paſſed by the word *lands*, and *Stiles* 261, 278, ſimilar caſe, where by the words *fee-ſimple lands*, a portion of tithes was held to paſs.

But if it does not paſs by the will, he inſiſted it was aſſets to pay debts.

Lord *Hardwicke* mentioned the caſe of *Robinſon* verſus *Tonge*, *Michaelmas term* 1730, determined by *Lord Chancellor King*, and

afterwards affirmed in the Houſe of Lords, that in equity an *advowſon deſcended upon the heir is aſſets*, for payment of debts of the anceſtor, becauſe here you may pray a ſale, but at law it is not extendable. *Vid. Vin. Abridg.* title Aſſets, *P.* 145. *Pl.* 28.

Mr. *Evans* of the ſame ſide ſaid, that in *Co. Lit.* 374. *b.* an advowſon is held to be aſſets.

Lord *Hardwicke* ſaid, but it is not held by Lord *Coke* to be aſſets to pay debts, but to ſupport a warranty, and the reaſon is, that the total eſtate paſſed.

Mr. *Brown* then inſiſted, that the deviſe of the eſtates *pur auter vie* to *Philip Weſtfaling*, was within the ſtatute of 3 *W. & M.* for relief of creditors, and that they are aſſets for payment of debts, and that they are compriſed under the general words eſtates a perſon *hath power to diſpoſe of by his laſt will*, and that whatever would have been aſſets in the hands of the heir, ſhall be ſo in the hands of the deviſee.

Here is an eſtate limited to the late Mr. *Herbert Rudhall Weſtfaling* for three lives, he had a power to deviſe it away, if he did not, it would have been aſſets in the hands of his heir, and therefore ſhall be ſo in the hands of the deviſee.

Mr. Solicitor General for *Philip Weſtfaling*.

Whether the eſtates deviſed to him are to be conſidered as aſſets, will depend upon the conſtruction of the ſtatute of fraudulent deviſes.

Before the ſtatute of 32 *H.* 8. *c.* 1. of *Wills*, and 34 & 35 *H.* 8. *c.* 5. no lands were deviſable, which gives a power that every man who had lands, tenements and hereditaments might deviſe, but is plainly confined to fee-ſimple, and not intended to life eſtates, for they were capable of being ſeized by the firſt occupant.

The next alteration in reſpect to wills, was by the ſtatute of frauds and perjuries, 29 *Ch.* 2. *c.* 3. *ſ.* 5. which gives a power of deviſing eſtates *pur auter vie*, as well as eſtates in fee-ſimple under the ſame ceremonies, and if there is no deviſe, the ſame ſhall be chargeable in the hands of the heir, if it ſhall come to him by reaſon of a ſpecial occupancy, *as aſſets by deſcent*, and if no ſpecial occupant, it ſhall go to the executors or adminiſtrators of the party, that had the eſtate thereof by virtue of the grant, and ſhall be aſſets in their hands.

The owner of lands might have deviſed them ſo as to diſappoint his heir or ſpecialty creditors, till the ſtatute of *fraudulent deviſes*, 3 & 4 *W. & M. c.* 14. the miſchief recited there is, that perſons might diſpoſe of their lands, tenements and hereditaments by will or appointment, in ſuch manner as to defraud their creditors.

The ſtatute means by lands, tenements and hereditaments, the things, and not the intereſt the perſon had in them.

I am aware the general words *or had power to diſpoſe of* will be inſiſted on by the other ſide, to take in all eſtates he had a power to diſpoſe of; but plainly eſtates for life are not in the meaning of the legiſlature; for the caſe put by the ſtatute of frauds is a deſcent to the heir, by reaſon of a ſpecial occupancy, but the power of deviſing ſuch eſtates is not taken away.

Lord *Hardwicke* ſaid, they are made in the nature of perſonal aſſets, and it is ſuch a power to diſpoſe as a teſtator has over perſonal aſſets, and all the determinations are upon this footing.

Mr. Solicitor General inſiſted, ſecondly, that the advowſon did not paſs by the will, eſpecially as it is *an advowſon in groſs*, becauſe this is an incorporeal inheritance.

The words of the will are lands, tenements, and leaſehold eſtates, and the word *lands* will not carry the inheritance; all his freehold lands ſeem to be in oppoſition to other ſort of eſtates; and lands have never been conſtrued to take in the intereſt a man has in any eſtate.

Lord *Hardwicke:* I apprehend it has been held, that the word *land* will paſs *the demeſnes of a manor*, and as a manor cannot be ſeparated from it, therefore it will paſs likewiſe.

Mr. Solicitor general then ſaid, Suppoſe a man has rent-charges, rent-ſervices, and lands, and he deviſes *his lands*, this is in contradiſtinction to his other tenures, and they will not paſs by the word *lands*.

Mr. *Parrot* of the ſame ſide, as to the caſe cited by Mr. *Brown* out of *Stiles*, that a portion of tithes paſſes by the word *lands*, there was nothing belonging to the teſtator in this place but theſe tithes, and therefore, rather than the will ſhould be ineffectual, it was held they paſſed, but the rule of law is, if there are eſtates which properly paſs by the words of the will, it ſhall not be extended to ſuch eſtates that do not properly paſs by the words.

Mr. *Noel*, council for the defendant *Herbert Weſtfaling*, in ſtating the caſe of *Robinſon* verſus *Tonge*, ſaid, it was an equitable eſtate in the advowſon, that deſcended on the heir at law, and could not be come at without the interpoſition of this court; but there is no caſe can be cited where a court of law has determined a legal intereſt in an advowſon to be aſſets.

Mr. *Wilbraham*, of the ſame ſide, ſaid there was no authority that by the deviſe of all *freehold lands*, an advowſon will paſs; in *Hob.* 303. It was held, that by a deviſe of tenements it will paſs, but not of lands only.

As it does not paſs then under the will, the queſtion is, whether, as it is a bare deſcent from anceſtor to the heir, it ſhall be aſſets to pay debts.

If it ſhould be your Lordſhip's opinion, that the caſe of *Robinſon* verſus *Tonge* was ſomething particular, as being the truſt of an advowſon, and that it does not extend to a legal intereſt in an advowſon, then it does not affect the caſe.

An advowſon yields no ſort of profit to the owner; I do not know in what manner a court of law can extend an advowſon, if the owner of it has no other eſtate.

To ſay that this court has a power of ſelling an advowſon, unleſs it determines firſt that it is aſſets, is begging the queſtion, and therefore, unleſs this point is firſt ſettled, the court has no juriſdiction, as being a mere legal right.

As to the eſtates *pur auter vie* being aſſets, he cited the Duke of *Devonſhire* verſus *Hilton*, 2 *Vern.* 719. and *Oldham* verſus *Pickering*, *Salk.* 464. where, by the declaration of Lord Chief Juſtice *Holt* in that caſe, it ſeems as if he thought the ſtatute of frauds and perjuries had ſtamped them aſſets for payment of debts.

If this be a full declaration that they are aſſets, then they could not be deviſed away.

On the the 13th of *April* 1747, this cauſe ſtood for judgment.

LORD CHANCELLOR.

There are two queſtions, which are queſtions of law.

Firſt, Whether a part of the eſtate of *Herbert Rudhall Weſtfaling*, called *the advowſon of Lenton*, paſſed by his will; or if it did not, whether

whether it is to be conſidered as aſſets by deſcent, as being an advowſon in groſs.

The ſecond queſtion is, Whether eſtates *pur auter vie* are within the ſtatute of fraudulent deviſes, and liable to pay the debts of the teſtator.

As to the firſt, I am extremely clear, it did not paſs by the will, there is no authority that *an advowſon* will paſs by the word *lands*, though it will by the words *tenements and hereditaments*.

Being then not deviſed, this brings it to the queſtion, whether, as ſubſiſting in a legal eſtate, and no truſt, it is aſſets? and I am clearly of opinion it is, and ſo determined in *Robinſon* verſus *Tonge*.

It is pretty extraordinary, how it came ever to be doubted whether it was aſſets.

In the caſe of a debt by ſpecialty, where there is judgment againſt the heir, it is to recover to the value of the land: it is laid down by *Fleta, lib.* 2. *cap.* 65. and *Co. Lit.* 374. that an advowſon is aſſets to ſatisfy a warranty, and there are no negative words that it is not aſſets to ſatisfy a bond debt, and ſeems to be a diſtinction without a difference to ſay it is not.

The notion of its not being aſſets ſeems to have been taken up from a ſaying of Lord Chief Juſtice *Anderſon*, in the caſe of *Cleer* verſus *Peacock*, *Cro. Eliz.* 359. his words are, *although it may be holden, and is aſſets in a formedon, yet it is not aſſets in debt, for it is not of an annual value, and ſo cannot be deviſed*; but three judges *Walmſley*, *Beamond* and *Owen* held, *that it is well deviſable, for the body of the act is, that lands, tenements and hereditaments may be deviſed, and this is an hereditament*.

If it may be extended for the king, which goes upon the ſame reaſon and foundation, what colour is there to ſay it ſhould not be ſo in the caſe of bond creditors?

Soon after the caſe of *Cleer* verſus *Peacock*, there came caſes which ſtrongly import the contrary opinion, *Sir Will. Jones* 23, 24. and ſo it ſtood till the caſe of *Robinſon* verſus *Tonge*, in the Houſe of Lords, *March* 23, 1730.

It has been ſaid, the authorities go no further than where there has been a truſt of an advowſon, but do not extend to a legal intereſt in an advowſon; this argument is quite cut up by the roots by the determination in the Houſe of Lords.

In the minute book of that day, it is taken down that the queſtion propoſed to be aſked of the judges was, whether an advowſon in fee was aſſets, it muſt have been defectively taken by the clerk, for the queſtion intended was, *whether an advowſon in fee in groſs* was aſſets; for there could be no doubt as to an advowſon, appendant to a manor, becauſe the manor it ſelf being aſſets, what is appendant muſt be aſſets likewiſe.

An advowſon in fee in groſs, is aſſets by deſcent to ſatisfy bond creditors.

The judges who gave their opinion were, Lord Chief Juſtice *Eyres*, Baron *Price*, and Baron *Comyns*; and Lord *Raymond* being conſulted upon it afterwards, declared himſelf of the ſame opinion.

I am therefore of opinion it is *aſſets by deſcent to ſatisfy ſpecialty debts.*

The ſecond queſtion was, as to *the leaſehold eſtates pur auter vie* deviſed to *Philip Weſtfaling*.

It has been inſiſted for the plaintiffs, that if the perſonal eſtate, and the real eſtate deſcended, are not ſufficient to ſatisfy the debts, that the leaſehold eſtates are liable on the conſtruction of the ſtatute of fraudulent deviſes, which makes a deviſe void againſt creditors.

I am of opinion *the ſtatute does make it void.*

There are two ſtatutes to be conſidered; firſt, the ſtatute of frauds and perjuries, 29 *C.* 2. " And for the amendment of the law in " the particulars following; Be it enacted, that from henceforth " any eſtate *pur auter vie* ſhall be deviſeable by a will in writing, " ſigned by the party ſo deviſing the ſame, or by ſome other " perſon in his preſence, and by his expreſs directions, atteſted and " ſubſcribed in the preſence of the deviſor by three or more wit- " neſſes; and if no ſuch deviſe thereof be made, the ſame ſhall be " chargeable in the hands of the heir, if it ſhall come to him by " reaſon of a ſpecial occupancy as aſſets by deſcent, as in caſe of " lands in fee-ſimple; and in caſe there be no ſpecial occupant " thereof, it ſhall go to the executors or adminiſtrators of the " party, who had the eſtate thereof by virtue of the grant, and ſhall " be aſſets in their hands.

An eſtate *pur auter vie*, though it is deviſed, will be liable to debts by ſpecialty, to contribute in a courſe of adminiſtration, according to the groſs value.

The effect of this ſtatute is to make theſe eſtates deviſable, which were not ſo by the ſtatute of 21 *H.* 8. *of Wills.*

Then comes the third and fourth of *W. & M. c.* 14. for relief of creditors againſt fraudulent deviſes.

Lord *Hardwicke* read the preamble and the firſt enacting clauſe, " That all wills, *&c.* of manors, meſſuages, lands, tenements or " hereditaments, *&c.* whereof any perſon at the time of his deceaſe " *ſhall be ſeiſed in fee-ſimple* in poſſeſſion, reverſion or remainder, " *or have power to diſpoſe* of the ſame by his laſt will or teſtament, " ſhall be deemed as againſt bond or ſpecialty creditors to be frau- " dulent, and clearly, abſolutely and utterly void, fruſtrate and of " none effect."

It depends upon theſe words, *whereof any perſon is ſeiſed in fee, or have power to diſpoſe of.*

Moſt clearly teſtators have a power to diſpoſe, ſuch power being given them by an antecedent ſtatute, 29 *Ch.* 2.

Then what ground is there for the court to make a limited ſtrained conſtruction, and narrower than the words, upon a ſtatute, made for preventing *fraud?*

Mr. Solicitor General's principal objection was, that to conſtrue eſtates *pur auter vie*, if it ſhould come to the heir as *a ſpecial occupant* to be aſſets, would be to make a partial and imperfect proviſion under the ſtatute, as it does not take in *other eſtates pur auter vie* where *the heir* is not made the ſpecial occupant.

Now as to that, it is but a precarious and doubtful argument to conſtrue one thing not to be within the ſtatute, becauſe another is not: ſuppoſe there is *caſus omiſſus* in the act, there is no reaſon why what is expreſſed within the ſtatute ſhould not have its effect.

It is true indeed the caſe ſuppoſed by the ſtatute is, where there is no ſpecial occupant, and no deviſe; but then the ſtatute directs it ſhall go to the executors or adminiſtrators of the party that had the eſtate thereof, by virtue of the grant, and ſhall be aſſets in their hands, and has the ſame effect as if it had been granted to the grantee, his executors or adminiſtrators, and in this caſe the executor is as *a ſpecial occupant* for that purpoſe.

How did the law ſtand before the making of the ſtatute, as to a leaſe *pur auter vie* to *A.* his executors or adminiſtrato.s. 2 *R. Ab.* 151. *Let. G. pl.* 2.

" If a man leaſe to another and his executors, land for the life " of *J. S.* and *ceſtui que vie* dies, the executor ſhall be a ſpecial oc- " cupant, notwithſtanding it is a freehold.

If a man takes an eſtate as an executor, it is aſſets, for he cannot take any thing as an executor of a teſtator without being ſo; and Lord *Cowper* was of that opinion in the caſe of the *Duke of Devonſhire* verſus *Kinton*, 2 *Vern.* 719. " for he ſaid, he took it that be- " fore the ſtatute of frauds and perjuries, if an eſtate *pur auter vie* " came to an executor or adminiſtrator, it would be aſſets," and decreed it accordingly.

Where a man takes an eſtate as an executor it is aſſets, for as an executor of a teſtator he can take nothing without being ſo.

Now if before the ſtatute of frauds and perjuries, granting an eſtate *pur auter vie* to *A.* his executors or adminiſtrators, would have made it aſſets, can deviſing it to them prevent its being liable? certainly not, for the reaſon before mentioned, that taking as executors they muſt take it as aſſets.

As before the ſtatute of frauds, &c. granting an eſtate *pur auter vie* to *A.* his executors, &c. would have made it aſſets, deviſing it to them makes it equally ſo.

Therefore I am of opinion that *an eſtate pur auter vie*, though it is deviſed, will be liable to debts by ſpecialty, to contribute in a method of diſtribution, according to the groſs value.

" Lord *Hardwicke* declared, that the advowſon of *Linton*, not " being compriſed in the deviſe of the teſtator's will, ought to " be conſidered as real aſſets deſcended to the defendant *Herbert* " *Weſtfaling*, the teſtator's heir at law, ſubject to the teſtator's " debts by ſpecialty; and ordered the ſame to be ſold, and the mo- " ney ariſing by ſuch ſale to be applied in payment of ſo much of " teſtator's debts by ſpecialty, as his perſonal eſtate will not extend " to ſatisfy; And in caſe the teſtator's perſonal eſtate, and the mo- " ney ariſing by ſale of the advowſon, ſhall not be ſufficient to ſa- " tisfy the teſtator's debts, then his Lordſhip declared the reſidue of " the teſtator's debts by ſpecialty are well charged on the teſtator's " freehold eſtates, whereof he was ſeiſed in fee either in law or " equity, and alſo on his leaſehold eſtates *pur auter vie* deviſed by " his will, and ought to be borne proportionably in average between " thoſe eſtates: And his Lordſhip doth declare, that the equity of " redemption of the eſtates in mortgage ought to be conſidered as " part of the teſtator's real eſtate, which paſſed by the teſtator's " will to his truſtees: And further ordered, that the freehold eſtates " in fee and leaſehold eſtates, or a ſufficient part thereof, to be " ſettled and apportioned by the Maſter between the eſtates, accord- " ing to the reſpective groſs values thereof, be ſold, and that the " money ariſing by ſuch ſale be applied in the firſt place in payment " of the teſtator's debts by ſpecialty, as ſhall not be ſatisfied by the " other funds before mentioned, *pari paſſu*. And in caſe any ſpe- " cialty creditors ſhall exhauſt any part of the perſonal eſtate, then " his ſimple contract creditors are to ſtand in their place, and receive " a ſatisfaction *pro tanto* out of the money ariſing by the ſales " aforeſaid, and that the reſidue of the purchaſe-money be applied " in payment of what ſhall be found due for principal and intereſt " of the plaintiff *Mary*'s legacy of 3000 *l.* and other the legacies

" ſecured

" ſecured on the teſtator's real eſtate; and if there ſhall be any ſur-
" plus thereof, the ſame to be laid out in land, to be ſettled to the
" ſame uſes reſpectively as the lands from whence it aroſe ought to
" have been ſettled or gone.

Caſe 158. *Maynard* verſus *Pomfret*, *at the laſt ſeal after Hilary term*, *March* 27, 1746.

Where a defendant for want of putting in his anſwer has ſtood out the whole proceſs of contempt to a ſequeſtration, and the bill taken *pro confeſſo* on a decree againſt him *ad computandum*; the court will not diſcharge the ſequeſtration on paying the coſts of the contempt only, but will keep it on foot as a ſecurity to the plaintiff, for the defendant's appearing before the Maſter to take the account.

A Bill was brought againſt the defendant for a diſcovery; as the material part of the caſe depended upon the diſcovery, the defendant would not anſwer, but ſtood out the whole proceſs of contempt to a ſequeſtration, and the bill was taken *pro confeſſo*, and there was a decree againſt the defendant *ad computandum*.

It was moved on behalf of the defendant, that the ſequeſtration may be diſcharged on paying the coſts of the contempt.

LORD CHANCELLOR.

Paying the coſts of the ſeveral proceſſes, *ten ſhillings for one*, or *twenty for another*, is not clearing the contempt, for the contempt is the not putting in his anſwer, which is not in the defendant's power to do now, after the cauſe has been ſet down and the decree made.

It was ſaid for the defendant, that this differs from the caſe where a certain duty is decreed upon a bill taken *pro confeſſo*, becauſe there the eſtate may be ſold, and the money ariſing from the ſale applied to diſcharge it, purſuant to the decree; but here as it is a decree *ad computandum*, it may be preſumed till the account is taken, that the defendant may have a balance in his favour, and therefore on paying the coſts the ſequeſtration ought to be diſcharged.

This is a pretty hard preſumption in favour of the defendant, after he has ſtood out the whole line of the proceſs, rather than ſubmit to anſwer; but if I was to diſcharge this ſequeſtration, I ſhould do a manifeſt injuſtice, and make the proceſs of the court intirely ineffectual, and the defendant would have his ends of the contempt, in not putting in his anſwer, for he would refuſe attending the Maſter to take the account, and the plaintiff by that means loſe the fruit of his decree; and therefore as I am of opinion the coſts are conſequential of his contempt, and not the contempt itſelf, I ſhall not diſcharge the ſequeſtration, but keep it on foot as a ſecurity to the plaintiff for the defendant's appearing before the Maſter to take the account.

April

Caſe 159.

April 1, 1747. *De Grey and others, executors of Hardwick Sewell,* } Plaintiffs.
Plampin Richardſon and others, — Defendants.
Plampin Richardſon, — — Plaintiff.
De Grey and Hardwick Sewell Richardſon, and Alice Richardſon and others, — } Defendants.
Hardwick Sewell Richardſon, — Plaintiff.
Plampin Richardſon and others, — Defendants.

Lands on which there were leaſes for years exiſting, and a rent incurred deſcended on a wife as tenant in tail general who ſurvived three months after the rent-day incurred; though ſhe made no entry, nor received any rent during her life, yet this was ſuch a poſſeſſion in the wife as made the huſband tenant by the curteſy.

THE firſt bill was brought by the executors of *Hardwicke Sewell* to eſtabliſh his will, and the truſts thereof. The ſecond bill ſtates, that by virtue of a ſettlement made in 1699. on the marriage of the father and mother of *Hardwick Sewell*, and in 1703. the eſtates therein mentioned deſcended on him as their ſon and heir in tail, that on the 27th of *November* 1742, he died without iſſue, and upon his death the eſtates deſcended on the plaintiff's wife *Alice* the ſiſter of *Hardwicke Sewell* as heir in tail general under the ſettlement: *Alice* died the 19th of *Auguſt* 1743. leaving two children, the defendants *Hardwicke Sewell Richardſon*, and *Alice Richardſon*, and the plaintiff inſiſts that he is intitled as tenant by the curteſy to the poſſeſſion of theſe eſtates, his wife being in her life-time, and at her death, ſeiſed thereof, and leaving ſuch iſſue as aforeſaid, and therefore prays to be let into the poſſeſſion thereof, and to receive the rents for his life.

Hardwicke Sewell Richardſon, plaintiff in the third bill, and ſon of *Plampin Richardſon*, inſiſts that *Alice* his mother was never ſeiſed of theſe eſtates, nor did ſhe, or her huſband *Plampin Richardſon* in her right, take poſſeſſion thereof, or receive any part of the rents, and therefore he is not entitled to be tenant by the curteſy: Prays an account of the rents and profits of the eſtates from the executors of *Hardwicke Sewell*, and that they may be placed out at intereſt till he comes of age.

The rents under the leaſes were payable at *Michaelmas* and *Lady-Day*, but the tenants being greatly in arrear at the death of *Hardwick Sewell*, *Alice Richardſon*, the ſiſter of *Hardwicke Sewell*, did not receive any of the *Lady-Day* rent notwithſtanding ſhe lived four months beyond that time, nor did any other perſon receive it in the life-time of *Alice*.

Mr. *Wilbraham*, council for *Plampin Richardſon*, who claims to be tenant by the curteſy, cited the following authorities in ſupport of his claim. *Co. Lit.* 29. *a. ch.* 4. *ſec.* 35. title *Curteſie D'engleterre*;

in the comment it is ſaid, there is a ſeiſin in deed, and a ſeiſin in law, and here *Littleton* intendeth a ſeiſin in deed *if it can be attained unto*; a man ſeiſed of an advowſon or rent in fee hath iſſue a daughter, who is married and hath iſſue, and dieth ſeiſed, the wife, before the rent became due, or the church became void, dieth; ſhe had but a ſeiſin in law, and yet ſhall be tenant by the curteſy, *becauſe he could by no induſtry attain to any other ſeiſin, and impotentia excuſat legem.*

He cited likewiſe *Co. Lit.* 15. *b.* *Id. ſec.* 350. and *Moore* 125. *Trin.* 23 *Eliz. Rot.* 1229. and *Symonds* verſus *Cudmore*, *Carth.* 260.

Mr. Noel, council for *Hardwick Sewell Richardſon* the ſon, againſt the claim of tenancy by the curteſy, ſaid, that to intitle a man to be tenant by the curteſy, there muſt be an actual ſeiſin of the huſband, or by receipt of rents in the life-time of the wife, unleſs in the caſe mentioned by Lord *Coke* in his comment upon *Lit.* 15. *a.* which is the caſe of *poſſeſſio fratris*, and diſtinguiſhed by him from all other caſes.

He cited *Sterling* and *Pendleton* before Lord *Hardwicke*, where his Lordſhip held there muſt be an actual entry to make the huſband tenant by the curteſy.

Mr. *Weldon* of the ſame ſide cited *Co. Lit.* of dower, *ſec.* 52. " In every caſe where a man taketh a wife ſeiſed of ſuch an eſtate " of tenements, *&c.* as the iſſue which he hath by his wife may " by poſſibility inherit the ſame tenements of ſuch an eſtate, as the " wife hath, *as heir to the wife:* In this caſe, after the deceaſe of the " wife, he ſhall have the ſame tenements by the curteſy of *Eng-* " *land*, but otherwiſe not: *Co.* in his comment ſays, *as heir to the* " *wife* doth imply a ſecret of law, for except the wife be actually " ſeiſed, the heir ſhall not (as hath been ſaid) make himſelf heir " to the wife; and this is the reaſon that a man ſhall not be tenant " by the curteſy of a ſeiſin in law.

LORD CHANCELLOR.

This is a matter of great conſequence to huſbands, as moſt of the lands in *England* are let out upon leaſes for years, and tenants extremely backward in paying their rents, and as a wife may have a right for a year or two, or no actual entry made, it would be hard for this reaſon to prevent a tenancy by the curteſy.

The queſtion is a queſtion of law, whether where lands on which there are leaſes for years exiſting, and a rent incurred, deſcend on the wife as tenant in tail; and ſhe ſurvives three months after the rent-day incurred, but has made no entry, nor was there any rent

paid during her life, is ſuch a poſſeſſion of the wife, as will make the huſband *tenant by the curteſy*?

It has been inſiſted on one hand, that there muſt be a ſeiſin in deed.

And on the other hand, that if the ſeiſin in deed cannot be attained unto, the law excuſes it; and therefore the caſe put by Lord *Coke* will afford a good deal of argument on the preſent caſe: *A man ſeiſed of an advowſon or rent in fee hath iſſue a daughter, &c. Co. Lit.* 29. *a.*

To go by ſteps, here is an eſtate of which the brother was ſeiſed in tail, deſcends upon the ſiſter in tail general; the poſſeſſion of the leſſee was the poſſeſſion of the brother, and he undoubtedly died ſeiſed, afterwards the ſiſter became ſeiſed.

The huſband would have been tenant by the curteſy if the wife had died before the rent-day came.

Suppoſing ſhe had died before *Lady-day*, I ſhould have had no doubt but the huſband would have been tenant by the curteſy, becauſe he could do nothing till rent-day came; for the law never requires a man to become a treſpaſſer.

Lord *Coke* ſays in his comment on the 8th ſection of *Littleton* 15. *a.* "If the father maketh a leaſe for years, and the leſſee entereth "and dieth, the eldeſt ſon dieth during the term before entry or "receipt of rent; the younger ſon of the half blood ſhall not in-"herit, but the ſiſter, becauſe the poſſeſſion of the leſſee for years "is the poſſeſſion of the eldeſt ſon, ſo as he is *actually ſeiſed* of the "fee ſimple, and conſequently the ſiſter of the whole blood is to "be heir."

There is not a ſtricter caſe than this of *poſſeſſio fratris*, and yet you obſerve Lord *Coke* ſays, that if the eldeſt ſon die before entry, or receipt of rent, the ſiſter ſhall inherit.

Actually ſeiſed is the ſame thing as ſeiſin in deed; then why was not the wife in this caſe actually ſeiſed?

Mr. *Noel* in anſwer to this refers to the next page in *Co. Lit.* 15. *b.* "What then is the law of a rent, advowſon, or ſuch things as lie "in grant? If a rent or an advowſon do deſcend to the eldeſt ſon, "and he dieth before he hath ſeiſin of the rent, or preſent to the "church, the rent or advowſon ſhall deſcend to the youngeſt ſon, "for that he muſt make himſelf heir to his father: and therefore, "ſays Mr. *Noel*, there ought to have been *an actual ſeiſin* of the "rent, or *Plampin Richardſon* could not be entitled to be *tenant by the curteſy*.

But

But the conſequence I draw from it is different from what Mr. *Noel* does; for in the ſame ſection he ſaith, " This caſe differeth " from the caſe of the tenancy by the curteſy; for there, if " the wife dieth before the rent-day, or that the church become " void, becauſe there was no laches or default in the huſband, nor " poſſibility to get ſeiſin; the law, in reſpect of the iſſue begotten " by him, will give him an eſtate by the curteſy of *England*;" ſo that you obſerve the caſe of tenant by the curteſy is conſidered more favourably than a *poſſeſſio fratris*, for a *poſſeſſio fratris* as *facit ſororem eſſe hæredem* requires ſome act to be done to make her heir.

Then all that remains in the preſent caſe is the laches in not receiving or diſtraining for the rent that became due at *Lady-day*.

The receipt of rent would have amounted to evidence of an actual ſeiſin, and if the truſtees under the will of the brother had received any rent in the life-time of the wife, would have been a material objection; but no rent has been received that has incurred after the death of the brother either by the wife or any perſon againſt her; and therefore is a very ſtrong caſe, to make the huſband a tenant by the curteſy, as the poſſeſſion of the leſſee was the poſſeſſion of the wife, and there could be no other without making the huſband a treſpaſſer.

Lord *Hardwicke* " declared the will of *Hardwick Sewell* to be " well proved, and that it ought to be eſtabliſhed, and the truſts " thereof performed, and decreed the ſame accordingly: and as to " the teſtator's real eſtate, he ordered the Maſter to inquire what " part thereof was compriſed in the two ſettlements dated the 26th " of *February* 1699. and the 13th of *Auguſt* 1703. and what par- " ticular parts of the teſtator's eſtate deſcended to *Alice* the late " wife of the defendant *Plampin Richardſon*, the mother of the " plaintiff *Hardwick Sewell Richardſon*, in tail, and what particular " parts of the eſtate paſſed by the teſtator's will to his truſtees: " and alſo to inquire what parts of the lands which deſcended to " the defendant *Plampin Richardſon*'s wife in tail were at the teſta- " tor's death ſtanding out on any leaſe or leaſes for years, and of " what particular part of ſuch eſtate the teſtator died ſeiſed in actual " poſſeſſion, and to ſtate the ſame: and his Lordſhip doth declare " that he is of opinion, that the defendant *Plampin Richardſon* is " intitled to be tenant by the curteſy of all ſuch lands as deſcended " to his late wife in tail, whereof any leaſes for years were exiſting at " the teſtator's death, which continued till the death of his wife; " but that he is not intitled to be tenant by the curteſy of any part " of ſuch lands, whereof no ſuch leaſes for years were exiſting and " continuing as aforeſaid."

Doctor

Case 160.

April 4, 1747. *Doctor Winne, canon reſidentiary of the church of Sarum,* } Plaintiff.
Bampton, Sayer, and others, canons of the ſame church, — — — } Defendants.

IN the church of *Sarum* there are a Dean and ſix Canons, who grant and renew leaſes, and divide the fines into ſeven parts, if the leaſe is made when the number is compleat, but if during a vacancy, then among the Dean and Reſidentiares, according to their number exiſting.

Though a Dean and Chapter are reaſonable in the fines they demand, if an accident delays the leaſe, which has not happened from their fault, or from the tenants, yet if it is not compleated till after a new member comes in, he ſhall have his proportion.

On the 28th of *October* 1738. Doctor *Eyres*, one of the canons died, and there were only five canons beſides the dean, and ſo continued till the 27th of *June* 1739. when the plaintiff was elected.

About the time of the plaintiff's election Mr. *Stiles* being willing to renew two leaſes for lives of the manor of *Melkſham*, agreed with the canons for a fine of a thouſand and fifty pounds, and in *November* 1739. delivered the old leaſes to the defendant *Sayer* to be ſurrendered, to enable the dean and chapter to make new leaſes when the agreement ſhould be compleated; and the dean and chapter on the 12th of *November* 1739. granted him two leaſes accordingly, to him and his heirs, to hold for three lives, and at the ſame time a licence of alienation was granted him, and leaſes and licence were executed, and paſſed the common ſeal, after the plaintiff was admitted a canon, ſo that he became entitled to a ſeventh part of the thouſand and fifty pounds fine, being one hundred and fifty pounds, but the whole was received by the dean and the other five canons, which was twenty-five pounds each, more than they were intitled to.

The dean and one of the canons, on an application to them by the plaintiff, paid him twenty-five pounds each, but the four other canons refuſed, and therefore the bill prays that they may account with the plaintiff for the ſeventh part of the fine.

The defendants inſiſt, that in *April* 1739. long before the plaintiff's election, Mr. *Stiles* applied to the Dean and Chapter of *Sarum* to renew, and on the 19th of *May* paid one thouſand and fifty pounds to the defendant, which amounting to one hundred and ſeventy-five pounds apiece, was ſoon after divided, as it is uſual to divide fines, in conſideration whereof the Dean and Chapter on the 26th of *June*, the day preceding the plaintiff's election, ſealed two leaſes, whereby they demiſed to Mr. *Stiles* and his heirs the manor of *Melkſham* for three lives, which were left in the defendant's

hands, to be delivered to Mr. *Stiles* when he ſurrendered the old leaſes, which were not ſurrendered till the 8th of *November* 1739. and the defendant *Sayer*, to whom the whole care was left of finiſhing this affair, altered the date of the leaſes while they were in his keeping, by inſerting the date of the 12th of *November* inſtead of the 26th of *June*, merely to make the date of the leaſes ſubſequent to the date of the ſurrender of the 8th of *November*; and the defendants inſiſt that the agreement entered into and ſigned with Mr. *Stiles* for the purchaſe of the leaſes, and payment of the fine, and the Dean and Chapter's ſealing new leaſes, amounted to a ſurrender of the old, and that the ſurrender of the 8th of *November* was unneceſſary, and conſequently the leaſes of the 26th of *June* immediately took effect on the ſealing of them, and that the reſealing on the 12th of *November* was at the requeſt of Mr. *Stiles*'s agent, and that the Dean and Chapter complied only to ſatisfy his ſcruples, and therefore the reſealing after the alteration of the date amounted to no more than a confirmation of what was before effectual and valid; that the agreement with Mr. *Stiles* for granting leaſes was fully carried into execution on his part, by paying the fine in *May* 1739. and that the Dean and Chapter and Reſidentiaries, at the time the agreement was made and fine paid, were alone intitled to divide the fine.

It appeared in evidence, that theſe leaſehold eſtates were in mortgage to Mr. *Edwin*, and that one of the lives dying, application was made on behalf of Mr. *Stiles* and the mortgagee, to the defendant *Sayer*, for renewing them, by adding a new life or lives; and by his order the chapter clerk made two ſets of leaſes, one in Mr. *Stiles*'s and the other in Mr. *Edwin*'s name, and both were ſealed together on the 26th of *June* 1739. and at the time of the ſealing, the chapter clerk obſerved to the Dean and two of the Canons, that he thought it irregular to ſeal two leaſes of the ſame premiſſes to different perſons, and ſwore that he afterwards ſaw the two leaſes, with a raſure appearing in the date, which was altered and made to bear date the 12th of *November* 1739. inſtead of the 26th of *June*, and that the leaſes with this raſure were in the hands of the defendant *Sayer*; and afterwards in *Auguſt* 1740. reſealed at the requeſt of Mr. *Stiles*'s agent, he being diſſatisfied with the leaſe having been altered. Doctor *Clark* the dean ſwore he apprehended the reaſon, inducing the defendant *Sayer* to make ſuch alteration, might be to ſecure the whole fine paid on the renewal of ſuch leaſe to the reſt of the Chapter, excluſive of the plaintiff. Mr. *Stiles* in his examination ſwore, that about the 17th of *May* 1739. he gave directions to pay the Dean one thouſand and fifty pounds, as a fine for renewing the leaſes, but did not remember it ever came under his conſideration when or how the Dean and Chapter ſhould divide the money, but that he could not but look on it as a depoſit in their hands, for which he was to have new

leaſes, as ſoon as things were ripe for the execution and delivery, and that the reaſon of his directing the money to be paid ſo incautiouſly, was owing to the preſſing inſtances of the defendant *Sayer*, who frequently by letters urged him, as on the part of the Dean, to the ſpeedy performance of the agreement, or elſe that the Dean and Chapter would not think themſelves bound to ſtand to it.

LORD CHANCELLOR.

The general queſtion is, whether the plaintiff, as a canon reſidentiary of the church of *Sarum*, is entitled to a ſhare of the fine of one thouſand and fifty pounds, with the dean and other canons as *reſidentiary exiſting*, and having a right at the time.

It muſt be admitted to be the general rule, that where a leaſe is made by theſe corporate bodies ſealed under the common ſeal, (for no intereſt can paſs out of them at law, but under the common ſeal) they are intitled to divide the money ariſing from the fine in equal proportion amongſt them in ſome caſes, and in others, the dean has a double ſhare to the reſt of the chapter.

No intereſt can paſs out of a corporate body at law but under the common ſeal.

The firſt queſtion is, when the leaſe was really and effectually made in law to Mr. *Stiles*, now *Sir Francis Eyles Stiles*, the leſſee.

This is very eaſily reſolved in point of law; to be ſure it was not a ſubſtantial effectual leaſe, till ſealed in 1740. for as to the ſealing in 1739. the day before the plaintiff's election, it is admitted at the bar that was invalid, for want of a ſurrender of the old leaſes, or it would have been a leaſe for four lives, and within the diſabling ſtatutes; and no men in their ſenſes would ſet their ſeals to leaſes giving a right to two different ſets of perſons for their lives, the ſame day: Therefore they could have no apprehenſion they had made an effectual leaſe, and binding upon the body corporate.

As to the altering the date from the 26th of *June* to the 12th of *November*, it ſhews plainly Mr. *Sayer* himſelf did not apprehend the former were valid leaſes, ſo that they were ineffectual not only in point of law, but even in the apprehenſion of the parties till 1740. when Mr. *Stiles* the leſſee found out the management againſt himſelf, and inſiſted upon an effectual leaſe.

If it was not a ſubſtantial leaſe in point of law, conſider it next on the foot of equity.

It has been inſiſted, on the part of the defendants, that if there was ſuch an agreement in *May* and *June* 1739. as bound both parties in a court of equity, this court, though executory, will carry it into execution, and therefore is to be conſidered as final and compleat from that time.

There

The rule as to carrying agreements into execution as to private perſons, will not hold generally as to aggregate bodies.

There are many caſes with relation to private perſons, where agreements have been conſidered as binding, and the court will carry them into execution, but will not hold generally as to agreements made with aggregate bodies.

Then the queſtion will be, what has been done in the preſent caſes on the ſide of the plaintiff; it is called a depoſit only, and on the ſide of the defendants a payment, and that the body corporate is bound by it.

Bodies corporate, eſpecially eccleſiaſtical, differ extremely from private perſons.

Bodies corporate, eſpecially *eccleſiaſtical*, differ extremely from private perſons: I do not give any opinion on the caſe I am going to put, but ſuppoſe a body corporate, having a power, make an agreement for a renewal, and the fine is paid, I will not ſay the court will not compel them to execute a leaſe, notwithſtanding a new member is introduced amongſt them, becauſe, as they had a power over the legal eſtate, they had a power over the equitable; but then there will be a great difference where the agreement for the contract was not fixed and certain, but might be varied, for here was a queſtion between themſelves how the contract was to be made.

Suppoſe there is an enhancing of the fine on the delay of the tenant's applying to renew, that will not alter the right of the new member as to his proportionable ſhare of the fine; I will go further ſtill; ſuppoſe the court ſhould conſider an agreement to do an act by a dean and chapter as done, where the dean and chapter have full power over the revenues, and the tenants full power to renew their eſtates held of them, yet it will prove nothing in the preſent caſe, for that will bring it to the queſtion, whether this was ſuch an agreement as they were bound by.

I am of opinion this was not a binding agreement, for it all depended upon the will of Mr. *Edwin* the mortgagee, who was no party to the agreement.

Suppoſe a dean and chapter are very reaſonable in the fine they demand, and any accident delays the leaſe, which has not at all happened from the fault of the dean and chapter, or even from the tenant, but from ſome particular circumſtances, yet if the leaſe is not compleated till the new member comes in, he ſhall have his proportion.

A blank was left for the lives in the leaſes that were ſealed on the 26th of *June*, and the dean and chapter were not obliged to accept of the lives that ſhould be named afterwards, and Mr. *Stiles* ſays, he underſtood it as a depoſit only, becauſe the dean and chapter might, if they pleaſed, diſapprove of the lives.

Beſides

Beſides this, here was Mr. *Edwin* in the caſe, who had the legal intereſt, and a right to be conſulted as to the ſurrender of the old leaſe; for I am of opinion, if he had refuſed to ſurrender, a court of equity would not have compelled him, as he was an incumbrancer, for he might have objected to the lives propoſed, and inſiſted the lives in being were better, or obliged the tenant, the mortgagor, to have propoſed other lives, or redeem him: Indeed, if it had been a chattel intereſt, and leaſe for years only, it would have been otherwiſe, for then, upon ſurrendering the old, in which there was only a remainder of a term to come, a new and longer term would have been granted, which was an advantage to the mortgagee, as being a better ſecurity.

Where a mortgagee of an old dean and chapter leaſe, refuſes to ſurrender, a court of equity will not compel him, for he may inſiſt the lives in being are better, or oblige the tenant, the mortgagor, to propoſe others, or redeem him; otherwiſe if it had been a chattel intereſt, for there the granting a new and longer term is an advantage to the mortgagee.

Mr. *Edwin* did not ſurrender the leaſes, nor were any orders ſent by Mr. *Stiles* for executing new leaſes till *November* 1739; the plaintiff was elected the 27th of *June* before, and therefore is intitled to a ſhare of the fine.

Accidents might have happened in the intermediate time, of deaths in the corporate body, or of ceſſion, upon their being preferred, which might have made a majority of new members; in that caſe it would have been abſurd, that a minority ſhould have inſiſted the agreement was binding, and ought to have been carried into execution.

By a letter of the 7th of *Auguſt* 1739, from Sir *John Eyles*, Mr. *Stiles*'s father, to the defendant *Sayer*, it appears, that it was owing to the misfortune of the mortgagees refuſing to ſurrender; the affair was not finiſhed; Sir *John Eyles* acted for his ſon, and therefore this imports that the ſon underſtood the payment of the thouſand guineas to be as a depoſit only, and had no apprehenſion the dean and chapter intended to divide it till the whole contract was performed; another letter to *Sayer* of the 31ſt of *Auguſt* 1739, has been read, importing what defendant calls an agreement was not binding, but requires a further agreement.

Then at what time was the conſent of the leſſee, that the dean and chapter ſhould divide it amongſt them? certainly not till *Auguſt* 1740, and ſeems to me ſo plain, that I am of opinion there was no agreement that could bind this body corporate or leſſee, till after the ſurrender, and Mr. *Edwin* the mortgagee's coming in.

Taking it then either in law or equity, it is a clear caſe, that the plaintiff is intitled to his ſhare of the fine.

If a body corporate makes an agreement with a perſon to grant him a leaſe, and the money is paid, though ſome of the members of that body were wanting, a court of equity will carry it into execution.

Still it has been ſaid, that theſe are *incerti proventus*, and a dean and chapter therefore are juſtified in getting them as ſoon as poſſible, and that the agreement with a leſſee, and payment of a fine, binds the body corporate; and if a body corporate makes an agreement with a perſon to grant him a leaſe, and the money is paid, I will not ſay a court of equity would not carry it into execution; probably it would, though ſome of the members of that body were wanting.

A dean and chapter ought not to ſuffer any immediate advantage to themſelves in filling up vacant lives, to bias their minds in taking a leſs time, to the prejudice of the ſucceſſion.

But a dean and chapter ought to conſider themſelves as truſtees for their ſucceſſors, and not ſuffer any immediate advantage to themſelves in filling up vacant lives, to bias their minds in taking a leſſer fine, to the prejudice of the ſucceſſion.

Where the matter is finiſhed and complete, a court of equity cannot ſet it aſide, but they would not ſtrain to ſupport ſuch a contract.

They have a truſt repoſed in them by the crown, or by their founder, for the benefit of the ſucceſſion, as well as for themſelves, and they ought to have the ſucceſſion principally in view, and though where the matter is finiſhed and complete, a court of equity cannot ſet it aſide, yet they would not ſtrain to ſupport ſuch a contract.

Upon the whole, I am of opinion the plaintiff is intitled to a decree for his demand, and on the circumſtances of the caſe, to his coſts from all the defendants; and his Lordſhip decreed accordingly.

Caſe 161.

April 8, 1747. *Ex parte Strangeways.*

A Bill was brought by Mr. *Strangeways* againſt his wife, ſhe appeared in court, and deſired that a guardian might be aſſigned to put in an anſwer for her.

LORD CHANCELLOR.

A huſband's bringing a bill againſt a wife, is admitting her to be a feme ſole, and ſhe muſt put in her anſwer as ſuch.

I am of opinion, that the huſband's bringing a bill againſt her is admitting her to be a feme ſole, and ſhe muſt put in an anſwer as ſuch; and that he never knew an inſtance of appointing a guardian in this caſe.

April 8, 1747. *Ex parte Maire.* Caſe 162.

A Petition was preferred, praying that an infant, the heir of a mortgagee in fee, who was likewiſe a feme covert, might convey by fine under the ſtatute of 7 *Ann. c.* 19. the Maſter reporting it to be neceſſary.

The court, under the ſtat. of 7 Ann, may order an infant, the heir of a mortgagee in fee, and who is likewiſe a feme covert, to levy a fine under the general words, that perſons under age *ſhall convey and aſſure.*

Lord Chancellor ſaid, this queſtion came before him ſoon after he had the ſeals, and that he conſulted with Lord Chief Baron *Comyns*, who thought the court might order an infant that was a feme covert to levy a fine; for the act is general, that all perſons under age ſhall convey and aſſure, and that as a feme covert of full age could not aſſure, but by fine, the court may direct an infant to convey in the ſame manner in the preſent caſe. *Vide Lord Chief Baron Comyns's Rep.* 615.

An affidavit of ſervice on the huſband is not ſufficient, he muſt conſent by council to the prayer of the petition.

In the preſent caſe there was only an affidavit of ſervice on the huſband, which his Lordſhip did not think ſufficient, but directed it to ſtand over till the next day, that council might conſent to the prayer of the petition for the huſband; and the next day he made an order according to the prayer of the petition.

April 10, 1747. *Ex parte Little.* Caſe 163.

A Petition to ſuperſede the writ of *excommunicato capiendo* after the return day was out.

This court cannot do any thing after the return of the writ of *excommunicato capiendo* is out, for the King's Bench have the cognizance, for they can compel the ſheriff to return it, and the application to quaſh it muſt be there.

Mr. *Yorke* for the petitioner, cited 1 *P. Wms.* 435. *The King* verſus *Bunard*, where the court inclined to think, that after the writ has been iſſued out of this court, and been brought into the court of King's Bench, and there delivered to the ſheriff, but not yet actually returned into the King's Bench, this court, on a plain error appearing, may ſuperſede or quaſh it.

Mr. *Wilbraham* of the other ſide, cited *The King* verſus *Fowler*, *Salk.* 293. where it was held by the court of King's Bench, that a perſon in cuſtody, by a writ of *excommunicato capiendo*, cannot go into Chancery for a *ſuperſedeas*, becauſe the writ is returnable in the King's Bench, and they may quaſh the writ, or award a *ſuperſedeas* as they are judges of the cauſe, and have it before them.

He likewiſe cited *The Queen* verſus *The Biſhop of St. Davids*, *Salk.* 294, where the ſame rule is laid down.

LORD CHANCELLOR.

After the return of the writ of *excommunicato capiendo* is out, this court cannot, on a petition to quaſh the writ, do any thing in it, as they have no authority, for the court of King's Bench have the cognizance of it, and they can compel the ſheriff to return it, and you muſt apply there to quaſh it.

If the writ had iſſued in the vacation, and not yet returnable, this court would have given relief, and diſcharged the perſon out of cuſtody.

If the writ had iſſued in the vacation, and had not been yet returnable (for it muſt be returned on one of the return days in the term) this court would have given relief, and diſcharged the perſon out of cuſtody.

The petition was diſmiſſed.

Caſe 164. *Knight* verſus *Lord Plimouth*, *April* 10, 1747.

A receiver appointed by this court ſhall not make good a loſs which was not owing to any default of his, for where the rents he has in his hands are large, it is a neceſſary precaution to remit it by bills to *London* rather than in ſpecie.

A Perſon who had been appointed *receiver* under an order of this court of Lord *Plimouth*'s eſtate, having received the ſum of ſeven hundred pounds and upwards in rents, did not think it ſafe to remit the money to *London*, and therefore paid it to *Winſmore*, a conſiderable tradeſman in *Worceſter*, and took bills of exchange from him drawn on perſons in *London*; Mr. *Winſmore* very ſoon after becomes a bankrupt, and there was an application to the court ſome time ago againſt the receiver, that he may make good to the eſtate the loſs that has happened; Lord Chancellor referred it to a Maſter to inquire into the fact, and to ſtate it with all the circumſtances to the court.

Where a receiver pays money to a tradeſman, and takes bills for the ſum, if he was in credit at the time, though he fails ſoon after, it ſhall not affect the receiver.

It came on to day upon the Maſter's report, and upon the ſtate of it as certified by the Maſter, it appeared the receiver did it only for the greater ſafety, as it was a large ſum of money to remit in ſpecie, and that he had no notice of *Winſmore*'s being in declining circumſtances, who, till a week before he broke, had as great credit as any perſon in *Worceſter*.

Upon the circumſtances of the caſe, his Lordſhip ſaid, it would be very hard to oblige the *receiver* to make good a loſs which was not owing to any default of his, but as the ſum was large, it was a neceſſary precaution to remit it by bills, rather than in ſpecie, and at the time the money was paid to *Winſmore*, he had no reaſon to doubt its being lodged in a ſafe hand, and therefore indemnified the receiver in the act he had done.

But ſaid, at the ſame time, he would not lay it down generally, that the court will indemnify a receiver appointed by them, if it ſhould appear he had been guilty of any fraud or colluſion in a tranſaction of this kind, and that the money was loſt by his wilful default, and placing it in what he knew at the time to be an improper hand; for he ſhould then be of opinion, the court, as he is an officer appointed by them, would oblige him to anſwer the loſs out of his own pocket.

But if the money had been loſt by his wilful default, and placing it in what he knew at the time to be an improper hand, the court will oblige a receiver to anſwer the loſs out of his own pocket.

April 11, 1747. *Ex parte Anneſley.* Caſe 165.

LORD CHANCELLOR.

THERE is no privilege of peerage in *Ireland* in the caſe of waſte; *quære* as to *England*.

Blount verſus *Doughty*, *Tereſa Maria Blount*, *and Martha Blount and others*, *May* 4, 1747. Caſe 166.

LISTER Blount the plaintiff's grandfather, by deed of the 15th of *May* 1710, reciting a ſettlement wherein was contained a power for him to charge the manors, *&c.* thereby ſettled, with any ſum not exceeding two thouſand pounds, demiſed to *Engleſield* and *Libb* the manor of *Maple-Durham*, *&c.* to hold to them, their executors, *&c.* from the day of his death for *ninety-nine years*, on truſt to raiſe two thouſand pounds, and pay the ſame to the defendants *Tereſa Maria Blount*, and *Martha Blount*, the plaintiff's aunts, as an addition to their fortune, in manner following, *videlicet*, In caſe one or both of them married, then to pay to one or both of them ſo marrying one thouſand pounds apiece, within ſix months after their marriage; and if both died before marriage, then to ſuch perſon as at the death of the ſurvivor ſhould be intitled to the inheritance of the premiſſes.

The court will not determine bonds to be voluntary, if they do not exactly tally with the ſum given for them; but if the contract was fairly entered into without any circumſtance of fraud, has been held to be made for a valuable conſideration.

Liſter Blount by his will, dated the 15th of *May* 1710, "gave "to the defendants *Tereſa* and *Martha* 1500*l.* apiece, to be raiſed "out of his perſonal eſtate, (except plate, pictures, collection of "horns and houſhold goods) and to be paid to them within *twelve* "*months* after his deceaſe, with intereſt at five *per cent.* from his "death, and after other legacies and debts paid, gave the reſidue of "his perſonal eſtate (except as aforeſaid) to the defendants equally "between them, *and likewiſe by his will requeſted his ſon* Michael "Blount, *then an infant about the age of ſeventeen; that when he* "*married he would give defendants one thouſand pound apiece, ſix* "*months after they ſhould be married*, and likewiſe gave all the ex-"cepted plate, *&c.* to *Michael Blount*, he paying for the ſame "within twelve months after his marriage, or age of twenty-one, "one thouſand pounds to theſe defendants as an addition to their

" fortune, and made *Henry Englefield* and *Martha Blount*, defen-
" dants mother, executors."

Liſter Blount died *June* 10, 1710, after whoſe death *Michael Blount*, the only ſon and heir of *Liſter*, by a recovery, barred the intail in his father's marriage ſettlement, and thereby became intitled to an eſtate in fee in the premiſſes, ſubject to 2000*l.* additional portion ſecured by the deed of the 15th of *May* 1710.

" By articles of agreement of the 10th of *June* 1714. between
" *Tereſa* and *Martha Blount* of the the firſt part, *Michael Blount* of
" the ſecond, and the executors of *Liſter Blount*'s will of the third,
" reciting the will as above, and that *Michael* was willing to accept
" the plate, pictures, *&c.* at the value of one thouſand pounds,
" and that the whole amount of what the defendants *Tereſa* and
" *Martha* were to have towards their maintenance whilſt they con-
" tinued ſingle, would not be above 931*l.* 8*s.* 9*d.* apiece, which
" was conceived to be too little to maintain them according to their
" birth, which being added to the 1000*l.* apiece ſecured by their
" father's ſettlement, would make their whole fortunes, in caſe
" they married, amount to but 1931*l.* 8*s.* 9. each; and further
" reciting that *Michael* having attained his age of twenty-one, out
" of brotherly love and affection, was reſolved to augment their
" fortunes, it was witneſſed, that for ſettling all controverſies be-
" tween the parties, and ſecuring to the defendants a competent
" maintenance while ſingle, and portions in caſe of marriage; the
" defendants covenanted with the executors of *Liſter Blount*, that
" it ſhould be lawful for them to pay the money which remained
" in their hands of *Liſter*'s perſonal eſtate to *Michael*, and deliver
" to him the reſt of the perſonal eſtate undiſpoſed of, and to make
" over all the right and intereſt of the defendants in the ſame for
" his uſe and benefit; and that the defendants would execute to the
" executors a general releaſe of all their demands by virtue of the
" will; and in conſequence thereof, *Michael* covenanted with the
" defendants *Tereſa* and *Martha*, that he, his heirs, executors, or
" adminiſtrators would, upon the defendants executing ſuch releaſe,
" give to theſe defendants two ſeveral bonds in the penalty of 4000*l.*
" for payment of 1025*l.* to each of them, their executors, *&c.* on
" the 25th of *March* next (*which was accordingly paid to the defen-
" dants*), and alſo fifty pounds a year to each of them, clear of
" taxes, half-yearly, ſo long as they continued unmarried; and alſo
" to pay to the defendants reſpectively the further ſum of 1000*l.*
" within ſix months after their reſpective marriage, over and above
" the 1000*l.* ſecured to them by the deed of the 15th of *May*
" 1710."

Tereſa *and* Martha *did afterwards give a releaſe to the executors.*

And

And *Michael* did, by two bonds dated the 7th of *May* 1716, bind himſelf, his heirs, *&c.* in the penalty of 2000*l.* conditioned to pay to each of his ſiſters 50*l.* a year without deduction whilſt ſingle, and to each of them, their executors, *&c.* 1000*l.* ſix months after their reſpective marriages.

Michael was at his death indebted in above 4000*l.* by bond and otherwiſe.

The bill was brought by the ſon of *Michael*, that the 2000*l.* provided for *Tereſa* and *Martha Blount* may be raiſed out of the perſonal and real aſſets of *Michael*, and paid purſuant to the truſts of the deed of the 15th of *May* 1710, and that the remainder of the ninety-nine years term in the truſt eſtate might be aſſigned to attend the inheritance.

At the hearing of the cauſe it was decreed, that it be referred to a Maſter to take an account of the perſonal eſtate of *Michael*, and to ſummon his creditors, and to ſtate the ſeveral incumbrances and debts, and reſerved the conſideration as to the ſatisfaction of the ſeveral debts and incumbrances, till after the report.

It came on now upon the Maſter's report, by which it appears that there were a great number of bond creditors of *Michael Blount*, ſubſequent in time to the bonds given by him to *Tereſa* and *Martha Blount*.

The principal queſtion was, whether the bonds to *Tereſa* and *Martha* are voluntary, and to be poſtponed to juſt debts.

Mr. Solicitor general for the defendant cited *Bell* verſus *Scott*, 2 *Lev.* 70. and *Newſtead* verſus *Searle*, *February* 20, 1737, before Lord *Hardwicke*, 1 *Tr. Atk.* 265. and the caſe of *Doctor Young* and *The truſtees of the late Duke of Wharton, and ſome of his bond creditors*, alſo before Lord *Hardwicke*, 2 *Tr. Atk.* 152. *Ca e* 136.

LORD CHANCELLOR.

The queſtion is, whether the two bonds of the 7th of *May* 1716, from *Michael Blount*, were voluntary, or for a valuable conſideration.

If to be conſidered as merely voluntary bonds, then they are within the caſe of *Jones* verſus *Powell*, before Lord *Harcourt*, *Eq. Caſ. Abr.* 84. and ought to be poſtponed to all debts.

If for a valuable conſideration, then they muſt be allowed to come in with the bond creditors of *Michael*.

I am of opinion they are not mere voluntary bonds.

It would be extremely dangerous for the court to determine them to be voluntary; if they are not adequate, or tally exactly with the ſum given for them, the court has not meaſured the conſideration of debts of this kind by exact rules of proportion of value, nor does it require that the conſideration ſhould be commenſurate to the value of the eſtate; but if ſuch a contract was fairly entered into without any circumſtance of fraud, then it has been held as made for a valuable conſideration: I was of that opinion in *Newſtead* verſus *Searls*, and in Doctor *Young*'s caſe.

Where a father makes a will, and in conſidering the particulars of his eſtate, gives a legacy to his ſon, deſiring he will do an act for his ſiſter's benefit, this amounts to an obligation upon the ſon, as far as the value of the father's eſtate extends.

Here was a requeſt likewiſe by the father of *Michael* to make good the father's will, and if a bare requeſt only, would have been a ſtrong circumſtance in favour of the defendants; but where a father makes a will, and is conſidering the particulars and ſituation of the eſtate, and gives a legacy to the ſon, and deſires he will do an act for the benefit of his ſiſters, this to be ſure does amount to an obligation upon the ſon as far as the value of the father's eſtate extends; and in many caſes a requeſt has been conſtrued to amount to an abſolute deviſe.

Where a ſon taking beneficially by a father's will, promiſes to make it good, this may be a valuable conſideration for a bond, and would not be fraudulent.

If the ſon taking a benefit from the father's will, promiſes to make it good, this may be a valuable conſideration for a bond or ſettlement, and would not be fraudulent; and this was a very ſtrong ingredient in the caſe of Mr. *Thynn* of *Egham*, where the court decreed againſt the ſon, as he had declared that he would be only an executor in truſt for her under the father's will. *Eq. Caſ. Abr.* 380. 1 *Vern.* 296.

It has been objected here, that the ſon was under age at the time of the will, and at the death of the teſtator.

A promiſe under age, may be a conſideration for a promiſe when of age.

But if, after coming of age, he thought fit to renew that promiſe, the promiſe under age may be a conſideration for a promiſe when of age, and has been ſo held at common law.

But I go further, and even abſtracted from this, think it a good conſideration: The ſiſter took a bond inſtead of ready money, for they were intitled to have received above 450 *l.* apiece, and might then have improved that ſum, in the funds, and in this length of time made it conſiderable.

No body can tell likewiſe how far the undertaking of the brother to perform the promiſe might create a facility in the ſiſters in taking the account of *Liſter Blount*'s eſtate.

They were alſo intitled, on the delivery of a ſpecifick legacy to *Michael*, to a farther ſum, valued by the teſtator at a thouſand pounds:

They likewiſe conſented the reſidue ſhould be paid over to *Michael*, and take his bond, his perſonal ſecurity for payment of the money.

This was a conſideration, and a very material one; it was a great prejudice to them to loſe the immediate payment of the money, and as great an advantage to *Michael* to have it in his hands; a releaſe beſides was given by the defendants to the executors of *Liſter Blount*.

All theſe things complicated together make a good conſideration, for it is an intire contract, and muſt be taken together; and I cannot divide it, for no body can ſay the ſiſters would have permitted the brother to retain this thouſand pound, unleſs he had agreed to perform the promiſe.

The determination I ſhall make will not be liable to the inconvenience ſuggeſted by the council for the creditors; for whenever the court ſhall ſee a conſideration is made up, with a view to defraud creditors, the court will lean againſt it, and reduce it to what is juſt and equitable: But there is no ſuch ingredient in the preſent caſe.

Where the court ſees a conſideration is made up with a view to defraud creditors, they will reduce it to what is juſt and equitable.

2 *Lev.* 70. is a very ſtrong caſe; there a *feme covert* joins in an alienation of her jointure, and had another made the ſame day without precedent articles or agreement; and it was held by *Hale*, and the whole court, not to be fraudulent againſt purchaſers.

To be ſure, where this is any ſymptom of fraud, and done with an intention to cover ſomething againſt creditors, the court will not ſuffer it to prevail; but as this tranſaction is clear of any ſuch imputation, I am of opinion the two ladies Mrs. *Tereſa* and Mrs. *Martha Blount* are to be conſidered as bond creditors for a valuable conſideration, for the whole ſum.

Eaſter term, May 6, 1747. Caſe 167.

LORD CHANCELLOR.

IT is not a ſufficient inducement to the court, to diſſolve an injunction for ſtaying waſte, that the defendant in his anſwer ſwears, he has not committed any waſte ſince the filing of the bill, for as he admits that he has done waſte before, the court will preſume he may do further waſte: the injunction therefore muſt be continued.

If a defendant by his anſwer admits he has done waſte before the filing of a bill, though he ſwears he has committed none ſince, yet that is not ſufficient to induce the court to diſſolve the injunction.

A plaintiff on the death of a defendant, is not obliged to bring a bill of revivor, but may file a new bill.

Where a cauſe is abated by the death of a defendant, the plaintiff is not obliged to bring a bill of revivor, but may file a new bill, becauſe the plaintiff may think perhaps, that he can make a better caſe than by the firſt bill. *Vide* 1 *Vern.* 463. where this rule is laid down.

Caſe 168. *Ridout* verſus *Pain*, *May* 9, 1747.

R P. in the deviſe at the end of his will, ſays, "All the reſt, reſidue and remainder of my goods, chattels and perſonal eſtate, *together with my real eſtate*, not herein before deviſed, I give to my wife, whom I appoint ſole executrix." The words, *together with my real eſtate, will carry the land and inheritance, notwithſtanding they are accompanied with the words goods, chattels and perſonal eſtate.*

"*Richard Pain* the plaintiff, *Elizabeth*'s firſt huſband, made his will on the fourth day of *Auguſt* 1733. and after therein reciting, that he had already ſettled the moiety of his farm and lands in *Ovingdeane*, in jointure on (*the complainant*) his then wife, and that in caſe he ſhould die *he thought that not ſufficient for her to live hoſpitably upon*, did by his will give to the plaintiff *Elizabeth* one moiety of the other half part, not ſettled on jointure to her, for life, and alſo gave to her all his manſion-houſe with the out-houſes, &c. wherein he then dwelt in *Lewes*. and alſo a ſmall parcel of *Brookland* in *Lewes*, for her life, and did by his will give to his ſiſter *Mary Pain* (now *Mary Jones*) the other moiety of the unſettled moiety of *Ovingdean*, and after the death of the ſurvivor of *Elizabeth* and *Mary* to truſtees, to the uſe of his brother *Robert Pain* for life, with remainder to the heir male of the body of *Robert*, remainder to *Thomas Pain*, remainder to the heirs male of his body, remainder to the teſtator's own right heirs: he likewiſe gave the manor of *Gravely* farm, and *Wildgooſe* land, parcel of the ſame, to *Robert* and his heirs, charged with legacies; he further gave to *Robert Pain* the reputed manor of *Redhall*, *Redhall* farm, and *new farm*, parcel of *Redhall*, and the heirs male of his body, and a farm called *Burſtall* in *Surrey* to his ſiſter *Mary* and her heirs, and two farms in *Hanney* and *Laughton* in *Suſſex*, to his brother *Thomas Pain* and his heirs male; and for want of heirs male of either *Robert* or *Thomas*, then he gives the laſt mentioned premiſſes in truſt for his own right heirs, *and all the reſt, reſidue and remainder of his goods, chattels and perſonal eſtate, together with his real eſtate, not herein before deviſed, he gives to the plaintiff Elizabeth, whom he appointed ſole executrix.*

The teſtator died on the 17th of *January* 1733. without making any other deviſe or diſpoſition of his real eſtate, and at the time of his death was ſeiſed of the advowſon of *Ovingdean*, and the fourth part of a wharf called *Sabs-Key* in *London*, which eſtates are not mentioned in the will, nor deviſed ſpecifically to any perſon.

The teſtator not leaving perſonal aſſets behind him ſufficient for payment of his debts, and ſeveral diſputes ariſing between the plaintiff *Elizabeth*, and *Robert*, *Thomas*, and *Mary Pain*, touching the

the will and the real and perſonal eſtate of the teſtator the plaintiff *Elizabeth*, and the defendants agreed to refer all matters in difference to the determination of Mr. *Newdigate* and Mr. *Staples*, and the plaintiff and the defendants did by ſeveral bonds dated the 6th of *June* 1735. bind themſelves in the ſum of one thouſand pounds each, to abide the award of Mr. *Newdigate* and Mr. *Staples*.

In purſuance of the ſubmiſſion, the arbitrators made their award on the 17th of *October* 1735. and reciting that the perſonal eſtate of the teſtator fell ſhort five hundred and ten pounds ſix ſhillings and ſix pence to pay his debts, awarded the deficient ſum to be paid by the plaintiff and the defendants in proportion to the value of their ſeveral freehold eſtates, which came reſpectively to them on the teſtator's death, either by deſcent or deviſe; *and did further award with the like conſent of all parties, that one or more fine or fines, recovery or recoveries ſhould be levied and ſuffered of the whole eſtate of Richard Pain the teſtator, as ſoon as conveniently might be*; and that all or any of the parties ſhould join in the ſame, as council ſhould direct, *and that a deed to lead the uſes thereof* ſhould be executed by ſuch parties, to confirm the ſaid eſtates in the ſame manner as the ſame were given by the will of *Richard Pain*, at the proportionable expence of the parties.

By leaſe and releaſe of the 19th and 20th of *May* 1737. reciting the will, the differences between the parties, the arbitration bonds and the award, it is by the ſaid indenture witneſſed, that for the better performing the award, and effecting the purpoſes ſubmitted thereto by the ſaid parties, and in conſideration of five ſhillings apiece paid by *Nathaniel Trayton* to the plaintiff *Elizabeth*, and *Robert*, *Thomas*, and *Mary Pain*, they did grant and releaſe to *Trayton* and his heirs, all the eſtates before mentioned, of which *Richard Payn*, Eſq; died ſeiſed, or poſſeſſed of, to hold to the ſaid *Trayton* and his heirs, to the intent that he might become tenant of the freehold of the premiſſes, ſo that three or more recoveries might be had againſt him, for barring all eſtates tail and remainders in the ſaid premiſſes, *that the ſame* might be conveyed according to the intent and will of the teſtator, and declared the uſes thereof as follows, *videlicet*, *as to the manor of Ovingdean, advowſon of the ſame pariſh church of Ovingdean, and as to the dwelling-houſe wherein the plaintiff Elizabeth then lived, and the parcel of Brookland, and the undivided fourth of Sabs-Key, to the uſe of Elizabeth for her life*, and after her deceaſe to a truſtee, in truſt for *Robert Pain* during his life, with limitations to his iſſue male, and ſeveral remainders over, remainder to the teſtator's right heirs.

The plaintiff executed theſe deeds, upon an apprehenſion that the uſes therein were agreeable to the will, being ſo informed by *Robert*, *Thomas*, and *Mary Pain*, and their attornies, and in purſuance of theſe

theſe deeds in *Michaelmas* term 11 *Geo.* 2. recoveries were ſuffered of the ſaid premiſſes; on the 29th of *May* 1739. the plaintiff intermarried with Mr. *Ridout*, and they inſiſt that *Elizabeth* is well intitled to the fee-ſimple of the manor of *Ovingdean*, and alſo of the rectory of the pariſh of *Ovindean*, which are not mentioned in the will, and alſo of the dwelling-houſe in *Lewes*, and to *Brookland*, and to the undivided fourth of *Sabs-Key*, and have brought their bill to have the benefit of the will and award, and that the eſtates claimed by them may be conveyed to them and the heirs of *Elizabeth* for ever.

The defendants inſiſt, that the uſes in the releaſe declared are agreeable to the expreſs words of the will, and that the plaintiff by the will of her late huſband is intitled to a moiety of the other half part of *Ovingdean*, not ſettled in jointure, to the manſion-houſe in *Lewes*, and to the *Brookland*, *for her life only*, by the expreſs words of the will; and as to all the reſidue of his real eſtate, not particularly mentioned therein, they apprehend that he only intended her an eſtate for life, *becauſe he declared the reaſon of his making ſuch farther proviſion for her was that he thought ſuch jointure not ſufficient for her to live hoſpitably upon*, and that was his only intention of deviſing her any part of his real eſtate.

Mr. Attorney General for the plaintiff inſiſted, the reſiduary words paſs the eſtates in reverſion as well as poſſeſſion, and that the whole intereſt of the teſtator in his ſeveral eſtates not before diſpoſed of paſs to the wife.

Suppoſe a man gives an eſtate to *A.* for life, and afterwards ſays, I give all my real eſtate to *A.* that this would paſs the reverſion, becauſe at the time of the deviſe for life the teſtator had the reverſion in him, and therefore ſomething ſtill remaining muſt paſs by the latter words, *all my real eſtate*, which was the reverſion.

He cited the caſe of *Sir Letton Strode* verſus *Ruſſell*, 2 *Vern.* 621. to ſhew that the words *lands*, *tenements and hereditaments*, have been held ſufficient to paſs the fee in a deviſe; and to the ſame purpoſe *Beachcroft* verſus *Beachcroft*, 2 *Vern.* 690. and *Cook* verſus *Gerrard*, 1 *Lev.* 212.

Mr. *Brown* of the ſame ſide cited no caſes upon the general doctrine, becauſe ſo well eſtabliſhed, but only thoſe that bear a reſemblance to the particular wording of the will, *viz.* *Hopewell* verſus *Ackland*, in *Salk.* 239. and in Lord Ch. B. *Comyns* 164. and *Scott* verſus *Alberry*, Lord Ch. B. *Comyns* 337. and *Hyley* verſus *Hyley*, 3 *Mod.* 228.

Mr.

Mr. Solicitor General for the defendants ſaid, whether *Elizabeth* is intitled to an eſtate for life only depends on two queſtions:

Firſt, On the general conſtruction of the will, and whether the words, *together with my real eſtate*, are to be conſtrued to extend to the whole ſpecies of real property he had, or to that he had not before mentioned in his will.

There is a difference between a general ſubſtitution of real and perſonal eſtate; for if a man gives a perſonal thing to *A.* he gives it him for ever, without any neceſſity for a limitation, or qualification of what eſtate: But in *real* the word *eſtate* either ſignifies the intereſt a man has in the eſtate, or only the thing, *the land*, and inſiſted that in the preſent caſe it means only the thing, and the teſtator did not intend to give his intereſt in it likewiſe.

He cited *Wright* verſus *Horne* in the Common Pleas in the time of Lord Chief Juſtice *Eyres*, *Hil.* 1724. 1 *Mod. Caſ. in Law and Eq.* 221. where it was held the reſiduary words did not paſs the eſtate, but it deſcended to the heir; he cited likewiſe *Markaul* and *Twiſden*, *Eq. Caſ. Ab.* 211.

He argued, that the teſtator would not have given the plaintiff an expreſs eſtate for life, for an increaſe of maintenance, if he intended to have added the fee afterwards.

In *Hopewell* verſus *Ackland*, and *Scott* verſus *Alberry*, the court, he ſaid, went upon the intention, and not upon the word *eſtate*, nor in either of them is there any limitation of what eſtate, ſo that probably the perſons who determined them, thought real eſtate would paſs as well as perſonal without limiting for what eſtate: In the preſent caſe are only the words *real eſtate*, but not the words, as in thoſe caſes, of *whatſoever* and *whereſoever*.

The ſecond queſtion is, if the plaintiffs are intitled to any relief after the award: The teſtator died in 1733. the differences were referred to arbitrators in *June* 1735. all the parties were appriſed of the will, and of the doubt in the will, and agreed that the arbitrators ſhould determine this diſpute among the reſt, and they have awarded it to be only an eſtate for life in the wife; and if perſons do not chuſe to go into a court of juſtice, but to refer it to private perſons, they are equally bound by their deciſions, as if determined in law or equity.

The perſon who drew the deed to lead the uſes was *Elizabeth*'s council, ſo that there is no pretence of fraud and impoſition; and therefore the court will not ſet the whole at ſea again, upon no other ſuggeſtion, but the miſtake of the arbitrators as to the conſtruction in law of the will.

He cited for this purpoſe the caſe of *Angleſea* verſus *Angleſea* in *Ireland*, and which by appeal came before the houſe of Lords here upon this point, whether as Lord *Angleſea* had ſubmitted to arbitration merely on a miſapprehenſion as imagining *Charles Anneſley* had no intereſt under ſeveral wills, and codicils, ſhould be bound by the ſubmiſſion; and the houſe of Lords determined the agreement to be binding on *Lord Angleſea*.

Mr. Attorney General in reply ſaid: The deviſe to *Elizabeth* in the firſt part of the will was intended for a maintenance, and the latter as a gift; and why is ſhe not intitled to a bounty from the teſtator, as well as any other deviſee.

The council for the defendants argue, that where a teſtator has given an expreſs eſtate for life, it ſhall not be conſtrued the teſtator meant by other words to give a greater eſtate; but this argument muſt be confined to thoſe caſes where it has been determined that an expreſs deviſe for life ſhall not by implication be inlarged into a greater eſtate; but this does not prevent a teſtator, notwithſtanding he has in the former part of a will given only an eſtate for life, from giving afterwards a larger eſtate by expreſs words.

As to Mr. Solicitor General's ſecond point, that the parties are bound by the award, it would be deſtroying one principal rule in equity, that the court ought to relieve againſt miſtakes.

To day the cauſe was in the paper as ſtanding for judgment.

LORD CHANCELLOR.

I did not direct it to ſtand over from any doubt in my mind, as to the points made in the cauſe, but that I might have time only to ſettle what the decree ſhould be.

He then ſtated the will, and the ſeveral deviſes and limitations of the teſtator's real eſtates, and ſaid, I mention theſe particularly, becauſe I think the diſtribution of the ſeveral parts of the eſtate are material upon the conſtruction of this will.

The teſtator died ſoon after the making of it, and controverſies ariſing between the plaintiff *Elizabeth*, the widow of the teſtator, and his heir at law, and the reſt of the defendants, they agreed to refer all matters in difference to arbitrators, *who awarded that recoveries ſhould be ſuffered of the whole eſtate of Richard Pain, and a deed to lead the uſes thereof ſhould be executed by all the parties, to confirm the eſtates in the ſame manner as they were given by the will.*

There

There is nothing particular that binds down the parties in the award, becauſe the uſes it directs are relative to the will.

The parties ſigned their conſent to this award.

And by deed to lead the uſes, bearing date the 20th of *May* 1737. the plaintiff *Elizabeth* and the defendants releaſe to *Nathaniel Trayton* all the eſtates compriſed in the will, to make him tenant to the *præcipe*, for ſuffering recoveries to bar the eſtate-tail in the premiſſes, *that the ſame might be conveyed and aſſured according to the intent of the will of the teſtator.*

It is to be relieved againſt this ſettlement that the bill is brought, and the particular complaint is that there are four parcels limited (by the deed to lead the uſes,) to *Elizabeth for her life only*, contrary to the will of the teſtator, and intention of the parties; the firſt two parcels are not mentioned in the will, *Sabs-key*, and the *advowſon of Ovingdean*; the ſecond two parcels are deviſed to *Elizabeth* under the will, *videlicet*, the houſe in *Lewes* and *Brookland*, in all which *ſhe claims the fee-ſimple.*

The queſtion, is, whether ſhe is intitled to the inheritance.

This depends in the firſt place on what is the true conſtruction of the will, and what eſtate ſhe took under it.

And in the ſecond place, if the conſtruction be with her, then whether *the agreement*, *and the award*, *and the ſubſequent deed*, have altered the caſe, and created a bar to the equity that is ſet up by the bill.

The firſt queſtion divides itſelf into two ſubordinate queſtions; 1ſt, as to the parcels not taken notice of by the will; and 2dly, as to thoſe two deviſed by the will, whether the inheritance of *theſe four parcels* paſſes by the words in the reſiduary clauſe.

As to the firſt, it is very plain that the inheritance paſſed, and will not admit of a doubt.

Lord *Hardwicke* then read the words of the reſiduary clauſe.

There can be no queſtion but the words, *together with the real eſtate*, will carry the land and inheritance, notwithſtanding they are accompanied with the other words goods, chattels, *&c.* for though there are caſes where it has been doubted, whether the word eſtate joined to goods, *&c.* will carry the real eſtate, yet when a teſtator ſays, *together with my real eſtate*, it puts it out of all doubt.

The

The caſe of *Markant* verſus *Twiſden*, cited by Mr. Solicitor General, was very different from this, for there the words were *chattels real and perſonal.*

Chattels real, are not called ſo, as being real eſtate, but becauſe they are extractions out of the real.

What are chattels real? *leaſeholds and terms for years!* not called ſo, as being real eſtate, but becauſe they are *extractions* out of the real, as Lord Chief Juſtice *Holt* called them.

The reſiduary clauſe in this will carries the intereſt as well as the thing itſelf.

Then, if the reſiduary clauſe includes *the real eſtate*, does it contain the intereſt as well as the thing? There is no doubt but it does, eſpecially ſince the caſe of the *Counteſs of Bridgewater* and *the Duke of Bolton*, in 7 *Mod.* 106. which is a book of no authority, but the caſe is well reported. Lord Chief Juſtice *Holt* in delivering the opinion of the court, ſays, that by conſequence of law it carries the fee, for the word eſtate implies a fee-ſimple, for that is the general eſtate which every man is ſuppoſed to be ſeiſed of, and comes from *ſtando*, becauſe it is fixed and permanent, and imports the abſoluteſt property that a man can have; he argued too, it imports a fee from the manner of pleading a *que eſtate*, as in a *formedon* the tenant pleads *J. S.* was infeoffed with warranty *cujus ſtatum* the tenant has, and that ſhall be underſtood of a *fee*. This caſe has never been doubted ſince. (*Vide a Report intitled Holt's Caſes from* 1688 *to* 1710. *p.* 281.)

The conſequence of this is, that as to the two parcels not mentioned in the will, there can be no doubt but they paſſed by the reſiduary clauſe to the plaintiff *Elizabeth.*

The next queſtion is, as to the other two parcels deviſed by name to *Elizabeth* for life, whether the reverſion in fee of theſe eſtates, is included in the reſiduary clauſe?

Settled ſince the caſe of *Wheeler* verſ. *Walroon* in *Allen* 28. that the reverſion will paſs, by the word *reſt* of my lands, in a deviſe.

I think it has been clearly ſettled ſince the caſe of *Wheeler* verſus *Walroon*, in *Allen* 28. that the reverſion will paſs by the word *reſt* of my lands, and followed by all that ſuit of caſes of *Willows* verſus *Lidcot*, 2 *Ventr.* 285, 286. *Litton* verſus *Faulkland*, *&c.* 2 *Vern.* 621. and in ſeveral others in 3 *Mod.* and *Carthew.*

Then the queſtion is, whether there is any thing particular to take this caſe out of the general rule.

One objection has been raiſed from the recital in the will, which is as follows, " That he had already ſettled the moiety of his farm " and lands in *Ovingdean* in jointure on his then wife, and that " in caſe he ſhould die, he thought that not ſufficient for her to live " hoſpitably upon, and therefore did by his will give to *Elizabeth*

" one moiety of the other half part, not ſettled on jointure to her " *for life, &c.*

From hence it was argued, that by this will he intended to give *Elizabeth* but an eſtate for life to increaſe her maintenance.

It is moſt manifeſt the teſtator did not intend to confine his bounty in all his eſtate to his wife for life, for he has not barely given her the uſufructuary intereſt in goods and chattels, but the whole property, and therefore as clear, that the inheritance paſſed in thoſe parts of the real eſtate, of which the will takes no notice, and it is inferring a great deal too much to ſay that he intended to give her nothing but for life, and does not furniſh any argument to overturn the general rule.

Another objection has been ſtarted, that the reſiduary deviſe is to the ſame perſon who is before made tenant for life, and therefore inconſiſtent to give her the ſame thing in fee, which he had given her for life only, in the former part of the will.

This objection deſerves to be conſidered, but I think is not ſufficient, it is a great deal too much, to ſay that when a man makes a will, and gives a perſon a particular limited eſtate in one part of that will, and afterwards deviſes to the ſame perſon in more general words, that the deviſee ſhall not take benefit by ſuch general reſiduary deviſe; here are no reſtrictive words, if there were, would have made a material alteration in the caſe.

The law preſumes that a teſtator even in making his will may vary his intention; as ſuppoſe a man gives a farm in *Dale* to *A. and his heirs* in one part of the will, and in another to *B. and his heirs*, it has been held by the old books to be a revocation; but latterly conſtrued either a jointenancy or tenancy in common, according to the limitation.

Where a man gives a farm in *Dale* to *A.* and his heirs in one part of his will, and in another to *B.* and his heirs, it is now conſtrued either a jointenancy or tenancy in common, according to the limitation.

As to the caſes upon this head, the only one that carries an opinion in point is *Ayley* verſus *Hyley*, in 3 *Mod.* 228. and *Comberb.* 93. where it was adjudged, that if it had not been for an exception in the will, the words reſt and remaining part of his eſtate would have paſſed the reverſion in fee.

I do allow that is only a judicial opinion, and not a judgment in point; but then conſider that the caſes of *Hopewell* verſus *Ackland*, and *Scott* verſus *Alberry*, determined ſince, agree with this; in the latter the teſtator ſays, as touching the worldly eſtate it hath pleaſed God to beſtow upon me, I give the ſame in manner following; *Item*, I give to *T. S.* all that my parcel of land lying in *Waltham Abbey* being the lands in queſtion); *Item*, I give to the ſaid *J. S.*

my wearing apparel, linen, books, *with all other my eſtate whatſoever and whereſoever not herein before given and bequeathed.*

When a teſtator gives all his eſtate whatſoever and whereſoever, it comprehends all that he had, real or perſonal.

It is true the words for life are not in it, and it may be ſaid the latter words are explanatory of the intention in the former, but the court did not put it at all upon this; but held that from the force of the words themſelves, that when teſtator gave all *his eſtate whatſoever*, it comprehended all that he had, real or perſonal eſtate.

It is very plain therefore, that the reverſion in theſe two parcels likewiſe paſſes to the plaintiff *Elizabeth* by the reſiduary words, and whatever may be the general argument, a particular one ariſes here from the will itſelf in favour of this conſtruction; for as to part of what he gives to *Elizabeth* for life, he diſpoſes of the inheritance to his brother, and his iſſue, remainder to his own heirs, and then gives *the reſt, reſidue, &c.* to *Elizabeth*; this is ſhewing how much he meant ſhould go in reverſion to his heirs, and might very naturally give the inheritance in the reſidue to *Elizabeth*, after he had taken out by way of exception what he intended to give to other perſons.

This being the true conſtruction of the will, then the next queſtion is, whether the award and the agreement of the parties ſigning the award, and the ſubſequent recovery and declaration of the uſes, will be a bar to the plaintiffs.

It has been objected by the defendant's council, that the award will ſtand in the plaintiff's way, and that whether rightfully or wrongfully determined, as the arbitrators are judges of their own chuſing, the parties are bound by it, eſpecially as no circumſtances of fraud are pretended, and there would be no end of controverſies, if parties were allowed to come into this court afterwards.

I agree this to be the general rule, not to open ſuch agreements; and the caſe of *Can* verſus *Can*, determined by Lord *Macclesfield*, is very ſtrong to this purpoſe, 1 *P. Wms.* 723.

But theſe authorities are not at all ſimilar to the preſent caſe, for ſuppoſing this had depended on the award, and that had directed different uſes than are in the will, if the arbitrators are miſtaken in a plain point of law, it is a ground to ſet it aſide.

If arbitrators are miſtaken in a plain point of law, it is a ground to ſet aſide an award, otherwiſe if it had been a doubtful one.

The caſe of *Comforth* verſus *Green*, in 2 *Vern.* 705. will determine this point, where Lord *Cowper* lays it down, that if arbitrators go upon a plain miſtake either as to law or fact, equity will relieve againſt the award; and in the caſe of *Medcalf* verſus *Ives*, the 18th of *June* 1737. I was of the ſame opinion. *Vide* 1 *T. Atk.* 63.

If indeed it had been a doubtful point of law, the arbitrators award might have ſtood, notwithſtanding the court upon great deliberation ſhould be of a different opinion.

But I am delivered from this, becauſe the award does not ſpecify any particular uſes, but directs, " That a deed to lead the uſes of " the fines and recoveries ſhould be executed by all the parties, to " confirm the eſtates in the ſame manner as the ſame were given by " the will of *Richard Pain.*" There is indeed a recital in the award which affords a conjecture, but I am not to determine by arbitrary implications.

Then the only queſtion is, whether I am to relieve againſt the deed of the 20th of *May* 1737. if this varies from the uſes of the will, and the plain legal conſtruction, it differs equally from the award, and therefore there is no occaſion to enter into the debate how far the court have power over awards, or will confirm or ſet aſide the agreement; and that brings it to what is the true conſtruction of the will, which I have mentioned before.

" I therefore declare, that the plaintiffs in the original cauſe are " intitled to have the uſes of the deed of the 20th of *May* 1737. " ſo far as they relate to the particular parts of the real eſtate of the " teſtator herein after mentioned, rectified and varied, according to " the true conſtruction of his will; and do order and decree that " the teſtator's houſe, and the piece of *Brookland* in *Lewes*, and " alſo the advowſon of the pariſh church in *Ovingdean*, and the " fourth part of the eſtate called *Sabs-Key* in *London*, with their re- " ſpective appurtenances, be conveyed *to the plaintiff Elizabeth*, " the wife of the plaintiff *Richard Ridout*, *and her heirs*, and the " plaintiff Mr. *Ridout* preſent in court, conſenting to pay the teſta- " tor's debts that remain unſatisfied, and likewiſe to reimburſe the " defendants any of the teſtator's debts they may have paid off; I " do further order, that he do pay off ſo much of the teſtator's " debts as remain unſatisfied, and any of the defendants who have " paid any of the teſtator's debts, are to ſtand in the place of the " creditors, to receive a ſatisfaction from the plaintiff Mr. *Ridout* " for what they have ſo paid.

Sir

Caſe 169. *Sir James Lowther* verſus *Stamper*, *May* 8, 1747.

The court will not grant an injunction to ſtay waſte in digging mines till the anſwer is come in, or the defendant has made default in not putting in his anſwer.

MR. *Barlow*, before the anſwer was come in, moved for an injunction to ſtay waſte in digging mines of coal, upon an affidavit of the title, waſte committed, and a certificate of the bill filed.

Lord *Hardwicke* denied the motion, becauſe it appeared that the defendant ſet up a right to the inheritance of the eſtate in which the mines were dug, and ſaid that ſuch injunctions were never granted before the hearing, unleſs the defendant had only a term in the eſtate for years, or for life, and the reverſion was in the plaintiff.

Mr. *Barlow* compared it to the caſe of bills brought by the proprietors of new inventions under letters patent, for an injunction to ſtay other perſons from doing any thing of the ſame kind; there on the filing of the bill, the court on affidavit and certificate will grant an injunction.

His Lordſhip ſaid, this was quite a different caſe from the preſent bill, becauſe the right of the plaintiff there to the ſole property appeared upon record, but here the rule of the court is not to grant an injunction till either the coming in of the anſwer, or the defendant's making default in not putting in his anſwer.

Caſe 170. *Carte, adminiſtrator of the late vicar of Hincklet*, verſus *Ball and others*, *May* 13, 1747.

Though this court does not take cuſtoms ſo ſtrictly certain as courts of law, yet it requires them to be ſubſtantially laid.

THE bill was brought for a ſubſtraction and account of tithes, againſt the inhabitants and occupiers of *Hinckley* in *Leiceſterſhire*.

The defendants inſiſt upon a contributory modus of ſeventeen ſhillings for the lands which they hold of the hamlet of *Hide* in the ſame pariſh.

The dean and chapter of *Weſtminſter*, who are the rectors, do not in their anſwer diſclaim the right to the tithes, but refer to their leſſee, who apprehended ſhe had no right, and has never collected them.

Mr. Attorney General for the defendants.

He ſaid, a vicar of common right is not intitled to tithes, but by virtue of an endowment or grant from thoſe who were the owners of the land.

An

An antient payment *for tithes* is a *modus*, and ſuppoſes an agreement originally.

LORD CHANCELLOR.

A general charge of an endowment is ſufficient to intitle the plaintiff to ſhew an endowment at the hearing, without mentioning *the particular ſort of endowment*.

Mr. Attorney General then went on and ſaid, The receipts run in this manner: *May* 1702. received then of *Robert Ball* the ſum of eleven ſhillings and four pence for the tithe due at *Lady-day*, for his part of the *Hide grounds*. Signed *John Par*.

Other receipts call it the *Hides* only.

Mr. *Clark* of the ſame ſide cited *Hardcaſtle* verſus *Smithſon*, *July* 1745. before Lord *Hardwicke*, (*vide ante* 245.) to ſhew that the court will not conſtrue the *modus* with great nicety where it is in general properly ſet out by the anſwer.

Mr. *Evans* of the ſame ſide: A rector has nothing to do but to make out his title to the rectory, and the tithes will be due of courſe to him, *but otherwiſe as to a vicar*.

There is no evidence ariſes from uſage, for the plaintiff has not been able to ſhew the tithes were even paid to the vicar.

That a *terrier*, neither here, or at *niſi prius*, has been admitted to be evidence of the vicar's right, unleſs uſage goes along with it.

Mr. Solicitor General for the plaintiff ſaid, that in the caſe of *Berry* verſus *Evans*, Lord Chief Baron *Comyns* ſolemnly determined, that even againſt a lay impropriator you cannot preſcribe *in non decimando*, and in extraparochial places the King is intitled, and if it appears the rector is not intitled, the *vicar* muſt.

LORD CHANCELLOR.

This is an unuſual demand, as it is a bill brought by an adminiſtrator of a vicar who was for 15 years together vicar of this pariſh, and yet during all the time of his incumbency no tithe was paid, nor demand ever made; but however if the right appears, the plaintiff is intitled to a decree.

His right depends on two queſtions;

Firſt, Whether as ſtanding in the place of the vicar, he has ſhewn a right to the tithes in kind.

Secondly, Whether the *modus* ſet up by the defendant's anſwer, is not a ſufficient bar to that right.

I will take up the ſecond queſtion firſt.

I am of opinion *the modus*, as ſtated in the anſwers of the defendant's, is not ſufficiently laid in point of law.

It is more correctly laid in the ſecond anſwer, and is laid there in the following manner; ſeventeen ſhillings in the whole paid for the *Hides* in lieu and ſatisfaction of all tithes, 5 *s.* and 8 *d.* for the part of *Hides* in the occupation of ſuch a perſon, 4 *s.* and 4 *d.* for the part in the occupation of another, and 7 *s.* for the part in the occupation of another.

Two objections have been taken by the plaintiff's council, that it does not ſay the time when it is to be paid, nor enumerates the perſons by whom it is to be paid.

As to the firſt, in the court of Exchequer, if a particular time was not laid, that court formerly would have over-ruled the *modus*, and not gone into the merits, but latterly they have very properly let in a greater latitude of proof, and it is ſufficient if it is laid at a particular time, or *thereabouts*.

But the ſecond is what I lay ſtreſs upon, that it is not ſaid by whom it is to be paid, and I do not know any caſe in the books or in experience, where it is not alledged to be paid by ſome body, and it is very reaſonable it ſhould be ſaid by whom, becauſe the parſon may then be ſure to whom he muſt apply, or againſt whom he may have a remedy for his tithes.

This cannot be ſupplied by ſaying that in other parts of the anſwer, they have ſhewn the ſeventeen ſhillings have been paid by thoſe perſons who have held theſe lands, for that may be accidental; and though it has been ſaid this court does not take cuſtoms ſo ſtrictly certain as courts of law, yet this court requires cuſtoms to be ſubſtantially laid.

If before the court of Exchequer, where caſes of this kind are more frequent, it would have been over-ruled at once.

The next queſtion is upon the evidence.

No proof has been read to ſhew there ever was ſuch an entire *modus* paid of ſeventeen ſhillings a year, but the defendants add ſeveral *moduſſes* together, and then by computation in arithmetick, make juſt the ſum of ſeventeen ſhillings: In ſome meaſure like the

Duke of *Grafton*'s caſe of fines, where by looking into the Lord's books, they found what was the largeſt fine he took, and charged that ſum to be the cuſtomary payment.

There is no evidence that theſe payments are applicable to the *modus*, and therefore I am of opinion it is not ſufficiently made out.

Upon the opinion I have given as to this part, if the plaintiff had been *rector* I ſhould have decreed at once for him, but a rector differs materially from a *vicar*.

A rector has, and ſo has a lay impropriator, a right to all the tithes in the pariſh, and has nothing to do but to prove himſelf rector: it is otherwiſe with regard to a vicar, for he muſt ſhew an actual endowment, or evidence of the uſage.

To intitle himſelf to tithes, a rector has nothing to do but to prove himſelf ſo; as to a vicar otherwiſe, for he muſt ſhew an actual endowment.

In the firſt place, there is no evidence here of payment of tithes in kind, which will be a much more material conſideration againſt a vicar than a rector.

Whether the anſwer be ſo formally drawn as might be, yet it is ſufficient as to the denial of the plaintiff's right; for though the defendants admit *Carte* was vicar, yet they ſay they do not know or believe that he was intitled to the incloſed grounds of *Hinkley*, and to all or any part of the tithes.

So that, by their anſwer, they inſiſt he was not intitled; but then it is argued for the plaintiff, that the defendants ſetting up a *modus* is an implication that the vicar was intitled to tithes, and to be ſure it is, but this does not preclude the defendants from objecting to the plaintiff's title, and it would be hard to preclude them, becauſe they fail in the defence they ſet up for themſelves.

Setting up a *modus* does not preclude the defendants from objecting to the plaintiff's title to tithes.

Suppoſe a plaintiff at law declares, and the defendant pleads any thing in bar, which by preſumption admits the demand, whereupon the plaintiff demurs, and the court holds the plea bad, yet they will ſtill ſee whether the plaintiff in his declaration has made a caſe ſufficient to intitle him to recover.

If a defendant pleads any thing in bar, which by preſumption admits the demand, and the plea is held to be bad, yet a court of law will ſtill ſee whether the plaintiff has made a caſe that intitles him to recover.

The plaintiff is, unfortunately for him, precluded by the rule of this court from reading the evidence of the endowment, which it is ſaid would have put this matter out of queſtion.

The

A certificate of the original agreement between the rector and the vicar in relation to tithes, must appear to come out of the charter houſe of the abbot, and not out of his hands only, or it cannot be read.

The abbot of *Lyra* in *Normandy* has ſent a certificate of the original agreement between the rector and the vicar in relation to the tithes, but though it appears to come out of the abbot's hands, yet as it does not appear that it came out of the charter-houſe of the abbot, or that he was the proper officer to keep the records, it could not be admitted to be read.

A certificate from a foreign abbey was not allowed before the reformation.

Even before the reformation, a certificate from a foreign abbey was not allowed; therefore, as the original deed relating to the endowment cannot be read, I muſt take it from the evidence before me, which is, that no tithe has ever been paid to the vicar.

The terriers are very dark, and I can hardly make any judgment of them, and it is very far from being clear from thence, that tithes in kind were ever paid to the vicar.

A vicar may not only be endowed of the tithes of a pariſh, but of *a penſion* likewiſe.

A vicar may not only be endowed of the tithes of a pariſh, but of *a penſion* likewiſe, and therefore how can I preſume he was endowed of the tithes, when he might be endowed of this annual payment by way of penſion.

If it depended upon this only, I would inquire, whether in any caſe tithes have been decreed in kind to a vicar, where there is no evidence of tithes having ever been paid to him in kind.

The dean and chapter, the rectors, do not diſclaim their right to the tithes; if they had, it might have put an end to the queſtion in favour of the vicar; this being the caſe, I am not ſatisfied he is intitled to the tithes in kind, and therefore it muſt be put in a method of trial.

Where an impropriator's right does not come in queſtion, he need not be made a party to a bill for ſubſtraction of tithes.

It is ſaid the rectors ought to be parties to the iſſue, but it is not neceſſary they ſhould, for where an impropriator's right does not come in queſtion, he need not even be made a party to a bill that is brought for ſubſtraction of tithes.

His Lordſhip directed an iſſue to try whether the vicar of *Hinckley* is intitled to tithes in kind, for the *Hamlet* of *Hide*, in the pariſh of *Hinckley*.

Rico verſus *Gualtier*, *May* 14, 1747. Caſe 171.

MR. *Jones* moved for a *ne exeat regno* againſt the defendant upon this caſe, that the plaintiff, being a foreigner, was drawn in to give a bond in the penalty of 50 *l.* and a warrant of attorney to enter up a judgment to the defendant, for the debt of a third perſon, and that, being ignorant of the *Engliſh* language, he did not know what the nature of the paper was that he had ſigned, and the defendant ſoon after took out execution upon the judgment, and the ſheriff appraiſing a quantity of *leau de carme* at eight pounds only, it was bought in at that price by the defendant, though the plaintiff ſwears by his affidavit that he verily believes it was worth ſeven hundred pounds, and the bottles alone ſeventy pounds.

The court cannot grant a *ne exeat regno*, unleſs the plaintiff ſwears poſitively the defendant is indebted to him in a certain ſum.

The bill was brought for the ſeven hundred pounds, and charges the defendant ſold part only of this ſeizure for two hundred pounds, and prays to be relieved againſt it as a fraud.

LORD CHANCELLOR.

Notwithſtanding there is an affidavit of a perſon who heard the defendant ſay he ſhould quit the kingdom on account of the plaintiff's demand, yet I cannot grant a *ne exeat regno*, as the plaintiff does not ſwear poſitively the defendant is indebted to him in a certain ſum; if the bill had been brought for an account only, the plaintiff's ſwearing he verily believes the balance in his favour would amount to ſo much, it would have been ſufficient.

Where a bill is brought for an account only, the plaintiff's ſwearing he believes the balance in his favour would amount to ſo much, will intitle him to a *ne exeat regno*.

His Lordſhip denied the motion.

Wilford verſus *Beaſeley*, *May* 16, 1747. Caſe 172.

LORD CHANCELLOR.

THE plaintiff brought an original bill for relief, the defendant made a full defence; witneſſes were examined, and a decree was pronounced againſt the defendant in *December* 1745.

Evidence in the croſs cauſe concerning the matters in iſſue in the original cauſe, not allowed to be read after a decree in that cauſe; otherwiſe as to the depoſitions in the croſs-cauſe not relating to the matters put in iſſue in the original.

May 24, 1745, the defendant brought a croſs-bill touching the ſame matters, put in iſſue in the firſt clauſe; the defendant anſwered, and the plaintiff in the croſs-cauſe examined other witneſſes, for the ſame matters put in iſſue by the anſwer in the original cauſe.

Which evidence was objected to as an inlet to perjury, and the objection was allowed as in a ſimilar caſe of *Kamner* verſus *Gulſton*, *June* 25, 1745. if the defendant had not examined all his witneſſes in the firſt cauſe, he ſhould have enlarged the time for publication.

N. B. Publication paſſed in the original cauſe, *May* 4, 1745, and the decree was in the *December* following.

Mr. Attorney general for the plaintiff, in the croſs-cauſe, inſiſts, that the matters in the croſs-cauſe are different from what they were in the original bill.

Where neither party examines witneſſes in the original cauſe, the depoſitions of witneſſes examined to the ſame matters put in iſſue by that cauſe, may be read at the hearing of the croſs-cauſe.

It is not material, ſaid Lord *Hardwicke*, that all the defendant's witneſſes were not examined to the matters in iſſue in the original cauſe, where any have been examined; if neither party had examined witneſſes in the original cauſe, the court might be induced to admit the depoſitions to be read in the croſs bill.

In the preſent caſe witneſſes have been examined, and his Lordſhip refuſed the evidence in *the croſs-cauſe* to be read, touching the matters in iſſue in the original cauſe, but gave liberty to read any of the depoſitions in the croſs-cauſe, not relating to the matters put in iſſue, in the original cauſe.

Caſe 173. *Sherrard* verſus *Sherrard*, *before the Maſter of the Rolls*, *May* 5, 1747.

Where money is directed to be laid out in land, and in the mean time inveſted in government ſecurities, though a tenant for life die in the middle of a half-year, it ſhall not be apportioned, but be paid to the reverſioner.

THERE was a ſettlement made by *Robert* Earl of *Leiceſter* in 1700, whereby an eſtate in *Suſſex* was limited to his four ſons for life, ſucceſſively, without impeachment of waſte, *remainder to the heirs of the body of the ſettler*, and he charged upon the *Suſſex* eſtate, together with other eſtates, two ſeveral ſums of 5000*l.* and 6000*l.* for younger childrens portions. In 1720, the *Suſſex* eſtate was decreed to be ſold, and the ſaid two ſums to be paid off, and after payment thereof, the reſidue of the produce ariſing by ſale, to be laid out in land to the ſame uſes as in the deed of 1700, and in the mean time to be placed out in government ſecurities, and by order, of the 20th of *February* 1720, *the intereſt and dividends were to go as the rents and profits would in caſe it was laid out in land*; upon the death of *Joceline* Earl of *Leiceſter*, the laſt tenant for life, the petitioners were intitled to the lands, as the perſons next in remainder, under the ſettlement in 1700.

Earl *Joceline* died the 7th of *July* 1743. the petition was for the payment of the entire half-year's dividend, amounting to 285*l.* accrued due at *Michaelmas* 1743.

It

It was oppoſed by the adminiſtrator of Earl *Joceline*, the laſt tenant for life, who inſiſted, that by virtue of the order of the 20th of *February* 1720, which directed *that the intereſt ſhould be paid as the rents and profits would*, it muſt be conſidered as if the money had actually been laid out in land, and therefore by the ſtatute of 11 *Geo.* 2. *c.* 19. the dividend ought to be apportioned, and ſo much of the half-year's dividend as accrued in the life of tenant for life belonged to his repreſentative.

The Maſter of the *Rolls*, (*William Forteſcue*, Eſquire.)

The conſtant uſage has been, where money is to be laid out in land upon any ſettlement, and in the mean time inveſted in government ſecurities, that the intire half-year's dividend ſhall be paid to him in reverſion, notwithſtanding the tenant for life died in the middle of the half-year, and ſhall not be apportioned; otherwiſe indeed in the caſe of a mortgage, and what makes this caſe the ſtronger is, that there was a power to grant leaſes, and in that caſe the council of the adminiſtrator of Earl *Joceline*, admitted it would go to the reverſioner.

Welford verſus *Beazely*, *May* 23, 1747. Caſe 174.

A Queſtion aroſe upon the ſtatute of frauds and perjuries, whether a perſon *ſubſcribing* a deed as a witneſs only, which ſhe knew the contents of, could be ſaid to have ſigned it within the meaning of that ſtatute.

LORD CHANCELLOR.

The meaning of the ſtatute is to reduce contracts to a certainty, in order to avoid perjury on the one hand, and fraud on the other, and therefore both in this court, and the courts of common law, where an agreement has been reduced to ſuch a certainty, and the ſubſtance of the ſtatute has been complied with in the material part, the forms have never been inſiſted upon.

Where an agreement has been reduced to a certainty, and the ſubſtance of the ſtatute of frauds, &c. complied with in the material part, the forms have never been inſiſted upon.

The word *party* in the ſtatute is not to be conſtrued party as to a deed, but *perſon* in general, or elſe what would become of thoſe decrees where ſigning of letters, by which the party never intended to bind himſelf, has been held to be a ſigning within the ſtatute.

There have been caſes where a letter written to a man's own agent, and ſetting forth the terms of an agreement as concluded by him, has been deemed to be a ſigning within the ſtatute, and agreeable to the proviſion of it.

Lord

Where there is a complete agreement in writing, and a perſon who is a party, and knows the contents, ſubſcribes it as a witneſs, only ſhe is bound by it, for it is a ſigning within the ſtatute.

Lord Chancellor denied the general doctrine as laid down in *Prec. in Chan.* 402, *Bawdes* verſus *Amhurſt*, though true as applied to that caſe by Lord *Cowper*, and ſaid the difference betwixt the two caſes was, that the writing there, though all in the father's hand, was only a ſketch of an agreement not ſettled or confirmed by the parties; but here the defendant ſigned it as a compleat agreement, and as ſhe knew the contents, is to be bound by it in the preſent caſe. *

Caſe 175. *Elton* verſus *Elton*, *May* 19, 1747.

Sir *Abraham Elton* by his will gives to his grandaughter *A. E.* the daughter of his ſon *J. E.* 1500*l.* to be at her own diſpoſal, in caſe ſhe marry with the conſent of *J. E.* and his wife; and in caſe of their deaths before that time, then with the conſent of their truſtees, and not otherwiſe. *A. E died at fourteen, and unmarried: J. E. as the repreſentative of A. E. is not intitled to the 1500l. for the veſting of the legacy relating to the event of the marriage, as that never happened, the legacy did not veſt.*

OLD Sir *Abraham Elton* by his will, "reciting that he had "a right and power to diſpoſe of the ſum of fifteen hundred "pounds, being part of the money ſettled on his late deceaſed "daughter *Elizabeth*, the late wife of *Peter Day*, Eſquire, and "which ſum is now in his hands, ſays, now I do hereby give "and bequeath the ſame, and all my right and intereſt therein, "unto my grandaughter *Anna Elton*, the daughter of my ſon *Jacob "Elton, to be at her own diſpoſal, purſuant to the requeſt of my ſaid "late deceaſed daughter* Elizabeth Day, *in caſe ſhe marry with the "conſent and approbation of my ſaid ſon* Jacob Elton *and his wife, "and in caſe of their deaths before that time, then with the conſent "and approbation of their truſtees, and not otherwiſe.*"

In 1729, the grandaughter died at the age of fourteen, and unmarried.

Jacob Elton, the father of the infant, brings his bill for the 1500*l.* as her repreſentative, inſiſting it was a veſted legacy.

The principal defendants are the aſſignees under the commiſſion of bankruptcy, againſt Sir *Abraham Elton*, the eldeſt ſon of the teſtator, who claim the fifteen hundred pounds in his right, he being the reſiduary legatee of Dame *Mary Elton* his mother, who was the reſiduary legatee of old Sir *Abraham Elton*, and inſiſt, that the

* On a marriage treaty, the intended huſband, and the young lady's father, went to a councillor's chambers to have, in conſideration of the portion the father propoſed to give, a ſettlement drawn; minutes of agreement were taken down in writing by the council, and given by him to his clerk, to be drawn up in form: the next day the father dies, and the day following the marriage was ſolemnized: this agreement, notwithſtanding theſe preparations, was held by Lord *Cowper* to be within the ſtatute of frauds and perjuries. *Bawdes* verſus *Amhurſt*.

grandaughter dying under age, and unmarried, the legacy never veſted, and conſequently, being lapſed, falls into the *reſiduum* of old Sir *Abraham Elton*'s perſonal eſtate.

Mr. *Attorney General*, council for the defendant, ſaid, that this is to be conſidered as a condition ſubſequent, and therefore the marriage not happening, by the act of God the legacy was become abſolute.

The way of judging of conditions precedent and ſubſequent, is not to determine it one way or another by the particular words, but by the whole tenor; and for this purpoſe he mentioned the caſe of *Peyton* verſus *Berry*, 2 *Wms.* 626. one deviſes the reſidue of his perſonal eſtate to *J. S.* provided ſhe marries with the conſent of his two executors; on the death of one, the condition (being a ſubſequent one) is become impoſſible, and ſhe may marry without the conſent of the ſurvivor.

The caſe the teſtator had in view was not *Anna Elton's marriage in general*, but to prevent her marrying improvidently; and the words *not otherwiſe*, do not mean if ſhe does not marry at all, ſhe ſhall not have it; but if ſhe marry otherwiſe than with the conſent and approbation of *Jacob Elton* and his wife, *&c.* that the teſtator conſidered the words as *in terrorem*, and veſted in the legatee, as much as if the condition had not been inſerted at all.

He cited likewiſe the caſe of *Ward* verſus *Trigg*, in the court of exchequer, *Eaſter* term 1746, " I give to my daughter four hun-" dred pounds if ſhe marries with the conſent of her mother, but " if ſhe marries without the conſent of her mother, then to fall into " the *reſiduum* of my perſonal eſtate."

The daughter did not marry at all, but died after twenty-one, and by her will gives the four hundred pounds to the plaintiff, who brought his bill for it, *and the court held it to be a veſted legacy, and well diſpoſed of by the will, though the daughter died unmarried.*

Mr. *Noel* of the ſame ſide ſaid, that the teſtator's object was not to defeat the legacy to his grandaughter, but the effect of that paternal care he had for her, that if ſhe married at all, it ſhould be with the approbation of her father and mother.

Mr. *Browning* of the ſame ſide, cited *Semphill* verſus *Bayley*, *Prec. in Chan.* 562.

Mr. *Solicitor General* for the defendant, allowed it was a clear ſettled point, that a reſtraint of marriage, whether a condition pre-

cedent or ſubſequent, if it be a legacy of perſonal eſtate, is a void condition, unleſs given over on the conditions not being performed.

It was given at a time when both the parents were living, who were bound to maintain her, and takes away all the implications that might otherwiſe ariſe.

But the whole will turn upon this, when is the time of payment? *I give to my grandaughter* Anna Elton, *to be at her own diſpoſal*, I aſk when? If the teſtator has fixed no time, *immediately!* But then the will ſaying, *in caſe ſhe marry with the conſent and approbation of my ſon* Jacob Elton *and his wife*, &c. ſhews he did not intend it ſhould be at her own diſpoſal *unleſs ſhe married.*

And it is reaſonable to ſuppoſe this his intention, becauſe the teſtator, and *Elizabeth Day*, the aunt of *Anna Elton*, knew that her father would provide for her, and intended this only as an addition if there ſhould be a marriage.

That *dies incertus conditionem in teſtamento facit*, is the rule of civil law, and though they do not hold a marriage with conſent to be neceſſary, yet they ſay, where it is given on condition of marriage, there muſt be a marriage. *Dig. lib.* 35. *tit.* 1. *de conditionibus & demonſtrationibus, &c. Lex* 75. *& id. Lex* 68. *Si ita legatum eſſet, cum nupſerit: Si nupta fuerit, & hoc teſtator ſciſſet, alterum matrimonium erit expectandum; nihilque intererit utrum vivo teſtatore, an poſt mortem ea iterum nupſerit.*

Mr. *Brown* of the ſame ſide, cited the caſe of *Garbut* verſus *Hilton*, *November* 26, 1739. before Mr. *Verney* at the *Rolls*. *A.* gave a legacy of 200*l.* to *B.* provided ſhe married with the conſent of her father and mother, and the ſurvivor of them: *B.* brings her bill for the legacy while ſhe is ſingle, and Mr. *Verney* held it did not veſt till her marriage, and diſmiſſed her bill.

Mr. *Wilbraham* of the ſame ſide ſaid, only tranſpoſe the words inſtead of I give 1500*l.* to *Anna Elton*, to be at her diſpoſal in caſe ſhe marries, ſuppoſe the teſtator had ſaid, *in caſe Anna Elton marries, I give* 1500*l. to be at her diſpoſal*, and there could have been no doubt, but there muſt have been a marriage to make it veſt.

LORD CHANCELLOR.

The general queſtion is, whether it was a veſted legacy in *Anna Elton* at the time of her death, and that will depend on the conſtruction of the clauſe in the will, and the authorities of this court.

His Lordſhip then ſtated the deviſe to *Anna Elton.*

As

As to the clauſe in a former part of the will, in which the teſtator gives 1000*l.* to *Anna Elton*, his grandaughter, at twenty-one, or marriage, which ſhould firſt happen, I ſhall conſider it afterwards.

It has been inſiſted for the plaintiff, that the legacy veſted in *Anna Elton* immediately on the death of the teſtator, and therefore, notwithſtanding ſhe is dead unmarried, that he, as her repreſentative, is intitled to it, and that the whole of this is a condition ſubſequent, and her dying before marriage being the act of God, it does not therefore defeat the legacy.

But I deny this abſolutely, and hold it to be a condition precedent, though whether a condition precedent or ſubſequent it makes no difference; but that this is a condition precedent appears from the words, for whether a teſtator ſays in caſe ſhe marries I give, or I give in caſe ſhe marries, it makes no difference, but in both caſes it is annexed to the ſubſtance of the deviſe, the words *to be at her diſpoſal* do not vary the caſe, for whoever gives a legacy gives it to be at the diſpoſal of the legatee, and thoſe words cannot be ſeparated from the words *I give*; it is plain therefore upon the words that it is a condition precedent, and dependant upon the marriage.

Suppoſe this young lady had, immediately on the death of her grandfather, brought a bill here for the legacy, the court could not have decreed it, for the time is annexed to the ſubſtance of the legacy, and therefore is ſtronger than the caſe of *Atkyns* verſus *Hiccocks*, 1 *Tr. Atk.* 500. which was annexed to the payment only, and is called by the civil law *execution of the legacy*, and in this reſpect, I govern myſelf a good deal by the caſe of *Garbut* verſus *Hilton* at the *Rolls*.

It has been ſaid by Mr. Attorney General, it is very improbable the grandfather would make ſuch a diſpoſition, as might keep it poſſibly in ſuſpence during the whole life of the grandaughter.

Could ſhe have had the intereſt if ſhe had brought her bill? Certainly ſhe could not; for where intereſt is not given by a grandfather, ſhe is not intitled to it; otherwiſe where a legacy is given by a father, becauſe if he does not provide maintenance, the court will give intereſt in lieu of it, though the legacy be payable at a future day.

The civil law does not make any difference whether the condition is precedent or ſubſequent, for there any reſtraint of marriage is void, but then this court and the civil law do both require *the factum* of the marriage ſhould be performed.

Whether

Whether it is taken in the ſenſe of a condition, or in the ſenſe and meaning of a time of payment, it is the ſame thing, for the rule is *dies incertus in teſtamento conditionem facit.*

When it is given to be paid at twenty-one, the time is certain, and known to an hour, and therefore held to be tranſmiſſible; but where the time is *uncertain*, it has been held not to veſt till the contingency happens, *becauſe it cannot be aſcertained whether it will ever happen or no.*

I do agree there is an ambiguity in the words *not otherwiſe*, whether they relate to the words immediately antecedent, or to the whole clauſe.

It has been contended for by the plaintiff, that they relate only to the words immediately antecedent; but I do not know what warrant there is to confine theſe words only to a part of the ſentence, but they muſt run through the whole, and means that he does not give it unleſs there ſhould be a marriage.

In the caſe of *Atkyns* verſus *Hiccocks*, I determined upon the ſame foundation, and the ſame principles I go upon in the preſent, though, as I ſaid before, that is a ſtronger caſe, for there in the gift of the legacy the time was not annexed to the ſubſtance of the legacy, but to the payment only, and yet the ground of my determination was, that the veſting of the legacy related to the event of the marriage, and as that never happened, the legacy did not veſt.

A grandfather is not bound to provide for a grandchild, eſpecially where a father is living at the time of the will, and after the teſtator's death.

There it was a legacy given *by the father* as a portion, but in the caſe of a grandfather, he is not bound by that duty of nature to provide for a grandchild, eſpecially in this caſe, where a father was living at the time of the will, and after the death of the teſtator.

Where there is no ſurrender of a copyhold eſtate by a grandfather to the uſe of his will, the court will not ſupply it againſt an heir, in favour of the grandchild.

In the caſe of a deviſe by a grandfather to a grandchild, of a copyhold eſtate where there is no ſurrender, the court will not ſupply it againſt an heir at law; and ſo held in the caſe of *Kettle* verſus *Townſend*, 1 *Salk.* 187.

I am of opinion from the whole texture of this will, that the legal conſtruction agrees with the intention of the teſtator.

The will ſpeaks that the grandfather meant this legacy as an addition to her fortune, *in caſe ſhe married*, for in a former clauſe of the will he had given her another legacy of 1000 *l.* either at twenty-one, or marriage, which ſhould firſt happen, ſo that if ſhe had lived to be twenty-one, and had died unmarried, yet ſhe would have been intitled to ſomething.

It

It might have been a queſtion, whether the words *to be at her own diſpoſal*, were not giving it to her ſeparate uſe, but if they were not, it would have made no difference, becauſe her relations might before the marriage have ſecured it for her ſeparate uſe.

The caſe of *Atkyns* verſus *Hiccocks* is in point, and whether right or no, has not been appealed from; and I ſhall not be inclined to deviate from my own opinion, which was given upon mature conſideration. *

Flanders verſus *Clarke*, *May* 20, 1747. Caſe 176.

Margaret Flanders, by a will dated the 15th of *November* 1733. "bequeathed to her ſon *John Flanders* one hundred and fifty "pounds, to be paid to him by her executors therein named, at "ſuch times, and in ſuch proportions, as they ſhould judge neceſ- "ſary for him, and declared her will to be, that the ſaid *John* "*Flanders* ſhould not have the diſpoſition of the ſaid legacy to his "then, or any future wife, but that in caſe of his death without "iſſue, the ſame ſhould revert unto the ſaid teſtatrix's family; "but in the mean time ſhe directed her executors by half-yearly "payments to pay the ſaid *John Flanders* intereſt after the rate of "*five per cent.* for ſuch parts of the ſaid principal as ſhould from "time to time continue in their hands, till the whole ſhould be "paid."

The power of execution is not determined by the death of one, but the whole ſurvives to the other, and he may aſſent to a legacy.

The ſurviving executrix of the mother directs the hundred and fifty pounds by her will to be paid within two years after her death.

The bill is brought by the legatee for the hundred and fifty pounds, and inſiſts he has a right to be paid the whole.

LORD CHANCELLOR.

The clauſe in this will is ſo particular, that it cannot be determined by any general rule, but on the penning of the will.

To take the clauſe by its particular parts, *Margaret Flanders* "bequeaths to her ſon *John Flanders* one hundred and fifty pounds, "to be paid to him by her executors, at ſuch times and in ſuch "proportions, as they ſhould judge neceſſary, and declared that her "ſaid ſon ſhould not have the diſpoſition of the ſaid legacy to his

* A teſtator deviſes to *E. H.* 200*l.* to be paid her at the time of marriage, or within three months after, provided ſhe marry with the approbation of his two ſons. *E. H.* died after 21. but without being married. Bill brought by her repreſentative for the legacy. *Per Lord Hardwicke*, In all caſes where the condition of marrying is annexed, it is neceſſary there ſhould be a marriage to veſt the legacy. *Atkins* verſus *Hiccocks*, *Tr. Vacation* 1737. 1 *T. Atk.* 500.

" then, or future wife, but that in caſe of his death without iſſue, " the ſame ſhould revert unto the ſaid teſtatrix's family.

If it had reſted there, I ſhould have been of opinion *John Flanders* ſhould have had the uſufructuary intereſt only, and it would have gone over on his leaving no iſſue at his death; for as I ſaid at firſt, the particular penning ties up the words to iſſue living at the time of his death, and points out the particular time when he might make the diſpoſition, and ſhews therefore it was a particular time, and a particular dying without iſſue, that was meant by the teſtatrix.

But in the mean time, ſhe directed her executors, by half-yearly payments, to pay the ſaid *John Flanders* intereſt at the rate of five *per cent.* for ſuch parts of the ſaid principal as ſhould from time to time continue in their hands *till the whole ſhould be paid.*

Her intention ſeems to be, that her executors ſhould have a power of paying the whole, or in part, as the trade, dealings or occaſions of the ſon ſhould require, and that he might ſpend or diſpoſe of this as he thought proper, but while any part of the hundred and fifty pounds remained in the executors hands, to be ſubject to the will.

It has been objected, that the aſſent of the executors is neceſſary to every legacy, and here being two under the will of *Margaret Flanders*, and one dead, the ſurvivor cannot aſſent.

I do agree, whether it be a ſpecific legacy, or a pecuniary one, the aſſent of the executor is neceſſary, but the power of executors is not determined by the death of one, for the whole ſurvived to the other executor, and ſhe might aſſent.

This comes near the caſe, in *Fitzgibbons's Reports, of the Attorney General in behalf of the Goldſmiths Company of London* verſus *Hall* 314. where what the court went upon was the limitation over was void; for as the ſon had a power to ſpend the whole, the company could have no more than he ſhould have left unſpent, and therefore diſmiſſed the bill.

The legacy in the preſent caſe amounts to the very ſame; here is a power to ſpend the whole, and for the executor to pay to the ſon of the teſtator from time to time, either part of the hundred and fifty pounds, or the whole, as the occaſions of the ſon ſhould require.

This being too a proviſion made by a mother for a ſon, I am of opinion the legacy ought to be paid to him, without his giving any ſecurity; and decreed accordingly.

Petre

Petre verſus *Petre*, *May* 20, 1747. Caſe 177.

LORD CHANCELLOR.

THE court will not oblige a jointreſs to bring in her jointure deed into court, or before a Maſter, unleſs the party requiring it will confirm her jointure, but will direct her only to deliver in a ſchedule of the deeds, and the court at their diſcretion may order what ſhall or ſhall not be produced.

A jointreſs is not obliged to bring in her jointure deed into court, unleſs the party requiring will confirm it.

Where there is a numerous family of children who are infants, upon an application for maintenance for the eldeſt ſon, the court will make a liberal allowance to him, that he may be the better able to maintain his brothers and ſiſters, conſidering him in the light of the father of the family; but in the preſent caſe the eldeſt ſon being conveyed away clandeſtinely to *Doway*, out of the hands of the guardian, the court, as he cannot be brought before them, can make no order of this kind, but directed, after Lady *Mary Petre*'s jointure is ſatisfied, that the ſurplus rents and profits ſhould be laid out for the benefit of the eldeſt ſon.

Upon an application for maintenance for an eldeſt ſon, the court will make him a liberal allowance, to enable him to maintain his brothers and ſiſters, conſidering him *in loco parentis*.

Lady Head verſus *Sir Francis Head*, *May* 21, 1747. Caſe 178.

THE defendant's council objected to the reading the depoſition of *Jane Genew*, the wife of *John Genew*, for the plaintiff, as he is the *prochein amy* of the plaintiff, and liable to the coſts.

The court allowed the objection.

The depoſition of the *prochein amy* of the plaintiff cannot be read for the plaintiff, being liable to coſts.

Anon. Eaſter term, *May* 21, 1747. Caſe 179.

AN order was obtained on a motion of courſe, that the plaintiff ſhould be at liberty to add ſome new interrogatories for the examination of the defendant, the examinations already put in being reported inſufficient, and that both ſets of interrogatories may be anſwered at the ſame time.

LORD CHANCELLOR.

I find no inſtance of an order of this ſort, on a motion of courſe; it has ſome analogy to orders for amendment of bills, where anſwers have been reported inſufficient; and if this practice is not of courſe for adding interrogatories, on an examination being reported inſufficient, I will not ſet up this as an inſtance, and thereby introduce a new practice.

Notice muſt be given, before you can move to add new interrogatories for the examination of a defendant, on the examinations before put in being reported inſufficient. Such an order obtained on a motion of courſe is irregular, and will be diſcharged.

The court has rather gone too far in allowing the amendment of bills on anſwers being reported inſufficient.

I think the court has rather gone too far in allowing the amendment of bills, on anſwers being reported inſufficient, as it has frequently been made uſe of as a ſcheme and method of delay.

If the party wants to add new interrogatories, on an examination reported inſufficient, an application ſhould be made to the court by notice to the other party, that the court may be apprized whether there is a ground for it; but as this was an order obtained on a motion of courſe, the court thought it irregular, and diſcharged the order.

Caſe 180. *City of London* verſus *Naſh*, *May* 25, 1747.

Where a perſon on a building leaſe covenants to new build the brick meſſuages on the premiſſes, the rebuilding ſome and repairing others is not ſufficient to anſwer the covenant, but the leſſee muſt rebuild the whole.

LORD *Hardwicke* ſtated the caſe as follows:

The bill is brought by the city of *London* againſt *Naſh*, to have a ſpecific performance of an agreement for a building leaſe of ſome old houſes near *Leaden-hall* market.

The points in the cauſe are, what is the true intent of the covenants in the leaſe and agreement entered into between the city of *London* and *George Greaves*, a builder, the original leſſee, and whether the covenants are ſufficiently performed?

Another point has been made on the circumſtances of fraud and miſbehaviour in obtaining of this leaſe, the defendant being at that time a committee-man for letting the city lands.

It appears theſe were very old houſes, and that the city had an intention by their committee for letting the city lands to let theſe premiſſes in the year 1734. an order thereupon was made to ſurvey the premiſſes on the firſt of *May*, and it was reported they were much out of repair, and proper for *a repairing leaſe*.

The utmoſt term allowed for repairs is one and twenty years, but the city are not bound down upon *building leaſes* for any certain term.

The propoſals for taking a repairing leaſe were rejected, and came to nothing. The conſideration of theſe houſes was taken up again in 1736. Mr. *Naſh*, who was then of the committee, was appointed to inſpect.

The 3d of *November* 1736. a report was made, to which *Naſh* was a party: in purſuance of an order in *May* before, that the inſpectors were of opinion the houſes ought to be rebuilt, as they are in a very bad and ruinous condition, and to which report Mr. *Naſh*

ſigned in the firſt place, on the 4th of *November* 1736. an advertiſement was ordered to be put in the publick papers, that the premiſſes were to be let on a *building leaſe* of ſixty-one years.

Every one of theſe acts import in the ſtrongeſt manner a building leaſe.

Mr. *George Greaves* offered to give the city a thouſand pounds fine upon a ſixty-one years leaſe, and that propoſal was accepted, and he was declared the beſt bidder: after this a draught of a leaſe was prepared, in which were theſe words, the leſſee to new build the premiſſes, *or any part thereof*; but it appears that the words, *or any part thereof*, were ſtruck out in the draught, and left out in the original; the leaſe was to be approved of by two of the committeemen, and was ſo accordingly, by Mr. *Heaton* and the defendant *Naſh*.

Afterwards this leaſe was executed on the 8th of *February* 1736. and thoſe words, *or any part thereof*, being left out, proves they had been under the conſideration of the whole committee, and dropped by their expreſs direction.

Mr. *Greaves* came into poſſeſſion under this leaſe.

The firſt queſtion was, what is the true intent and meaning of the covenant.

It was inſiſted by the counſel for the city of *London*, the meaning is, that all the meſſuages ſhould be entirely *new built*, whereas but two have been new built, and the reſt repaired.

And by the council for the defendant *Naſh*, that if he built new meſſuages in the plural number, (which muſt be two at leaſt) and the reſt were put into repair, that this is ſufficient to anſwer the covenant.

I am of opinion the true conſtruction is, all the meſſuages ſhould be rebuilt.

Mr. *Greaves* covenants that he will new build the brick meſſuages on the premiſſes within the compaſs of three years.

What can be the meaning of ſuch a covenant? Why, to rebuild the whole, for *an indefinite propoſition is equal to an univerſal propoſition*, for had it been left to Mr. *Greaves*'s diſcretion to build two, three or four houſes, it would have been ſo very uncertain, that it could never be the meaning.

It was an omiſſion that there was not a plan annexed to the leaſe, deſcribing what ſort of houſes *Greaves* was to build.

If there could be any doubt upon the covenants, it muſt be conſidered on the nature of the contract, what does that import? A building leaſe even *by the term only*, which is for ſixty-one years.

Suppoſe an action at law had been brought, and in that action the city of *London* had aſſigned a breach, that *Greaves* had not performed the covenant in new-building all the premiſſes, and the defendant had pleaded he had built two houſes, the plaintiff muſt have had judgment, for building two only is not a performance of the covenant.

The diſtinction between a repairing and a building leaſe appears by the acts done by the city; on the two reports of repairs, that no perſon had appeared to make propoſals, an advertiſement was thereupon ordered for propoſals to build, contract, *&c.* All this ſpeaks an intention of letting *a building leaſe* in oppoſition to and in contradiſtinction to *a repairing leaſe*.

It has been proved by Mr. *Dance* the city ſurveyor, that on a repairing leaſe, the city of *London* never let but for twenty-one years, but if on a building leaſe for ſixty-one, or more, and then all the premiſſes muſt be new built.

But what greatly ſtrengthens the caſe, is, the inſertion of the words, *or any part thereof*, in the draught, and their being ſtruck out afterwards, which ſhews the city of *London* ſaw this would be an evaſion, and ſtruck out theſe words to prevent any miſapprehenſion in the ſenſe of the leaſe.

The defendant is now contending for the very thing which the city diſagreed to, and diſapproved of, before the leaſe was executed.

An obſervation has been made on the part of the defendant, that there is no mention in the advertiſement that *all* the premiſſes were to be *new built*; but to be ſure the true conſtruction is, that *all* are to be new built.

The next queſtion then will be, whether that has been performed?

Pulling down the fore and back front of houſes and rebuilding them, is not equivalent to houſes intirely new built, for they very often drop down afterwards.

I am of opinion it has not; for all the defendant has done, is to build *two new houſes*, and to repair the old; and though it is indeed a very large repair, for he has pulled down the fore and back fronts, and new built them, and that what are chiefly left are party walls,

yet

yet this is very different from new building of houſes, for notwithſtanding new fronting houſes, they very often drop down afterwards, and therefore are not equivalent to houſes entirely new built.

A great deal of evidence has been read to prove that this is a ſubſtantial repair, and that the houſes will be as good at the end of ſixty-one years to let on a repairing leaſe, as if new built.

The witneſſes vary, and it is difficult to reconcile them, unleſs taken in the ſenſe in which it is ſworn and explained by one of the witneſſes, who ſwears he could have built all theſe houſes for a hundred pounds a houſe, provided he was not tied to a proper thickneſs of walls, *&c.* and I believe he might; but though Mr. *Greaves* was not confined to particular dimenſions, yet it muſt be underſtood that the whole ought to be built in a proper workmanlike manner.

The next queſtion will be, what kind of decree I ought to make; it was inſiſted at the beginning of the cauſe for the plaintiffs, that they are intitled to a ſpecific performance, and that the defendant muſt rebuild all the houſes, which by neceſſary implication will import that the defendant muſt pull down all the houſes which have been only repaired, and new build them.

It was objected on the part of the defendant, that the plaintiffs are not proper to come here for a ſpecific performance, but ought to be left to their action at law.

The objection will not hold, for upon a covenant to build, the plaintiffs are clearly intitled to come into this court for a ſpecific performance, otherwiſe on a covenant to repair; for to build is one entire ſingle thing, and if not done prevents that ſecurity which the city of *London* has for the rent, by virtue of the leaſe.

Upon a covenant to build, the leſſors are clearly intitled to come into this court for a ſpecifick performance, otherwiſe on a covenant to repair.

But the moſt material objection for the defendant is, that the court is not obliged to decree a ſpecific performance where it will be attended with great loſs and hardſhip to one of the parties, and though not ſpecifically performed, yet the defendant has laid out two thouſand two hundred pounds at leaſt in the repairs, and therefore, to be ſure, has put them in a very good condition at preſent.

Now, if the defendant was miſtaken in the ſenſe of this covenant, or perhaps has even knowingly evaded it, ſtill it would be hard to decree a ſpecific performance, and ſuch a decree too would be contrary to the good of the publick, by pulling down houſes, which from the evidence chiefly appear to be in ſuch a good condition, as that they may ſtand a great number of years.

It

It would be no ſervice to the city of *London* to make ſuch a decree, for all they want is to be compenſated in damages, and therefore the court ought not to make a decree for a ſpecific performance.

But then it has been ſaid on the part of the defendant, if ſo, there is no occaſion for any other decree in this court, but the plaintiff ſhould be left to law.

Now though this is a covenant unperformed, and runs with the land, and will affect an aſſignee, yet if the breach was made before the aſſignment it will not affect him, and if an action were brought againſt the repreſentatives of *Greaves*, then they muſt come into court againſt *Naſh* for an indemnity; and this would occaſion a circuity.

So that the queſtion will be, what the relief is I ought to give, whether an action, or whether I ſhall direct an iſſue.

I ſhall not direct an action, becauſe all proper parties are before me, the repreſentative of the original leſſee, and the aſſignee of the leaſe, but I ſhall order an iſſue.

It is evident to me, that this leaſe has been obtained in an improper manner, taken by Mr. *Greaves* as a truſtee only for the defendant Mr. *Naſh*, and appears to be plainly a beneficial leaſe: Mr. *Greaves* dies before the three years expire for building theſe houſes, and his adminiſtrator aſſigns this leaſe, for the conſideration of five ſhillings only, to Mr. *Naſh*.

All the other circumſtances ſhew that this was taken originally for Mr. *Naſh*'s benefit, becauſe no body can imagine Mr. *Greaves*'s repreſentative would have aſſigned it over for ſo ſmall a conſideration as five ſhillings, if Mr. *Greaves* had ever had any beneficial intereſt.

The excluding a member of the committee of city lands from being a buyer or a ſeller is a good rule as it prevents fraud.

Mr. *Naſh* likewiſe is a member of the committee of city lands, and all committee-men are expreſſly excluded from being a buyer, or a ſeller, which is a good rule, and hope they will continue it, becauſe it prevents fraud and colluſion.

This was a ſcheme of Mr. *Naſh* to increaſe the term to ſixty-one years, inſtead of twenty-one, and yet to do nothing more than repair, notwithſtanding the term in the leaſe is trebled; and though Mr. *Naſh* has twice under his hand reported they were in a very bad and ruinous condition, ſtill he has thought proper to examine witneſſes to prove they were in a good condition, and fit to be repaired.

I ſhall give more credit to his own report than to his witneſſes.

The relief muſt be by way of inquiry of damages before a jury; and I am more inclined to this, than to decree a ſpecific performance, becauſe it appears upon the diſpute of the extent of the buildings, that there was a formal committee with *Mr. Dance the ſurveyor of the city of London*, at the head of it, viewing the repairs, while the workmen were employed about it, and yet made no objection to Mr. *Greaves*'s going on, and therefore are too late in coming here for a ſpecific performance, unleſs they had brought a bill recently and immediately after this ſurvey.

The court, inſtead of decreeing a ſpecific performance of the covenants in the leaſe, choſe to give relief by way of inquiry of damages before a jury, and directed an iſſue accordingly.

Lord *Hardwicke* directed an iſſue to try what damages the mayor, commonalty and citizens of *London* have ſuſtained, by the non-performance of the covenants in the leaſe to Mr. *Greaves*, and appointed the city of *London* plaintiffs, and *Naſh* alone defendant.

Godfrey verſus *Watſon*, *March* 21, 1747. *It came before the court on exceptions to a Maſter's report.* Caſe 181.

THE firſt exception was for not allowing the ſum of three hundred eighty one pounds, being the ſurplus intereſt beyond the penalty of a judgment.

Where a creditor by judgment extends lands by *elegit*, he holds *quouſque debitum ſatisfactum fuerit*, and at law the debtor cannot on a writ *ad computandum* inſiſt on the creditor's doing more than account for the extended value; but if the debtor comes here for relief, the court will give it him, by obliging the creditor to account for the whole he has received; but as he who comes for equity muſt do equity, will direct the debtor to pay intereſt to the creditor though it ſhould exceed the principal.

A creditor is not confined to the extent of the penalty upon a judgment, but may carry the computation of intereſt beyond it

It was ſaid by the plaintiff's council, that the creditor is intitled only to the extent of the penalty upon a judgment, and that he can carry the intereſt no further.

LORD CHANCELLOR.

At law upon a judgment entered up, it is the *debitum recuperatum*, and the ſtated damages between the parties, but if the creditor does not take out a *fieri facias* againſt the perſon of the debtor, or his perſonal eſtate, but extends the lands by *elegit*, which the ſheriff does only at the annual value, and much below the real, the creditor holds *quouſque debitum ſatisfactum fuerit*, and at law the debtor cannot, upon a writ *ad computandum*, inſiſt upon the creditor's doing more than account for the extended value; but if the debtor comes into a court of equity for relief, this court will give it him, by obliging the creditor to account for the whole that he has received; and as a perſon who comes for equity, muſt do equity, will

direct the debtor to pay intereſt to the creditor, even though it ſhould exceed the principal; and I remember very well upon ſerjeant *Whitaker*'s inſiſting before Lord Chancellor *Cowper*, that this would be repealing *the ſtatute of Weſtminſter*, his Lordſhip ſaid he would not repeal the ſtatute, but he would do compleat juſtice, by letting the creditor carry on the intereſt upon his debt, as he was to account for the whole he had received.

Where a mortgagee has tacked a judgment to his mortgage, he ſhall not be confined to the penalty of the judgment, but is intitled to intereſt upon the debt ſecured by judgment though it exceeds the penalty.

And the ſame rule prevails in this court, where a mortgagee has tacked a judgment to his mortgage, he ſhall not be confined to the penalty of the judgment, but ſhall be intitled to intereſt upon the debt ſecured by judgment, though it exceeds the penalty, down to the time the principal is paid off; and therefore his Lordſhip allowed the defendant's exception.

A mortgagee in poſſeſſion is not obliged to lay out money any further than to keep the eſtate in neceſſary repair; but if a mortgagee has expended any ſum of money in ſupporting the right of the mortgagor to the eſtate, where his title has been impeached, the mortgagee may certainly add this to the principal of his debt, and it ſhall carry intereſt.

He may add to the principal of his debt a ſum expended in ſupport of the mortgagor's title where it is impeached, and it ſhall carry intereſt.

Lord Chancellor ſaid, that a mortgagee in poſſeſſion is not obliged to lay out money any further than to keep the eſtate in neceſſary repair; but if a mortgagee has expended any ſum of money in ſupporting the right of the mortgagor to the eſtate, where his title has been impeached, the mortgagee may certainly add this to the principal of his debt, and it ſhall carry intereſt.

A mortgagee ſhall not be allowed for his trouble in receiving the rents of the eſtate himſelf; but if the eſtate lies at ſuch a diſtance as obliges him to employ a bailiff to receive them, what he paid to the bailiff ſhall be allowed.

He alſo ſaid, a mortgagee ſhall not be allowed for his trouble in receiving the rents of the eſtate himſelf, but if an eſtate lies at ſuch a diſtance from the place of his reſidence, as he muſt have employed a bailiff, if it had been his own, he ſhall then be allowed ſuch ſums as he has paid to a bailiff, to receive the rents of this eſtate.

Caſe 182. *Ex parte Ricards, June* 18, 1747.

A father by will appoints his wife guardian of his eldeſt ſon till 21. a petition on the infant's behalf to confirm her guardian, and to be juſtified in what ſhe ſhould expend for his maintenance. *No inſtance where there is a teſtamentary guardian of the court's confirming it in this ſummary way, or ſending it to a Maſter to aſcertain the allowance for infant's maintenance; a bill is neceſſary for this purpoſe.*

THE father of the petitioner by his will appoints his wife guardian of the petitioner, his eldeſt ſon, and likewiſe of his ſecond ſon, till their ages of twenty-one, and allots a maintenance for the ſecond during his infancy, but none for the eldeſt.

A petition was preferred on behalf of the eldeſt ſon an infant of eight years of age, to confirm his mother guardian, and that he might be juſtified in what ſhe ſhould expend in his maintenance, and

and prays it may be referred to a Maſter, to conſider of a proper allowance for the infant's maintenance and education.

LORD CHANCELLOR.

Sir *Joſeph Jekyll* was the firſt judge who went ſo far in this ſummary way to direct an allowance for maintenance; before his time the court would do no more than appoint a guardian in ſocage, till the infant had attained his age of 14; but I know of no inſtance where there is a teſtamentary guardian, that the court have in this ſummary way confirmed the guardianſhip, or ſent it to a Maſter to aſcertain what ſhall be allowed to the guardian, for the infant's maintenance, and thought a bill neceſſary for this purpoſe; but at the Attorney General's requeſt, as the application appeared to be a very reaſonable one, his Lordſhip ordered the petition to ſtand over till the next day of petitions, and in the mean time to ſearch for precedents.

Ex parte Edwards, June 18, 1747.

Caſe 183.

THE mother by her will apointed Mr. *Ruſſell* guardian to her ſon the petitioner, till his age of twenty-one.

The mother's appointment of a guardian to her ſon by will is void, the ſtatute confining the power of appointing a teſtamentary guardian to the father only.

An application made now to the court for maintenance, and in caſe they ſhould not approve of the guardian appointed by the mother, that a new one may be aſſigned.

LORD CHANCELLOR.

The ſtatute of 12 *Cha.* 2. *ch.* 24. *ſec.* 8. confines the power of appointing *a teſtamentary guardian to the father only*, and therefore the appointment by the mother, of a guardian in this caſe, is abſolutely void, and the infant being of his age of fourteen, choſe a guardian in court.

On the petition of the Marquis of Powis in the cauſe of Nicholls verſus *Maynard, June* 18, 1747.

Caſe 184.

THE late Marquis and the petitioner joined in mortgaging an eſtate for ſecuring twelve thouſand pounds borrowed of Sir *Charles Gunter Nicholls* deceaſed, with intereſt at four and a half *per cent.* but there was a verbal agreement, that if the mortgagor paid the intereſt for every half year before the third quarter became due, that the mortgagee would allow him an abate of half a *per cent.*

Where a mortgage is at four and an half *per cent.* with a proviſo that if the intereſt be paid after each half year before three quarters of a year become due, the mortgagee will accept of four *per cent.* if the mortgagor fails of paying the intereſt at the appointed time, *he cannot be relieved in this court.*

At

At the death of Sir *Charles Gunter Nicholls*, there was a conſiderable arrear of intereſt, and the mortgagor propoſed, if the defendant, the truſtee for the plaintiffs, daughters of Sir *Charles Gunter Nicholls*, and deviſees of the twelve thouſand pounds, would agree to take four *per cent.* for the arrear of intereſt, that the mortgagor would be bound to continue the mortgage for ſeven years; upon this propoſal it was referred by the court to a Maſter to ſee if it was for the benefit of the infants; the Maſter reported it to be ſo, and that report was confirmed, and afterwards the intereſt was regularly paid at the end of every half year, before the third quarter was lapſed, to the late Marquiſs's death.

The petitioner having been entangled in a great many perplexed affairs, has ſuffered the intereſt to run conſiderably in arrear ſince, but now offers to the infants guardian and truſtee to pay the arrear of intereſt at four *per cent.* and as an equivalent for the other half *per cent.* intereſt upon intereſt, to be computed from the end of each half year; the ſimple intereſt and the intereſt upon intereſt amount together to a thouſand and one pound eleven ſhillings.

One of the mortgagee's daughters is dead, and the whole beneficial intereſt in the twelve thouſand pounds veſts in the ſurvivor.

It was prayed by the petition, with the deſire of all parties, that, to ſave the expence of going before the Maſter, this ſum may be ordered to be paid to the infant's truſtee, on or before the 22d of *July* next, in full of intereſt due to the 22d of *December* laſt.

Where a mortgage is made with a reſervation of four *per cent.* intereſt, and a proviſo that, on non-payment thereof within a certain time after it is due, the mortgagor ſhall pay five, *this is but as a nomine pœnæ, and relievable in equity.*

I do not ſee how I can make ſuch an order, as an infant is concerned, for as the mortgage is at four and a half *per cent.* with a proviſo, that if the intereſt be paid after each half year, before three quarters of a year become due, the mortgagee will accept of four *per cent.* if the mortgagor fails of paying the intereſt at the appointed time, he cannot be relieved in this court, any more than on any other compoſition between parties, becauſe the abate of half *per cent.* by the mortgagee was for prompt payment, and the terms of the agreement not being complied with, the mortgagee and his repreſentative are intitled to intereſt at four and a half *per cent.* but if the mortgage had been made, with a reſervation of four *per cent.* intereſt, with a proviſo that upon non-payment thereof, within a certain time after it is due, the mortgagor ſhall pay five *per cent.* ſuch proviſo would not be good, and has been determined ſeveral times; becauſe where the intereſt is to be increaſed, if not paid at the day, that is but as a *nomine pœnæ*, and relievable in equity. (*Vide Vin. Abridg.* title *Mortg.* 452. letter *M.*)

Lord Chancellor referred it to a Maſter, to ſee whether the propoſal made by the mortgagor, would be for the infant's benefit.

Anon. June 18, 1747. Caſe 185.

IN the year 1707. upon a bill of foreclosure, it was referred to a Maſter to take an account of what was due to the mortgagee for principal, intereſt and coſts, and the Maſter's report was confirmed *niſi*; and by the regiſter's minutes, at a ſubſequent ſeal in the ſame cauſe, it was taken down *order abſolute*, but never entered; the regiſter refuſes to enter it now, and the application is to the court for an order *de novo*.

A Maſter's report of what was due to a mortgagee for principal, intereſt and coſts, was confirmed *niſi*, and by the Regiſter's minutes at a ſubſequent ſeal in the ſame cauſe taken down *order abſolute*, but never entered; on the Regiſter refuſing to do it, an application for an order *de novo*.

LORD CHANCELLOR.

To enter an order *nunc pro tunc* is a motion of courſe, where the party entitled to the order comes recently; but I apprehend after a length of time, there ought to be notice of ſuch motion; and what is prayed now goes ſtill further; but as it would be very hard at this diſtance to open a foreclosure, I will give the other ſide an opportunity of inquiring in the office, to ſee if they can make out the minute in the regiſter's book, to relate to ſome other matter in the cauſe, and not the foreclosure.

To enter an order *nunc pro tunc* is a motion of courſe, where the party intitled to it comes recently, but after a length of time there ought to be notice of ſuch motion.

In the courts of law, for inſtance in the Common Pleas, where a recovery has not been entered upon record, if it appears by the minutes in the prothonotary's book that it was ſuffered at bar, the court will order it to be entered; but then it muſt be with a proviſo, that it does not prejudice any ſubſequent purchaſer; the ſame in the caſe of an old judgment, they will order it to be entered up, but ſo as not to affect a ſubſequent creditor; and therefore if in the preſent caſe it ſhould appear on further ſearch that it was the order *niſi*, which was made abſolute for confirming the Maſter's report, I ſhall then direct according to the prayer of the petition.

Where a recovery in the court of Common Pleas has not been entered upon record, if it appears by the prothonotary's minutes it was ſuffered at bar, the court will order it to be entered, with a proviſo it does not prejudice any ſubſequent purchaſer. *Idem* as to an old judgment.

Caſe 186. *Gill* verſus *Watſon*, *June* 25, 1747.

Though at law you can examine only to the general credit; yet, otherwiſe in equity, for as the witneſs there cannot be prepared to defend every particular action of his life, not knowing to what they intend to examine him; yet, on an examination here, he may be able to anſwer any particular charge, as he has time enough to recollect it.

Quære, If there is any ſuch diſtinction between the examinations here, and at law, with regard to examinations to the credit of witneſſes, being told by an experienced practiſer, that they are general here, as well as at law.

ARticles were exhibited by the defendant for examining to the credit of one of the plaintiff's witneſſes, notwithſtanding publication has been paſſed ſome time, and the cauſe was to be in the pauper paper at the *Rolls* on *Saturday* next.

Mr. *Clark* for the defendant, moved for liberty to exhibit interrogatories, and for a commiſſion for examination of this witneſs into *Yorkſhire*, but produced no affidavit to ſupport the articles.

Lord Chancellor thought an affidavit neceſſary, and ſaid, though at law you can examine only to the general credit, yet it is otherwiſe in equity; for at law the witneſs cannot be prepared to defend every particular action of his life, as he does not at all know to what they intend to examine him; but upon an examination in this court, he may be able to anſwer any particular charge, as he has time enough to recollect it: *Quære*, if there is any ſuch diſtinction between the examinations here and at law, with regard to the credit of witneſſes, becauſe Mr. *Capper*, a very eminent and experienced practiſer, told me, that examinations to the credit are general here, as well as at law, and the form of the articles are ſo in this caſe; firſt, that the witneſs is a perſon of ill fame, and not to be credited; ſecondly, that he pays no regard to the nature of an oath; and in the ſame manner through the ſeveral *items*.

Lord Chancellor denied the motion, becauſe the plaintiff comes too late after publication, and the cauſe was already ſet down in the paper.

Caſe 187. *Pearce* verſus *Grove*, *June* 25, 1747.

The court will not allow a defendant to amend an anſwer by ſtriking out of it the admiſſion of a fact, by which the plaintiff would be deprived of the benefit of this evidence, eſpecially as he does not ſwear he was ſurpriſed into it, or ill adviſed in ſetting it forth.

MR. Attorney General moved to amend an anſwer, by ſtriking out the offer of the defendant's bringing in his ſhare into hotchpot, upon a miſcomputation of the father's eſtate.

LORD CHANCELLOR.

Whatever may be the right of the parties, it is impoſſible to ſuffer the defendant to amend his anſwer in the manner he deſires, for it would be of dangerous conſequence.

It is true, at law they will allow you to amend, but it is in matters of form only, here it is an extreme different thing, for it is an admiſſion of facts, as, that thirteen hundred pounds advanced by the defendant's father in his life-time, was a full advancement.

And though, if the certainty of the ſum appears, a child is not precluded from the reſidue of the orphanage ſhare, if he will bring the ſum before advanced into hotchpot, yet he may be bound by any agreement between him and his father, that this money ſo advanced ſhould be in full, and bar him of the reſidue of his orphanage ſhare.

It would be ſtrange therefore, to ſtrike out this admiſſion, and deprive the plaintiff of the benefit of this evidence, when the defendant does not ſwear that he is ſurpriſed into this admiſſion, or ill adviſed in ſetting it forth.

I diſtinguiſh between an admiſſion of a fact, and an admiſſion of a conſequence in law, or a conſequence in equity, if it had been ſo, the party would not have been bound by it.

The party is not bound by an admiſſion of a conſequence in law, or a conſequence in equity, for the court is to judge of the law.

There are ſeveral admiſſions of parties where the defendant has been miſtaken in his point of law, and yet ſhall not be bound by it, becauſe the court is to judge of the law.

As in the caſe of a ſpecial verdict, if the jury make a wrong concluſion, the court is not bound, but will judge by the fact; *id.* as to a writ of error, where error in law is aſſigned, and the defendant comes in and admits the error, yet the court is not bound by the admiſſion, but will determine according to their own judgment whether it is error in law.

Though the jury make a wrong concluſion in a ſpecial verdict, the court will judge by the fact.

Lord Hardwicke denied the motion.

Anon.

Caſe 188. *Anon. June* 27, 1747.

The court will not make an order upon a maſter to admit depoſitions taken in a former cauſe between the ſame parties to be read, as it is putting parties to an unneceſſary expence, the proper courſe being to take exceptions.

AN account was now depending in the cauſe before a Maſter, the plaintiff offered to read, as evidence before the Maſter, the depoſitions in a former cauſe, wherein the plaintiff and the defendant were parties, which he refuſed to admit, unleſs an order of the court was obtained for that purpoſe; Mr. *Evans* moved now for ſuch order, but *Lord Chancellor* denied it, becauſe he would not put perſons to unneceſſary expence by ſuch applications; and ſaid, the reaſon why you cannot read ſuch evidence at the hearing without an order is, that every cauſe before the court is an intire proceeding, and determined for the moſt part in one day, ſo that unleſs you have a previous order it is a fatal exception; but before a Maſter, parties go on *de die in diem*, and heh as an opportunity of judging whether he ought to admit the depoſitions to be read, or if the Maſter ſhould be miſtaken, you may take exceptions, and therefore there is no occaſion for the court to make an order in it.

Caſe 189. *Haws* verſus *Haws*, *June* 26, 1747.

A. H. deviſes all his manors to his four children *W. C. A.* and *T.* their heirs and aſſigns, equally to be divided between them, ſhare and ſhare alike, as tenants in common, and not as joint-tenants *with the benefit of ſurvivorſhip*. The court was of opinion, the teſtator meant, if any of his four children died before twenty-one, it ſhould go to the ſurvivors, having uſed the ſame words in the precedent clauſe relating to his perſonal eſtate, and given the benefit of ſurvivorſhip there, if either died before twenty one.

ANDREW Haws, the teſtator's grandfather, being ſeiſed in fee of a moiety of the manor of *Down-Barns*, in *Middleſex*, deviſed this moiety and all other his manors in *Middleſex*, *unto his four children* William, Carlton, Andrew, *and* Thomas *Haws*, *their heirs and aſſigns, equally to be divided between them, ſhare and ſhare alike, as tenants in common, and not as joint-tenants with the benefit of ſurvivorſhip.*

The principal queſtion was, whether by the deviſe to his four children they took as jointenants, or a tenancy in common generally, or with any, and what contingent limitation over as to their reſpective ſhares.

LORD CHANCELLOR.

This court leans againſt joint-tenancy, as it is an inconvenient eſtate, and ſo do courts of law now, though they favoured them formerly.

The general rules inſiſted on are true, for certainly joint-tenants are not favoured here, becauſe they introduce inconvenient eſtates, and do not ſo well provide for families, therefore this court leans

againſt

againſt them, and ſo, I believe, do the courts of law now, though they favoured them formerly, and the ground upon which they went was the multiplication of ſervices under the old tenures, but the ſtatute of 12 *Car.* 2. *c.* 24. *ſect.* 1. has reduced the ſeveral ſorts to ſocage tenure only.

Where the words of a will are ſo inconſiſtent as that they cannot be reconciled, the court muſt reject thoſe words that are leaſt conſiſtent with the intention of the teſtator.

Another general rule is, that where a man has made a deviſe in his will, with a great number of words that may ſeem to claſh with one another, the court will put ſuch a conſtruction as may make them conſiſtent; but if they are ſo inconſiſtent as that they cannot ſtand or be reconciled together, the court muſt reject thoſe words that are leaſt conſiſtent with the intention of the teſtator.

The words *equally to be divided* import a tenancy in common in a will, if there are no more words.

Here his Lordſhip recited the words in the clauſe; this is a deviſe in fee to all of them, *equally to be divided*, imports a tenancy in common in a will, if there were no more words, but here are other expreſſions which make it ſtill ſtronger, *as tenants in common, which are not as joint-temants*; the laſt words are *with benefit of ſurvivorſhip*, and this creates the difficulty.

Doubtful and ambiguous words ought not to controul clear and certain expreſſions.

I am of opinion that theſe words are not ſo ſtrong as to controul the precedent words, for to conſtrue it otherwiſe, would be from doubtful and ambiguous words, to ſet aſide clear and certain expreſſions.

On the other hand, to conſtrue the words with benefit of ſurvivorſhip, according to the conſtruction of the plaintiff's council, as if he had ſaid *without benefit of ſurvivorſhip*, or not with ſurvivorſhip, (though I will not ſay but it has been done) would be contrary to the meaning of the teſtator, upon the whole tenor of the will.

The next conſtruction put upon it by the plaintiff's council was, that this refers to a benefit of ſurvivorſhip to the ſurvivors of the children, if one, or more, *died in the life-time of the teſtator.*

But this is too nice a conſtruction, for it is more natural to ſuppoſe that a man intends the children of his children ſhould be provided for than not, and the court ſuppoſes a parent is taking care of the poſterity of his children.

It is not probable to think he meant that the benefit of ſurvivorſhip ſhould mean *ſurvivorſhip of himſelf*, for a teſtator very ſeldom provides for a contingency in his life-time, for when any happens, he may alter his will if he pleaſes.

Not but if no other reaſonable conſtruction can be put upon theſe words, the court ought to reſort to it, as in the caſe of Lord *Bindon* verſus *Earl of Suffolk*, 1 *P. Wms.* 96. " Deviſe of a debt to five grand-" children, ſhare and ſhare alike, equally to be divided between them, " and if any of them die, then to the ſurvivor, held to be tenants " in common; for by the words *if any of them died, his ſhare* " *ſhould go to the ſurvivor*; Lord *Cowper* ſaid, it muſt be intended " if any of them ſhould die *in the life-time of the teſtator*, for by " that conſtruction, every word of the will would have its effect " and operation.

There is in another part of the will, a plain inference, that he meant a ſurvivorſhip ariſing among one another, and not a ſurvivorſhip in the life of the teſtator: It is in the precedent clauſe relating to the perſonal eſtate, where the ſame words are uſed, and the benefit of ſurvivorſhip given in caſe any of them died before twenty-one.

This excludes the putting the unnatural conſtruction before mentioned, and *verba relata ineſſe videntur*, and is juſt as if he had ſaid, that if any of them died under twenty-one, it ſhould go to the ſurvivor.

The ſame words in the ſame will, though in a different clauſe, ought to have the ſame ſenſe; and as the teſtator intended ſurvivorſhip among his children in the perſonal, he muſt mean it alſo in the real eſtate.

Then conſider what effect it will have upon the conſtruction on the real eſtates, the four children who are to take the perſonal, take too the real eſtate, and the ſame words in the ſame will, ought to have the ſame ſenſe; he was here making a proviſion for the younger children, to take, indeed, as tenants in common, but with the benefit of ſurvivorſhip; what benefit of ſurvivorſhip could he intend, but the ſame as he intended in the ſurvivorſhip of the teſtamentary part of his perſonal eſtate; I do not doubt but this was his real intention, as he was making a proviſion for younger children, and if one of them ſhould die, did not intend any part of it ſhould go away to his eldeſt ſon, which would leſſen the proviſion that was clearly intended for the younger children; and therefore his Lordſhip decreed accordingly.

Caſe 190. *Elliot* verſus *Collier*, *July* 1, 1747.

Where a huſband dies before he adminiſters to his wife's perſonal eſtate, it ſhall not go to her next of kin, but to his repreſentative.

THE bill was brought by the plaintiff, as the repreſentative to a ſecond huſband of the daughter of a freeman of *London*, for her ſhare of her father's cuſtomary eſtate.

The defendant inſiſted ſhe was fully advanced in her father's life-time.

There was another queſtion in the cauſe, whether, the huſband dying without adminiſtring to the perſonal eſtate the wife had in her own right, it ſhall go to the next of kin of the wife, or to the repreſentative of the huſband.

LORD CHANCELLOR.

This is a very clear caſe; the repreſentative of the wife has no right to an account of her perſonal eſtate, and that point does not follow barely the legal right of adminiſtration, for though the eccleſiaſtical court are bound by act of parliament to grant the adminiſtration to the next of kin of the wife, yet that does not bind the right in this court; for the huſband ſurviving the wife, her whole eſtate veſted in him at the time of her death, and no perſon could poſſibly be intitled to the rights of the wife but himſelf, ſo that her whole property belonged to him: there are ſeveral caſes in which it has been held, that though the eccleſiaſtical court are bound to grant adminiſtration by 31 *Ed.* 3. *c.* 11, yet thoſe perſons have been looked upon in this court as mere truſtees.

Though the eccleſiaſtical court are bound by act of parliament. to grant the adminiſtration to the next of kin of the wife, yet that does not bind the right in this court, for the huſband ſurviving the wife, her whole eſtate veſted in him at the time of her death, and the whole property belonged to him.

Suppoſe the wife had ſurvived the huſband, only ſuch part of the perſonal eſtate of her father as had continued *choſes in action*, would have ſurvived to her, for whatever he had reduced into poſſeſſion, would have been the huſband's.

Had the wife ſurvived the huſband, ſuch part only of her father's perſonal eſtate as had continued *choſes in action*, would have ſurvived to her.

Upon the equity of the ſtatute of diſtributions, this court makes an *adminiſtrator de bonis non* only a truſtee for ſuch part of the teſtator's perſonal eſtate as is undiſpoſed of, for his next of kin, therefore I am of opinion the huſband's repreſentative is intitled to the wife's perſonal eſtate, and that it veſted in the huſband before adminiſtration was taken out.

This court makes *an adminiſtrator de bonis non* only a truſtee for the next of kin, with reſpect to ſuch part of a teſtator's perſonal eſtate as is undiſpoſed of.

The next queſtion is, as to the cuſtom of *London*, it is a certain rule, that where a freeman has children, and no wife, one moiety belongs to them, and the other is the teſtamentary part.

Where a freeman of *London* has children, and no wife, the cuſtom is, that one moiety belongs to them, and the other is the teſtamentary part.

As certain too, that if one child is advanced in the life-time of the father, though not fully equal to the cuſtomary ſhare, yet if the certainty does not appear, then it is an advancement; and the principal reaſon I take to be, is, becauſe it cannot be known what is to be brought into hotchpot.

If one child is advanced in the father's life-time, though not fully equal to the cuſtomary ſhare, yet if the certainty does not appear, it is an advancement.

A gold

A watch and wedding clothes no advancement.

A gold watch and wedding clothes are no advancement of a child.

The quantum of the advancement muſt appear, his conſent is not ſufficient to bar a child of her orphanage ſhare.

A father's conſent to the marriage is not ſufficient to bar her, it muſt appear how much he has advanced her under his own hand.

An advancement muſt be by way of portion in marriage.

An advancement muſt be by way of portion in marriage, or to ſet up in the world, and the things given here are only emoluments.

Though there have been ſome ſtrict caſes determined on the cuſtom of *London*, thoſe have been in regard to freemens wives, and not upon the advancement of children.

Suppoſe the father had given her 50*l.* in money, as he has left but one child more, and the orphanage ſhare amounts to 2000*l.* it would have been going a great way, to ſay even this would have been an advancement: conſider the reaſon of the cuſtom at the time of its firſt eſtabliſhment, it was for the ſake of trade; and though there have been ſome ſtrict caſes determined on the cuſtom of *London*, yet thoſe have been in the caſe of freemens wives, and not upon advancement of children. *Lewen* verſus *Lewen*, *Eq. Caſ. Abr.* 159.

It has been ſaid next, that the maintenance allowed by the father to the daughter after marriage, is an advancement, and that the certainty of the maintenance does not appear.

The queſtion is, whether that can be conſidered as any advancement at all.

Alimony advanced by a father to a child ought not to be conſidered as an advancement.

Now, it has been determined, *alimony* advanced by a father to a child, ought not to be conſidered as an advancement; in the caſe of *Edwards* verſus *Freeman*, *Eq. Caſ. Abr.* 249. " For the court held, " as to the 80*l. per ann.* maintenance, provided for the daughter " by the ſettlement, that it ſhould not be brought into hotchpot, " being only for the education and maintenance of the daughter, " of which the parents were the beſt judges:" that indeed was upon the ſtatute of diſtributions of inteſtates eſtates, but goes upon the ſame reaſon as if it had been a queſtion on the advancement under the cuſtom.

What the daughter of a freeman received from him after her marriage, for maintenance, ſhall be conſidered as a debt due from her to the perſonal eſtate of the father.

The daughter was juſt of age when ſhe married; the queſtion is, whether the maintenance ſhould be conſidered as a debt from the daughter to the perſonal eſtate of her father?

It is reaſonable the repreſentative of the daughter ſhould make ſome allowance for the maintenance, as ſhe has ſo much more out of the perſonal eſtate than her ſiſter by this means; and I do not know

know whether this alimony might not be conſidered as an advancement *pro tanto*, being after her marriage, but, however, it muſt be brought in as a debt to the father's eſtate, and as ſhe thought proper to diſpute his will, I think what ſhe received after her marriage for maintenance, ſhould be conſidered as a debt due from her to the perſonal eſtate of the father.

Lord Chancellor declared, " that *Elizabeth Filmore*, one of the " two daughters of *Boover*, who was a freeman of the city of " *London*, on the evidence in the cauſe, ought not to be taken " to be advanced by her father in his life-time; and that the " plaintiff, as executor of her huſband, who ſurvived her, is inti- " tled to her cuſtomary ſhare of her father's perſonal eſtate: and " ordered, that *Boover*'s perſonal eſtate, after payment of his debts " and funeral expences, be divided into moieties, one moiety " whereof is the orphanage part of the teſtator, he having died " without leaving any wife, the other is his teſtamentary part, and " ſubject to the diſpoſition of his will; and as to the orphanage " part, ordered, that the ſame be divided into two equal ſhares; " and declared that one ſhare thereof belongs to the plaintiff, as " executor of the ſecond huſband of *Elizabeth*; and his Lordſhip " alſo declared, that the defendant, as executor of the teſtator " *Boover*, ought to be conſidered as a creditor of *Elizabeth*, for " the value of her maintenance, which was furniſhed by *Boover* to " *Elizabeth*, after the death of her firſt huſband, and ordered the " Maſter to inquire how much by the year *Boover* deſerved in re- " ſpect of ſuch maintenance, and that the ſame be deducted out " of ſo much as ſhall be coming to the plaintiff for the ſhare of " *Elizabeth*, and be anſwered as a debt to *Boover*'s perſonal eſtate; " and it being admitted that 60*l.* had been paid to the plaintiff's " teſtator before his death, his Lordſhip ordered that ſo much " ſhould be allowed, as a payment of the cuſtomary ſhare of " *Elizabeth*."

Tittenſon verſus *Peat*, *July* 1, 1747. Caſe 191.

THE defendant pleaded an award.

LORD CHANCELLOR.

The only ground to impeach an award is colluſion, or groſs miſbehaviour in arbitrators; for, otherwiſe, being made by the judges of the parties own chuſing, it is final, and binding upon all the parties, or no perſons would ever accept of being arbitrators.

An award being made by judges of the parties own chuſing is final, unleſs there is colluſion, or groſs miſbehaviour in the arbitrators.

A defendant is not obliged to ſet out the account between him and the plaintiff, after an award in his favour relating to that account, for a plea of an award is good not only to the merits, but to the diſcovery.

A plea of an award is not only good to the merits of the caſe, but to the diſcovery; for a defendant to the bill is not obliged to ſet out the whole account between him and the plaintiff, after an award in his favour, in relation to that very account, for that is concluſive to all the parties, till an error is ſhewn in taking the account, or partiality and improper behaviour in the arbitrators; and if any particular error is pretended, the plaintiff ought to charge it with all its circumſtances, nor is he precluded from proving it now, if he has evidence that will amount to it.

Arbitrators are not bound to give notice of the time they intend to meet, or the particular place where.

One objection has been made, that the arbitrators did not give ſufficient notice of the time they intended to meet, or the particular place at which they were to meet, they are not bound to do it, and therefore no objection of that kind is material.

Lord *Hardwicke* allowed the plea.

Caſe 192.

Anon. July 1, 1747.

LORD CHANCELLOR.

The court cannot let a demurrer ſtand for an anſwer.

THE court cannot let a demurrer ſtand for an anſwer, becauſe it is a mute thing.

Caſe 193.

Baſh verſus *Dalway July* 6, 1747.

By ſettlement on the marriage of *H. A.* with *J. C.* in caſe there was no iſſue male, and there ſhould be daughters living at the death of the father, who ſhould attain 21, or be married, then ſuch daughters ſhould have 2000*l* a-piece; there were no ſons but only three daughters; the defendant who was one married *A. D.* and previous to his marriage covenanted to aſſign with his wife's conſent 500*l.* to truſtees, in truſt after the death of *A. D.* and the defendant, to pay it amongſt the children of the bodies of the defendant and *A. D.* and that he ſhould after the marriage aſſign to the truſtees all the money and ſecurities for it then due and belonging to the defendant. *H. A.* died in 1744. *A. D.* in 1745 inteſtate, to whom the defendant adminiſtered and received the 2000*l.* The children, who are a ſon and daughter, have a right to the portion, and decreed to be ſecured for their benefit.

THE truſt term created upon the marriage of the defendant's father and mother was as follows:

That in caſe there ſhould be no iſſue male of *Henry Andrews* by *Jane Cole*, and if there ſhould be iſſue between them one or more daughter or daughters *living at the death of the father, who ſhould attain twenty-one or be married*, then ſuch daughter or daughters ſhould have a portion or portions of two thouſand pounds apiece.

There were no ſons of the marriage, but three daughters, of which the defendant was one, and previous to her marriage with *Alexander Dalway*, there was a covenant on his part, which recited,

cited, that *Elizabeth Uthwite* was indebted to the defendant *Margaret Andrews*, the daughter of *Henry Andrews* by *Jane Cole*, in five hundred pounds on bond, and that ſhe, with the conſent of the ſaid *Alexander Dalway*, did aſſign to two truſtees the five hundred pounds, in truſt as to the intereſt for the life of the huſband, and after his death to receive it for her life, and after both the huſband and wife's deaths, to pay the five hundred pounds and intereſt due amongſt all and every the child and children of the bodies *then living* of *Margaret* and *Alexander Dalway*, and in default of ſuch child or children, then to pay the five hundred pounds to the executors of the ſurvivor of the father and mother, and that the huſband ſhould after the marriage, on the requeſt of the truſtees, grant and aſſign to the truſtees all and every the ſum and ſums of money, and ſecurities for the ſame, then due and owing, and *belonging to Margaret Andrews*, from any perſon or perſons, and which *Margaret Andrews* was intitled unto in any reſpect whatſoever.

Henry Andrews died in 1744.

In 1745. Mr. *Dalway* died inteſtate, the defendant *Margaret* adminiſtered, and receives the two thouſand pounds.

The plaintiff *Baſh*, as *prochein amy* to the children of the defendant, who are one ſon and one daughter, brought his bill to have the two thouſand pounds ſecured for the benefit of the children.

LORD CHANCELLOR.

I am of opinion the plaintiffs, the children, have a right to the portion.

The firſt queſtion is, whether the portion of two thouſand pounds under the father's marriage ſettlement, at the time of the defendant's marriage, was a contingent portion.

Secondly, If it has happened, whether the wife is bound by the covenant of the huſband only under the articles made on her own marriage.

The precedent part of the articles include a ſmall part of the real eſtate, the now plaintiffs being heirs of the body; that eſtate certainly is in the power of the mother in point of law, and veſts in the mother in tail; but in this court being under articles is to be carried into ſtrict ſettlement to the wife for life, to the firſt and every other ſon in tail, and in default of iſſue male to daughters.

Though under articles the real eſtate was in the mother's power, and veſted in her in tail, yet in this court is to be carried into ſtrict ſettlement to the wife for life, to the firſt, &c. ſons in tail, and in default of iſſue male to daughters.

Vide the truſts as to the 500 *l. and after both the huſband and wife's deaths, to pay the* 500 *l. and intereſt due amongſt all and every the child and children of the bodies then living of Margaret and Alexander Dalway.*

That is, after the death of father and mother, for the benefit of the children of the marriage, ſuch as ſhould be ſurviving at the death of the father.

Then follows the laſt clauſe, that the huſband ſhould after the marriage, *&c. vide the words.*

It has been ſaid on the part of the defendant the mother, it is not ſufficient to intitle the plaintiffs to the two thouſand pounds, for it was for ſuch children *as ſhould be living at the death of the father.* That it reſted in contingency, whether they would ſurvive the father; and in ſtrictneſs of law it was not due and owing to *Sarah Andrews* in the life-time of her father.

But take it abſtracted from the ſenſe of *due and owing*, and it was *belonging* to her, for it was a natural proſpect that ſhe ſhould ſurvive the father, and if the word *belonging* means any thing excluſive from the words *due and owing*, it does mean belonging to her after the huſband's death.

There are ſtrong words which follow, *viz. and which Margaret Andrews was intitled to in any reſpect whatſoever.*

Had any body aſked what portion has the daughter under *Henry Andrews*'s ſettlement? the anſwer would have been, two thouſand pounds on the death of the father; then it is in the nature of a ſecurity for the daughter by being veſted in the truſtees to wait the contingency, not barely a condition or a right where nothing at all veſted; but here was a term for years in truſtees, and *quoad* this truſt they were truſtees for her, and they might have been guilty of a breach of truſt, ſo that ſhe had a right at the time of the marriage.

She married an officer who had nothing, and it would indeed have been very extraordinary ſhe ſhould, at the time ſhe was providing and taking care for herſelf, overlook this, when ſhe might have been intitled, on both her ſiſters dying, to the whole ſix thouſand pounds.

I am of opinion on the generality of the words of the covenant this ſum was included.

Secondly, If the contingency has happened, whether the wife is bound by the covenant of the huſband only under the articles made on her own marriage.

A wife is bound by the huſband's covenant only under articles made on her marriage.

It has been inſiſted on the part of the defendant, this is the covenant of the huſband only, that therefore his repreſentatives alone are bound.

I cannot ſay but there might have been an event which would have given it to the wife, *viz.* if her huſband had died in the life-time of the father.

But the death of the father happening in the life-time of the defendant's huſband alters the caſe; I am not obliged to give any opinion as the huſband has not aſſigned this contingency of the wife's, but I am rather inclined to think the husband would not have had a right to aſſign it.

As to the caſe of *Theobald* verſus *Duffoy*, *M. T.* 11 *Geo. Mod. Caſ. in Law and Eq.* 2 *Part* 101. it turned on the joining of the wife, by the conſent of her friends, and in an aſſignment of a term to a fair purchaſer; but it has been frequently determined, that a huſband may aſſign a wife's *choſe in action* for a valuable conſideration; but what does that turn upon? Why, the husband's right to ſell.

Frequently determined that a huſband may aſſign a wife's *choſe in action* for a valuable conſideration.

The husband here ſurvived the father, ſo that he had a right to call upon the repreſentatives of the father, or the truſtees, to raiſe it.

Could the wife have prevented him from getting the money, unleſs ſhe had brought a bill by her *prochein amy* for her ſettlement, and even then it could not have been for her own benefit only, for the children muſt likewiſe have had it ſettled on them, for the court would not have decreed a partial performance of covenants, but the whole.

I am of opinion the children too had a right in the life-time of their father, to have brought a bill by a *prochein amy* to have their intereſt ſecured.

The death of the husband makes no alteration, it muſt ſtand juſt in the ſame right as it did at the death of the wife's father, for the intereſts of the wife, husband and children were fixed, and whichever had brought a bill, it muſt have been ſettled to thoſe uſes, and *the rather as there is real eſtate.*

The huſband's death makes no alteration, but muſt ſtand in the ſame right as it did at the death of the wife's father, for the intereſts of the wife, huſband and children were then fixed.

What is covenanted to be done, is in this court conſidered as done.

The queſtion here truly depends upon this general rule of the court, that what is covenanted to be done, is conſidered as actually done, and therefore as the right had accrued to the husband in his life-time, what is prayed by the plaintiffs, his children, is concomitant to that right which veſted in their father.

Lord *Hardwicke* decreed the two thouſand pounds ſhould be ſecured for the benefit of the children.

Caſe 194. *Ekins* verſus *Dormer*, *July* 20, 1747.

LORD CHANCELLOR.

A grant from Queen *Mary* of *decimas bladorum & fœni & omnes alias decimas*, theſe general words are not ſufficient to bar the rector of his common right of tithes, unleſs expreſly ſtated what was the right of the crown.

THE bill was brought for tithes in kind of hay, of a moiety of the manor of *Shipton*, but comes in an imperfect manner before the court.

The plaintiff as rector is intitled to all tithes, unleſs there is ſome bar, as a *modus*, compoſition, *&c.*

The queſtion here is as to a moiety of the privy tithes of the demeſnes of a manor, and the tithe hay, whether the rector is intitled in point of pernancy to the whole, or the defendant is intitled to this moiety as well as to the tithes of corn and grain under a grant from the crown, the firſt year of Queen *Mary*, in which were theſe general words, *decimas bladorum & fœni & omnes alias decimas.*

I do not think any ſtreſs can be laid on thoſe general words, and take them in their utmoſt extent, are not ſufficient to bar the rector of his common right, unleſs it had been expreſly ſtated what was the right of the crown; and in making out the grant, the drawer might probably, at the requeſt of the grantor, put in theſe general words.

There is no pretence of payment of the privy tithes to the Lord of the manor. I am of opinion theſe general words are by no means ſufficient to ſhew a right in the defendant againſt the rector.

The next queſtion is as to the two *moduſſes*.

The firſt objection was, as to the manner of introducing them in the cauſe, for that in reſpect to the croſs bill they are not ſet out with any certainty, and to be ſure they are not, and therefore the croſs bill muſt be diſmiſſed; but a different conſideration ariſes upon the original bill, notwithſtanding the particular *moduſſes* are not mentioned in the bill, nor particularly pleaded by the anſwer, yet as the plaintiff's own witneſſes ſhew a reaſonable ground for a *modus*,

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it would be going too far to ſay that an account of tithes ſhould be decreed, where even upon the plaintiff's evidence it appears there is a *modus*.

I am of opinion therefore the court is bound to take notice of the two *moduſſes*, the ten ſhillings for hay, and five pounds for the privy tithes of the demeſne lands.

As to the firſt, it is mentioned to be a *modus in decimando* in the receipt for it from the parſon, but the receipt for the five pounds calls it a compoſition.

It has been ſaid, that the *moduſſes* are too rank, and that the ten ſhillings for hay particularly are ſo, becauſe the *modus* for the tithes of corn is but three and thirty ſhillings.

No argument at all is to be collected from thence, becauſe leſs might be in tillage at that time than there is now.

The objection is ſtronger as to the five pounds for the privy tithes of the demeſnes; undoubtedly it is a pretty large ſum, and it has been inſiſted the whole value of the manor is but fifteen pounds, as appears from an ancient ſurvey in *Henry* the 8th's time, where it is called *firma* of *Shipton*, which implies a rent reſerved.

But I can no more infer from thence, that this was the value of the rack rents of the manor in *Henry* the 8th's time, than I can at preſent the real value of a biſhop's manor from the rent reſerved in a leaſe of it.

In a caſe that came by appeal to the Houſe of Lords in Lord *Talbot*'s time relating to the pariſh of *Chedingfold* in the county of *Surrey*, the Lords reverſed a decree of the court of Exchequer for being too haſty in rejecting a *modus* as too rank, and ſaid, it was taking too much upon them to determine it to be no *modus* upon ſuch kind of evidence which was not concluſive evidence againſt a *modus*, and directed an iſſue to try it.

The Houſe of Lords reverſed a decree of the Exchequer for being too haſty in rejecting a *modus* as too rank, it being too much for that court to determine it to be no *modus*, where the evidence was not concluſive againſt it, but preſumptive only.

Another objection was, that the five pounds is no *modus* at all, for in the receipt from the parſon it is mentioned to be an ancient compoſition.

I do not know the abſolute diſtinction between an ancient compoſition and a *modus*; there may be a difference between a compoſition

An ancient compoſition is ſynonymous with a *modus*, unleſs ſomething be ſhewn that breaks in upon its *immemorialneſs*.

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tion that is not beyond the memory of man and a *modus*, but unleſs ſomething be ſhewn that breaks in upon the immemorialneſs of it, it is ſynonymous with the *modus*.

A real compoſition is where an agreement is made with a parſon or vicar, with the patron and ordinary's conſent, that ſuch lands ſhall be diſcharged from the payment of tithes *in ſpecie*, on account of a recompence made to the parſon or vicar out of other lands.

There is indeed a difference between *a real compoſition* and a *modus*, for a real compoſition is when an agreement is made with a parſon or vicar, with the conſent of the patron and ordinary, that ſuch lands for the future ſhall be diſcharged from the payment of tithes in ſpecie, by reaſon of a recompence made to the parſon or vicar for them out of other lands; but a *modus* is nothing more than an ancient compoſition between a lord of a manor and the owners of the land in a pariſh and rector, which gains ſtrength by time.

Where there is no objection in point of law to *moduſſes*, nor tithes in kind ever received within the memory of man, the court will not decree an account of tithes.

I am of opinion here is a conſiderable foundation laid before the court for the two *moduſſes*, the one of ten ſhillings, and the other of five pounds, and therefore the court cannot decree an account of tithes where there is no objection in point of law againſt them, nor any pretence there has ever been tithes in kind received within the memory of man, and therefore iſſues muſt be directed to try theſe two ſums.

The plaintiff being in court, and declining to try the *modus* of ten ſhillings for tithe hay of the manor, and five pounds for privy tithes of the demeſne lands, his Lordſhip decreed an account of what was due for thoſe annual payments.

Caſe 195. *Townſend* verſus *Lowfield*, *July* 24, 1747.

LORD CHANCELLOR.

Where there is no poſitive proof of fraud, circumſtances of ſuſpicion are not ſufficient for the court to ground a decree upon; all they can do in a matter of account is to give the plaintiff leave *to ſurcharge and falſify*.

THERE had been a former cauſe in which the defendant was plaintiff and the plaintiff defendant, and a decree for an account; and though this is not a bill of review, yet as it is a bill in aid of an account, it is not improper.

The bill charges fraud in not actually and *bonâ fide* advancing to the plaintiff, or other perſons for his uſe, the ſums defendant now claims before the Maſter, and prays among other things the court will direct the defendant *Lowfield* to be examined upon interrogatories, and to be allowed no ſum but what he ſhall produce receipts for, or proved by witneſſes who were preſent atthe time they were advanced.

No actual fraud has been proved by the plaintiffs witneſſes on the defendant, and circumſtances of ſuſpicion are not ſufficient for this

court to ground a decree upon; and as to what is prayed by the bill, the court never gives ſuch directions, unleſs groſs fraud is actually proved upon the defendant, as was the caſe of Sir *Oliver Aſkcomb* verſus *Greenoway*.

The Houſe of Lords too reverſed the decree in *Johnſon* verſus *Johnſon*, which came originally before Lord *Lechmere* in the dutchy court for this very reaſon; the bill in that cauſe was brought by the repreſentative of the mortgagor to redeem a mortgage, and the defendant by his anſwer inſiſted on payment of two hundred and thirty pounds, the principal ſum of the mortgage, and ten pounds more indorſed on the mortgage deed, as *bonâ fide* lent, and to have an allowance for money in repairs, and alſo other allowances. On the 29th of *November* 1725. Lord *Lechmere* decreed that the plaintiff ſhould redeem on payment of ſuch principal money and intereſt, as ſhould be proved by the defendant to have been actually and really lent and paid by him to the mortgagor, for diſcovery whereof the defendant was to be examined upon interrogatories, *whether any and what ſum and ſums were at any time, and when, where, and in whoſe preſence actually and really lent and paid by the defendant, or on his account, to or for the account of the mortgagor*.

There were proofs in the cauſe, that the greateſt part of the money was paid by the defendant to the mortgagor at the time the mortgage deed was executed, and that the mortgagor at the time he ſigned the deed declared he had received the whole two hundred and thirty pounds; therefore the appellant inſiſted the reſpondent ſhould have been let into redemption on the uſual terms, and that the appellant ought not to have been decreed to make any other proof of the actual payment of the conſideration money; and that it was ſtill harder upon the appellant, as the mortgagor is dead, and the appellant deprived of having any diſcovery, by the examination of him upon oath, of the money advanced, and prayed the decree might be rectified in this particular.

It came before the Houſe of Lords on the 18th of *March* 1727. on an appeal of the defendant, and the decree below was reverſed becauſe the mortgagor was dead, and the appellant had loſt the benefit of his examination, and becauſe *no actual fraud* had been proved on him.

Here one *Haughton* is dead, to whom the defendant paid ſums for and on account of the plaintiff Mr. *Townſend*, and therefore the defendant cannot have the benefit of his examination, nor is there in this caſe any poſitive proof of fraud; therefore I ſhall decree only that the plaintiff be at liberty to ſurcharge and falſify.

Caſe 196. *Edwards* verſus *Lewis*, *July* 27, 1747.

In the caſe of leaſes from colleges and eccleſiaſtical bodies, if the leſſee in the new takes in the right of him who was the owner of the old, he muſt take ſubject to all the equity to which the original leaſe was liable.

DAVID *Edwards* by his will gave his real eſtate to his wife for life, remainder to the plaintiff, and after deviſing the perſonal eſtate in the firſt place, for payment of his debts, he bequeathed the reſidue to his wife, who, on his death, entered upon a leaſehold eſtate under Queen's college, and then intermarries with the defendant, who, after her death, takes out adminiſtration *de bonis non* to the firſt teſtator, but finding the outgoings of the leaſehold exceeded the profits, and being of no ſervice but to the plaintiff, his freehold lands being intermixed with the leaſehold, neglected to apply for the renewal, but tacitly conſented the plaintiff ſhould renew, who accordingly gets a new leaſe from the college, the old one being ſuffered to run out.

The queſtion here is, ſuppoſing the reſt of the perſonal eſtate ſhould fall ſhort to pay the teſtator's debts, whether the plaintiff will be liable to pay thoſe debts by virtue of his being in poſſeſſion of theſe leaſehold premiſſes.

LORD CHANCELLOR.

I am inclined to be of opinion, that if the perſonal eſtate of the teſtator falls ſhort, the leaſehold eſtate in the hands of the plaintiff is ſubject to pay the creditors the reſidue of their debts, or, otherwiſe, by this neglect of the adminiſtrator, or by colluſion between him and the plaintiff, the creditors might be defeated of their juſt debts; but as it is probable in taking the account of the teſtator's perſonal eſtate, there may be ſufficient to pay the teſtator's debts, without having recourſe to the leaſehold, I ſhall not give an abſolute opinion, but only obſerve in general, that in caſe of leaſes from colleges and eccleſiaſtical bodies, there is nothing the court has more adhered to, than if the tenant, who in a conſtant courſe of letting is intitled to a college leaſe, or any perſon claiming from that tenant, apply, either before it expires, to renew, or after it is actually expired, and ſurrenders the old leaſe for that purpoſe; yet, whether the new leaſe is granted to the ſame perſon, or any other, if the leſſee in the new takes in the right of him who was the owner of the old leaſe, he muſt take ſubject to all the equity to which the original leſſee was liable.

Lord Chancellor " ordered an account to be taken of the teſta-
" tor's perſonal eſtate, and reſerved the conſideration how far the
" renewed leaſe of the lands held of Queen's college in *Cambridge*,
" is liable to be applied towards ſatisfaction of the teſtator's debts
and

" and legacies, till after it ſhall be ſeen whether the funds before " mentioned are ſufficient to pay his debts and legacies.

Drakeford verſus *Wilks and others*, *July* 28, 1747. Caſe 197.

If a legatee promiſes a teſtator that, in conſideration of a diſpoſition in favour of her, ſhe will do an act in favour of a third perſon, ſhe who undertook to do the act muſt perform.

MRS. *Drakeford*, an intimate friend of the plaintiff's had made a will, and thereby deviſed a bond of three hundred and ſixty pounds and upwards to the plaintiff; the teſtatrix was afterwards induced to make a new will, and gave this bond to Mrs. *Ann Wilks*, and made her executrix, but obliged her to promiſe that ſhe would, after her own death, give it to the plaintiff.

The teſtatrix died, and *Ann Wilks* proved her will, and about two months after the death of the teſtatrix, made a deed of gift of the bond to the plaintiff, to take place after her death, and frequently declared, that ſhe would not cheat the plaintiff, and that ſhe did it in regard to the promiſe ſhe made the teſtatrix.

Upon the death of Mrs. *Ann Wilks*, the bond came into the hands of the obligor, who was her brother, and repreſentative, and upon his refuſing to pay it, the plaintiff brought her bill, to compel the payment of the bond, and offered to read evidence to eſtabliſh the fact, but it was inſiſted by the defendant's council this was to give parol proof to overturn a written will, and that the bond, by the will of Mrs. *Drakeford*, had been given abſolutely to *Ann. Wilks.* who was made executrix alſo, and that it was within the miſchief the ſtatute of frauds and perjuries intended to prevent.

The court over-ruled the objection; and the fact, with all its circumſtances, was very fully proved.

LORD CHANCELLOR.

The firſt queſtion is, whether there is any foundation to relieve the plaintiff on the truſt and confidence ſet up by the bill.

The ſecond queſtion is, whether the court will aſſiſt in the caſe of a voluntary deed.

I will conſider the laſt queſtion firſt, in order to remove it out of the way.

The defendant's council have made two objections.

Firſt, Suppoſing it ſtood abſtracted from weakneſs and inſanity in *Ann Wilks*, it is a mere voluntary deed, and the court will not aſſiſt the plaintiff to carry it into execution.

A perſon may as well make a diſpoſition by deed to take place after her death as by will, and ſuch a deed has been decreed to be good in ſeveral inſtances, as againſt perſons ſtanding in repreſentation to the donor, otherwiſe as againſt creditors.

This is of no weight, becauſe againſt any perſon who ſtands before the court merely as the repreſentative of Mrs. *Wilks*, it is a good diſpoſition, for a perſon may as well make a diſpoſition by deed to take place after her death, as by will: this court have in ſeveral inſtances decreed ſuch a deed to be good, as againſt perſons ſtanding only in repreſentation, to the donor, as being volunteers alſo, but would not be good againſt creditors.

The ſecond objection was, Inſanity in Mrs. *Ann Wilks*.

No evidence has been laid before me of actual impoſition, circumvention, or fraud, and the deed of gift appears to be an act conſiſtent with every other act ſhe has done.

It was inſiſted, the preparing the draught of the deed to give it in the life-time of Mrs. *Wilks*, inſtead of after her death, is an evidence of impoſition.

But it appears clearly to be the miſtake and ignorance of the drawer, for it was altered immediately, and ſubmitted to, but though there ſhould be no fraud; yet if Mrs. *Ann Wilks* was incapable of making any diſpoſition at all, it is void.

If it had reſted here, and this had been the whole of the caſe, I ſhould have ſent it to be tried on the inſanity, notwithſtanding ſhe does not appear on the evidence to be inſane without lucid intervals; but I will not ſend it to trial, becauſe the firſt point is with the plaintiff, which puts an end to the ſecond queſtion.

It has been truly ſaid by Mr. *Wilbraham*, it is dangerous to ſet up parol truſts of perſonal eſtate, as well as real eſtate ſince the ſtatute; and that the court will not ſuffer parol declarations to be ſet up in oppoſition to the will.

But if there is a declaration and undertaking by a legatee to do an act, in conſideration of the teſtator's deviſing to that legatee, I know no caſe where the court has not decreed it, whether ſuch an undertaking was before the will has been made, or after.

The caſe of *Thynn* verſus *Thynn*, in 1 *Vern.* 296. and *Jones* verſus *Nabbs*, *Paſch.* 1718. *Eq. Caſ. Abr.* 405. and *Kinſman* verſus *Kinſman*, 5 *Q. Ann*, mentioned in *Jones* and *Nabbs*, depended upon the undertaking and promiſe of the perſon who was to receive benefit by the will.

This is not ſetting up any thing in oppoſition to the will, but taking care that what has been undertaken ſhall have its effect: a will being ambulatory, if the teſtatrix has a converſation

with a legatee, and the legatee promiſes that, in conſideration of the teſtator's diſpoſition in favour of her, ſhe will do an act in favour of a third perſon, and the teſtatrix lets the will ſtand, it is very proper the perſon who undertook to do the act ſhould perform, becauſe, I muſt take it, if Mrs. *Ann Wilks* had not ſo promiſed, the teſtatrix would have altered her will.

Therefore I am of opinion, that ſuch an undertaking by an executor, or reſiduary legatee, either before or after the will is made, ought to have its effect.

The next queſtion is, whether this has been ſufficiently proved?

I think it has very clearly, for even ſome time after the will had been made, Mrs. *Ann Wilks* declared, ſhe would not defraud the plaintiff, and there is a full evidence likewiſe of the undertaking, by which ſhe bound her own conſcience.

An account muſt be taken of the principal and intereſt due on the bond, and with coſts, becauſe the defendant is the debtor on the bond; there is no occaſion for a circuity to decree the bond to be delivered up, in order to have a ſuit at law for it, becauſe, as the defendant *Wilks* is the debtor, I can decree a payment of the debt; and his Lordſhip did decree accordingly.

Caverley verſus *Dudley and Biſco*, *July* 29, 1747. Caſe 198.

LADY *Catharine Howard* by her will, dated the 7th of *July* 1727, gave all the reſt and reſidue of her eſtate, real and perſonal, to Mr. *Biſco*, in truſt to pay the produce thereof to the defendant Lady *Dudley* for life, for her ſeparate uſe, excluſive of her huſband; and after her daughter's death, gave ſuch reſidue to the child or children of her daughter, and made the defendant *Biſco* executor.

S. C. gave the reſidue of her eſtate in truſt to pay the produce thereof to Lady *Dudley* for life, for her ſeparate uſe, and after her death, to her children, and appointed *B.* executor. Lady *Dudley* wanting money, took up one hundred and twenty pounds of *B.* and granted him an annuity of twenty pounds during her life, and directed *B.* to pay himſelf out of the produce of the reſidue of *L. C. H.*'s eſtate, by quarterly payments. *Lady Dudley might contract to raiſe money by loan, but not by annuity, as it is too large an anticipation, and therefore ſhe was allowed to redeem the annuity from the beginning, though made irredeemable.*

The defendant Lady *Dudley* has received yearly three hundred pounds, or thereabouts, from the defendant *Biſco*, in part of the produce of the reſidue of the teſtatrix's eſtate, but, wanting money, applied to the plaintiff, and offered to ſell him an annuity during her life, at ſix years purchaſe, the plaintiff conſented to it, and agreed to purchaſe an annuity of twenty pounds during the defendant's life, for one hundred and twenty pounds, and by deed of appointment,

pointment, dated the 20th of *December* 1743, in conſideration of one hundred and twenty pounds paid by the plaintiff to Lady *Dudley*, ſhe granted an annuity of twenty pounds to the plaintiff during the defendant's life, and directed *Biſco* to pay the ſame out of the produce of the reſidue of the eſtate of Lady *Howard*, by quarterly payments.

The defendant *Biſco*, the truſtee, refuſes to pay the arrears of the annuity in this manner, inſiſting that the produce of Lady *Catharine Howard*'s eſtate is by will to be paid into the hands of Lady *Dudley*, and no other perſon.

The bill was brought in 1745, for an account of the teſtator's perſonal eſtate, and to be paid the arrears of the annuity and growing intereſt, and that the future payments may be ſecured, and the defendant *Biſco* be reſtrained from paying any further ſums of money to Lady *Dudley*.

LORD CHANCELLOR.

I am of opinion it was not the intention of the teſtatrix that Lady *Dudley* ſhould anticipate the produce of her eſtate by raiſing money upon it, and words ſhould have been thrown in to reſtrain her from doing it, but as there are no ſuch words in the will, ſhe might contract for raiſing a ſum of money by way of loan, but not by way of annuity for her own life, as it is too large an anticipation; and therefore directed an account to be taken of Lady *Catharine Howard*'s eſtate, and out of the produce, gave the defendant Lady *Dudley* leave to redeem the annuity from the beginning though made irredeemable; and that, from the time of filing the bill, the annuity ſhould ceaſe; and that the payments already made of the annuity ſhould be applied in payment of the intereſt, in the firſt place, and afterwards in ſinking the principal; and the reſidue of the principal his Lordſhip directed to be paid out of the produce of the teſtatrix's eſtate.

Caſe 199. *Baker* verſus *Hart*, *July* 31, 1747.

The court, for the more ſolemn determination, in ſome caſes direct a ſecond trial, without ſetting aſide the firſt verdict, for otherwiſe the defendant would loſe the benefit of urging the firſt verdict in his favour.

THE cauſe was heard before Lord Chancellor in *May* 1746, and iſſues were then directed: it came on now upon the equity reſerved, and upon an application for a new trial.

LORD CHANCELLOR.

Upon the ſecond iſſue before Lord Chief Juſtice wills, the jury found that *William Baker*, the father of the plaintiff, was not the heir of Admiral *Hoſier*; but it has been certified to me by the Chief Juſtice, that the finding of the jury depended upon the verdict given on the firſt iſſue.

The application now is, not to ſet aſide the verdict, but for another trial.

Where it is a matter of inheritance, the court, without ſetting aſide the firſt verdict, for the more ſolemn determination, in ſome caſes direct a ſecond trial, and if the court direct ſuch trial without ſetting aſide the former verdict, then the firſt may be given in evidence, and will have its weight with the jury, and therefore it is a very material difference to the parties, becauſe if I was to direct a trial, on my ſetting aſide the firſt verdict, the defendant would loſe the benefit of urging the firſt verdict in his favour at another trial.

In many caſes, where it is a matter of inheritance, and not actually concluſive, the court have not directed a new trial, but where the inheritance will be abſolutely bound, the court has granted a new trial.

In the preſent caſe, it is inſiſted, the inheritance will be bound, and ſaid, in anſwer to that, the plaintiff may try it over again in ejectment, if ſo, where is the prejudice to the defendant, if the court ſhould direct it to be tried again; for the leaving it to the plaintiff to bring an ejectment, will not quiet the queſtion, becauſe the defendant will be intitled to bring a bill here for a perpetual injunction.

In the caſe of *Atcherley* verſus *Vernon*, Lord Chancellor *King* granted an injunction, and at the hearing of the cauſe made it perpetual; the court conſidering the fee-farm rents deviſed by the will of Mr. *Vernon*, the chancery council, as part of the truſt eſtate, he decreed accordingly, and it was upon this ground the court granted a perpetual injunction, becauſe truſts are the proper juriſdiction of this court, and it would be tripping up the heels of their juriſdiction if the parties were ſuffered to proceed at law, and by that means overturn the decree of this court.

In the caſe upon Sir *Thomas Coleby*'s will, the court had decreed a partition of the lands, *&c.* ſo that bringing an ejectment there was

was equally in the conſequence defeating the decree of this court.

If the plaintiff ſhould bring an ejectment, and ſhould ſucceed in it, though a direction has been given here for a receiver, and to account and pay the profits, he might alſo bring an action for thoſe very meſne profits, *&c.*

Here it was a queſtion of legitimacy, but then it was a legitimacy ſet up after the death of the father, and no pretence of cohabitation, and all the facts ſpeaking contrary to cohabitation, and to a marriage, for ſhe ſuffered herſelf to be arreſted in the name of *Pritchard*, lay in gaol for ſome time, and was cleared at laſt by the inſolvent debtors act; this circumſtance, though not concluſive, yet is material againſt the marriage; the daughter likewiſe was placed out by the pariſh of St. *Giles*, as a baſtard child, and after being uſed by a father in this manner, it is very extraordinary if ſhe had really been legitimate, that ſhe did not compel the father to maintain her.

This queſtion of legitimacy is very different from that, where there had been a cohabitation, as was the caſe of *Stapleton* verſus *Stapleton*, and no doubt at all in that caſe but there had been a marriage; the only queſtion was, as to the time, whether they were married before the birth of the eldeſt ſon.

The verdict obtained in a former trial before Lord Chief Juſtice *Eyres*, was given in evidence upon this trial before Lord Chief Juſtice *Wills*, who certifies it had conſiderable weight with the jury, and if there is any thing that impeaches the evidence, on which the firſt verdict was given, it will be very material, for the verdict before Lord Chief Juſtice *Eyres* turned on a clergyman's evidence, one *Phillips*, who ſwore he chriſtened the child as the child of Admiral *Hoſier* and his wife, but on his death bed confeſſed, in great agonies, that he was ſuborned to give this evidence, on the defendant's mother giving him a bond of one hundred pounds to ſwear this fact.

Where *a verdict* is given in evidence, it is neceſſary for the perſon who gives it in evidence to ſhew on what title it was obtained; and on the other ſide, they are at liberty to ſhew on what kind of proof it was given.

Where a guardian has been guilty of ill practice in the proſecution of a ſuit, to obtain a verdict, though it was not the act of the infant herſelf, yet that male practice may be given in evidence.

The defendant Mrs. *Hart* was, at the time of the trial before Lord Chief Juſtice *Eyres*, an infant, but if it is ſhewn that the mother acted as guardian for her, and was guilty of ill practice in the

proſecution

proſecution of the ſuit, to obtain the verdict, though it was not the act of the infant herſelf, that male practice may be given in evidence, or otherwiſe ſuch verdict may ſtand unalterable, and not liable to be impeached, and mankind would be in a very bad ſituation.

But this was not the caſe, for the defendant *Hart* was married at the time, and her huſband, as ſeiſed in her right, proſecuted the ſuit, and was a co-obligor in the bond to *Phillips*, as a reward to him for ſwearing in the cauſe.

If the circumſtance of *Phillips*'s perjury had appeared to the court of Common Pleas, it muſt have had great weight, the defendant's huſband being ſeiſed in her right when that ejectment was brought, and being guilty of male practice, this might certainly have been given in evidence.

This takes off the force of the objection, that there are two concurrent verdicts for the defendant.

Another objection raiſed for the plaintiff was, that they were not permitted to give in evidence the depoſition of one *Woolnoth*.

If there was a difference in the ſpelling of *Woolnoth*'s name, that takes away the preſumption of the identity of the perſon at the former trial, and the court were right in refuſing it, unleſs the party producing it would ſhew him to be the ſame perſon, but *Woolnoth*'s is ſo looſe an evidence, that I ſhould not be inclinable to grant a new trial on ſuch an ingredient only.

Another objection taken by the defendant was, that there has been a conſiderable delay in the cauſe, and that nine or ten witneſſes examined at the former trial in *Kent*, are ſince dead, that gave material evidence for the defendant *Hart*'s mother, who called herſelf the wife of Admiral *Hoſier*.

As to that, the plaintiff brought a new ejectment ſoon after, and had judgment by default, and the defendants, by colluſion, prevailed on the tenants to attorn.

As to the death of witneſſes, they are mortal, and no perſon can keep them alive, but this circumſtance had weight with the jury in the laſt trial, and they conſidered the evidence then given for the defendant with the greater benignity and indulgence, and to be ſure is a material ingredient for a court and jury to take into their conſideration where there is a great length of time between the two trials.

The marriage is extremely improbable, the licence was taken out by the woman, the intended huſband in it called *Francis Hoſier*, mariner, at the ſame time he was a captain of a firſt rate man of war; it is ſaid, in excuſe, he had a mind to conceal his marriage, but it is much more likely ſhe had it filled up in this manner to conceal it from the whole world, in order to ſet up a marriage after his death, and at this rate any man might be married to a common woman.

In the eccleſiaſtical court the defendant's mother was determined not to be the wife of Admiral *Hoſier*, upon a conteſt there, relating to the right of adminiſtration to his perſonal eſtate, and yet, upon a trial at law relating to the real eſtate, was found to be his wife.

In the eccleſiaſtical court a teſtator was determined to be *compos mentis*, and that ſentence affirmed before the delegates; afterwards, on a trial at law in relation to the real eſtate, he was found *non compos*; an application to the Houſe of Lords to reverſe the ſentence, but the petition was diſmiſſed, becauſe that ſentence was deciſive, and no appeal lies from it.

It is very much to be lamented that there ſhould be ſuch different determinations in two concurrent juriſdictions; but though it is a great abſurdity, there is no way to make them uniform; I know but one caſe where this variation of judgment has happened, and that was the caſe of *Maxwell* and Lord *Mountague*; there a teſtator was determined to be *compos mentis*, upon a ſuit in the eccleſiaſtical court, and that ſentence was affirmed in the court of delegates: afterwards, on a trial at law in relation to the real eſtate deviſed by the will, the teſtator was found *non compos*, and then an application was made to the Houſe of Lords by petition, to reverſe the ſentence in the court of delegates, in order to make the determinations uniform, but the Houſe of Lords diſmiſſed the petition, becauſe the ſentence of the delegates is deciſive, and no appeal lies from it.

A trial at bar directed in the court of King's Bench, on the party's who prayed a trial at bar conſenting, that if he prevailed, he would be contented with *niſi prius* coſts, or otherwiſe it would not have been granted.

I am of opinion, on the plaintiff's paying the coſts to the defendant, that he ſhould be at liberty to lay all theſe circumſtances before a jury; but the queſtion will be, how it ſhould be tried? I will direct a trial at bar in the court of King's Bench, provided the party praying a trial at bar, will conſent, that if he prevails, he will be contented with *niſi prius* coſts, and on thoſe terms, I am of opinion, this matter ſhould be tried again; and Lord *Hardwicke* gave directions accordingly.

Head

Head verſus *Head*, *May* 20. 1747.

Caſe 200.

THE bill was brought for the arrears and growing payments of an annuity of four hundred pounds a year from the defendant Sir *Francis Head*, purſuant to an agreement between the plaintiff and the defendant for that purpoſe, and to eſtabliſh the agreement for a ſeparate maintenance.

The depoſition of a wife of a *prochein amie* cannot be read, as the huſband is liable to coſts.

Mr. Attorney General for the plaintiff, cited the caſe of *Oxenden* verſus *Oxenden*, 2 *Vern.* 493. and *Seeling* verſus *Crawley*, *id.* 386. and *Angier* verſus *Angier*, *Prec. in Chan.* 496.

The defendant's council objected to the reading the depoſition of *Jane Genew*, the wife of *John Genew*, as her huſband is the *prochein amy*, and liable to coſts.

Lord Chancellor allowed the objection.

The council for the plaintiff read next Sir *Francis Head*'s letter to Sir *William Boyce*, Lady *Head*'s father, being an agreement to pay Lady *Head* four hundred pounds a year, dated *Auguſt* 25, 1740. which was as follows:

Dear Sir *William*,

" I ſhall always with pleaſure remember my dear *Quinette*'s " many good qualities, and be far from imputing her misfortunes " as faults, but as it will be much eaſier for me not to be a conſtant " witneſs to what we can neither of us help, *I am willing to ſend* " *her* 100l. *and no more*, *between this and* Chriſtmas next, *and to* " *continue her ſuch quarterly payments*, *when it ſhall beſt ſuit my con-* " *venience*, *ſo long as we ſhall continue ſeparate*, with this one proviſo, " that if you ſhould think at any time my pretty *Gabrielle* ſhould " want any kind of inſtructions, ſhe may be ſent to me, who will " always receive and inſtruct her as my child, according to my " parental duty; and have nothing further to add but my prayers " that we may all enjoy quiet here, and everlaſting quiet hereafter, " and am

Dear Sir *William*,

Your moſt dutiful ſon, *&c.*

Francis Head.

The

The plaintiff by her bill ſeeks to eſtabliſh this as an agreement for a ſeparate maintenance, and to ſecure the payment of four hundred pounds a year for her life.

Mr. Solicitor General of the ſame ſide: By a ſubſequent letter, dated the 22d of *September* 1741, to Lady *Head*, Sir *Francis* ſays, " upon ſending a receipt you may have *your* money on demand."

What is *your* money? Why, the money he had agreed to pay her.

The pretence of her being diſordered in her ſenſes, is as long ago as 1739, and ſubſequent to that, for four years, here is, by ſeveral letters, an acknowledgment the agreement was ſubſiſting, and payments in purſuance of it, and the defendant never offered to take her home till the bill filed.

There is evidence too of Sir *Francis*'s endeavour to convey her to a mad-houſe, without giving her the leaſt notice; and on her application a writ of *ſupplicavit* iſſued; and though by his anſwer now, he offers to take her home, he ſays, at the ſame time, he ſhall ſhut her up, conſidering her as mad; this is the very thing which the court attempted to obviate by *the ſupplicavit*; and notwithſtanding Sir *Francis* moved that it might be diſcharged, yet your Lordſhip refuſed it.

To ſhew that a woman, after a ſeparation, is not obliged to go home to her huſband when he ſhall think proper to take her back again, unleſs there is a proſpect of living happily, and in harmony together, he ſtated the caſe of *Seeling* verſus *Crawley*, in 2 *Vern.* 386.

Mr. *Brown* for the defendant.

Sir *Francis Head* married in 1726; Lady *Head*'s fortune was 4000*l.* down, and 4000*l.* more on the death of the ſurvivor of Sir *William* and Lady *Boyce*.

Angier verſus *Angier*, is a caſe with very different circumſtances, for there was a clear agreement for a ſeparation, and the behaviour between the huſband and wife both equally bad.

He cited the caſe of *Whorwood* verſus *Whorwood*, in 1 *Ch. Caſ.* 250. where, after a decree for a ſeparate maintenance, the court, on a bill of revivor brought, would not continue it, as the huſband offered to take her back; but in the caſe of Sir *George Oxenden*, cited for the plaintiff, it does not appear the huſband offered to take her back again.

In all caſes cited, or that can be cited, where an agreement for a ſeparate maintenance has been decreed, a clear agreement has been manifeſted to the court, but in the preſent caſe it is very far from being ſo, for in the letter to Sir *William Boyce*, Sir *Francis* does not ſay ſo long as we ſhall *live* ſeparate, but *continue* ſeparate only.

Lord Chancellor ſtopped Mr. *Clarke*, who was council for the defendant, from going on to ſhew that this was not originally intended as an agreement to continue during their joint lives, becauſe he did not ſee it at all in that light; but the material queſtion will be, whether the occaſion for this ſeparation ceaſes, or not?

Mr. *Clarke* cited *Octavo Chanc. Rep.* 222. a bill was brought by a huſband to ſet aſide a decree of ſeparation obtained during the interregnum; Lord Chancellor *Clarendon* referred it to the twelve judges to certify their opinion, whether the act of parliament had confirmed the judicial proceedings before the reſtoration, and they were of opinion it had.

This caſe of *Whorwood* verſus *Whorwood* came on again before Lord Keeper *Bridgeman*, and is mentioned by Sir *Lionel Jenkins* in his life and letters, *p.* 723. the court did not indeed reverſe the decree, but then they let it lie dormant, and if the wife did not return to the huſband, left it open to proceed againſt her in the eccleſiaſtical court, for a reſtitution of conjugal rights.

Lord Hardwicke, to give the friends of each ſide an opportunity of interfering in order to bring about a reconciliation, adjourned the cauſe from time to time till the 3d of *July* 1747, and then gave his opinion.

Two queſtions ariſe upon this caſe; firſt, whether here was any ſuch agreement between the parties for a perpetual ſeparation and maintenance, as this court will eſtabliſh?

Secondly, Whether in caſe there was no ſuch agreement Sir *Francis* has, by his behaviour to Lady *Head*, given reaſon for the court to decree her a ſeparate maintenance?

Now, as to the firſt of theſe two queſtions, here was no agreement for the parties to live ſeparate, and for Sir *Francis*'s making this allowance for alimony, but merely during an occaſional abſence, and for his lady's ſupport whilſt that laſted.

It is therefore to be conſidered, whether any thing has happened ſince the making of this agreement to put an end to it, and to induce the court to decree the maintenance for the future; and

what effect this conſideration will have upon the general relief prayed by the bill, by which liberty is required for Lady *Head* to live ſeparate, and that the court would decree her huſband to pay her maintenance, and likewiſe what effect this will have upon the arrears already due.

No inſtance of a decree for eſtabliſhing a perpetual ſeparation betwixt huſband and wife, and to compel him to pay her a ſeparate maintenance, unleſs there is an actual agreement for that purpoſe.

As to the liberty prayed, it is not in the power of the court to decree it, and I do not find that this court ever made a decree for eſtabliſhing a perpetual ſeparation betwixt huſband and wife, or to compel a huſband to pay a ſeparate maintenance to his wife, unleſs upon an agreement between them, and even upon this unwillingly.

The agreement betwixt Sir *Francis* and Lady *Head* was only for the payment of a maintenance during an occaſional abſence; now, conſider what has been done to put an end to this agreement.

Lord Hardwicke then ſtated the evidence of Lady *Head*'s diſorder, and Sir *Francis*'s intention of carrying her by force to a mad-houſe, and then went on as follows; I cannot ſay that Sir *Francis*'s behaviour upon this occaſion was proper, he ſhould have firſt gone and ſatisfied himſelf of my Lady's condition before he had made ſuch an attempt; but yet, upon the circumſtances of her conduct, I will not ſay that this was ſuch an act of cruelty as would forfeit the right and authority of an huſband, or would be a ſufficient ground for the ſpiritual court to decree alimony, and a ſeparation upon.

The obtaining a ſupplicavit does not juſtify a wife's elopement from her huſband, for it is a ſecurity taken for her on ſuppoſition they are to live together.

The point of *the ſupplicavit* granted to Lady *Head* is carried too far: the having obtained *a ſupplicavit* is no reaſon that a wife ſhould elope from a huſband, for it is a ſecurity taken for the wife, upon a ſuppoſition that they are to live together.

He then ſtated the caſe of *Whorewood* verſus *Whorewood*, 1 *Ch. Caſ.* 250. and the opinions of the Lord Keeper and Lord *Shaftſbury*; and obſerved, upon Lord *Shaftſbury*'s ſending the parties to their remedy in the eccleſiaſtical court, that it muſt have been grounded upon this, that as the court of chancery had ſucceeded to the juriſdiction of the ſpiritual court in matters of alimony, *&c.* during the rebellion, a decree then made by the court of chancery in purſuance of this juriſdiction was to be taken as a ſentence of the ſpiritual court, after their juriſdiction was reſtored, and to be referred thither for its examination.

Then his Lordſhip read the paſſage from Sir *Leoline Jenkins*'s letters, from the words *Theſe are either cruelties ſo called*, to the words *the decree in queſtion*.

His

His Lordſhip then repeated the reaſons given in the book for the opinion in that caſe, and applied them to the preſent, by ſaying in this caſe nothing appeared to ſhew the huſband had rendered himſelf incapable of demanding the return of his wife, and that as the wife appeared unreaſonably averſe from returning, he could not make a decree for the continuance of the alimony.

As to the arrears of the ſeparate maintenance, he decreed them to be paid, becauſe he ſaid, ſome things which had happened on Sir *Francis*'s part, were an excuſe for my Lady's not returning to him till this *judicial* offer of receiving her had been made by the anſwer of the huſband; as for inſtance, *Sir Francis's letter, his attempt to carry her to a madhouſe, &c.* and that theſe were very good pretences for not putting herſelf under his power, eſpecially where the court had thought there were grounds for granting her a *ſupplicavit.*

His Lordſhip decreed the arrears to be paid to Lady *Head*, but that Sir *Francis* having offered to receive her again, he ſhould receive and treat her as his wife if ſhe would return, but in caſe ſhe did not return in a month, the maintenance ſhould ceaſe for the future; and on the other hand if ſhe returned home, and the defendant refuſed to receive, maintain and treat her as his wife, the ſeparate maintenance ſhould then continue.

The Attorney General verſus *Lloyd and others*, *July* 31, 1747. Caſe 201.

THIS came before *Lord Chancellor* on an appeal from the Rolls, upon a queſtion ariſing from the will and codicil of Mr. *Millington.*

James Millington, by his will dated the 8th of *February* 1734. gives particular lands and his perſonal eſtate to be laid out in lands to charitable uſes; then by a codicil dated the 12th of *July* 1736. recites his will, and that he had deviſed his lands to ſuch uſes, "but that there had been an act of parliament, intitled *The mort-*"*main act*, and being in doubt whether the deviſe made by him "to ſuch charitable uſes would be good or not, and being ſtill de-"ſirous, as far as in him lies, to confirm his ſaid will, nevertheleſs "if by the act of parliament, or by any conſtruction of law there-

J. M. by will dated *February* 8, 1734. gives particular lands and his perſonal eſtate *to be laid out in lands to charitable uſes*, and declares by codicil *July* 12, 1736.

if by the mortmain act the eſtates cannot paſs to thoſe uſes, he gives them to *M. B.* and his heirs. By a ſecond codicil of the 17th of *March* 1736-7. reciting he had been adviſed the deviſe of his lands was void, gives his perſonal to the ſame charitable uſes, and his real eſtate to the defendant *M. B.* The mortmain act paſſed in 1736. and the teſtator died the 8th of *February* 1737. *On a caſe ſtated for the opinion of the court of King's Bench, the Judges certified it was their opinion theſe eſtates were well deviſed by the ſecond codicil to Millington Buckley.*

" upon, the eſtate is not well deviſed, and cannot go to thoſe " uſes; then and in ſuch caſe I give thoſe lands to *Millington Buck-* " *leigh* and his heirs."

The ſecond codicil dated the 17th of *March* 1736-7. reciting as aforeſaid, " that being adviſed the deviſe of his lands would be " void, and it being my intention the charity ſhould be continued, " and being adviſed my perſonal eſtate can be given, I do therefore " by this codicil give my perſonal eſtate to the charitable uſes be- " fore mentioned, and I do hereby give my real eſtate to the de- " fendant."

The mortmain act paſſed in 1736. and teſtator died the 8th of *February* 1737.

The *Maſter of the Rolls* on the 10th of *December* 1744. decreed the will and codicils to be well proved, and that they ſhould be eſtabliſhed, and the truſts thereof ought to be performed; the defendant *Millington Buckley*, who had attained his age of 21. apprehending himſelf aggrieved by this decree, for that there was not any declaration therein, that the eſtates in *Stretton* and *Shrewſbury* on his arriving at 21. would belong to him, he therefore appealed to Lord Chancellor.

The Attorney General for the charity cited *Onyons* verſus *Tyers*, 2 *Vern.* 741. and the ſame caſe in *Prec. in Chan.* 459. called there *Onyons* verſus *Tryers*, and *Salk.* 592. and Sir *Robert Clifton* verſus *Lady Lombe*, on the conſtruction of Sir *Thomas Lombe*'s will, before Lord Chancellor *Hardwicke*.

Mr. *Wilbraham* of the ſame ſide cited *Aſhburnham* verſus *Kirkhall*, where it was certified by the opinion of all the Judges to Lord *Hardwicke* on the 4th of *December* 1739. that a deviſe of lands under a will to charitable uſes made before the ſtatute of mortmain, notwithſtanding the teſtator ſurvived the ſtatute of mortmain, paſſes the lands.

Mr. Solicitor General for the defendant cited *Coggerſhall* verſus *Coggerſhall* before the council, in the preſence of two chief juſtices, the ground of the determination there was a total incompleat will, and was therefore ſet aſide.

Lord *Hardwicke* ſtopped the Attorney General when he was going to reply for the charity, and ſaid, that he was very doubtful about the conſtruction of this will, and that he would tell them why, though he did not intend, nor could he give any abſolute opinion.

This

This is a caſe which is extremely different from all the caſes cited, a caſe in which the revocation of the former, or the validity of the new diſpoſition, does not at all turn upon collateral acts or circumſtances, but merely upon the words of the firſt and ſecond codicils, and the whole ariſes upon the conſtruction of the inſtruments themſelves: in that reſpect it differs from the caſe of *Onyon* verſus *Tyrer*, for that turned entirely upon the collateral acts made uſe of by the teſtator towards the execution of the ſecond, and the cancellation of the firſt will; and there Lord *Cowper* was doubtful of the advantage that could be taken of thoſe circumſtances at law, and he concludes, as it is mentioned in *Vernon*, *that in caſe it had been a good cancelling of the will at law, it ought to be relieved againſt, and the will ſet up again in equity under the head of accident.* But how he would have come at it there, if the law had ſaid, that the firſt will was revoked, I cannot ſee, or how a court of equity can ſet up a will againſt the heir which was revoked at law; this is the principal caſe of all that has been cited.

The reaſons, that make me doubt of the conſtruction contended for on the part of the charity, are theſe:

Firſt, If the teſtator had intended what the relators contend for, that the codicil ſhould be a revocation of the firſt deviſe, and a new deviſe only in caſe his will ſhould be determined to be void; he might as well have left it upon the firſt codicil, unleſs only in reſpect of changing the diſpoſition of the perſonal eſtate, for there was occaſion of alteration as to the perſonal eſtate, but not as to the real.

Secondly, It is a very nice thing to ſay, that becauſe the reaſon a man gives for his deviſe is falſe, therefore his deviſe ſhall fail, and how far that will extend I cannot ſay: but here he has put the deviſe upon the fact itſelf, for the words of the ſecond codicil are, *that being adviſed the deviſe of his lands would be void, &c.* (*vide the words before.*) That he was ſo adviſed was a fact in his own knowledge, and he has grounded his deviſe upon this advice, and not upon the reality of the law, though that ſhould come out in the event one way or another, upon that he makes his determination, which he might do to quiet a doubtful queſtion, I will not have this litigated after my death, but I will ſettle it myſelf upon ſome certain foundation.

Thirdly, And this is the principal reaſon I doubt whether this different diſpoſition is put ſingly upon the point of law, the words of the laſt codicil are very material, *It being my intention the charity ſhould be continued, and being adviſed my perſonal eſtate can be given, I do therefore by this codicil give my perſonal eſtate to the charitable uſes beforementioned; and I do hereby give my real eſtate to the de-*

fendant Millington; who can tell what the teſtator meant by theſe words? he might be adviſed that his perſonal eſtate might be ſo much increaſed as to be ſufficient to ſupport the charity, (for the codicil was made a conſiderable time after the will) if he took the whole into his conſideration, the point of law upon the ſtatute, that the deviſe of the real eſtate would be void, that he might make a good diſpoſition of his perſonal eſtate to the uſes of the charity, and that the perſonal eſtate would be ſufficient for that purpoſe; all theſe reaſons might be the ground of his diſpoſition.

Theſe things make me doubt greatly of the conſtruction of this will, and it is a new point: I think therefore it ſhould undergo a ſolemn determination: it is a legal queſtion, and upon a legal deviſe, and I will make a caſe, and ſend it to the Judges to have their determination upon it.

His Lordſhip accordingly ordered a caſe to be made on the teſtator's will and codicils, and the act of parliament to prevent the diſpoſition of lands, whereby the ſame became unalienable, for the opinion of the Judges of the court of King's Bench; and the queſtion was to be, whether the teſtator's real eſtate in *Stretton* and *Shrewſbury* were well deviſed by the ſecond codicil dated the 17th of *March* 1736. to the defendant *Millington Buckley* for life, with remainders over to his firſt and other ſons in tail male, the ſaid *Millington Buckley* having obtained his age of 21. and the Judges of the court of King's Bench were to be attended with the caſe, and reſerved all further directions till after the Judges ſhould have made their certificate.

The Judges of the court of King's Bench having been attended with the caſe, they by that certificate dated *January* 24, 1748. certified that upon hearing council on both ſides on the queſtion ſtated, and on conſideration of the caſe, they were of opinion, that the teſtator's real eſtate in *Stretton* and *Shrewſbury* were well deviſed by the codicil dated the 17th of *March* 1736. to *Millington Buckley* for life, with remainder over, as limited in the codicil.

Lord Chief Juſtice *Lee*.
Mr. Juſtice *Wright*.
Mr. Juſtice *Denniſon*.
Mr. Juſtice *Foſter*.

On the 5th of *May* 1749. Lord *Hardwicke* in conſequence of the certificate declared, that *Millington Buckley* having attained his age of 21 years, is intitled to the teſtator's real eſtate in *Stretton* and *Shrewſbury* for his life, with remainder to his firſt and every other ſon in tail male ſucceſſively, and referred it to a Maſter to take an account of the rents of all the premiſſes in *Stretton* and *Shrewſbury* accrued

accrued ſince the 10th of *September* 1747. when *Millington Buckley* attained 21. and what ſhall be coming upon the balance of the account, to be paid by the truſtees to *Millington Buckley*.

Forward verſus *Duffield*, *Auguſt* 1, 1747.

Caſe 202.

LORD CHANCELLOR.

WHERE *A.* has ſeveral demands againſt *B.* and *B.* pays money generally to *A.* he may apply it to the payment of ſuch debt as he thinks proper, for the rule is *ſolvendum ad modum recipientis.*

The defendant brought an action againſt the plaintiff upon the whole penalty of a charter-party, where part of the money was due only, and had judgment on the whole penalty, the defendant at law comes into equity to be relieved upon paying the principal and intereſt.

The plaintiff in a charter-party is right in ſuing on the whole penalty, though only a part of it remained due, but on offering to pay principal, intereſt and coſts, the defendant at law may be relieved in this court.

The plaintiff at law is right in ſuing upon the whole penalty, though only part of the debt remained due; and ſo it is in the caſe of a common bond, an obligee, though only part is unpaid, may bring an action on the whole penalty: but then the obligor is as right in bringing a bill to be relieved on paying the principal, intereſt and coſts; and if the obligee will put in a bad anſwer, and inſiſt on more than is really due, he ſhall loſe his coſts here, though intitled to his coſts at law.

If an obligee will put in a bad anſwer, and inſiſt on more than is really due, he ſhall loſe his coſts here though intitled to them at law.

Lord Chancellor " ordered the Maſter to compute intereſt on " 546 *l.* 10 *s.* 7 *d.* the balance due to the defendant from the end " of three months after the landing of the ſhip's cargo, at 5 *per* " *cent.* and that 180 *l.* paid by the plaintiff to the defendant under " an order of the 12th of *February* 1742. be applied towards keeping down the intereſt, and afterwards towards ſinking the principal of the balance; and on the plaintiff's paying the defendant " the reſidue of what ſhall be found due to him for ſuch principal " and intereſt with the coſts, that both ſides do deliver up the " charter-party, and the defendant acknowledge ſatisfaction on " record of the judgment obtained by him at the plaintiff's expence, " and in default of payment by the plaintiff at the time appointed " by the Maſter, the bill to be diſmiſſed with coſts.

Caſe 203. *Powis* verſus *Corbet*, *Auguſt* 6, 1747.

LORD CHANCELLOR.

Where a teſtator has created a particular truſt out of particular lands for the payment of debts, and ſubject to the truſt deviſed it over, the deviſees can take no benefit till after the whole burden is diſcharged upon it.

THE eſtate made ſubject to a 500 years term by the will of *Corbet Kinaſton*, for the payment of debts, muſt firſt be applied before the creditors can come upon the eſtate deſcended on his heir at law; for if a teſtator has created a particular truſt out of particular lands, and ſubject to that truſt deviſed it over, the deviſees can take no benefit but of the remainder, after the whole burden is diſcharged upon it; and as to that, the heir at law ſtands in a better place than the deviſees do.

Aſſets deſcended on the heir at law muſt be applied to the payment of debts before the lands can be charged, which are ſpecifically deviſed.

The next queſtion is between the deviſees of the real eſtate which paſſes by the codicil, and the heir at law of the teſtator; undoubtedly, according to the determination of *Galton* verſus *Hancock*, *June* 11, 1743. the aſſets deſcendible on the heir at law muſt be applied to the payment of debts before the lands can be charged, which are ſpecifically deviſed.

The rule of the court as to a mortgagee who is likewiſe a bond creditor, is, that he may tack it to the mortgage as againſt the heir, becauſe aſſets being deſcended he cannot redeem one without paying off the other.

Another defendant in this cauſe and mortgagee, *Amye Kynaſton*, was likewiſe a bond creditor to *Corbet Kynaſton*; her council inſiſted ſhe had a right to tack it to the mortgage as againſt the heir, becauſe aſſets being deſcended he cannot redeem one without paying off the other, for the court will not make a circuity by putting her to the neceſſity of ſuing on the bond; and they inſiſted further that the rule was the ſame with regard to a deviſee, and that the court will not oblige a mortgagee, who is likewiſe a creditor by bond, to ſue him under the ſtatute againſt fraudulent deviſes.

Lord Chancellor agreed this was the rule of the court as to a mortgagee, who is likewiſe a bond creditor againſt the heir; but did not remember it was ever determined in favour of ſuch mortgagee where there are intervening incumbrancers of a ſuperior nature between his mortgage and the bond, and therefore would not direct that Mrs. *Kynaſton*'s bond ſhould be tack'd to her mortgage.

Pyncent

Pyncent verſus *Pyncent*, *Auguſt* 6, 1747. Caſe 204.

THE depoſitions of a witneſs in this cauſe were referred for impertinence, the maſter reported them to be impertinent, and the witneſs has taken exceptions.

Depoſitions referred for impertinence, the maſter reported them impertinent; on exceptions taken to his report, ordered to ſtand over till the hearing, the court being doubtful, whether depoſitions could be referred for impertinence only.

Lord Chancellor ordered it to ſtand over till the hearing of the cauſe, being doubtful whether a depoſition could be referred for impertinence only, for in the caſe of *Cocks* verſus *Worthington*, *December* 14, 1741, and the other caſes therein mentioned, the reference was for ſcandal as well as impertinence.

Neve verſus *Weſton and his wife*, *Auguſt* 7, 1747. *In the paper of pleas and demurrers.* Caſe 205.

A Bill had been brought by a ſingle creditor in behalf of himſelf and other creditors, againſt the executor of *William Northmore*, and the deviſee of his real eſtate; the preſent plaintiff came in under the decree in that cauſe before the maſter, and proved his debt; and now brings his bill in the name of himſelf and other creditors of *William Northmore* againſt his deviſee and executor, and makes his heir at law a party, who was not ſo to the other ſuit.

The deviſee and executor plead the former ſuit is ſtill depending.

LORD CHANCELLOR.

A man who comes in before a maſter under a decree, is *quaſi* a party to that ſuit, the preſent plaintiff does not by his bill make any caſe to ſhew it was abſolutely neceſſary that the heir at law ſhould be brought before the court, and therefore allowed the plea.

Whoever comes in before a Maſter under a decree is *quaſi* a party to that ſuit; and if he brings a new bill, a plea the former ſuit is ſtill depending will be allowed.

Caſe 206. *Bicknell* verſus *Gough*, *Auguſt* 7, 1747.

When fraud is charged, the defendant cannot plead the ſtatute of limitations to the diſcovery of his title, but muſt anſwer to the fraud.

A Bill was brought for a diſcovery of the defendant's title, charging fraud in the defendant, and praying to be let into poſſeſſion of the eſtate.

The defendant pleaded the ſtatute of limitations both to the diſcovery and relief.

LORD CHANCELLOR.

I am of opinion the defendant cannot plead the ſtatute of limitations to the diſcovery, but muſt anſwer to the fraud; and that, as the defendant has pleaded it, it is in the nature of a demurrer, for the defendant not averring any fact to which the plaintiff might reply, but reſting it on facts of the plaintiff's own ſhewing, if I was to allow the plea, the plaintiff could not take exceptions to the anſwer, and therefore over-ruled the plea.

Caſe 207. *Skip* verſus *Warner*, *Auguſt* 10, 1747. *Laſt ſeal.*

A Motion was made to diſmiſs a bill for want of proſecution; the cauſe has proceeded ſo far, as that a commiſſion has been taken out, but nothing has been done upon it, but publication has paſt, and iſſue being joined, the queſtion in diſpute before his Honour was, whether it muſt not be ſet down *ad requiſitionem defendentis*; or whether, according to the rule of the court, the defendant may not move to diſmiſs for want of proſecution; his Honour had ſome doubt, and directed it to be moved before Lord Chancellor.

LORD CHANCELLOR.

You cannot move to diſmiſs a bill after publication is paſt, and it is no hardſhip to the defendant, for if the bill is diſmiſſed at the hearing, he will have his full coſts.

I know of no rule, that the defendant may move to diſmiſs a bill after publication is completely paſt; the modern practice has been after a *ſubpœna* to rejoin, and even after a commiſſion for examination of witneſſes, if nothing has been done under it, to diſmiſs the bill, but the defendant here is under no hardſhip, becauſe, when it comes to a hearing, this cauſe will not be conſidered as on bill and anſwer only, and therefore the defendant may have his full coſts if the bill ſhould be diſmiſſed at the hearing: Lord *Hardwicke* denied the motion.

Ex

Ex parte Johnſon, Auguſt 11, 1747. Caſe 208.

MR. *Thompſon*, a deviſor, being a truſtee, deviſed all his eſtate to his ſon, an infant, in tail, with remainders over.

An infant, on whom a truſt is deſcended, may, under an order of this court, convey by a common recovery.

A petition was preferred, that the infant on whom the truſt is deſcended may be ordered to convey by recovery, purſuant to the ſtatute of 7 *Ann. c.* 19.

Lord Chancellor, at firſt, thought there muſt be an application for a privy ſeal for this purpoſe, but the act being general, that the infant *ſhall convey lands as the court by order ſhall direct:* his Lordſhip in this caſe made an order, that the infant ſhould convey by *a common recovery.*

Mackenſie verſus *Robinſon, Auguſt* 11, 1747. Caſe 209.

A Petition was preſented on behalf of a mortgagor, that the mortgagee of a naked advowſon may accept of his nominee, and preſent him upon an avoidance, the incumbant being dead.

A mortgagee muſt accept of a mortgagor's nominee, to an avoidance of an advowſon; for, inſtead of bringing a bill of foreclоſure, he ſhould have prayed a ſale of the advowſon.

Mr. *Clarke*, of council for the mortgagee, inſiſted, as there is a large arrear of intereſt, he ought to preſent, if any advantage accrues from it, and cited the caſe of *Gardiner* verſus *Griffith*, 2 *Wms.* 404. there the plaintiff's father being poſſeſſed of a 99 years term of the advowſon of *Eckington*, made a mortgage thereof to the defendant, and in the mortgage deed was *a covenant that on every avoidance of the church the mortgagee ſhould preſent*; the court gave no opinion, but ſeemed to incline that the defendant *Griffith*, the mortgagee, had a right to preſent.

LORD CHANCELLOR.

I am of opinion that the mortgagor ought to nominate, and that it is not preſumed any pecuniary advantage is made of a preſentation; to be ſure, theſe are indifferent ſecurities, but the mortgagee ſhould have conſidered it before he lent his money, and inſtead of bringing a bill of foreclоſure, as he has done in this caſe, ſhould have prayed a ſale of the advowſon.

Lord Chancellor mentioned the next day, that he was not quite clear as to this point, and that he had looked into the caſe of *Gardiner* verſus *Griffith* ſince yeſterday, according to the ſtate of it in the Houſe of Lords, where the decree of Lord Chancellor *King* was affirmed; he ſaid, that was a mixed caſe, and that he doubted

himſelf whether a covenant that the mortgagee ſhould preſent (as was the caſe there) was not void, being a ſtipulation for ſomething more than the principal and intereſt, and the mortgagee cannot account for the preſentation: Lord *Hardwicke* adjourned it for further conſideration to the next day of petitions.

Upon the 21ſt of *October* following, this petition came on again, and the mortgagee not being able to find any precedent in his favour, gave up the point of preſenting, and an order was that the mortgagor ſhould be at liberty to preſent, and the mortgagee was obliged to accept of the mortgagor's nominee.

Caſe 210. *Shields* verſus *Atkins*, *Auguſt* 10, 1747.

It would be dangerous, where a perſon enters on the foot of the truſt, and never makes any declaration of his having performed the truſt in purſuance of the will, to conſtrue this ſuch an entry, as that a fine and nonclaim would bar the right of the plaintiff a remainder-man.

ROBERT Shields of *Nunthorpe* in *Yorkſhire*, being ſeiſed in fee of a meſſuage and lands in *Great Ayton*, by his will dated the 6th of *December* 1710, "deviſed to *Robert Shields* of *Carlton*, "*Carpenter*, from and after the deceaſe of *Ann*, the teſtator's wife, "the ſaid meſſuage and lands, to hold to the ſaid *Robert Shields* the carpenter, and his heirs and aſſigns, in truſt, till the rents and profits "of the ſaid deviſed premiſſes ſhall raiſe and pay the ſeveral legacies "and bequeſts therein after mentioned, and ſo ſoon after his ſaid "eſtate ſhall by the rents and profits have raiſed and paid the ſame, "he gave the ſaid premiſſes to *Robert Shields*, ſon to his brother "*William Shields*, *for his life*"; (then follow theſe words, and) "being my will is, that the ſaid *Robert Shields* the carpenter, and "his heirs, ſhall have a contingency of enjoying my ſaid eſtate, and "yet not deſigning to ouſt my ſaid nephew *Robert Shields*, nor his "iſſue, or iſſues, (ſo long as there ſhall any remain in the line from "his body directly) from and after the deceaſe of him my ſaid ne"phew *Robert Shields*, I give the premiſſes aforeſaid unto the "heirs of his body, male or female, for his or her natural life, and "after his or her deceaſe, to his or her heirs, males or females, of "his or her body for their lives, *and ſo to be continued as a life* "*eſtate only in the line of him my ſaid nephew* Robert Shields, *his* "*iſſue, and their iſſue of their bodies, one after another, ſo long as* "*any ſuch* ſhall be, and for default of ſuch iſſue, then I give the ſaid "premiſſes unto the ſaid *Robert Shields* carpenter, my ſaid truſtee, "his heirs and aſſigns for ever."

The teſtator died ſoon after, and upon his death, his widow entered upon the ſaid meſſuage and lands, and enjoyed the ſame till her death in the year 1724, and then *Robert Shields* of *Carlton*, the plaintiff's father, as truſtee under the will, entered thereupon, and out of the rents and profits paid ſeveral of the legacies; and he dying about the 5th of *November* 1726, the plaintiff, as his ſon and heir at law, entered upon the ſaid premiſſes, and for ſome time received the rents, and thereout paid off the reſidue of the legacies.

Robert

Robert Shields, the nephew of the teſtator, went beyond the ſeas in the life of *Ann* the teſtator's widow, and being upon his return to *England*, fell ſick on board the ſhip, and thereupon being ſet on ſhore in the *Weſt* of *England*, died there, having never been in poſſeſſion of the ſaid premiſſes, and left *Jane* his only child, an infant, and the defendant *Mary* his widow; the plaintiff received, for ſome few years afterwards, the rents of the premiſſes, and remitted the ſame to the defendant *Atkins* (brother of the defendant *Mary*) for the uſe of *Jane*, and the defendant *Atkins*, for many years afterwards, received the rents for *Jane*'s uſe.

Jane died in the year 1737, without iſſue, unmarried, and an infant, and upon her death, all the limitations of the ſaid premiſſes under the will to *Robert Shields* the nephew, and the iſſue of his body being ſpent, the plaintiff became intitled to the fee-ſimple thereof, and in 1744 brought ejectments, but not being able to prove the deaths of *Robert* the nephew, and *Jane*, and terms likewiſe ſtanding out, did not proceed to trial, and prays by his bill that theſe terms may not be ſet up at law againſt the plaintiff in any ejectment for the recovery of the poſſeſſion of the ſaid premiſſes, and that he may have the title deeds delivered up to him, and that the defendants may account with the plaintiff for the rents and profits.

The defendant *Atkins*, as to ſuch part of the bill as ſeeks an account of the rents accrued due ſince the death of *Jane Shields*, or to be let into the poſſeſſion thereof, *&c.* pleads in bar, that by an indenture dated the 17th of *June* 1723, *Robert Shields, the nephew*, in conſideration of two hundred pounds, did grant and ſell to the defendant and his heirs *all his right, title, uſe, intereſt, reverſion and remainder*, of and in all the ſaid meſſuage and lands, to hold the ſame, and all the eſtate, right, title and intereſt of *Robert Shields the nephew*, immediately from and after the deceaſe of *Ann Shields*, and the expiration of the truſt to *Robert Shields* of *Carlton*, for the payment of legacies, unto the defendant, his heirs and aſſigns for ever.

That the value of the eſtate purchaſed was but eight pounds ten ſhillings, and therefore two hundred pounds was a full conſideration, being ſubject to the widow's life eſtate, and the payment of the legacies.

He admitted he entered on the death of the widow, and paid the legacies; and that in the twelfth year of the preſent king he levied a fine of the ſaid premiſſes, with proclamations, but that no deed was made declaring the uſe of the fine, but the ſame was intended by the defendant to be to the only uſe of the defendant and his heirs.

That he, at and from the time of levying the fine, was, and hath been ever ſince, and is now ſeiſed, and in the actual poſſeſſion and receipt of the rents and profits of the ſaid meſſuage and lands, and that neither the plaintiff, nor any other perſon by his order, did, within five years after ſuch fine levied, and proclamations, make any entry into ſuch meſſuage and lands; wherefore the defendant pleads the fine and proclamations to ſo much of the bill as aforeſaid.

Mr. *Wilbraham* for the plaintiff cited the caſe of *Machil* verſus *Clerk*, 7 *Mod.* 18. and in *Holt's caſes* 615.

LORD CHANCELLOR.

The perſon who has levied the fine does not appear to me to have ſuch a caſe as ought to be favoured, if in law or equity it can be got the better of; but if he has a right in law, I do not at preſent ſee that equity will take it from him.

The defendant did not take the purchaſe on the credit of the grantor's being ſeiſed in fee, for *Robert Shields* the nephew has granted to him only the right, title and intereſt he had in the land, and not the land itſelf, which creates a doubt even on the face of the conveyance itſelf, what kind of eſtate *Robert Shields* could convey.

To be ſure, it is not clear what eſtate the nephew had under the will of his uncle, but *primâ facie* it ſeems to me as if the grantor had only an eſtate for life (though I am not obliged to give an opinion) as the ſubſequent limitations are to the heirs of his body for life.

The plaintiff's council have made two objections; firſt, that the defendant's eſtate was but *pur auter vie*, and that after the death of the teſtator's widow, and *Robert* the nephew, he levied the fine.

If it had been a leaſe for years, determinable on lives, reſerving rent, and the lives dead on which the eſtate determined, the defendant would have been a tenant by ſufferance; and though there is a mixture of wrong, the landlord may affirm his title by accepting rent, therefore the tenant by ſufferance is extremely like a tenant at will, and a fine levied by him will not avail, as has been determined in Mr. Juſtice *Forteſcue's caſe*.

If a feoffment with livery be made, it is a diſſeiſin, and a fine levied afterwards, when the five years are run out, is a bar.

If the defendant had a mind to gain an eſtate by wrong, he ſhould have made a feoffment with livery, which would have been a diſſeiſin, and then a fine levied afterwards, and five years run out after the title accrued, is a bar.

But

But the preſent is not the caſe of a leaſe with a rent reſerved, but a deviſe of an eſtate for life, with remainders over, and the wrong conſequently is much greater.

The ſecond objection is a more material one, and is a point of equity; that the next limitation in the will, after the eſtate for life to the widow, is to *Robert Shields* the carpenter, and his heirs, till the legacies are paid, and therefore this is a fee determinable on the payment of the legacies.

And it is very remarkable that the defendant's own deed expreſſes it to be a grant from the nephew, of the ſaid meſſuage and lands, after the expiration of the truſt for payment of the legacies; and he admits by his anſwer, that his eſtate was not to commence till afterwards.

After *Ann* the widow, the nephew dies, then the defendant entered, but it was on the foot of the truſt, for he ſays, he paid ſeveral legacies, ſo that he does not enter in contradiction to the truſt, but in purſuance of it; and therefore, as a fine levied by a truſtee, ſhall never hurt a *ceſtuy que truſt*, it will be very material at the hearing, whether the defendant is not to be conſidered as the truſtee, by undertaking the payment of legacies on the very foot of the truſt.

Suppoſe the plaintiff had entered, as he might by virtue of the limitation, before the legacies were paid, the court would have held him a truſtee, and raiſed the legacies; and it would be hard if the defendant, after owning he entered upon the foot of the truſt, and paid the legacies, ſhould ſupport the fine, for no other reaſon but becauſe he ſays he paid the legacies long before the fine was levied.

Suppoſe *Robert Shields*, the carpenter, had entered, and paid the legacies, and then levied a fine, this would not have given him ſuch an eſtate as would have barred the remainder-men, becauſe it would be dangerous, where a perſon enters on the foot of the truſt, and never makes any declaration of his having performed the truſt by payment of the legacies in purſuance of the will, to conſtrue this ſuch an entry as that a fine and non-claim afterwards would bar the plaintiff's right.

The remainder-man who was to take after the determination of the eſtate limited to *Robert Shields*, the truſtee, could not tell when the limitation to himſelf took place in poſſeſſion, without notice of the expiration of *Robert*'s eſtate, by all the legacies of the teſtator being paid, for it was not to be at the peril of the remainder-man to divine when the truſt ended, but an account of the truſt, and

and notice of expiration of the truſt, muſt be given to him, and a perſon out of poſſeſſion could not tell before.

But if the defendant has gained a title both at law and in equity, I will not take it from him, and therefore let the plea ſtand for an anſwer.

Caſe 211. *Skip* verſus *Harwood*, *Auguſt* 11, 1747.

A commiſſion of bankruptcy cannot ſuperſede a decree of this court for a receiver, which is a diſcretionary power exerciſed by this court with as great utility as any ſort of authority that belongs to them, and is proviſional only, and does not affect the right of parties.

THE plaintiff and the defendants had been partners together in the brewing trade, ſeveral diſputes had ariſen between them and actions, amongſt the reſt an action in the court of Common Pleas, and the partnerſhip, by the conſent of both, was diſſolved in 1741.

Mr. *Skip* afterwards brings his bill here for an account of what was due to him from the partnerſhip, and on the 30th of *June* laſt there was a decree for a receiver to collect in the partnerſhip debts, and that Mr. *Harwood* ſhould not diſpoſe of any part of the dead ſtock.

The morning of the decree Mr. *Harwood* removed no leſs than two hundred and fifty butts of beer in a fraudulent colluſive manner, in order to evade the decree he expected would be made in the cauſe, for he was preſent in court during the hearing, which laſted three days.

On the 14th of *July* a commiſſion of bankruptcy iſſued againſt *Harwood*, and he was found by the commiſſioners to have committed an act of bankruptcy on the 11th of the ſame month.

The aſſignees under the commiſſion, who are in poſſeſſion of the goods that were clandeſtinely conveyed away, inſiſt, they have a right to detain them notwithſtanding the decree Mr. *Skip* has obtained, and that he muſt now come *in pari paſſu* with other creditors under the commiſſion.

LORD CHANCELLOR.

A judgment creditor, to be ſure, has no preference under commiſſions of bankruptcy though execution has been taken out, if not actually executed; but then a commiſſion of bankruptcy cannot ſuperſede a decree of this court for a receiver, which is of a different conſideration, and is a diſcretionary power exerciſed by this court with as great utility to the ſubject as any ſort of authority that belongs to them, and is proviſional only for the more ſpeedy getting in of a party's eſtate, and ſecuring it for the benefit of ſuch perſon

who ſhall appear to be intitled, and does not at all affect the right; and therefore his Lordſhip made an order that the aſſignees, and all other perſons who have taken any of the effects of Mr. *Harwood*, or notes of hand to him for debts due to the partnerſhip ſince the pronouncing the decree, ſhall deliver them to the receiver.

Where a perſon attends a cauſe to which he is a defendant, and had notice of the decree by being preſent when it was pronounced, if he does any act in contravention to it, he is guilty of a contempt, and liable to be committed to the *Fleet*.

As to what has been inſiſted, that the decretal order is not actually paſſed, and therefore Mr. *Harwood* is not guilty of a contempt, his Lordſhip ſaid, where a perſon, as Mr. *Harwood* has done, attends a cauſe to which he is a defendant the whole time of the hearing, and had notice of the decree by being preſent when it was pronounced in court, if he does any act that is a contravention to the decree, he is guilty of a contempt, and puniſhable for it notwithſtanding the decretal order is not drawn up; and there are ſeveral inſtances of this kind, or otherwiſe it would be extremely eaſy to elude decrees, ſome of which in their nature require a conſiderable length of time before they can be compleatly drawn up.

Lord *Hardwicke* committed Mr. *Harwood* to the *Fleet* for his contempt.

Pott and others verſus *Reynolds and others*, *ſecond ſeal before Michaelmas Term* 1747. Caſe 212.

The court will not give leave to withdraw a replication, unleſs it is added that the plaintiff may be thereby enabled to amend his bill, or otherwiſe it may be a contrivance to defeat the defendant of his full coſts, by getting the bill diſmiſſed at the hearing with 40 *s.* coſts.

MR. *Bignell* moved that the order of the twenty-ſecond of *July* laſt, for withdrawing the replication, may be diſcharged, or that the plaintiff may ſubmit, if his bill be diſmiſſed at the hearing, to pay the defendant full coſts.

The order was obtained upon petition to the Maſter of the Rolls, upon an application merely for withdrawing the replication, and ſince the order the cauſe has been ſet down in Lord Chancellor's paper on bill and anſwer.

The defendant, upon an apprehenſion this order was obtained by the plaintiff only to ſave the full coſts, moved it might be diſcharged.

LORD CHANCELLOR.

Theſe orders are very rarely granted, unleſs to the application for leave to withdraw the replication; ſomething further is added, as that the plaintiff may thereby be enabled to amend his bill, or ſome reaſon that may induce the court to give the plaintiff this indulgence, becauſe otherwiſe it may be a contrivance of the plaintiff's to defeat the defendant of his full coſts, by getting the bill diſmiſſed at the hearing with forty ſhillings coſts only. Lord *Hardwicke* ordered

dered it to ſtand over till the firſt *Thurſday* in the term, that the regiſter may ſearch for precedents, and at the ſame time ſaid he ſhould then expect the plaintiff to ſhew ſome reaſonable ground for his withdrawing the replication.

Caſe 213. *Sir Edward Smith* verſus *Aykwell*, *the ſame day in Michaelmas term* 1747.

The plaintiff gave the defendant a note for 2000 *l.* for undertaking to procure him a marriage with a Lady; the fact being ſupported by an affidavit, the court made an order on the defendant to keep the note in his own poſſeſſion, and not aſſign or indorſe it over, but would not extend the injunction ſo far as to prevent him from proceeding at law.

MR. *Yorke* moved for an injunction to reſtrain the defendant either from bringing an action on a promiſſory note given by the plaintiff to the defendant in the ſum of two thouſand pounds, for undertaking to procure him a marriage with a Lady, or that the defendant may be prevented from aſſigning it over to any other perſon.

LORD CHANCELLOR.

Where an inſolvent executor is getting in the aſſets before probate, the court will reſtrain him, and direct the money to be paid into the Bank till anſwer and further order.

This is not the common caſe for injunctions, which are for ſtaying of waſte, or quieting poſſeſſion before the hearing to the party, who has had the ſame three years, on a bill brought upon a forcible entry; but yet the court on extraordinary circumſtances in a caſe, has granted an injunction till appearance and coming in of the anſwer, as in the caſe of *Powis* verſus *Andrews* before Lord *King*, where an inſolvent executor was getting in the aſſets before probate; there the court reſtrained him, and directed it to be paid into the Bank till anſwer and further order, and founded their directions on a caſe of a like nature before Lord *Harcourt*, which was the firſt inſtance, and approved and applauded by every body; the caſe of *Powis* verſus *Andrews* went up likewiſe into the Houſe of Lords, and was affirmed.

Here it is not only charged by the bill to be a marriage-brocage agreement, but the fact ſupported by an affidavit; and therefore I will make an order on the defendant to keep the note in his own poſſeſſion, and not aſſign or indorſe it over to any perſon whatever, but ſhall not extend the injunction ſo far as to prevent him from proceeding at law.

Anon.

Anon. The ſecond ſeal before Michaelmas term 1747. Caſe 214.

A Bill was brought to ſtay execution on a judgment obtained at law, and on ſervice of the *ſubpœna*, and for want of an appearance, the plaintiff had an injunction, but it was not ſealed; and in the vacation the defendant takes the plaintiff in execution, and during the vacation appears, and puts in his anſwer.

It is no excuſe for proceeding at law after an injunction is granted, that it was not ſealed, for where a defendant or his attorney have been preſent on an order for an injunction, and they have proceeded at law before it has been ſealed, the court has conſidered it as a contempt, and committed the perſons for it.

A motion was made, that the defendant might ſtand committed for the contempt of the court, in proceeding after an injunction had been granted.

The defendant ſwears by his affidavit, that he never was ſerved with the *ſubpœna*, nor was either the body or the label left with him; and inſiſted beſides, that the injunction was not ſealed when he took the plaintiff in execution.

Lord Chancellor ordered the affidavit of the officer who ſerved the *ſubpœna* to be read, who ſwears he ſerved the defendant with it by leaving the label, and ſhewing him the body at the ſame time.

LORD CHANCELLOR.

This is not regular ſervice, becauſe where there is only one defendant, you ought to leave the body of the *ſubpœna*; but where there are ſeveral, you leave the labels with the firſt defendants you ſerve, *ſhewing them the body only*, and with the laſt you leave the body itſelf; but as the defendant has appeared, this in the common caſe would have cured the irregularity of the ſervice, and the defendant could not have taken advantage of it now, (the ſame rule at law) but as this was juſt before the long vacation, when the defendant choſe rather to appear than be liable to an attachment, therefore he is at liberty ſtill to inſiſt upon not being ſerved at all, or irregularly ſerved; but as to the injunction's not being ſealed, that is no excuſe for his proceeding at law after the injunction was granted, becauſe there have been inſtances here, where a defendant, or his attorney only, have been preſent upon an order for an injunction, and they have proceeded at law before it has been ſealed, that the court have conſidered this as a contempt, and committed the perſons for it.

Lord *Hardwicke* at firſt directed an inquiry before the Maſter; but as it is to be confined merely to the contempt, and the coſts upon it, to ſave the expence of an inquiry, he recommended it to the plaintiff, if the defendant would agree to diſcharge him out of execution, to wave the motion; and the parties, on his Lordſhip's recommendation, did agree accordingly.

Caſe 215. *Floyd* verſus *Nangle*, *October* 22, 1747. *in the paper of petitions.*

Where a ſolicitor has been negligent in managing a client's buſineſs, this court can grant an attachment againſt him, and courts of law exerciſe the ſame ſummary juriſdiction over attornies.

THE defendant by his petition ſets forth, that his ſolicitor, Mr. *Gordon*, had groſly miſbehaved in the management of his client's cauſe, and therefore prayed that he may make the petitioner ſatisfaction, and alſo prayed by his petition to ſet aſide the proceedings in the cauſe for ſurpriſe, and likewiſe for an irregularity in the plaintiff's proceedings before the decree.

LORD CHANCELLOR.

With regard to the complaint againſt the ſolicitor, there are the ſtrongeſt circumſtances of the groſſeſt neglect, for all the inſtructions were ſent from *Ireland* by the client to the ſolicitor that could be deſired, and the anſwer returned from thence, in order to be filed; but notwithſtanding this it was not filed till the cauſe was ſet down upon a ſequeſtration, and after this a decree *pro confeſſo* was pronounced.

The ſolicitor imputes it to the neglect of his clerk, he not being at leiſure himſelf, becauſe he was then engaged in crown cauſes.

If true, Mr. *Gordon* muſt anſwer it to the client as much as if his own immediate act.

There is no doubt but the ſolicitor muſt make ſatisfaction; as to the *quantum*, it depends on the other queſtion between the defendant and the plaintiff; but let that come out how it will, I am very doubtful whether I can make an adequate ſatisfaction, for I cannot enter into that examination, becauſe all the neceſſary materials in the caſe are not before me.

A client, to be ſure, may have an action againſt a ſolicitor for negligently managing his buſineſs; but courts of law have now exerciſed a ſummary juriſdiction by attachment over attornies, which they have done very rightly, as it is a much ſpeedier remedy; and there is no doubt but this court has the ſame power over ſolicitors.

The next queſtion is, with regard to ſetting aſide proceedings as between the plaintiff and the defendant, and that the cauſe may proceed regularly.

I refuſed it upon a former application, and diſmiſſed the petition for want of an affidavit.

I imagine the party on the former petition preſumed the court would do as in the caſe of *Robinſon* verſus *Cramwell*; but that was very different, becauſe there the proceedings were regular, and the defendant put in an anſwer, *&c.* and no exceptions were taken to it, and it was only the decree's being ſigned and inrolled that made an extraordinary application neceſſary, or otherwiſe it would have been an application of courſe to rehear the cauſe, if the party had come in a reaſonable time.

But here exceptions may be taken by the plaintiff to the anſwer, and therefore is not at all to be governed by it.

What induces me to adhere to the ſtrict rules of the court is, that the former proceſſes of contempt were by colluſion between the ſolicitor Mr. *Gordon* and his client, in order to delay the plaintiff, which appears by *Nangle*'s own affidavit, who was adviſed by *Gordon*, as he acknowledges, to go to *Ireland* to delay the cauſe, and to ſtay there till *Gordon* ſhould think it ſafe to ſend for him.

But notwithſtanding, if there is an irregularity in the proceedings of the plaintiff, and the plaintiff inſiſts upon the ſtrict default of the defendant, as the courts of law ſay, it is very neceſſary a perſon inſiſting upon the rigour *ſhould hit the bird in the eye.*

Where after a judgment by default the perſon does not come in time for a new trial, the court will not grant it.

The courts of common law, where a perſon does not come in time, after a judgment by default, for a new trial, will not grant it, if the perſon in poſſeſſion of the judgment inſiſts upon it, but then he muſt take care that all his proceedings are regular in obtaining that judgment: the ſame rule upon an outlawry ſet aſide by motion or writ of error, or plea, where there is any irregularity.

The irregularity here was in this manner: *Nangle* after ſeveral orders for time to put in his anſwer, was by the laſt order to enter his appearance with the Regiſter, and ſubmit that the ſerjeant at arms ſhould go without further motion.

A ſerjeant at arms was granted on a certificate of the ſix clerk, that the anſwer was not filed.

An irregularity in proceſſes may be cured by the defendant's appearance.

The return of the ſerjeant at arms was in *June* 1746. but the return was not filed till the 24th of *October* after.

Then it comes to this, whether a ſequeſtration iſſued before the filing of the return of the ſerjeant at arms is ſufficient.

It has been inſiſted a ſufficient return of the ſerjeant at arms is made, and that it is enough without filing.

When a motion is made for a ſerjeant at arms, the perſon moving has the commiſſion of rebellion in his hand; ſo when a ſequeſtration is moved for after a ſerjeant at arms returned, then the gentleman who moves ſhould have the return of the ſerjeant at arms in his hand, and therefore the ſuppoſition of law is, that all theſe are returned and filed before the ſubſequent proceſſes iſſue.

But as the queſtion has not been determined before, I will refer it to a Maſter to certify the practice of the court.

But then it has been ſaid, all this is cured by what the defendant has done afterwards, and that an irregularity in proceſs may be cured by the ſubſequent proceedings.

The firſt anſwer was filed after the cauſe was ſet down on ſequeſtration, and even after *the decree pro confeſſo*; but the court let him in upon the taxation of coſts before the Maſter, who was attended by the ſolicitors on both ſides; and it is certain this irregularity may be cured, as well as an irregularity by *ſubpœna* may be cured by the defendant's appearance.

It was ſtrongly litigated in *Whittington* verſus *Charlton*, which was a caſe of appeal of murder, that the party appearing had cured an irregularity in the meſne proceſs; three Judges *Parker*, *Powis* and *Eyre* were of this opinion, Mr. Juſtice *John Powell* of a contrary opinion.

No court of common law has gone ſo far as to ſay, if there is any irregularity in the proceedings on a judgment by default, that they will not let the defendant in to contend upon the merits.

I do not know that any court of common law has gone ſo far as to ſay, that if there is any irregularity in the proceedings where judgment has been obtained by default, they will not let the defendant in to contend upon the merits notwithſtanding.

The defendant, as I ſaid before, applied to the court upon a former petition to ſet aſide theſe proceedings, and as there was no affidavit, his petition was diſmiſſed, but he was allowed to go before the Maſter on taxation of coſts.

Shall ſuch an allowance be ſufficient alone to debar him from entring into the merits? All this depends upon the firſt queſtion, whether it is an irregularity or not, for if there is no irregularity, he will not be intitled to enter into them; and therefore Lord *Hardwicke* referred it to a Maſter to inquire into the irregularity, and to certify it to the court.

Mr. *Noel* cited *Henriques* verſus *Pereira* in 1722. where after *a decree pro confeſſo*, the defendant was permitted to open the cauſe again, upon an irregularity in the proceedings on *meſne proceſs*, on the part of the plaintiff. Lord *Hardwicke* directed it to be looked into.

Pyncent

Pyncent verſus *Pyncent*, *October* 24, 1747. Caſe 216.

A Bill was brought by a ſon againſt a father, where the plaintiff is only a remainder-man in tail under a ſettlement, made by his grandfather, after the death of his father, tenant for life, without impeachment of waſte, to have the title deeds brought into court, that they may be forthcoming for the benefit of all parties intereſted.

A ſon, remainder-man in tail under a ſettlement made by a grandfather in which the father is tenant for life, without impeachment of waſte, prefers a bill to have the title deeds brought into court. *Lord Hardwicke refuſed to direct it, and ſaid ſome third perſon, and ſecure place, agreed upon by the parties, would be a much properer depoſitory than a Maſter.*

An objection was taken for want of parties, that annuitants of the ſon, upon the reverſion, after the death of his father, ſhould have been before the court, and likewiſe a daughter of the defendant, who is intereſted under a truſt term for years, prior to the limitation to the plaintiff.

LORD CHANCELLOR.

As to the relief prayed, it is the firſt I ever ſaw of the kind, ſuch applications have been made againſt a jointreſs by remainder-man, and upon agreeing to confirm her jointure, the court have done it; or where the remainder-man is a ſtranger to tenant for life, it may have been done, but not where it is under a ſettlement made by a grandfather; the father is made tenant for life without impeachment of waſte, and the ſon remainder in tail only, reverſion in fee to the grandfather; indeed, if there was evidence that the father was deſtroying of deeds, in order to better and enlarge his eſtate, the court might then take care to put the deeds out of his power.

The relief prayed, the firſt of the kind, ſuch applications have been made againſt a jointreſs, and on the remainder-man agreeing to confirm her jointure, the court have done it; or where a remainder-man has been a ſtranger to tenant for life, it has been done, but not in this inſtance.

But the court in general is not very inclinable to direct title deeds of a family, which are often very numerous, to be depoſited in a maſter's hands, becauſe, they being ſubject to mortality, the deeds are very often loſt and miſlaid, to the great detriment of families; and therefore I ſhould think ſome third perſon, and ſecure place, agreed upon by all parties, would be a much properer depoſitory upon ſuch occaſions.

However, as the annuitants are not before the court who have an equitable charge upon the eſtate, nor the daughter who has an intereſt in the eſtate under the truſt term, they are concerned in the title deeds; and therefore, if the plaintiff was right in his application in other reſpects, I cannot do it till the annuitants are firſt heard, and the objection conſequently for want of parties muſt be allowed.

Another relief is prayed, that the truſtees under the grandfather's ſettlement, might execute a legal conveyance to the plaintiff, purſuant to the terms of the truſt.

LORD CHANCELLOR.

The truſtees may very properly ſay, as the annuitants are not before the court, if we ſhould convey to the ſon with notice of theſe equitable charges, we ſhall be guilty of a breach of truſt, and liable in our own perſons; for as there is as yet no conveyance of the legal eſtate by truſtees, and they have notice now of the ſon's incumbrances, they cannot ſafely do it.

Caſe 217. *Anonymous. October* 24, 1747.

Any one bond creditor may bring a bill againſt an executor for a diſcovery of aſſets, and for ſatisfaction, as the court decrees only an account, and directs the executor to pay in a courſe of adminiſtration.

WHERE a bond creditor brings a bill againſt an executor for an account of aſſets, and for ſatisfaction, it is no objection, for want of parties, to ſay, he has not brought other bond creditors, or creditors of a ſuperior nature before the court, for any one bond creditor may bring his bill, as the court decrees only an account, and directs the executor to pay in a courſe of adminiſtration; and then the executor before the maſter may ſet forth as he is conuſant of the ſtate and condition of his teſtator, what debts are prior to the plaintiff's, which he is obliged to pay, as having a legal preference.

Caſe 218. *Sibley* verſus *Cook, October* 27, 1747

A. H. gives ſeveral legacies, and declares, that if any of the perſons ſhould die before the ſame become due, that they ſhall not be deemed lapſed legacies; and then ſays, to *Ann* the wife of *Richard Wenſley*, and to her executors or adminiſtrators, I give 50*l.* ſhe died in the teſtatrix's life-time, and her huſband adminiſtred to her: *Lord Hardwicke held it not to be a lapſed legacy, and decreed it to the huſband.*

A Bill was brought by the executor of *Ann Hume*, in order to have the direction of the court as to the payment of the *reſiduum* of her eſtate, ſhe *inter alia* deviſed in the words following; "I give and deviſe the ſeveral legacies and ſums following, "which I will ſhall be paid to the ſeveral perſons herein after "named, *and that if any of thoſe perſons ſhould die before the "ſame become due and payable, I will that they, or any of them, "ſhall not be deemed lapſed legacies*;" then ſhe particularizes the ſeveral legatees, and ſays, "to *Ann* the wife of *Richard Wenſley*, "and to her executors or adminiſtrators, I give the ſum of fifty "pounds."

Ann Wenſley died in the life-time of the teſtatrix, and her huſband adminiſtred to her.

A collateral queſtion aroſe in this cauſe, whether this is a lapſed legacy?

Mr. Solicitor General, council for the huſband, cited *Darrell* verſus *Moleſworth*, 2 *Vern.* 378. as a caſe in point; " There divers " legacies were given by a will, and it was directed by the will " that if any legatee died before his legacy *was payable*, it ſhould " go to his brothers and ſiſters; a legatee died in the life-time of " the teſtator; It was adjudged it was no lapſed legacy, but ſhall " go to his ſiſter.

LORD CHANCELLOR.

I am of opinion this is not a lapſed legacy.

If a man deviſes a real eſtate to *J. S.* and his heirs, and ſignifies or indicates his intention, that if *J. S.* die before him, it ſhould not be a lapſed legacy, yet, unleſs he had nominated another legatee, the heir at law is not excluded, notwithſtanding the teſtator's declaration. So in the deviſe of a perſonal legacy to *A.* though the teſtator ſhould ſhew an intention, that the legacy ſhould not lapſe in caſe *A.* die before him, yet this is not ſufficient to exclude the next of kin.

If a man deviſes his real eſtate to *J. S.* and his heirs, ſignifying his intention, that if *J. S.* die before him, it ſhould not be a lapſed legacy, *the heir at law is not excluded, unleſs the teſtator nominates another legatee.*

But here, in caſe *Ann Wenſley* dies before the teſtatrix, ſhe expreſſly provides againſt the lapſing, for ſhe ſays, *if any of theſe perſons die before the ſame become due or payable, I will that they or any of them ſhall not be deemed lapſed legacies*, and ſubſequent to this, deviſes to *Ann, and to her executors and adminiſtrators* 50*l.* ſo that in caſe of her death before the teſtatrix, other perſons are named to take, which diſtinguiſhes it from the caſe I put before; and in *Darrell* verſus *Moleſworth*, the court laid a ſtreſs upon the words *was payable*, which is very much the ſame with the preſent, *become due or payable.*

And upon the authority of this caſe, Lord *Hardwicke* decreed the legacy to the huſband.

Nicholls verſus *Leeſon*, *October* 28, 1747. Caſe 219.

A. By his will gives an annuity of fifty pounds each, to his brother and ſiſter in-law, for their reſpective lives, out of his two ſhares in the *New River* Company, and charges theſe ſhares, and the rents and profits, with the payment of them.

Where an annuity is given to a relation for life, and it has been paid for any length of years, without any deduction for the land tax, it will be preſumed to have been ſo paid by mutual conſent, and the payer is not intitled to be relieved.

The bill is brought by the huſband of the ſiſter, for the arrears and growing payments of the annuity of *fifty pounds*.

It has been conſtantly paid from 1728 to the 15th of *May* 1744, without any deductions, but the defendant inſiſts now it is liable to a proportion of the land tax, and that he will not pay the growing annuity unleſs the plaintiff will account backwards, by allowing for the ſixteen years paſt the land tax, and take this in part payment of the annuity.

The plaintiff's council ſaid, there was no ground to go any further back at law than the ſtatute of limitations, but that this court will not go back ſo far, and is exactly within the rule laid down in *Aſton* verſus *Oriel College*.

Here it is the caſe of a particular perſon, who has nothing elſe for maintenance, and muſt ſtarve if ſhe is to refund.

Mr. Attorney General for the defendant.

Perſons are intitled to be relieved againſt a miſtake in law and equity, as well as a miſtake in fact.

It is not ſaid to be given for maintenance, nor could there be any natural affection between the teſtator and the annuitants, therefore are mere volunteers, nor is it charged by the bill that they want it for maintenance.

In *Aſton* verſus *Oriel College*, a tenant had for ſeveral years paid the rent to the college, without retaining the land tax, and brought his bill to be relieved againſt this payment as being founded on a miſtake, and it was inſiſted that he was not liable to the land tax.

There the court would not relieve, becauſe, by ſuch an allowance, the college would have injured their ſucceſſors.

Lord Chancellor.

There is no juſt ground to decree back an account of theſe arrears, or a refunding, and it would be of miſchievous conſequence to do it.

It is not ſaid by the will, for her maintenance; but where a teſtator gives ſo ſmall an annuity to a relation for life, the thing ſpeaks itſelf that it was given for maintenance, or to improve her way of living.

Strictly

Strictly it is ſubject to the land tax, though the party giving does not imagine ſo at the time.

There was no impoſition or fraud of the plaintiff on the defendant; if it is a miſtake, it is equally ſo on both ſides.

In the caſe of *Oriel College*, the court mentioned its being a fluctuating body, which, to be ſure ſtrengthens it; but they went in general upon this, that where it was a payment of long ſtanding, and there was no fraud, the party receiving is ſuppoſed to have ſpent it in his maintenance, and therefore it would be very hard to make him refund what is no longer forth-coming.

In the caſe of *Brazen Noſe College*, they were plaintiffs, and yet the court made the ſame decree as in *Oriel College*, and did not oblige them to refund the money they had received of the tenant beyond the taxes.

If this annuity had been given charged on lands by way of rent-charge, and there had been a liberty of entring and diſtraining for the arrears, it would not have been ſo ſtrong a caſe, but here the plaintiff could have no other remedy than bringing a bill in this court; for how could ſhe have come at it by diſtreſs, for ſhe could not have diſtrained upon the water, nor the company's goods, as ſhe had no right of entry, and therefore was under a neceſſity of coming here.

I go upon the reaſon of other caſes, and on this general rule, that where the annuity is given to a relation for life, whether it is expreſſed for maintenance or not, if it has been paid for any length of years, and no deduction has been made on account of the land tax, nor was it owing to any fraud or impoſition on the receiver, I will preſume it has been ſo paid by the mutual conſent of both ſides, and if there ſhould ariſe any quarrel between the payer and receiver afterwards, the payer is not intitled to be relieved.

Lord Hardwicke decreed the plaintiff to be intitled to the growing payment of her annuity, ſubject to the land tax for the future, but declared that the defendant was not intitled in this court to have any deduction in reſpect to the land tax, for any time precedent to the time during which the preſent arrears have incurred.

Caſe 220. *The Attorney General* verſus *Parker, Price and Doughty, Michaelmas Term* 1747.

LORD CHANCELLOR.

Where there was only a general allegation as to the right of election to a curacy, and not examined into, or proved, the court would not make any decree, but diſmiſſed the information with coſts.

THERE are ſeveral parts of relief prayed by this information; firſt, to ſet aſide the election of Mr. *Doughty* to the curacy of *Clerkenwell*; and ſecondly, to eſtabliſh the right of election: in order to this ſeveral queſtions have been made at the bar.

The firſt was, As to the election of Mr. *Doughty*, and the aſſembly in order to it, and a piece of unfairneſs was objected in not countermanding the notice of election given in *February*.

The ſecond queſtion was, As to the right of election.

The third queſtion was, If Mr. *Doughty* was elected according to that right.

As to the firſt, I think the notice in *February* was a fair and legal one; and as to the countermand, that it being only on the *Sunday*, the very day before the election, I am of opinion they did right to refuſe it, and therefore this may be laid out of the caſe, which brings it to the merits out of which all the reſt muſt ariſe.

Firſt, In whom the right of election is, and what are the qualifications of the electors; and this tends to the general point of eſtabliſhing the right, by a decree of this court, and alſo to the queſtion in regard to Mr. *Doughty*.

And as to the firſt, it will depend upon the words of the deed of truſt, executed by Mr. *Drake* in 1656, and alſo upon the uſage in this pariſh, explanatory of the deed, and putting a general conſtruction upon it.

It appears to have been *a rectory impropriate*, of the monaſtery of *Clerkenwell*, and that there was a perpetual curacy ariſing out of it of four pounds a year to the curate; whether this was an ancient penſion, or created by King *Henry* the Eighth, after the diſſolution of monaſteries, which was very frequently done, does not appear.

It was given by Mr. *Drake* for the uſe of the pariſhioners and inhabitants for ever, and nothing is ſaid of the curacy, but to be ſure is conſequent to the truſt of *the rectory impropriate*.

As

As in one caſe the monaſtery were perpetual rectors, and the grantor in the other after the diſſolution, when this is granted to the pariſh, they have the nomination, becauſe they have the beneficial intereſt, and the truſtees muſt preſent purſuant to their nomination.

When the grantor of a rectory impropriate originally in a monaſtery, gives it to a pariſh, they have the nomination, and the truſtees muſt preſent purſuant to it.

Juſt as if it had been a grant of an advowſon of a preſentative living, the pariſh would have had the right of nomination to the truſtees, and they muſt have preſented ſuch perſon ſo nominated.

Pariſhioner is a very large word, takes in, not only inhabitants of the pariſh, but perſons who are occupiers of lands, that pay the ſeveral rates and duties, though they are not reſiant, nor do contribute to the ornaments of the church.

The word *pariſhioner* takes in not only inhabitants of the pariſh, but occupiers of lands that pay rates and duties.

Inhabitants is ſtill a larger word, takes in houſe-keepers, though not rated to the poor, takes in alſo perſons who are not houſe-keepers; as for inſtance, ſuch who have gained a ſettlement, and by that means become inhabitants.

The word *inhabitants* takes in houſe-keepers, though not rated, and alſo ſuch who have gained a ſettlement, and ſo become inhabitants, though not houſe-keepers.

Some ſort of limitation is allowed by both ſides to have been put by uſage on the liberality of this grant, and in the conſtruction of ancient grants and deeds, there is no better way of conſtruing them than by uſage, and *contemporanea expoſitio* is the beſt way to go by.

With reſpect to ancient grants and deeds, there is no better way of conſtruing them than by uſage, and *contemporanea expoſitio* is the beſt rule to go by.

It has been inſiſted by the relators, that it is confined to *inhabitants paying ſcot and lot*, or to perſons paying to *church and poor*, and by the defendants, that it extends to all *houſe-keepers* in general.

If it had ſtood without any kind of reſtriction at all, I cannot ſay the limitation of the relators would have been an unreaſonable one, and I was of that opinion in the caſe before me of the *Attorney General* verſus *Davy*, after *Trinity* term 1741. 2 *Tr. Atk.* 213. It aroſe in *Devonſhire*, and there I thought the inhabitants ought to be reſtrained to perſons paying *ſcot and lot*, that was a grant under a charter of the crown in *Edward* the Sixth's time.

But if there is an evidence of houſe-keepers conſtantly voting in this pariſh, it ought to prevail.

In a matter that depends upon tradition, the evidence of ancient perſons is properly admitted.

Conſider too the time of the grant; *the independant congregational ſcheme* prevailed then, and therefore it muſt be ſuppoſed the donor had an intention to make the right of election as liberal as poſſible, and all houſekeepers who were not rated, as well as rated, have voted in former elections.

It was proved alſo at the election, that all the four candidates ſigned a paper, in which was the following agreement, that the poll ſhould begin that day, and *all* houſekeepers ſhall poll.

It is very extraordinary they ſhould agree, if they did not think it to be the right.

It is expreſly ſworn that this paper was read publickly to the aſſembly, and univerſally agreed to in the veſtry before the poll began.

Can there be a ſtronger evidence of what was the right in the pariſh, than ſuch an unanimous acquieſcence previous to the election?

In all theſe caſes evidence of ancient perſons is conſtantly admitted as proper evidence, becauſe this muſt depend a good deal upon tradition.

Then how is it poſſible for me to decree it to be only in houſekeepers paying *ſcot and lot*, it would be putting an arbitrary conſtruction of the court, which I am not impowered to do.

Mr. Attorney General ſays, ſelect veſtries in this pariſh, and only houſekeepers paying *church and poor*, have a right to be preſent and vote there; but in the interrogatories, no queſtions are aſked, what is the right of election, and is not at all to be governed by what is the right of veſtry in this pariſh, for a perſon may grant in ſuch a manner to a pariſh as not to be affected at all by the veſtry.

The ſelect veſtry has been ſet aſide here for thirty years, and laid open ever ſince; but ſuppoſe there was *a ſelect veſtry* at the time of the grant *de facto*, yet it is not in any reſpect to be governed by it, but upon the foot and words of the truſt.

Next, as to the election of Mr. *Doughty*, if according to the right, there is no doubt of it; but ſuppoſe it was not according to the right of election, Mr. *Doughty* on the poll had a majority of 286, and on the ſcrutiny they have gone into no proof as to the merits of the election, or how the majority ſtood upon the right of the election: and therefore if it had been in the houſekeepers paying church and poor, I could not ſet aſide the election, as they have not gone into the proof upon the merits, nor turn Mr. *Doughty* out as he is in poſſeſſion.

Next, as to eſtabliſhing it for the future in ſuch limited houſe-keepers, there is no ground for that, there is no general allegation what is the right of election, but is only incidental in Mr. *Doughty*'s particular election, nor is there ſo much as an interrogatory framed for this purpoſe.

Therefore I cannot make a decree to eſtabliſh the right of election, which has not been examined to, nor alledged nor proved; but if I could go ſo far as to make ſome ſort of decree, ought I to direct an iſſue to ſettle a right which may not come in queſtion again in forty years, for Mr. *Doughty* may continue curate ſo long? this would be abſurd.

Lord *Hardwicke* gave general directions to the regiſter to frame an order, to prevent applications to the court to withdraw the plaintiff's replication with a view to ſet down the cauſe on bill and anſwer only, and by that means get the bill diſmiſſed with coſts according to the courſe of the court only.

The whole information was diſmiſſed with coſts.

In *Michaelmas* term 1747. Lord Chancellor mentioned *the cauſe of Potts* verſus *Reynell*, and gave directions to the regiſter to frame a general order, which might for the future prevent applications to the court to withdraw the plaintiff's replication, in order to ſet down the cauſe on bill and anſwer only, and by that means get the bill diſmiſſed with coſts, according to the courſe of the court, whereas otherwiſe he muſt have paid the defendant his full coſts. But his Lordſhip would not make any order that ſhould affect this particular cauſe at the hearing.

Newman verſus *Auling*, *November* 9, 1747. Caſe 221.

A Bill was brought for the arrears of an annuity of thirty pounds a year given to the plaintiff and her late huſband during their joint lives, and to the ſurvivor, and ſecured by a bond in the penalty of five hundred pounds.

A bill for the arrears of an annuity of 30 *l.* ſecured by bond in the penalty of 500 *l.* an account decreed of the arrears due ſince the year 1741. and intereſt at 4 *per cent.* to be computed at the end of each half year.

The defendant was deviſee of the real and perſonal eſtate of the donor.

Lord Chancellor decreed an account of the arrears againſt the defendant, which were due ever ſince the year 1741. and intereſt at four *per cent.* to be computed at the end of each half year, and ſaid, as this was given by way of maintenance, and a bond with a penalty for ſecuring the payment, the plaintiff was clearly intitled to intereſt upon the arrears, for the court have gone further where an annuity

As this was given by way of maintenance, and a bond to ſecure the payment, the plaintiff is clearly intitled to intereſt, for the court have gone further in an annuity given for maintenance, and decreed intereſt, though it was only a bare ſimple grant of an annuity, without any power of entring, if in arrear.

has

has been given for maintenance; and decreed intereſt, though it is only a bare ſimple grant of an annuity without any power of entering, if charged upon real eſtate, and in arrear, or if ſecured upon a penalty to inforce the payment out of perſonal eſtate.

Caſe 222. *Sibthorp* verſus *Moxom*, *November* 10, 1747.

The plaintiff's grandmother ſays by her will, I likewiſe forgive my ſon-in-law *Richard Chillingworth* a debt of 500 *l.* due to me upon bond, and deſire my executor to deliver the ſame to be cancelled. The legatee died in the life-time of the teſtatrix. *The plaintiff, his repreſentative, ought to have the benefit of this diſcharge of the debt, and the court ordered the bond to be delivered up to be cancelled.*

THE queſtion in this caſe was, whether a legacy ſhould be deemed to be lapſed, and ſink into the inheritance for the benefit of the heir, or go to the repreſentative of the legatee.

The teſtatrix, the grandmother of the plaintiff, deviſed in the following words: I *likewiſe* forgive my ſon-in-law *Richard Chillingworth* a debt of five hundred pounds due to me upon bond, and all intereſt that ſhall be due for the ſame at my deceaſe, and deſire my executor to deliver up the bond to be cancelled, and made her ſon *John Perry* ſole executor.

The legatee died in the life-time of the teſtatrix.

Mr. Attorney General for the plaintiff argued, that this was an extinguiſhment of the debt, and ſhould enure to the benefit of the repreſentatives of that perſon whoſe debt it was, and diſtinguiſhed upon the force of the words, *I give, or I forgive*; a difference that was taken in the caſe of *Elliot* verſus *Davenport*, reported in 2 *Vern.* 521. and alſo in 1 *P. Wms.* 83.

The reaſon, he ſaid, of the word *likewiſe* being introduced in this clauſe was, becauſe ſhe had before given 10 *l.* apiece to the legatees for mourning.

Mr. *Brown*, council of the other ſide, ſaid, the true queſtion is, if this deviſe be of a legatory nature, or to operate by way of extinguiſhment.

It does not certainly amount to a releaſe of the debt, becauſe it does not take place till the death of the teſtatrix.

A will cannot releaſe a debt, 1 *Ventr.* 39. 1 *Sid.* 421. the legatee alſo muſt be *in eſſe* capable of taking at the death of the teſtatrix.

The legatee pointed out in the preſent caſe is *Richard Chillingworth*, not his executor or adminiſtrator; it was a perſonal bounty to

to him, and coupled with the pecuniary legacy of ten pounds ſhe had given him before.

Mr. *Wilbraham*, council of the ſame ſide, argued, that as to the words directing the bond to be delivered up to be cancelled, they ſtop too ſhort, they ſhould have gone ſo far as to ſay it ſhould be delivered up to the legatee, his executors or adminiſtrators; that would, he agreed, have been ſufficient.

LORD CHANCELLOR.

I am of opinion the plaintiff ought to have the benefit of this diſcharge of the debt, and that the bond ſhould be delivered up to be cancelled.

The teſtatrix had in contemplation, ſome benefit to all the branches of her family; the daughter of *Richard Chillingworth*'s wife is the perſon who now applies for this benefit, and it would be hard to ſay that becauſe the ſon-in-law died in the teſtatrix's life-time, that the grandaughter, who was of the teſtatrix's blood, ſhould loſe it.

To be ſure where a teſtator gives a debt, or *forgives* a debt, it is a teſtamentary act, and will not be good againſt creditors, but againſt an executor it may.

Where a teſtator forgives a debt, it will not be good againſt creditors, but againſt an executor it may.

And though this cannot operate as a releaſe at law, yet equity will carry it that length, and if an action had been brought on the bond, this court would have granted an injunction, or an original application might be made to this court; if ſo, what operation will it have in the preſent queſtion.

If an action had been brought on the bond, this court would have granted an injunction.

In the caſe of *Elliot* verſus *Davenport*, * had it been ſaid, *I forgive* my ſon ſuch a debt, and the bond had been ordered to be delivered up by the executor to be cancelled, it had been held a diſcharge.

There is nothing perſonal in the preſent caſe in the direction that the bond ſhould be delivered up to be cancelled.

But it is objected, this is not an independant clauſe, but *ancillary*.

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* *A.* deviſes to *B.* 400 *l.* which he owed her, provided that thereout he paid ſeveral ſums to his wife and children, and the reſt ſhe freely *gave* to him, and directs her executor to deliver up the ſecurity, and not to claim any part of the debt, but to give ſuch releaſe as *B.* his executors, &c. ſhould require. *B.* dies in the life-time of the teſtatrix; the Maſter of the Rolls, Sir *John Trevor*, decreed the legacies given out of the 400 *l.* to be paid, and the reſidue of the debt to the executor. *Elliot* verſus *Davenport*, 2 *Vern.* 521.

The queſtion then is, what conſtruction the court ſhould put upon it.

I think the teſtatrix intended *in all events* the bonds ſhould be delivered up to be cancelled; if this was her intention, the caſe is clear, and would operate moſt for the benefit of her family.

In *Elliot* and *Davenport* the words are not penned as *forgiveneſs or remiſſion*, there was no intention to releaſe the recogniſance till Sir *William Elliot* paid 150 *l.* thereout; but here is a clear intention to releaſe the debt; there it was to be delivered up to Sir *William Elliot*; here in general to be cancelled.

There the right of action ſubſiſted, which was the reaſon of that opinion; here it would be too nice to make ſuch a diſtinction, and would narrow the bounty too much, intended by the teſtatrix to her family; and therefore I decree the bond to be delivered up to the plaintiff to be cancelled, but without coſts.

A will to prevent the lapſe of a legacy ought to be ſpecially penned.

N. B. It was agreed by all, that a will, deſigning to prevent the lapſe of a legacy by the death of the legatee in the life of the teſtator, ought to be ſpecially penned.

Caſe 223. *Williams* verſus *Longfellow*, *Eaſter term* 1746. *before the Maſter of the Rolls*, *William Forteſcue*, *Eſq*;

If a defendant diſclaims generally, and the plaintiff replies to her anſwer, and ſerves her with a *ſubpœna* to rejoin, ſhe is intitled to have coſts againſt him for the vexation.

MARY Buſh, a defendant, diſclaimed generally as to all the matters in the bill, the plaintiff ought not to have replied to her anſwer; by doing ſo, and ſerving her with a *ſubpœna* to rejoin, ſhe is intitled to have coſts againſt him to be taxed for the vexation; otherwiſe where the diſclaimer is to part, and the anſwer is as to another part.

Caſe 224. *Bulſtrode* verſus *Bradley*, *November* 7, 1747.

In decrees againſt a mortgagee on a bill for redemption, or againſt an executor to account, it is the courſe of the court to direct it without future words; and yet if the perſon decreed to account receive any thing ſubſequent to the decree, it is inquirable before the Maſter, and they muſt bring ſuch ſums to account.

LORD CHANCELLOR. It is the conſtant practice of the court in decrees againſt a mortgagee, upon a bill for redemption, or againſt an executor to account, to direct it without future words, *videlicet*, to account for what they have received, or might have, if it had not been for their own default; and yet if the perſon decreed to account receive any thing ſubſequent to the decree, it is inquirable before the Maſter, and the defendants in each caſe muſt bring ſuch ſums ſo received to account.

Harding verſus *Cox*, *November* 21, 1747.

Caſe 225.

THE cauſe being *in Lord Chancellor's paper for hearing*, the plaintiff petitioned the Maſter of the Rolls, that he might be at liberty to amend his bill, by adding a prayer, upon a ſuggeſtion *that the cauſe was at iſſue only*, and that the prayer was in the original bill, but omitted by negligence in the amended, and it was ordered accordingly.

A plaintiff by a falſe ſuggeſtion, *that the cauſe was at iſſue only*, when it was in the Chancellor's paper for hearing, obtained an order at the Rolls for liberty to amend his bill; the order diſcharged, and the cauſe put off till next term, on paying the coſts of the day, that the plaintiff may have an opportunity of amending his bill.

The defendant moved at the opening of this cauſe to diſcharge this order, as being obtained upon a wrong ſuggeſtion.

LORD CHANCELLOR.

I can take no notice of the original bill, for though it be ſtill upon the file, it was not properly before the court, and therefore the order muſt be diſcharged, as being irregularly obtained with twenty ſhillings coſts; and his Lordſhip put off the cauſe till next term, that upon paying the coſts of the day, the plaintiff might have an opportunity of amending his bill.

Leigh and others verſus *Barry and others*, *December* 4, 1747.

Caſe 226.

THE plaintiffs are creditors of one *James Randal*, and had effects of his in their hands; he becomes a bankrupt, and the defendants are choſen aſſignees under his commiſſion; ſeveral diſputes ariſing between the defendants and the plaintiffs in relation to *James Randal*, and ſuits depending on that account, they came to an agreement, that the plaintiffs ſhall retain as much from the produce of the effects of *James Randal* in their hands, as will anſwer them a compoſition of two ſhillings and ſix pence in the pound for their debts, and ſhall account for the overplus to the defendants.

If truſtees will bind themſelves to be liable for the acts of each other, as they have done here, the court will not relieve them, eſpecially in the caſe of a compoſition of debts, as this was.

A deed was executed for this purpoſe between the plaintiffs and the defendants, in which the plaintiffs *John Gibſon*, *Joſeph Merriman*, *William Leigh* and *George Weſtgarth*, did for themſelves ſeverally, and for their ſeveral and reſpective heirs, executors and adminiſtrators, covenant with each other, and the heirs, executors and adminiſtrators of each other, that the above agreement ſhall be good and valid, and that they will perform the ſame on their reſpective parts.

And

And afterwards in the covenant for carrying the agreement into execution, the words of the ſecond covenant were, They do, and each of them doth covenant, promiſe and agree with the defendant *Thomas Barry* and *Richard Packer*, their executors and adminiſtrators, that they will pay the overplus, *&c.*

Joſeph Gibſon, one of the covenantors, did alone receive the money for the ſale of *James Randal*'s effects, and the others only joined in the receipt to the purchaſers.

Gibſon is become a bankrupt, and no payment has been made to the defendants the aſſignees.

The defendants, the aſſignees of *James Randal*, brought three ſeveral actions of covenant againſt the plaintiffs, upon which the plaintiffs brought a bill here for an injunction, which was granted on the uſual terms of giving judgment with a releaſe of errors.

It was inſiſted for the plaintiffs, that they ought not to make good the deficiency occaſioned by *Joſeph Gibſon*'s bankruptcy, as he alone received in the whole money ariſing from the effects of *James Randal*, and as truſtees they could not avoid joining with *Joſeph Gibſon* in the receipt.

LORD CHANCELLOR.

Though there are not negative words in a deed, that truſtees ſhall not be liable for one another's acts, yet the court will not make them ſo for more than each has received.

In the caſe of truſtees though there are not *negative* words in a deed, *that they ſhall not be liable for the acts of one another*, yet this court will not make them liable for more than each has received.

If they all join in a receipt for money, the court will make that truſtee liable only who received it; otherwiſe as to executors, becauſe they need not join.

The court has even gone further; for where they all join in a receipt for money, it will make that truſtee liable only who received it, for they are all obliged to join in the receipt; otherwiſe as to executors, for there is no neceſſity for their joining, but may act ſeverally if they think fit.

But if the truſtees will bind themſelves to be liable for the acts of each other, the court will not relieve them.

In the preſent caſe they are not bare truſtees, but intereſted as creditors of *James Randal*.

The firſt is a ſeveral covenant, for they do for themſelves ſeverally covenant with each other, and for the heirs, executors and adminiſtrators of each other.

Afterwards in the ſpecial covenant for carrying the agreement into execution, it is plainly joint and ſeveral, for it is, they do, and

each of them doth, covenant, promiſe and agree with *Thomas Barry* and *Richard Dacker*, their executors, *&c.* that they will pay the overplus, *&c.* and it was for the convenience of the truſt, that they had a joint and ſeveral power.

Another reaſon that makes them each liable for the other is, that this is a compoſition of debts, and if good at law, unleſs fraud or miſtake appears in the compoſition, there is no inſtance of this court's relieving againſt it.

The deed, beſides, recites there were ſuits depending, and a demand upon the plaintiffs on account of *James Randall*, the bankrupt, and allows them to retain what they had in their hands, to anſwer them a compoſition of two ſhillings and ſix pence in the pound, upon entring into the agreement and covenants in the deed.

This court have been ſo ſtrict in regard to compoſitions, that if there be an agreement to pay the compounded ſum at a day certain, and the perſon fails of paying it at the time, they will not relieve him, but he muſt pay the whole debt to the creditor.

If there be an agreement to pay the compounded ſum at a day certain, and the perſon fails, he muſt pay the whole debt to the creditor, for this court will not relieve.

Lord *Chancellor* decreed the plaintiffs ſhould be charged jointly, to make good the deficiency of *Joſeph Gibſon*, and to pay the defendants the coſts at law, and the coſts in this court, ſo far as it relates to the relief ſought againſt the joint covenant contained in the deed of the 27th of *February* 1741.

Banks verſus *Denſhaw and others*, *December* 9, 1747. Caſe 227.

A Queſtion aroſe in the cauſe, whether the court would ſupply the want of a ſurrender of ſome part of copyhold lands belonging to the father, in favour of the plaintiff, a younger child? The father, who was the teſtator, having two copyhold eſtates, one of which he had ſurrendered to the uſe of his will, and the other he had not.

A teſtator ſays in his will, I give all and every my freehold and copyhold meſſuages to *A.* and *B* (having ſurrendered the copyhold part thereof to the uſe of this my will.) He had two copyholds, one of which he had ſurrendered, the other not. *It being clearly his intention that both ſhould paſs, and being a deviſe to a younger child totally unprovided for, the court directed the heir at law to ſurrender it to the ſame uſes as were declared by the will.*

It was argued, for ſupplying the want of the ſurrender, that the teſtator's intention was plain, that all his freehold and copyhold eſtates ſhould be ſubject to the truſts of his will, under which the younger children claimed; and that the younger child being otherwiſe unprovided for, the court would ſupport the intention of the teſtator as to the fund for anſwering this, and the other charges created by the will.

On the other ſide it was argued, that the teſtator's having ſurrendered part, and thereby ſhewn that he was apprehenſive of the neceſſity of ſurrendering his copyhold eſtates, that he intended ſhould be ſubject to his will, to the uſes of ſuch will, excluded any argument from intention that the whole ſhould paſs, and rather favoured an argument that he intended no more ſhould paſs than he had ſurrendered; and the caſe of *Barker* verſus *Barker*, before Lord *Hardwicke*, was cited, where part of the teſtator's eſtate, conſiſting of the King of *Bohemia*'s Head on *Turnham Green*, being copyhold, and the greateſt part thereof lying in a manor where the teſtator had made a ſurrender to the uſe of his will, but the remainder a ſmall part in another manor in which no ſurrender was, yet the court refuſed to ſupply a ſurrender in that caſe, though ſo apparently inconvenient and deſtructive to the eſtate.

LORD CHANCELLOR.

The court ought to ſupply the want of a ſurrender in the preſent caſe, the words of the will are as ſtrong as can poſſibly be to ſhew the teſtator's intention, that the whole ſhould paſs; " Alſo I give " all and every my freehold and copyhold meſſuages to *A.* and *B.* " (having ſurrendered the copyhold part thereof to the uſe of this " my will)" which, being in a *parentheſis*, is but in the nature of a recital, and as ſuch conſidered only as a miſtake, and not deſcriptive of what the teſtator intended ſhould paſs, as was the caſe in *Barker* verſus *Barker*, *December* 15, 1743. which I very unwillingly determined as I did, the words there were *which copyhold premiſſes I have ſurrendered*, theſe were reſtrictive words, and bound the court to judge on what were ſurrendered.

Suppoſe the teſtator had in his will ſaid, whereas I have ſurrendered my copyhold to the uſe of my will, now I do, *&c.* and there had been no ſurrender, it would have been ſupplied in favour of younger children, legatees, or of creditors.

Beſides, in the preſent caſe, the ſubſequent part of the will puts the matter out of all doubt as to the teſtator's intention, if that was not ſufficiently plain before, as he thought it was, where the teſtator goes on, but my will is, that the ſaid copyhold part ſhall be ſubject to the payment of 400*l.* due on a mortgage of a part thereof; now this muſt be meant the whole copyhold part of his eſtate, becauſe the 400*l.* mortgage was on the part of the co-copyhold which was not ſurrendered.

Upon the whole I am clear, on the manifeſt intention of the teſtator expreſſed in his will, that the ſurrender ſhould be ſupplied; and directed the heir at law, who was alſo the cuſtomary heir, to

ſurrender

ſurrender the ſame to the ſame uſes as were declared by the teſtator's will, but ſuch ſurrender to be at the coſts of the plaintiff.

Foſter verſus *Vaſſall*, *December* 17, 1747. Caſe 228.

THE bill prayed that the defendant *Vaſſall*, and the repreſentatives of the other executors of the plaintiff's father, may account to the plaintiff, and that he may be paid what ſhall appear to be due, and that he may be quieted in the poſſeſſion of thoſe eſtates come to him by the death of his brother *John*.

To a bill brought againſt the defendant as an executor to account, he pleads a ſuit in the court of Chancery at *Jamaica*, brought againſt him by the plaintiff, with the like matter of complaint relating to the executorſhip: neither the term, nor even the year in which the ſuit was inſtituted, being ſet out for certain, there is not that averment which courts of law and equity both require in pleas, and as it was therefore defective in form, *Lord Hardwicke over-ruled the plea.*

To this it was pleaded, that the plaintiff and the defendant are natives of *Jamaica*, where both their eſtates lie, and both of them being reſident there, the plaintiff, in or about 1745, brought his bill in the court of chancery there, againſt the defendant, as one of the executors of the plaintiff's father, and in his bill ſets forth the like matter of complaint relating to the executorſhip, and guardianſhip, and the defendant's management and conduct of the eſtate, and ſets up the like claim to the eſtate, and prays the like account, and the ſame relief, as are required and prayed by his preſent bill.

To which bill in *Jamaica*, this defendant, in 1747, put in his anſwer, with the account relating to the truſt eſtate annexed; and ſoon after, in *Auguſt* 1745, quitted *Jamaica*, for the recovery of his health, and left his attorney there, to manage this ſuit, and his other affairs.

Iſſue was joined, and the ſame cauſe is ſtill depending there.

The defendant refers to the record in *Jamaica*, as he has no copy of the proceedings there; and inſiſts by his plea, that as all the matters and things lie there, he ought not to be ſued for the ſame matters and things here, all the vouchers being in *Jamaica*, and the laws and cuſtoms there differ in many reſpects from thoſe in this kingdom; and the defendant's eſtate lying altogether in *Jamaica*, and liable to be ſequeſtered for the non-performance of any order or decree there, and being more than ſufficient for that purpoſe, he therefore pleads the bill and anſwer, and proceedings there, to the diſcovery and relief now ſought.

Mr. *Wilbraham*, in ſupport of the defendant's plea, cited *Sparry's caſe, in the Exchequer*, 5 *Co.* 61. there *Owen* brought an action on

the caſe againſt *Sparry* of trover, of a certain quantity of cotton yarn, and ſelling it to perſons unknown, and converſion to his own uſe; the defendant pleaded, that the plaintiff had another action on the caſe depending in the King's Bench for the ſame trover, and converſion of the ſame goods, and this ſuit is proſecuted pending the other: and it was reſolved by Sir *Roger Manwood*, Chief Baron, and the whole Court of Exchequer, that the bill ſhould abate; for by the rule of law, a man ſhall not be twice vexed for one and the ſame cauſe, *nemo debet bis vexari, ſi conſtet curiæ quod ſit pro una et eadem cauſa.*

He likewiſe cited *Wells and his wife* verſus *The Earl of Antrim*, *December* 6, 1717, and *Otway* verſus *Ramſay*, *Mich.* 11 *Geo.* 2. *in B. R.* to ſhew that judgments obtained in the courts here extend not to *Ireland.*

He inſiſted, there is the ſame reaſon why the plantations ſhould have the ſame power in their courts of equity, as the courts in *Ireland* have.

As to the inconvenience charged by the bill itſelf, that the inventory of the executor is filed at *Jamaica*, and that this court cannot by any method oblige them to bring it over; ſuppoſe a decree ſhould be made there, all the books, papers and writings are then of courſe directed to be produced, in order to take the account; the ſame decree may be made here, and then we can only have copies of the books, *&c.* or there may be two contradictory decrees, which is the principal reaſon why the court will not allow of two ſuits for the ſame matter, depending at once in two different courts.

The court of *Jamaica* pays no more regard to the decrees of the court of *England*, than this court does to the ſentences of foreign courts.

The inconvenience of entering into it here being ſo great, the convenience of determining it there ſo apparent, he inſiſted that the plea ought to be allowed.

The defendant has, beſides, aſſerted in his plea, that he has a large fortune which is liable to be ſequeſtered there, ſo that the plaintiff may have compleat juſtice.

In anſwer to an objection thrown out by the plaintiff, that the plea is not ſupported by proper averments, and particularly, that it does not aver the ſuit in *Jamaica* is ſtill depending; Mr. *Wilbraham* cited *Urlin* verſus ——— 1 *Vern.* 332, where the Maſter of the *Rolls* held, that there need not be a poſitive averment, that the former ſuit is ſtill depending, for that is examinable by the Maſter.

LORD CHANCELLOR.

If this plea had been well pleaded, it might have brought on a conſiderable queſtion.

The different courts of equity are held under the ſame crown, though in different dominions, and therefore, conſidering this as a court abroad, the point of juriſdiction is the ſame as if in *Ireland*; and it is certain where the proviſion is in *England*, let the cauſe of ſuit ariſe in *Ireland*, or the plantations, if the bill be brought in *England*, as the defendant is here, the courts do *agere in perſonam*, and may by compulſion on the perſon, and proceſs of the court, compel him to do juſtice.

Where the defendant is in *England*, though the cauſe of ſuit ariſe in the plantations, if the bill be brought here, the court does agree *in perſonam*, and may by compulſion on the perſon, compel him to do juſtice.

Suppoſe different ſuits are brought there, and here, what is to be done?

I take it to be clear, if an action is brought in the courts of King's Bench, or Common Pleas, and the defendant pleads to it an action in *Ireland*, or the *Plantations*, they could not take any notice of it, nor would it bar the juriſdiction of the court here.

If the defendant does in an action in the court of King's Bench or Common Pleas, plead to it an action in the plantations, it will not bar the juriſdiction here.

It has been determined, if an action be brought in *Ireland* on a bond, and ſued to judgment there, you cannot even plead that judgment to an action in the courts here.

Though an action has been brought in *Ireland* on a bond, and ſued to judgment there, you cannot plead it to an action here.

The general rule of courts of equity with regard to pleas, is the ſame as in courts of law, but exerciſed with a more liberal diſcretion.

The rule with regard to pleas, is more liberally here exerciſed than at law.

To be ſure, two ſuits for the ſame matters in the plantations and here, may be attended with inconvenience, as Mr. *Wilbraham* has urged; and Lord *Cowper*, for that reaſon, in *Wells* verſus *Lord Antrim*, went as far as he could, but I ſhould not have been of opinion my ſelf, to allow the plea there, to the diſcovery.

The plea to the juriſdiction is known here as well as at law, but it is not ſo as to pleas in abatement or bar, for the court here allow themſelves a greater latitude as to circumſtances; and in the order of Lord *Cowper*, there is a reſervation for further proceedings here, if Lord *Antrim* ſhould make it impracticable to proceed in *Ireland*.

Though in the caſe of *Wells* verſus *Lord Antrim*, Lord *Cowper* allowed the plea to the diſcovery, Lord *Hardwicke* ſaid, he ſhould not have been of that opinion.

It is ſaid here, that in or about ſuch a year, the plaintiff brought his bill in the court of Chancery of *Jamaica*, &c.

Not even the year is ſet out for certain, not ſo much as the term mentioned in which the ſuit was inſtituted, and ſet forth in general only, that his former bill prays the like account, and the ſame relief with the preſent.

This is pleading hiſtorically only, and upon his memory, without any averment or certainty, which courts of law and equity both require in pleas.

It was ſaid by Mr. *Wilbraham*, the defendant had no copy of the proceedings with him in *England*, and therefore could not plead it with more certainty.

But this will not make the plea at all the better, the defendant ought to have applied by motion, on this ſuggeſtion, for more time to plead or anſwer, but the court cannot by their rules allow this plea, as it is defective in form, and therefore his Lordſhip overruled the plea.

Caſe 229. *Bell* verſus *Read*, *December* 17, 1765. Mr. Baron *Clark* ſitting for *Lord Chancellor*.

In *May* 1743. a bill was brought againſt the defendants for tithes; the 28th of *April* 1746 the cauſe was heard at the *Rolls*, and an account decreed, and the defendants directed to pay what ſhould reſpectively be found due: to a ſecond bill for the ſame matter, the defendant pleads the firſt, and the decree. Mr. Baron *Clark* allowed the plea, as the defendant would otherwiſe be put to double expence, and double vexation.

THE plaintiff, as rector of *Blunſden*, in *Wiltſhire*, brought his bill againſt the defendants, as occupiers of lands in the pariſh, for the great and ſmall tithes, and prays that they may come to an account with him for the tithes *which are due and payable to the plaintiff*, and that they may pay to him all and ſingular his tithes and duties for the future, as they ſhall accrue and grow due, as long as he continues rector there.

The defendants, as to ſo much of the bill as ſeeks any account or diſcovery of the tithes ariſing in *Blunſden*, at any time before the 28th of *April* 1746, plead, that before the plaintiff exhibited his preſent bill, he did, in *May* 1745, exhibit his firſt bill againſt the defendants for an account, and diſcovery of the tithes ariſing in *Blunſden*, and by that bill prayed, that the defendants might pay the plaintiff the full value of ſuch tithes with which the defendants were chargeable, *and which ſhould appear to be due to the plaintiff*, and alſo that the defendants might pay to the plaintiff *all his tithes for the future as they ſhould grow due, ſo long as he continued rector*

of

of Blunſden; and on the 28th of *April* 1746, that cauſe was heard before the Maſter of the *Rolls*, and it was ordered to be referred to Mr. *Bennet*, to take an account of what was due to the plaintiff from the defendants, for all the tithes demanded by the plaintiff's bill, and that they ſhould pay him what ſhould reſpectively be found due from each of them.

And in purſuance of the decree the plaintiff has left with the Maſter, three diſtinct charges againſt the three ſeveral defendants, and examined witneſſes in order to ſupport his charges, and alſo exhibited interrogatories before the Maſter for the examination of the defendants, who have each of them put in their ſeveral anſwers and examinations to the interrogatories.

And, in regard the plaintiff is by his preſent bill ſeeking the ſame relief and diſcovery as he ſought by his former bill, and as is already provided for him by the decree, according to the uſage of this court in caſes of this nature, the defendants do therefore plead the former bill, anſwers, decree, *&c.* in bar to ſo much, and ſuch part of the plaintiff's bill as aforeſaid.

Mr. *Tracy Atkyns*, in ſupport of the defendants plea, ſaid, that the ſecond bill muſt either be brought for vexation merely, or proceed from ignorance, and want of knowing the practice of this court; for he apprehended there was a material difference between the decrees of the Exchequer for an account of tithes, and the decrees of this court, that there they are directed to the time of of filing the bill only, but here to the time of the Maſter's report.

That Lord *Chancellor* ſeemed to be of this opinion in the caſe of the *Archbiſhop of York* verſus *Sir Miles Stapleton and others*, *February* 21, 1740; "That was a bill brought for an account of tithes, "and to eſtabliſh the cuſtom of ſetting out corn in ſtacks; his "Lordſhip directed an iſſue to try the cuſtom, and ſaid, though "it will be time enough to ſearch for precedents as to the manner "of directing the account, when the cauſe comes back after trial, "yet he took the difference between the courſe of proceeding in "the court of chancery, and the court of Exchequer, to be this, "that there they direct an account of tithes no further than the "bringing of the bill, but here the rule of the court in general is, "where an account of tithes is decreed, that it ſhall be carried "down even to the time of the Maſter's report, and not to the "filing of the bill only.

Mr. *Tracy Atkyns* obſerved further, that the rule is the ſame in ſimilar caſes, where the account is to be taken, and that in the caſe

of *Bulſtrode* verſus *Bradley*, *Michaelmas* term 1747, Lord *Chancellor* was pleaſed to ſay, " it is the conſtant practice of the court, in de- " crees againſt a mortgagee upon a bill for redemption, or againſt " an executor to account, to direct it without future words; and " yet if the perſon decreed to account, receive any thing ſubſe- " quent to the decree, it is inquirable before the maſter equally " with ſums received before the decree.

That if this be the practice, the plaintiff, by the decree in the firſt cauſe, may carry the account full as far under the firſt ſuit, as he can under the ſecond, and conſequently the laſt is multiplying ſuits unneceſſarily, without any advantage to the plaintiff, or anſwering any end, but what he has already, or might have obtained under *the former decree.*

Mr. Baron *Clark.*

The defendants plea of a former ſuit depending for the ſame matter ought to be allowed, or otherwiſe the defendant may be put to double expence, and double vexation, as poſſibly if the ſecond cauſe was to proceed, the decree may be different from the decree in the former ſuit.

Decrees for account of tithes in the court of Chancery are general, to account for all that are due, without ſpecifying any particular period, or limiting the account to a certain determinate time.

As to the difference in practice between the two courts, the Exchequer, and Chancery, it is undoubtedly ſuch as has has been inſiſted on by the defendants council, and in decrees for account of tithes in the court of Chancery, they are not drawn up differently from decrees to account in other matters, but are general, to account for all tithes that are due, without ſpecifying any particular time charged in the bill, or limiting the account to any certain determinate time.

And, as according to the practice of this court, an account for tithes may be carried on as long as the ſuit is depending between the parties; it would be vexatious if the plaintiff ſhould be allowed to proceed in a ſecond bill for the ſame individual tithes; I ought therefore to allow the plea as to the particular period of time covered by it the 28th of *April* 1746, the time when the cauſe was heard and decree made: and it was allowed accordingly.

Barnſley

Barnſley verſus *Powell*, *December* 18, 1747. *The laſt ſeal before Chriſtmas.* Caſe 230.

A Commiſſion to examine witneſſes in the cauſe iſſued in *Auguſt*, was executed in *September*, and continued till the 20th of *October*; an application was made by the defendant the beginning of *Michaelmas* term, for a new commiſſion, which was offered to him by the plaintiff on terms, but was rejected.

If a commiſſion be taken out in the vacation, and has not a certain return, it does not expire the firſt day of the following term, but may be continued in execution the whole of the next term, to the laſt return.

And now the defendant having lain by till the laſt ſeal after *Michaelmas* term, and after the cauſe is ſet down to be heard, moves that a new commiſſion may be granted, and that he may be at liberty to exhibit interrogatories, and that publication may be enlarged to ſix weeks.

LORD CHANCELLOR.

I am willing to let the defendant have an opportunity of examining, that there may be no imputation of hardſhip.

It is ſworn by the defendant's affidavits, that the commiſſion was cloſed without *Manſell Powell*, or his ſolicitor knowing it.

By the rule of the court, the plaintiff is firſt intitled to ſue out the commiſſion, and if the defendant has an opportunity of examining his witneſſes, he is not intitled to a new commiſſion; indeed, if the plaintiff neglects to ſue it out, it may be done *ex parte defendentis.*

The evidence of the defendant does not come up to his being hindered in examining his witneſſes; but, however, I am inclined, as far as I can, without manifeſt injuſtice, to let in the defendant to examine witneſſes.

The plaintiff's commiſſioners were under a miſtake in cloſing the examination the 23d of *October*, for if a commiſſion in *England* be taken out in the vacation, and has not a certain return, but only *ſine dilatione*, it does not expire the firſt day of the following term, but may be continued in execution the whole of the next term to the laſt return, and the defendant ſhould have applied to have enlarged publication till the laſt day of the term; but notwithſtanding his Lordſhip directed a new commiſſion to be returned by the laſt day of *Hilary* term, and publication enlarged to the firſt ſeal after that term.

The next matter is, whether the defendant may be at liberty to exhibit new interrogatories.

After the depoſitions have been ſeen under a former commiſſion, the court will not ſuffer additional interrogatories to be exhibited under a new one, but confined the defendant to the proving exhibits and croſs-examining a perſon already examined for the plaintiff, but not to examine any new witneſſes.

It is very dangerous to ſuffer additional interrogatories to make out new circumſtances after the depoſitions have been ſeen under the former commiſſion; and the court, beſides, expects all the defendants ſhould join in the application for new interrogatories; and therefore all the order I ſhall make in the preſent caſe is, that the defendant *Powell* be at liberty to exhibit additional interrogatories to the competency or credit only of Sir *Humphrey Howarth* already examined for the plaintiff, and alſo to prove exhibits, and likewiſe to be at liberty to croſs-examine Sir *Humphrey Howarth*, but not to examine any new witneſſes.

Caſe 231. *Hawkins* verſus *Crook*, *December* 21, 1747.

Where a ſequeſtration iſſues as a meſne proceſs, it falls with the death of the perſon, but if for non-performance of a decree, the death of the party does not determine it.

A Commiſſion of ſequeſtration iſſued in 1728, againſt the defendant, for want of an anſwer; Mr *Vaughan*, who was employed in the cauſe as ſolicitor for the plaintiff, made his own ſon commiſſioner, who now applies by petition to the court for an order upon the plaintiff, to pay him his fees as a ſequeſtrator.

LORD CHANCELLOR.

It does not appear he has made any demand in nineteen years, though the perſon againſt whom the ſequeſtration iſſued died as long ago as 1734; neither does it appear what goods were ſequeſtered, nor has any return ever been made, during all this time, of what was ſequeſtered, and though he delivered over the goods in 1730, he made no demand.

If the plaintiff ſhould ever call for an account of the goods ſequeſtered, then the petitioner might ſet off for his fees, provided he has made a return from time to time of what he has ſeized under the ſequeſtration: the petition was diſmiſſed.

N. B. His Lordſhip ſaid a ſequeſtration, that iſſues as a meſne proceſs of the court, falls with the death of the perſon, but where it iſſues for non-performance of a decree, the death of the party does not determine it.

Smith

Smith verſus *Wilmer and others*, *December* 22, 1747. Caſe 232.

IN the month of *April* laſt, at the inſtance of *Alexander Smith*, the defendants underwrote the ſum of one hundred pounds, on the goods to be loaden on board the *Ghent* packet, on a voyage from *Dort* to *London*, and in the voyage ſhe foundered, and ſunk with all her cargo; the defendants believing the ſhip was unfairly loſt, refuſed to pay the ſum inſured; whereupon Mr. *Cracraft*, attorney for *Smith*, cauſed eleven ſpecial original writs to iſſue out of Chancery againſt the defendants, returnable in the court of King's Bench, and having ſued out the ſame number of *capiaſſes ad reſpondendum*, returnable in *Michaelmas* term, held the defendants to ſpecial bail thereon, and on the 10th of *November* delivered three declarations againſt the defendants, and demanded pleas; and on the 16th of *November* the defendants attorney having demanded *oyer*, and a copy of the ſeveral original writs, *Lilliot*, who is clerk to *Cracraft*, brought to their attorney on the 20th of *November* the three originals, and copies thereof, who diſcovered they had been altered in ſeveral places after they had paſſed the ſeal of this court; for upon examining the copies with the writs, he found there were ſeveral interlineations, raſures and writings upon raſures newly made in the writs themſelves, and the defendants apprehending that the alterations were made by *Lilliot* under the direction of *Cracraft*, applied by petition to the court, that the ſeveral original writs may be brought here for Lord Chancellor's inſpection, to make ſuch order as he ſhould think proper, and that they might have their coſts they have been put to on this account.

After original writs had iſſued under the ſeal of this court, they were altered and amended with the leave of the curſitor by the plaintiff's attorney, and then reſealed; the defendant applies to ſuperſede the writs on account of the raſures made in them after they were ſealed: *As the miſtakes were merely literal or verbal, no grounds to ſuperſede them, eſpecially as the curſitors have declared it to be the courſe of their office, that when their clerks are guilty of miſtakes in making out the original variant from* the præcipe, *they direct the plaintiff's attorney to ſet them right, where the miſtakes do not affect the ſubſtance of the writ.*

It appeared by the affidavit of *Lilliot*, that three *præcipes*, agreeable to the declarations delivered to the defendants attorney, were left with Mr. *Buxton* the curſitor, in order for him to make out the original writs conformable thereto, and that *Lilliot* afterwards went to Mr. *Richard Floyer*, who acts as deputy philizer of the court of King's Bench, and aſked him for them, who delivered them to him, and told him that Mr. *Buxton* had not time to examine the writs, and that if there were any miſtakes in any of them, that *Lilliot* himſelf might alter and make them agreeable to the *præcipes*; that upon comparing and examining them with the draughts of the declarations, he found ſeveral miſtakes, and particularly in ſeveral places where the policy of inſurance was recited, ſome words were contracted, and wrote ſhort, which were written at length both in the declarations and *præcipes*; and admits he did, by the permiſſion and direction of *Floyer*, make ſeveral alterations in the writs, in order to make them agreeable to the *præcipes*, *before* oyer *and copies thereof were delivered to the defendants attorney*; but there being ſome few miſtakes overlooked after ſuch alterations made,

when the original writs were read over with the copies, (delivered to defendants attorney) he rectified the ſame after *oyer*, and copies delivered, on the day they were ſo delivered; and that the miſtakes were intirely owing to the curſitor's clerk who ingroſſed the writs without examining the ſame with the *præcipes*, and that *Lilliot*, after he had made all the alterations in the original writs, went on the 20th of *November* to Mr. *Buxton* the curſitor, and acquainted him with it, who approved of it, and the writs were on that day left with the curſitor to be reſealed, and were accordingly reſealed the next day, *and are now agreeable to the declarations and to the* præcipes *left with the curſitor*, and that this was the true and only reaſon why he altered the ſame, and that there is no alteration in the return thereof.

LORD CHANCELLOR.

Where an original writ iſſues from hence, and is altered, this court before the return have the cogniſance; doubtful if they have the return. *Vide ante* 362.

I have great doubt whether I can properly enter into this matter, for though where an original writ iſſues out of this court, and is altered and eraſed, I might before the return, and while it is *in tranſitu*, have the cogniſance, yet after it is returned, it is a record of the law court.

Mr. Attorney General, council for the petitioners, cited the caſe of the *Weavers company qui tam* verſus *Hayward*, *June* 12, 1746. after which was a proſecution on the callico act, and held there, that altering the original writ after it had been ſealed, was deſtroying the writ, and it was ordered to be ſuperſeded with coſts.

In the preſent caſe the writ was altered after the return, and reſealed after *oyer* had been prayed.

The copies of the writs were given to the petitioners attorney by the plaintiffs as they ſtood originally, and thereupon the defendants made application to Mr. Juſtice *Wright* to make the declarations agreeable to the original writs, and afterwards for the like purpoſe to the court of King's Bench, who refuſed to do any thing in it, as it was a matter for the animadverſion of this court.

The preſent application therefore is to your Lordſhip, to ſuperſede the writs on account of the raſures and alterations made in them after their being ſealed, and the queſtion is, whether the plaintiff's attorney can alter it, or if it is not a ſort of forgery upon the great ſeal, for the former writs had been made uſe of, returned by the ſheriff, and declarations delivered purſuant to them, and as there are no double ſtamps upon them, fall exactly within the caſe of the *Weavers company* verſus *Hayward*, for it is plainly a fraud upon the ſtamp act; they have beſides not only raſed them once to make them tally with the declaration, but amended them a ſecond time, and all the alterations are before the reſealing.

Mr.

Mr. *Cox* of the ſame ſide ſaid, after uſe has been made of a writ, it is a record of the court, and cannot be varied or altered.

Mr. *Brown*, council for the plaintiff at law, ſaid, it is very well known that where ſpecial *capiaſſes* are ſued out, the originals are not taken out till ſome time afterwards; the *præcipes* have never been altered, but only the originals made agreeable to them, and though the defendants put in a ſham plea at firſt, they have retracted it, and have pleaded the general iſſue ſince.

It is inſiſted the writs ought to be ſuperſeded, becauſe they had been altered after they had iſſued from the great ſeal; now nothing is more frequent than altering writs in things which are not material; and the revenue is not at all defrauded, becauſe it is the *capiaſſes* only that are ſtamped; the caſe cited therefore differs from the preſent, becauſe here the revenue cannot ſuffer.

Any alterations that vary *the teſte*, or the *return*, or *the ſubſtance of the writ*, are not allowable; but an alteration may be made in immaterial parts, becauſe that does not vary it in ſubſtance.

In the *Weavers company* verſus *Hayward*, the alteration was thus; the attorney who took out the writ, left the old teſte, and inlarged the return, which gave a new cauſe of action, and *that* the court would not endure; here nothing more has been done than only rectifying ſome verbal miſtakes, owing to the negligence of the curſitor's clerk.

The originals are conſidered merely as things of form, for they have been taken out even after a warrant for entering up of judgment, and the return of them is indorſed by the attorney as a thing of courſe, and never come into the hands of the ſheriff.

It is ſaid the defendants might have taken advantage of it by pleading in abatement; but if they had, the court would have aſſiſted the plaintiff in rectifying theſe variances between the originals and the *capiaſſes*; but as the defendants have pleaded now the general iſſue, they ſhall not be allowed to take advantage of a mere miſtake in form to ſuperſede a writ.

Mr. Buxton and Mr. Whitehead, two of the curſitors attending, *Lord Chancellor* aſked them, what the practice of the office is, where there are original writs.

Mr. Buxton ſaid in things that are not material, as clerks are liable to miſtakes, they have in an hundred inſtances directed the attorney's clerk to ſet it right.

LORD CHANCELLOR.

Suppoſe an original writ is made out to warrant a ſpecial *capias*, and the attorney's clerk has altered the original writ to make it conformable to the *præcipe*, has this been juſtified?

Mr. *Whitehead* ſaid, he always apprehended that in literal miſtakes, and even where a word has been left out, it has been uſual to ſupply it, and reſeal it.

In the preſent caſe the word *enure* was altered to *endure*, and the word *detainment* to *determinatus*.

LORD CHANCELLOR.

The *præcipe* left with the filazer, is the warrant to the curſitor to make out the original, for the *præcipe* is tranſmitted by him to the curſitor, and in the notion of law precedes the *capias*, though in practice it is not made out till afterwards.

When this application was firſt made to me, I apprehended it had been an extraordinary behaviour in the plaintiff and his attorney, and that they had taken upon them to alter an original writ, without bringing it to be reſealed.

No perſon after an original writ is ſealed can alter it without bringing it to be reſealed.

That would have been unwarrantable, for no body after ſealing can alter it without bringing it to be reſealed, or if it is ſuch a miſtake as is warranted to be amended by the curſitor, yet it ſhould be brought to be reſealed.

But at the hearing it turns out not to be an alteration by the attorney himſelf, but by the curſitor, and the writ ſent by him to be reſealed.

The queſtion is, whether this is irregular or not; a great many conſiderations ariſe, and ſome of a pretty nice nature: Firſt, Whether it is in the power of this court now to ſuperſede the writs.

If writs are altered after the return is out, and proceſs iſſued upon them and filed in the court of King's Bench without having them reſealed, it is under the cogniſance of the Judges there, and this court will not meddle with them.

If the writs had been altered after the return was out, and proceſs had iſſued upon them, and filed in the court of King's Bench without having them reſealed, I ſhould not have meddled with them, but it would have been under the cogniſance of that court, who might have ſet right a miſtake where there was an effacing of an original, and reſtored the writs as they were before.

The ſecond conſideration will be, what is the nature and foundation of original writs? to be ſure they were commiſſional to courts of common law, for without an original none of theſe courts had a commiſſion to hold plea; and a judgment where there is no original is void, unleſs by reaſon of privilege; as in the court of King's Bench, where the defendant is brought there by bill of *Middleſex*, then he is in the cuſtody of the marſhal, and a priſoner to the court at the time, and conſequently they have a privilege to retain him in that court.

Original writs were at firſt commiſſional to the courts of common law, for without an original none of thoſe courts had any power to hold a plea, and a judgment where there was no original was void; and all the juriſdiction the courts of common law have now is upon a preſumption of privilege.

In the Common Pleas they proceed in the nature of a declaration *by the by*.

In the court of Exchequer they proceed upon a ſuppoſition, that defendant is *debitor Domini Regis*, ſo that the juriſdiction the courts of common law have, is upon a preſumption of privilege, unleſs it is by original writ.

Where the party proceeds upon a ſpecial *capias*, and takes out an original writ to warrant it, the plaintiff has this benefit, that the defendant muſt plead without imparlance: but all this is varied by practice and modern uſage; for though the ſpecial *capias* is founded on the original, and ſuppoſes an original taken out firſt, yet it is otherwiſe in practice; and where they proceed upon a *latitat* in the court of King's Bench, or *clauſum fregit* in the court of Common Pleas, they will commit an attorney for praying *oyer* of an original; and where the plaintiff obtains a verdict, he need not ſue out an original, for the ſtatutes of jeofails cure the want of it; and yet in judgment of law the original is ſuppoſed to be taken out before the *capias*.

Though in judgment of law the original is ſuppoſed to be taken out before the *capias*, yet where the plaintiff has obtained a verdict he need not ſue it out, for the ſtatutes of jeofails cure the want of it.

I only mention this, to ſhew how by the modern practice it is grown into mere matter of form.

The complaint before me is, that this original after it had iſſued under the ſeal of the court has been altered and amended, and then reſealed, which it is inſiſted ought not to have been done.

The curſitors, Mr. *Buxton* and Mr. *Whitehead*, have certified in court that it is the courſe of their office, whenever a curſitor's clerk is guilty of a miſtake in making out the original variant from *the præcipe*, (which is the curſitor's warrant for the original), on the plaintiff's attorney ſhewing the miſtakes, to direct them to be ſet right, if they are only literal or verbal miſtakes, without affecting the ſubſtance of the writ.

This is a very reaſonable alteration, for it is not the miſtake of the party, but *vitium clerici*; if the alteration were to vary it in ſubſtance,

ſubſtance, that would not be juſtified; but if I was to alter this practice in the office, the plaintiff muſt make a motion to amend the writs, (for undoubtedly they are amendable) and then there is no occaſion to reſeal them, for this court can certainly alter writs iſſuing from hence; but where the officer alters it, it is neceſſary to have the ratification of the court by reſealing it.

As it would put the parties to a great expence to alter it, I ſhall not ſet aſide the practice of the curſitor's office, provided they do not exerciſe this power any further than they have hitherto done.

It has been ſaid, this ought not to be done after the writs are made uſe of; the uſe that has been made of them in this caſe is, the writs are returned, and *oyer* delivered to defendant's attorney.

The return of the original is mere form, for though made in the ſheriff's name, it never goes to him, but indorſed by the plaintiff's attorney, there is nothing in our bailiwick by which the defendant can be attached.

It is manifeſt this return is mere form, for though made in the ſheriff's name, it never goes to him, but is indorſed by the attorney for the plaintiff, *that there is nothing in our bailiwick by which the defendant can be attached.*

Whether true or falſe, the defendant cannot be hurt by it; which ſhews theſe things are gone into mere matter of form, and therefore this will not prevent the curſitor from making theſe alterations.

It is juſt as much a form as the curſitor's indorſing on the writ *pledges to proſecute*; the next conſideration is, as *to giving oyer*; this is a tranſaction which paſſes in the court of King's Bench, and therefore the curſitors can know nothing of it.

If after *oyer* given the plaintiff had come into this court, and ſhewn a variance between the writ and *præcipe*, the court would have directed it to be ſet right.

Suppoſe after *oyer* given the plaintiff had come to this court and ſhewn a variance between the writ and *præcipe*, the court would have directed it to be ſet right, therefore this is not ſuch a uſe of the writ as the law calls making uſe of it; what the law conſiders as a uſe of it is, a ſervice of the copy of the writ on the defendant, to appear; which was done in the caſe of the *Weavers company* verſus *Hayward*; the preſent is not any ſuch uſe of the writ at law.

I will conſider the precedent next, the *Weavers company* verſus *Hayward.*

What induced me to ſuperſede the writ there was, Firſt, That it ought to have been ſtamped, for it had been altered in the return without being ſtamped anew; and if once it has been made uſe of, the act of parliament relating to the ſtamps requires it to be new ſtamped, or otherwiſe it cannot be reſealed.

Secondly,

Secondly, It was a popular action by a common informer on the callico act, and the time limited for binging the action upon the ſtatute had been expired; and as the alteration of the writ was erroneous, and could not be ſerved again, becauſe the return was out, they therefore reſealed the writ, but let the old teſte ſtand, (that being within the time limited by the ſtatute,) ſo that it was a ſcheme and contrivance merely to carry on the proſecution after the time was expired.

In the preſent caſe there is no ground to ſuperſede the writs, and therefore all I could do would be to reſtore them as they were before.

It has been objected, they are ſo fixed by giving *oyer*, that I ought not to reſtore them; but ſuppoſe I ſhould determine *the curſitor* has done wrong, and alter them, if the plaintiff was afterwards to move me to ſet them right, I am bound to do it, for it is merely a *vitium clerici*, and the party is not to be hurt by it.

What a circuity is this? that I ſhould correct *the curſitor*, in order to bring on a motion of the party to amend the writs.

The next conſideration is, what the defendants have done to wave this irregularity; and they certainly have gone a good way towards it.

The oyer was on the 16th of *November*, ſo that the defendant's attorney ſaw at that time the variance between the original and declaration, therefore he ſhould have pleaded *the variances* in abatement, inſtead of that he pleads outlawry in bar; (for a plea of outlawry may be pleaded either in diſability of the perſon or in bar) and upon the 28th of *November* pleaded the general iſſue.

The defendant's attorney ſhould have pleaded the variance between the original and the declaration *in abatement*, but inſtead of that he pleaded outlawry *in bar*, and after that the general iſſue, this is a waver of the irregularity.

To be ſure this is a waver, and he ſhould have applied to the court before by petition, complaining of this tranſaction, for he had all that time to do it in, between the 16th and 28th of *November*, and yet does not think proper to apply till the 17th of *December*.

Beſides, what advantage can it be to the defendants to reſtore them, for the court of King's Bench cannot ſtay the proceedings in the ſuit, either for want of an original, or on account of a faulty original; for if the plaintiff has a verdict, that cures the want of it, and therefore they cannot ſtay the proceedings.

And by a new act of parliament made 5 *Geo.* 1. *ch.* 13. Lord *King*'s act, even an error in ſubſtance is cured after verdict; for the words are, "that where any verdict hath been, or ſhall be "given in any action, ſuit, bill, plaint or demand, in any of his "Majeſty's courts of record at *Weſtminſter*, or any other court of

" record within *England* or *Wales*, the judgment thereupon ſhall " not be ſtaid or reverſed for any defect or fault either in form *or* " *ſubſtance* in any bill, *writ original* or judicial, or for any variance " in ſuch writs *from the declaration*, or other proceedings."

Upon the whole, it would be a moſt fruitleſs thing to ſuperſede theſe writs, and put the parties to an expence of a further application; and therefore as to that I ſhall diſmiſs the petition; but as the plaintiff has put the defendants to the expence of *oyer*, he ought to pay the defendants the coſts he has put them to of craving *oyer* of original writs in the court of King's Bench, and likewiſe the coſts of this application; and his Lordſhip ordered accordingly.

Caſe 233. *At the ſecond ſeal before Hilary term* 1747, *Mr. Baron Clark ſitting for Lord Chancellor.*

Three creditors, who were within the terms of a truſt created by a will for the payment of debts, bring a bill to carry the truſts of the will into execution; the reſt of the creditors brought a ſecond bill for the ſame purpoſe, and obtained an order at the *Rolls* that both bills might be referred to a Maſter to certify which would be moſt for the creditors benefit. Mr. Baron *Clark* diſcharged the order, being of opinion, it has never been reduced to general rule, that one bill ſhould be depending only, where a number of creditors are concerned.

A Motion was made to diſcharge an order of the Maſter of the *Rolls*, to refer two bills brought by different creditors of one Mr. *Price* deceaſed, to a Maſter, to certify which ſuit would be moſt for the benefit of the creditors.

Mr. *Price* had by will appointed truſtees over a particular fund, for the payment of ſuch of his creditors by mortgage, bond, account, or otherwiſe, as were comprized in a ſchedule annexed to the will.

Three of theſe creditors, in behalf of themſelves and others, bring a bill to carry the truſts of this will into execution.

The reſt of the ſchedule creditors objecting to the framing of this bill, and ſuſpecting colluſion between the plaintiffs and the relations of Mr. *Price* the teſtator, who claimed annuities under his will, brought a ſecond bill in behalf of themſelves and all the ſchedule creditors, for the ſame purpoſe, and at a former ſeal obtained this order *ex parte* from the Maſter of the *Rolls*.

Mr. Baron *Clark*.

Suppoſe both theſe bills ſhould come to a hearing, and the firſt ſhould appear to be by colluſion, as is ſuggeſted, it would then clearly be diſmiſſed with coſts.

It is allowed this is the firſt order that has ever been made of the kind.

I ſee no difference between this caſe of truſt creditors, and where all happen to be ſimple contract creditors, the latter may certainly bring different bills.

How would the two cauſes be in a different ſtate after the Maſter's report, than it is in now, for it is agreed by council on both ſides, that if the Maſter ſhould report the ſecond, the moſt proper bill, yet the court would not preclude the plaintiffs in the firſt from going on, if they thought fit, nor could the Maſter's report be made uſe of at the hearing, as evidence of the impropriety of the firſt.

And if the court ſhould be of opinion that juſtice may be obtained on the firſt, they will not take into their conſideration, whether it is in every reſpect as properly framed as the ſecond bill.

It has never been reduced to a general rule, nor ever can, that one bill ſhould be depending only, where there is a number of creditors concerned.

If the firſt bill is ſo colluſive, as that the Maſter muſt ſee it on the face of it, there can be no harm to the plaintiff in the ſecond, to let it proceed, becauſe then the court will ſee it in the ſame light, and, as I ſaid before, diſmiſs it with coſts, and conſequently will not leſſen the fund for payment of debts, which is the principal argument that has been uſed by the plaintiffs in the ſecond bill.

As to the caſe mentioned of infants, where there are two ſuits brought by different *prochein amies*, and a reference to a maſter to certify which is the propereſt, there the court is their guardian, and will take care what is done is for their benefit, and therefore is a very different caſe from the preſent.

Where there are two ſuits brought by different *prochein amies*, the court will refer them to ſee which is propereſt, becauſe the court, as guardian of infants, will take care what is done ſhall be for their benefit.

I do not find there has ever been ſuch an order made as is now moved to be diſcharged, and would rather tend to create expence than to ſave it; and as the Maſter of the *Rolls* made the order merely *ex parte*, now it is controverted, I muſt be determined by my own judgment, and for the reaſons I have given, am of opinion it ought to be diſcharged.

Fotherby verſus *Pate*, *February* 9, 1747.

Caſe 234.

THE queſtion was, whether Mrs. *Pate*, who was an adminiſtratrix *durante minore ætate* of an executor, can be a competent witneſs after her adminiſtration is determined.

An adminiſtrator *durante minore ætate*, is in general a competent witneſs after the adminiſtration is determined.

The adminiſtration determined in 1744, and the bill was brought in 1745.

Lord

Lord Chancellor ordered the charges in the bill againſt Mrs. *Pate* to be read, which were to this effect, *that ſhe had poſſeſſed the perſonal eſtate of the teſtator, which hath hitherto been got in, and hath not accounted or delivered it over.*

In the joint anſwer of the executor and adminiſtratrix, they admit they received more than ſufficient to pay the teſtator's debts and legacies; and though they do not in expreſs words ſubmit to account, yet in caſe the plaintiff's is a juſt demand, they ſubmit to pay.

The general queſtion depends upon two particular ones.

Firſt, Whether ſhe may in general be examined?

Secondly, Whether under particular circumſtances ſhe may?

As to the firſt, I do not remember this point to have come before the court, but am of opinion, taking it as a general queſtion, ſhe may.

The diſtinction, to be ſure, is very well known, between an executor in truſt, and a truſtee.

A truſtee is conſidered in this court as having no intereſt at all, and is examined by order every day; but an executor or adminiſtrator in truſt have been determined not to be capable of being examined; the ground of this diſtinction is, that an executor is anſwerable for devaſtavits, &c. which may give an improper bias to his mind, and the poſſibility of male adminiſtration has induced this court to reject him as a witneſs.

A truſtee, though he has the legal eſtate, is conſidered as having no intereſt at all in this court, and is examined by orders every day; but a perſon, executor in truſt, or adminiſtrator in truſt, has been determined not to be capable of being examined; poſſibly the reaſons of the difference are pretty nice, and it is very difficult to find out any real or ſolid foundation for it; but I take the ground to be, he is conſidered as repreſenting the teſtator's eſtate, and is anſwerable for devaſtavits, &c. and that may give an improper bias to his mind; for as the law conſiders him as owner of the eſtate, the poſſibility of male adminiſtration has induced this court to reject him as a witneſs.

An adminiſtrator *durante minore ætate* cannot ſue, nor can he be called to an account but by the executor, and he is not anſwerable to any other perſon for whatever he may do during his adminiſtration.

But the caſe of an adminiſtrator *durante minore ætate* is certainly different; it is true, he repreſents the teſtator whilſt his adminiſtration ſubſiſts, but when determined, has nothing more to do; ſuch adminiſtrator cannot ſue, that is certain, nor cannot be called to an account, but by the executor, and whatever he may do during his adminiſtration, is not anſwerable to any other perſon, and if an action at law ſhould be brought againſt the executor, he might be introduced as an evidence for the executor.

It is hard to ſay, taking it on the general queſtion, that ſuch a perſon ſhould be allowed to be examined at law, and not in this court, for here it goes further in ſome inſtances than they do, by ſuffering truſtees to be examined, and therefore will in this reſpect ſhut out light they let in at law.

If an action at law ſhould be brought againſt an executor, ſuch adminiſtrator may be introduced as a witneſs for him, and if ſo, it would be hard to ſay he may not be examined in equity.

This adminiſtrator is little more than a perſon appointed *ad colligendum bona*, or an adminiſtrator *pendente lite*, and theſe are always admitted as witneſſes.

He is very little more than a perſon appointed *ad colligendum bona*, or adminiſtrator *pendente lite*, who are always admitted as witneſſes.

After he has poſſeſſed himſelf of effects, if you bring him before the court, without the executor, he may demur for that cauſe, but as this court will allow you to follow aſſets into any hands, if you will by proper charges ſhew he has not accounted to his exccutor but fraudulently, and by colluſion detains any part, there is no doubt but you may maintain ſuch a bill againſt an adminiſtrator *durante minore ætate*.

After ſuch adminiſtrator has poſſeſſed himſelf of effects, if brought before the court without the executor, he may demur for that cauſe.

As to the ſecond queſtion, Whether under particular circumſtances he may be examined.

I think he may, but am of opinion that there are not ſuch circumſtances in this caſe as will intitle her to be examined, for it is charged by the bill, that ſhe has not accounted, and delivered over the aſſets received by her to the executor.

That charge alone will not be ſufficient; but then in the joint anſwer with the executor, inſtead of inſiſting ſhe has accounted, and therefore that the bill ſhould be diſmiſſed as againſt her, ſhe ſubmits to pay, *&c.*

The anſwer might have been framed in ſuch a manner as to make her a witneſs, ſhe has put in ſuch a one as will make her liable to account on her ſubmiſſion to pay, and therefore ſhe is an incompetent witneſs, and rejected her accordingly.

The bill charged the adminiſtrator *durante minore ætate*, had not accounted and delivered over the aſſets received to the executor, who, by her anſwer, inſtead of inſiſting ſhe had accounted, ſubmitted to pay, this made her an incompetent witneſs.

Caſe 235. *Mitchell* verſus *Smart*, *February* 27, 1747.

An executor as he is *in auter droit*, unleſs he has proved his teſtator's will, is not intitled to bring a bill of interpleader till, as ſtanding in his place, he has made himſelf a debtor.

ELIZABETH Brown, leſſee for a long term, commencing in *Midſummer* 1737, agreed to pay for the firſt ten years 52*l.* *per ann.* for the next four 32*l.* *per ann.* and for the remainder of the term 24*l.* and covenanted with *Huet* the leſſor, to pay the ſum of 500*l.* at *Midſummer* 1747, and 200*l.* at *Midſummer* 1751.

Elizabeth Brown, in *April* 1743, aſſigned this term to *Foredam*, in conſideration of 370*l.* and covenanted to pay the 700*l.* at the time in the leaſe mentioned, and by an indenture of the 8th of *April* 1743. between *Elizabeth Brown* of the firſt part, *Foredam* of the ſecond, and *Richard Mitchell* of the third, taking notice that *Elizabeth Brown* had depoſited 300*l.* in *Mitchell*'s hands, and thereby covenanted to indemnify *Foredam* againſt the 700*l.* Mr. *Mitchell* covenants, that if Mrs. *Brown* did not pay the 700*l.* at the times mentioned in the deed, then he would pay to *Foredam* the 300*l.* and covenanted further, that if Mrs. *Brown* paid the 500*l.* part of the 700*l.* at *Midſummer* 1747, then he would pay to her the 300*l.*

Mrs. *Brown* died before *Midſummer* 1747, but before her death made her will, and appointed *Cartwright* and *Homan* her executors, neither ſhe or they paid the 500*l.* at *Midſummer* 1747.

Foredam likewiſe died before *Midſummer* 1747, and made *Smart* and *Croſſly* his executors, who have been evicted out of the poſſeſſion of the leaſehold eſtate, on account of the 500*l.* not being paid to the leſſor at *Midſummer* 1747, then *Smart* and *Croſſley* applied to *Richard Mitchell* to be paid the 300*l.* but he pretends Mrs. *Elizabeth Brown*'s executors claim it of him.

Richard Mitchell died at *Chriſtmas* laſt, without paying the money, but before his death made his will, and appointed *Simon Mitchell* his father executor, but he has not yet proved it, and has now brought a bill of interpleader againſt *Smart* and *Croſſley*, as executors of *Ralph Foredam*, and againſt *Cartwright* and *Howman*, as executors of Mrs. *Brown*, and prays that he may be permitted to bring the ſum of 300*l.* into court, and that the defendants might interplead, ſuggeſting that the executors of *Foredam* threaten to bring an action againſt him, and are now proceeding in the ſpiritual court, and therefore prays an injunction, and this day moved for the injunction, on bringing the money into court.

The defendants, the executors of *Foredam*, have put in an anſwer, and inſiſt upon being paid the 300*l.* and that there ought to be no injunction.

The

The executors of Mrs. *Elizabeth Brown* have not yet anſwered.

LORD CHANCELLOR

Denied the motion, and ſaid, that an executor as he is *in auter droit*, unleſs he has proved his teſtator's will, is not intitled to bring this bill of interpleader till, as ſtanding in the place of the teſtator by virtue of the probate, he had made himſelf a debtor.

An executor may at law bring an action before probate, but cannot declare till the will is actually proved, and a bill in equity being in the nature of a declaration at law, an executor cannot bring a bill here till after probate.

He may at law bring an action before probate, but he cannot declare till the will is actually proved.

Though the plaintiff *Simon Mitchell* ſays, a caveat is entered againſt his proving the will of *Richard Mitchell*, it appears to be no more than a monition to the executor, in order that an inventory may be brought in, to found a commiſſion of appraiſement.

Another reaſon for denying the motion is, that the executors of Mrs. *Elizabeth Brown* have not yet put in their anſwer, which may poſſibly put an end to the queſtion, and by the expreſs covenant *Richard Mitchell* was to pay the 300*l.* to *Foredam*.

Felton Harvy and Dorothy his wife verſus *Solomon Aſhley and others, March* 28, 1748. *when the cauſe ſtood for judgment.*

Caſe 236.

LORD CHANCELLOR.

THIS cauſe comes before the court upon a bill brought by Mr. *Harvey* and his wife, to have the benefit of ſeveral proviſions made for the plaintiff Mrs. *Harvey*, partly by the will of her grandfather *Alexander Pitfield*, and partly upon the ſettlement made by her father and mother, notwithſtanding the ſettlement was made upon her marriage with her late huſband *Charles Pitfield*, ſhe being then an infant; the prayer of the bill is in the alternative, that if ſhe cannot have this relief, then, that ſhe may have ſatisfaction made her out of the eſtates of her late huſband.

An infant is bound by a ſettlement made on her marriage, where it was made with the approbation of parents and guardians.

The caſe and the facts are theſe:

Dorothy Harvey, the plaintiff *Felton*'s wife, is the daughter of the defendant *Solomon Aſhley*, and *Winefrid* his wife, and the grandaughter of *Alexander Pitfield*: In 1737, *Dorothy* being then of the age of fifteen, and her father and mother both living, ſhe, with their

conſent, and with the approbation of all her relations, intermarried with *Charles Pitfield*, Eſquire, her firſt couſin, and the heir male of her mother's family.

Previous to the marriage, a ſettlement was made on the 29th of *June* 1737. *Charles Pitfield* was the firſt party, two truſtees, *&c.* were parties and the plaintiff *Dorothy* herſelf was a party; the ſtate of *Dorothy*'s fortune ſtood thus, ſhe was intitled under her grandfather's will to 5000 *l.* which was to be paid her on marriage, if ſhe married with the conſent of her father and mother, or at her age of twenty-one; and if ſhe married without ſuch conſent, or died before twenty-one, then the 5000 *l.* was given over to her ſiſter; beſides this, ſhe was likewiſe intitled to a portion under the marriage ſettlement of her father and mother; for by that ſettlement, in caſe of an eldeſt ſon, and younger children, a power was reſerved to Mr. *Aſhley* and his wife, to charge the eſtate therein limited with a ſum not exceeding 4000 *l.* which was to be paid to all or any of the younger children of the marriage in ſuch proportions as they ſhould think fit; and in caſe there was no iſſue male of that marriage, then a 500 years term was limited to truſtees, to raiſe the ſum of 3000 *l.* for daughters portions, but this was not to be raiſed till after the death of the father, and if a ſon ſhould be born afterwards, they were intitled to nothing.

The other part of *Dorothy*'s fortune was a moiety of *Alexander Pitfield*'s perſonal eſtate after the death of her mother, but depending upon a contingency; for by his will, if Mr. *Aſhley* and his wife died without leaving a ſon, then the reſidue of *Alexander Pitfield*'s perſonal eſtate (called 55000 *l.*) ſhould go to ſuch daughter or daughters of Mr. *Aſhley* and his wife, as ſhould be living at the death of Mrs. *Aſhley*.

From hence it appears, that Mrs *Harvey* was in preſent intitled only to 5000 *l.* and in order to intitle her to it, the mother's conſent by the grandfather's will was made neceſſary, if married before twenty-one, and if ſhe had married without ſuch conſent of the mother, it would have gone to the other ſiſter.

As to the circumſtances of *Charles Pitfield*'s eſtate, they ſtood thus, he had an eſtate at *Hoxton* in *Middleſex* of 500 *l.* a year, charged with a debt of 9000 *l.* he had likewiſe a moiety of an eſtate in the *Iſle of Ely* of the value of —— with incumbrances thereon to the amount of 6000 *l.* and another eſtate in *London* and *Middleſex* of 900 *l.* a year, which was in ſettlement to himſelf for life, remainder to his firſt and every other ſon in tail male, remainder to Mrs. *Aſhley* in fee.

Under theſe circumſtances the ſettlement made and executed was thus, as to the eſtate laſt mentioned, there was no occaſion nor poſſibility to make any ſettlement of it, being limited in ſtrict ſettlement to the iſſue male, and could not be altered; it frequently happening that eſtates are ſettled in ſuch manner, that they muſt neceſſarily go to the iſſue of the marriage: as to the eſtate in *Hoxton*, it was ſettled upon the marriage in ſtrict ſettlement; and in default of iſſue, to the ſurvivor of the huſband and wife: the eſtate in the iſle of *Ely* is likewiſe limited in ſtrict ſettlement, the laſt remainder to *Dorothy* in fee.

In conſideration of the marriage, and the huſband's fortune, the lady's is ſettled in this manner, her 5000*l.* is agreed to be paid immediately, to diſcharge the incumbrances upon the *Hoxton* eſtate; one moiety of the ſum of 3000*l.* to be raiſed by virtue of the term for that purpoſe, is to be applied in the ſame manner as the reſidue of the moiety of the contingent bequeſt in the grandfather's will aftermentioned; the other moiety of the 3000*l.* to belong to *Charles Pitfield*, but is not to be paid till after the death of *Dorothy*'s father: as to the contingent bequeſt, to which *Dorothy* was intitled under the will of *Alexander Pitfield*, a moiety of that was to go towards diſcharging the debt on Mr. *Charles Pitfield*'s eſtate; and what ſhould remain of that moiety was to be laid out in ſecurities, and the intereſt was to be paid to *Charles Pitfield* during his life, afterwards to *Dorothy* for life, then to the younger children; and if no younger children, then in truſt for the ſurvivor of *Charles Pitfield* and *Dorothy*, and the other moiety of the ſaid contingent bequeſts was to belong to *Charles Pitfield*, his executors and adminiſtrators; this is the diſpoſition made in favour of Mrs. *Harvey* of the ſurplus of the grandfather's perſonal eſtate.

The marriage took effect in *July* 1737, and ſubſequent to the marriage; the facts are theſe, in *Auguſt* 1739 Mr. *Pitfield* died, and left iſſue one daughter *Mary*; in *December* 1740, the plaintiff *Dorothy* married with Mr. *Felton Harvey*; after the marriage the plaintiff Mr. *Harvey* entered upon the eſtate in ſettlement, that *Charles Pitfield* had ſettled, and did ſome acts of ownerſhip: in *June* 1743 the plaintiff *Dorothy* attained her age of twenty-one, and on the 10th of *January* 1745 the bill was brought.

It has been ſaid by the plaintiff's council, that this is not a bill to ſet aſide the marriage ſettlement, for that would be too ſtrong, but only to let in the plaintiff *Dorothy*, and her ſecond huſband, to take that intereſt which ſhe had in her fortune; but this, in the preſent caſe, will appear to be a diſtinction in words only, for it is in effect to overturn the ſettlement after there is iſſue of that marriage, the huſband dead, and the contract on one ſide fixed.

This ſeems to be a bill *primæ impreſſionis*, for upon looking into the caſes I can find no precedent to warrant ſuch a decree.

The two principal points ariſing upon this caſe are, *Firſt*, Whether Mr. and Mrs. *Harvey* are to be bound by this ſettlement on her firſt marriage, abſtracted from any circumſtances that have happened ſince.

Secondly, If they are not, whether what has been done by the plaintiffs ſubſequent to the ſettlement either by acts of admiſſion, acquieſcence, and by way of affirmance of it, will vary the caſe.

It is not material perhaps to give an opinion on the firſt queſtion, for the latter conſideration might poſſibly make the firſt point unneceſſary; but to diſcourage ſuch an attempt as is now ſet up, I will give my thoughts upon it.

As to the firſt point therefore the great objection is, that *Dorothy* at the time of the marriage and ſettlement made was an infant, and that by the rules of law ſhe could not be bound but at her election when of the age of twenty-one.

Where an agreement appears upon the face of it to be prejudicial to an infant it is void, but if for his advantage, then voidable only.

It is very true in law this difference is taken, that where an agreement appears upon the face of it to be prejudicial to an infant, it is void, but if for his advantage, then voidable only; this doctrine is fully laid down in *Holt* verſus *Ward*, in *Fitzgibbons's Reports* 175, 275. a book of no authority; but the caſe is truly reported, and all the differences upon this point well taken, by Lord Chief Juſtice *Reeves* in his argument, which is the beſt I know upon the ſubject.

Marriage agreements differ from all others; as ſoon as the marriage is had the contract is executed, and cannot be reſcinded; the children are equally purchaſers under both father and mother, and therefore they cannot be ſet aſide, becauſe it would affect the intereſt of third perſons, *the iſſue*.

Infants may contract marriage, males at *fourteen*, females at *twelve*; and theſe agreements differ from all others; the principal conſideration is the marriage, ſettlements are prudential acts done chiefly for this conſideration, and the eſtate ſettled may be greater or leſs according to the diſcretion of the parties: as ſoon as the marriage is had, the principal contract is executed, and cannot be ſet aſide, or reſcinded, the eſtate and capacities of the parties are altered, the children born of the marriage are equally purchaſers under both father and mother, and therefore it has been truly ſaid that marriage contracts ought not to be reſcinded, becauſe it would affect the intereſt of third perſons, *the iſſue*.

and therefore they cannot be ſet aſide, becauſe it would affect the intereſt of third perſons, *the iſſue*.

There

There is a difference between agreements on marriage being carried into execution, and other agreements; for all agreements beſides are conſidered as intire, and if either of the parties fail in performance of the agreement in part, it cannot be decreed in ſpecie, but muſt be left to an action at law; in *marriage agreements* it is otherwiſe, for though either the relations of the huſband or wife ſhould fail in the performance of their part, yet the children may compel a performance: if the mother's father for inſtance hath agreed to give a portion, and the huſband's father hath agreed to make a ſettlement, though the mother's father do not give the portion, yet the children may compel a ſettlement, for non-performance on one part ſhall be no impediment to the childrens receiving the full benefit of the ſettlement; ſo if there be a failure on the part of the father's relations it is the ſame; all the court could do in that caſe would be to lay hold on ſuch eſtate as he ſhould claim towards making good his proportion of the ſettlement; for the children conſidered as purchaſers are intitled to all the benefit of the uſes under the ſettlement, notwithſtanding there has been a failure on one ſide.

All other agreements are conſidered as intire; and if either of the parties fail in performance of the agreement in part, it cannot be decreed in ſpecie: in marriage agreements it is otherwiſe, for though either the relations of the huſband or wife ſhould fail in the performance of their part, yet the children may compel a performance.

If the mother's father agrees to give a portion, and the huſband's father to make a ſettlement, though he does not give the portion, yet the children may compel a ſettlement.

If the court ſhould relieve here, it muſt relieve againſt the whole ſettlement, becauſe every part conſtitutes the whole, as there is a conſideration ariſes from each part; and therefore it is impoſſible to take away any part of the conſideration, without overturning the ſettlement intirely; nay, the intereſt of Mrs. *Harvey* herſelf would be affected eventually at leaſt, for ſhe muſt in ſuch caſe wave her jointure, and the huſband perhaps might come into poſſeſſion of the whole of her fortune, and make what uſe of it he pleaſes.

To go further; the law has intruſted the father and guardians with the marriage of their children and wards; and according to the old law they ought not to do it to their diſparagement; but ſuppoſing they ſhould act fraudulently or corruptly, the marriage agreement is not therefore to be ſet aſide, or the children to be ſtript, but the father or guardian may be decreed to make ſatisfaction, and the huſband, if a party to the fraud, ſhall do it likewiſe; analogous to thoſe caſes where fraudulent agreements have been made by parents to take back part of a child's fortune in contradiction to the open publick agreement, in which caſes the court interpoſes, as in *Turton* verſus *Benſon*, 2 *Vern.* 764.

Though a father or a guardian act fraudulently or corruptly, the marriage agreement is not to be ſet aſide, or the children to be ſtript, but the father or guardian may be decreed to make a ſatisfaction, and the huſband, if a party to the fraud, ſhall do it likewiſe.

The preſent caſe does not fall within the reaſon of theſe caſes of corrupt agreements; here is no diſparagement or pretence of fraud, or of any gain made by the father or mother; but on the contrary every

every thing appears to be done by Mr. *Aſhley* and his wife to advance it.

The daughter in the firſt place was married to the heir male of her mother's family, and by their conſent to the marriage they accelerate her right to *the* 5000 *l.* and veſts in *Dorothy* immediately though but *fifteen*; and, if there had been a ſon of Mr. *Aſhley* and his wife, would have been intitled to nothing; and in 1737 it was not impoſſible in the courſe of nature but there might have been a ſon, and they could too have appointed the whole to one younger child in prejudice to another; and yet they took the only method of ſecuring it, by making an appointment irrevocable of it under the ſettlement.

That parents did not make ſo beneficial a bargain for a daughter as they might have done, is not a ſufficient reaſon to ſet aſide a marriage agreement; the law has intruſted them with the marriage of their children, and there are many conſiderations, and proper ones, that may induce a parent to agree to a match, beſides a ſtrict equality of fortune, as the inclination of the parties, &c.

Thus it ſtands as to the nature of the ſettlement; the firſt objection is as to the incapacity of *Dorothy* as an infant; and the ſecond objection, that the parents of *Dorothy* did not make ſo beneficial a bargain for her as they might have done; admitting this was ſo, I apprehend it would not be a ſufficient reaſon to ſet aſide the marriage agreement; the law has intruſted parents with the marriage of their children; there are many conſiderations that may induce a parent to agree to a marriage beſides a ſtrict equality of fortune, as the inclination of the parties, their rank and quality, the perſon ſuperior perhaps in this reſpect to whom the infant is to be married, and other advantageous circumſtances; the convenience too and propriety of ſuch a match as to preſerve the whole eſtate in the family, which are matters proper for parents to judge of.

Where an infant is married to a gentleman of great eſtate, though the dower is a third, and ſhe has a jointure only of a tenth, yet as the law has intruſted parents with the judgment of proviſion for infants, ſhe ſhall not ſet it aſide upon the inequality between the dower and the jointure.

The ſtatute of *Hen.* 8. ſhews ſtrongly the opinion of the legiſlature in this reſpect; for though at law no jointure upon a woman even of full age could bar her of dower, yet the ſtatute makes it a bar, and a jointure will even bind an infant and preclude her from dower: conſider the truſt put in parents and guardians; ſuppoſe a female infant is married to a gentleman of great eſtate, the dower is one third, and yet ſhe has a jointure made to her of only one tenth of the value; and notwithſtanding this, as the law has intruſted parents and guardians with the judgment of the proviſion for infants, ſhe ſhall not ſet it aſide upon the inequality between the dower and the jointure.

I will not ſay how far a mere eluſory jointure might be relieved againſt, but if it is not adequate to what ſhe would have had in dower, it is no reaſon to ſet it aſide.

There may have been acts of parliament obtained for the marriage of a young Lady an infant, who has an intereſt in a real eſtate, but I never heard of a private act of parliament obtained for the marriage of a young Lady who has a money portion only, merely becauſe ſhe is *an infant*.

No inſtance of applying for an act of parliament for the marriage of a young Lady, who has a money portion only, merely becauſe ſhe is an infant.

The reaſon why it may be neceſſary to apply for an act of parliament upon the marriage of an infant who has an intereſt in real eſtate, is, that the rights of the infant to real eſtate will not be bound by any agreement made in relation to it, unleſs the huſband ſhould have iſſue by that marriage.

The reaſon why ſuch applications have been made in reſpect to real eſtate, is, that the rights of infants ſhall not be bound by any agreement in relation to it, unleſs the huſband ſhould have iſſue by that marriage.

But where it is *a money portion*, her intereſt in it may be bound by agreement on the marriage; and if a parent or guardian cannot contract for the infant ſo as to bind this property, the huſband, as it is a perſonal thing, would be intitled to the abſolute property in it immediately upon the marriage.

Unleſs a father or a guardian could contract for the infant ſo as to bind money property, as it is a perſonal thing, the huſband would be immediately intitled to it on the marriage.

To carry this ſtill further than at the bar, it muſt be allowed moſt portions to young Ladies ariſe under ſettlements, and ſhe is as much a purchaſer as if it came from a collateral relation; and yet there never was any objection to a father's directing on what terms ſhe ſhall be diſpoſed of in marriage.

Moſt portions ariſe under ſettlements, and the daughter is as much a purchaſer as if it came from a collateral relation, and yet there has never been any objection to the father's diſpoſing of her in marriage on what terms he pleaſes.

Another objection was made, that as part of this fortune is a contingent intereſt, which by the marriage would not have been transferred to the huſband, therefore what has been done with regard to this is redundant, and they ſhould at leaſt have left her the chance of taking the benefit of it.

I never heard any diſtinction where money portions were in poſſeſſion or contingency; the caſe of *Theobald* verſus *Defay* determined finally in the Houſe of Lords, is a very ſtrong caſe to the purpoſe; the court there gave relief againſt a recovery in ejectment, and Lord *Cowper* and Lord *Macclesfield* laid great weight upon its being a reaſonable act done by the conſent of the friends and relations of the wife.

The plaintiff *Dorothy*, if ſhe had been a feme ſole, might have made a will of this contingent intereſt, and it being a perſonal thing, it is ſaid ſhe might have bequeathed it at *fifteen* years of age.

Many portions of women depend upon contingencies, as upon rights of ſurvivorſhip; and yet diſpoſitions of them are frequently made, for otherwiſe they might come abſolutely in the power of

their huſbands, as where they fall into poſſeſſion during the coverture.

Charles Pitfield indeed hath happened to die in the life of the mother and *Dorothy*; but ſuppoſe Mrs. *Aſhley* had died, *Dorothy* and *Charles* ſurviving, would it not have been a great imputation on the father and mother if they had ſuffered the huſband to run away with it?

It is dangerous therefore for the court to enter nicely into a ſcrutiny of this kind, when theſe proviſions are made to guard againſt the huſband, and a very prudent proper caution; nor will they, when the event has happened, determine whether at the time the agreement was made, it was more or leſs beneficial.

Beſides, if the plaintiff Mrs. *Harvey* and her ſiſter Mrs. *Beckford* had died in the life-time of their mother, *Charles Pitfield* would have been intitled to the ſurplus for his life under *Alexander Pitfield*'s will.

It is a very remarkable limitation in *Alexander*'s will, *to and for my grandſon Charles Pitfield, after the deceaſe of my two granddaughters.*

This is a very odd limitation of perſonal eſtate; but however, I do not know but it might take effect, as being in the compaſs of lives *in eſſe* at the ſame time, and conſequently might have veſted in *Charles Pitfeld* himſelf; and the teſtator's intention was perhaps to augment and bring his fortune into one family.

I know of no precedents where a marriage agreement has been called into queſtion in this manner, where it was made with the approbation of parents and guardians; but there have been ſeveral caſes of decrees againſt infants.

In the caſe of *the Biſhop of Bath and Wells* verſus *Hippeſley*, 28 *Cha.* 2. before Lord *Nottingham*; there was a ſubmiſſion to an award by the Biſhop on one part, and the defendant, an infant and his guardian, on the other part; the award was to this effect, that during the Biſhop's life, and the infant's minority, the plaintiff and defendant ſhould be at liberty promiſcuouſly to dig lead ore in, *&c.* and that the profits ſhould be divided equally between them: a bill was brought to confirm the award, and the court being of opinion the infant was bound by it, indemnified the truſtees for what they had done, and decreed according to the prayer of the bill, that the award ſhould be eſtabliſhed. In the caſe of *Strickland* verſus *Coker*, the defendant was "ſeiſed for lives of a church leaſe in truſt for an "infant; on a treaty of marriage between the infant and the plain-"tiff, and a thouſand pounds portion, an indenture was made with "the

" the conſent of *Coker* the guardian, whereby the infant covenants " that the leaſe ſhould be ſurrendered, and a new leaſe taken, " and the wife's life put therein for her jointure; *Coker* was made " party only to ſhew his conſent: the marriage was had, the por- " tion paid, the huſband died, the leaſe ſurrendered, and the wife's " life put in: the widow ſued *Coker* to aſſign for her life, and de- " creed accordingly; and *Coker* pretending the truſt was in the firſt " to pay debts to him, it was decreed the debts ſhould be paid out " of the truſt after the widow's death. The decree affirmed on a " rehearing. 2 *Ch. Caſ.* 211.

In the caſe of *Blois* verſus *Lady Hereford*, 2 *Vern.* 501. " *A.* " married *B.* who had an eſtate in land and a fortune in money; " they being both infants, an act of parliament was obtained for " ſettling a jointure on the wife in bar of dower, but to ceaſe if " ſhe did not ſettle her land when of age, but nothing ſaid as to " the perſonal eſtate; part of the fortune is a mortgage for 1300 *l.* " taken in a truſtee's name; the wife when ſhe came of age ſettled " her own land, and afterwards the huſband dies, the queſtion " was, whether this money ſhould go to the plaintiffs executors " of Lord *Hereford*, or as a *choſe in action* ſurvive to the wife. " Lord *Cowper*, then Lord Keeper, ſaid, I lay no ſtreſs upon the " declaration of truſt, the law of this court will preſume a pro- " miſe; and in all caſes where a ſettlement is equivalent, it ſhall be " intended the huſband was to have the portion, the wife ſhall not " have her jointure and fortune both; and the rather in this caſe " becauſe a truſt, and the huſband could not come at it, ſo as to " alter the property without the aſſiſtance of this court; and the de- " fendant was condemned in coſts.

I mention this caſe only to ſhew, that though there was an act of parliament in conſideration of real eſtate ſettled by both ſides, yet no notice was taken of the money portion.

In the caſe of *Cannel* verſus *Buckle*, 2 *Wms.* 243. Lord Chancellor *Macclesfield* ſaid, " That if a feme infant ſeiſed in fee on a " marriage, with the conſent of her guardians, ſhould covenant in " conſideration of a ſettlement to convey her inheritance to her huſ- " band; if this were done in conſideration of a competent ſettle- " ment, equity would execute the agreement though no action would " lie at law to recover damages.

This is going a great way, as it related to the inheritance of the wife; but yet there are caſes where the court will do it; as if the lands of the wife were no more than an adequate conſideration for the ſettlement that the husband makes, and after the marriage the wife ſhould die and leave iſſue, who would be intitled to portions provided for them by the ſettlement, it would in that caſe be very reaſonable to affirm that ſettlement

Thus far upon *the firſt point*, relating to the force and validity of this ſettlement, as it ſtood originally, abſtracted from the ſubſequent circumſtances that have happened.

As to *the ſecond point*, whether the plaintiffs are concluded by acts done ſince the marriage; and, admitting there was a doubt upon the firſt point, yet the ſecond is very clear.

Though a freeman's widow lays claim to ſomething under a huſband's will, that does not bind her election to take either by the will or cuſtom, till ſhe has ſeen into the value of the huſband's effects; but ſhe will be concluded by acts done, and by acquieſcence, as where ſhe has lived a year or year and half after her huſband, and accepted an intereſt under the will.

It has been ſaid on the part of the plaintiff, and very truly, that there has been no expreſs aſſent in this cauſe, or expreſs ratification of this ſettlement, and that the parties ſhould not be bound unleſs the aſſent is clear, and after a full knowledge of the nature of the ſettlement, and therefore has been compared to the caſe of a freeman's widow, who, notwithſtanding ſhe lays claim to ſomething under the will of her huſband, will not bind her election to take either by will or cuſtom, till ſhe has ſeen into the value of her huſband's effects; and this is true in general; but there are caſes where ſhe ſhall be concluded by acts done by her, and by an acquieſcence; as, where ſhe has lived a year, or a year and half, after her huſband, and accepted an intereſt under the will, and then dies, and upon her death the executor files a bill for her cuſtomary ſhare, there the bill has been diſmiſſed.

There is ſufficient evidence here of the plaintiff *Felton Harvey*'s having knowledge and notice of *Dorothy*'s rights under this ſettlement: In 1742 he made a leaſe of a houſe in *Piccadilly*; in *December* 1744 he gave a letter of attorney to receive the rents of part of the eſtate, and in *January* 1744 a diſtreſs was made by virtue of an authority given by him; and in *May* 1745 he gave directions for getting in the hay; and all this was done after a council of eminence for the plaintiffs had peruſed the ſettlement.

There can hardly be a caſe where there have been more ſolemn acts done to affirm a ſettlement: In *Franklin* verſus *Thornbury*, 1 *Vern.* 132. an agreement being void as againſt an infant, yet was decreed, the infant having received intereſt under it after he became of full age, which was an affirmance of it.

In the caſe of *Cecil and others* verſus *The Earl of Saliſbury, in* 2 *Vern.* 224. the court ſaid, "They would hold an infant to his "offer made by him in his anſwer to a bill brought againſt him "while an infant, if the other ſide are thereby delayed, and if he "would have departed from what he had offered, he ought imme-"diately when he came of age to have applied to the court to have "retracted his offer, and amended his anſwer:" So, where a proviſion is made for a wife in lieu of her jointure, by articles during coverture, if the wife, after the huſband's death, enters but upon *part* of theſe lands, ſhe is obliged to perform the whole articles.

Theſe caſes turn upon this, that acts done after the becoming a widow will bind; but it has been objected theſe were acts of her huſband, and cannot bind the wife, who was an infant, in the life-time of her firſt huſband, and likewiſe an infant for ſome time ſince her marriage to her ſecond huſband.

This appears to me to be a new doctrine, that though Mr *Felton Harvey* himſelf would be bound, yet he is delivered from it on account of the infancy of the wife, which is in effect to ſay, he cannot be bound at all.

If a feme infant marry, and a jointure is made after marriage, and the huſband dies, leaving her an infant, if ſhe, without doing any act to determine her election during her infancy, marries a ſecond huſband, if he enters upon the jointure eſtate, that entry will bind the huſband and wife during the coverture.

Where a jointure is made after marriage, and the huſband dies, leaving his wife an infant, if ſhe, without doing any act to determine her election, marries a ſecond huſband, if he enters on the jointure eſtate, that entry will bind them both during the coverture.

Theſe are my thoughts on the two main points of the cauſe; but another objection was made, that *Charles Pitfield* was guilty of a fraud in ſecreting judgments, and other debts, that were charged upon the eſtate, and that this is a ground for relief, and ſo it is, but not to ſet aſide the whole ſettlement, for if there are any incumbrances which he did not diſcloſe, then *Charles Pitfield's unſettled eſtate* ought to be applied to exonerate that eſtate which is ſettled for the benefit of Mrs. *Harvey and her iſſue.*

As to ſo much of the bill, therefore, as ſeeks to ſet aſide, or to break in and impeach the ſettlement made on the marriage of Mrs. *Pitfield*, it ought to be diſmiſſed; and Lord *Hardwicke* decreed accordingly.

Tilbury verſus *Barbut*, *March* 2, 1747.

Caſe 237.

A Bill was brought againſt the defendant to deliver up all the deeds, &c. of the eſtate mentioned in the pleadings of the cauſe.

T. deviſes all his real and perſonal eſtate to his wife for life, and after her death to his ſon *John*, and his heirs for ever, and in caſe of the death of *John without any heir*, then to the plaintiff: *John* levied no fine, nor ſuffered any recovery, but by will deviſed the whole to the defendant. *This is a fee mounted on a fee, and a void deviſe to the plaintiff in law, and equally ſo in equity.*

The queſtion depends upon the will of the late Doctor *Tilbury*, who thereby deviſed all his real and perſonal eſtate to his wife *Ann Tilbury* for life, and after her death to his ſon *John*, a younger brother of the plaintiff's by another venter, and his heirs for ever, and in caſe of the death of *John Tilbury*, *without any heir*, then his real and perſonal eſtate deviſed to his ſon *John*, ſhall go and be enjoyed by his ſon *Cornelius* the plaintiff.

Ann Tilbury died in 1725; *John Tilbury* the ſon levied no fine, nor ſuffered any recovery, but made his will, and deviſed it to the defendant.

The queſtion is, whether *John Tilbury* took an eſtate in fee, or in tail, under the teſtator's will, or whether the plaintiff takes any more than an eſtate for life.

LORD CHANCELLOR.

In all deviſes of this kind, *where there is a fee mounted upon a fee*, I dare ſay the teſtators mean heirs of the body, but unleſs there are words to reſtrain it to an eſtate tail, I am bound to conſtrue it a fee in the firſt taker, and conſequently, as the teſtator had dedeviſed the whole to *John Tilbury*, the ſecond deviſe is void in law.

I cannot go on a preſumption the teſtator did not know the law; if teſtators do not uſe proper words the court will ſupply it, where the intention of the teſtator is conſiſtent with the rules of law, but where *there is a fee mounted on a fee*, it is a void deviſe to the plaintiff in law; and as this is a legal eſtate, I muſt conſtrue it the ſame in equity.

Caſe 238. *Anonymous. March* 10, 1747. *The third ſeal after Hilary Term.*

A guardian, before he had paſſed his accounts, brought an action againſt an infant for board, the court continued the injunction prayed by the infant's bill till the hearing, and ſaid in taking the account, the court would allow the guardian, *according to the maintenance allotted for the infant*, to which the jury would have no regard.

A Guardian for an infant brought an action againſt him for board, *&c.* before he had paſſed his accounts in this court, the defendant at law brought a bill here for an injunction to ſtay the proceedings at law; and Mr. *Brown* ſhewed cauſe to day why it ſhould not be diſſolved; his Lordſhip continued the injunction, and ſaid, that in taking the account the court would allow the guardian according to the maintenance allotted for the infant, which a jury would have no regard to, but in caſe the guardian had any aged witneſſes, the court, upon application and proper affidavit, would give leave to examine *de bene eſſe*.

Whithed and others verſus *Thiſtlethwait, Puckeridge and others, March* 10, 1747. *Third ſeal after Hilary Term.* Caſe 239.

THE plaintiff, in *December* 1747, obtained an order, that the defendant *Puckeridge* ſhould bring in his book of accounts, papers and writings, before a Maſter, purſuant to a decree; in four days after notice to his clerk in court, or that a ſerjeant at arms ſhould go to bring him before the court for his contempt.

In all caſes of commitment there muſt be an affidavit of ſervice.

On the 16th of *January* 1747 *Puckeridge*'s clerk in court was ſerved with notice.

On the 18th of *June* he obtained an order for three weeks time to bring in his books of account, *&c.*

On the 9th of *February* laſt he obtained an order for a month's more time.

The laſt order for time being expired, it was moved this day, that a ſerjeant at arms might go againſt the defendant.

The perſon who ſerved *Puckeridge*'s clerk in court being in the country, and the plaintiff not being able to procure an affidavit of ſervice, offered, as a proof of the defendant's being ſerved, a recital in his laſt order for time, of notice of the plaintiff's order of the 16th of *January*; and it was inſiſted by Mr. *Tracy Atkyns* for the plaintiff, that *Puckeridge*'s orders were of themſelves a proof he had notice, for he could apply only on the foundation of the plaintiff's order.

But notwithſtanding this, as it was a motion for taking the defendant into cuſtody, the court would not grant it, and ſaid, in all caſes of commitment there muſt be an affidavit of ſervice.

Mendes verſus *Mendes, in the paper of re-hearings, March* 11, 1747. Caſe 240.

ALVARO Mendes, the plaintiffs late father, being poſſeſſed of a very conſiderable perſonal eſtate, by will dated the 8th of *May* 1728, "gave to the defendant *Rachel Mendes* his daughter, 6000*l.* "and to the defendant *Catharine* his other daughter 5000*l.* to be

A father muſt be preſumed to make ſuch proviſions as will anſwer the purpoſe of children, and their advancement in the world, and the will ought to be ſo conſtrued as to carry the intention of the parent into execution.

"paid

" paid them reſpectively on their attaining the age of 26 years, or " days of marriage, but in caſe both or either of them ſhould die " before their reſpective ages became due, then the legacy or lega- " cies of her or them ſo dying, *together with the intereſt or in-* " *creaſe thereof*, ſhould go to and be equally divided between his " two ſons the plaintiffs, and in caſe of the death of either of them, " then to the ſurvivor of them; and the teſtator directed that 600*l.* " a year ſhould be given to his wife, the defendant *Sarah*, out of " his eſtate, for the maintenance and education of the plaintiffs and " their ſiſters, the defendants *Rachel* and *Catharine*, whilſt they " ſhould continue to live with her, and at her charge; and deviſed " all the reſidue of his eſtate, both real and perſonal, to the plain- " tiffs, to be equally divided between them; and in caſe of either " of the plaintiffs deaths, the whole reſidue of the eſtate to be en- " joyed by the ſurvivor; and in caſe of both the plaintiffs deaths, " *without leaving lawful iſſue*, then the reſiduary part of the eſtate " he directed ſhould be divided in the following manner; namely, " one part to his wife the defendant *Sarah*, and the other to his " daughters the defendants *Rachel* and *Catharine* equally, and their " iſſue, and *for want of iſſue*, to the ſurvivor of them; and if all " his children *ſhould die unmarried, or without iſſue*, then he gave " the reſiduary part of his eſtate, one half to his wife, one fourth " to his brother *Anthony Mendes*, and in caſe of his death, to his " children; and one fourth in like manner to his brother *James* " *Mendes* and his children, and made the defendants *Anthony*, *James* " and *Lewis Mendes* executors, who proved the will, and poſſeſſed " themſelves of the teſtator's eſtate.

After the appointment of the executors under Mr. *Alvaro Mendes*'s will, are theſe words; " *Memorandum*, The ſix hundred pounds " *per ann.* I have ordered ſhould be allowed my ſaid wife for my " childrens maintenance, is to be regulated as follows, *viz.* one " hundred pounds *per ann.* to be allowed by each girl, and two " hundred pounds *per ann.* is to be allowed by each boy, and in " caſe of the death of any of my ſaid children, *the inheritor or in-* " *heritors* are to pay their ſhare or proportion, ſo that the ſaid ſum " of ſix hundred pound may not prove deficient, to be placed at " the end of the will."

The two ſons of the teſtator, ſoon after his death, brought a bill by *Anthony de Coſta*, their next friend, for an account of the teſtator's perſonal eſtate, and that it may be ſecured for the plaintiffs benefit.

The executors ſubmitted to account, and to apply the eſtate as the court ſhall direct.

The

The children of *Anthony* and *James Mendes*, inſiſted on the benefit of the contingent limitations in the teſtator's will, in regard to part of the *reſiduum* of the teſtator's eſtate.

The 16th of *June* 1733, the executors were decreed to account for the perſonal eſtate of the teſtator; all directions touching the ſeveral limitations over of the legacies of 6000*l.* and 5000*l.* and the reſidue of the perſonal eſtate, and ſurplus intereſt were reſerved until the contingencies upon which the ſame are to take place ſhall happen; the plaintiffs were to be at liberty at twenty-one, and the daughters at twenty-ſix, or on propoſals made for their marriage to apply to the court.

The plaintiff *Moſes Mendes* having attained his age of twenty-one years, on the 13th of *December* 1746, petitioned the court that one moiety of the *reſiduum* of the teſtator's perſonal eſtate might be aſſigned to him; and it was ordered that the cauſe be ſet down in the paper of re-hearings on the matter reſerved by the decree, which was done accordingly, and was this day heard before Lord Chancellor.

Mr. Attorney General for the plaintiffs, the two ſons of the teſtator, inſiſted, that the reſidue ought to be divided between the two plaintiffs; for *equally to be divided*, in the firſt part, is clearly a tenancy in common, and the words *to be enjoyed by the ſurvivor* were not intended to make a joint-tenancy, which would be a contradiction, and therefore the court will put ſuch a conſtruction as will make the whole conſiſtent, and conſtrue the teſtator's meaning to be in caſe of the death of either of his ſons, in his life-time.

The next words are *in caſe of both my ſons deaths without leaving lawful iſſue, &c.* this muſt be meant on the ſame contingency as the former, in caſe of the death of either in the life-time of the teſtator, for to conſtrue it a dying without iſſue generally, is too remote, and conſequently the limitation over is void, and a court of equity rather leans againſt multiplicity of diviſions and contingencies of perſonal eſtate, unleſs the court are under a neceſſity of doing it.

And if all his children *ſhould die unmarried, or without iſſue*, then he gives the reſiduary part, one half to his wife, *&c.*

One of them is married, and therefore that contingency can never happen; but then there is a a disjunctive *or without iſſue*, this he inſiſted, for the reaſon before given, was a void limitation, being after iſſue generally, and for this purpoſe cited the caſe of *Lord George Beauclerk* verſus *Miſs Dormer*, *June* 17, 1742, (See 2 *Tr. Atk.*

Atk. p. 308.) and *Saltren* verſus *Saltren*, *July* 24, 1742, (See 2 *Tr. Atk.* 376.) and *Green* verſus *Rod*, *June* 1, 1729.

Mr. *Brown* of the ſame ſide.

The intention of the teſtator ſeems, that if both ſons ſhould live to take, that then it ſhould go no farther, or otherwiſe they can never have any benefit if they ſhould want to ſettle in the world, and did not mean it ſhould go over but upon the contingency of both the ſons dying in his life-time.

The contingency to the teſtator's two brothers is, if all the children ſhould die unmarried, or without iſſue.

One of the contingencies can never happen, for one of the daughters is married.

And as to the other contingency, it is too remote, for it is on a dying without iſſue generally, and there is no word that confines it to a dying without iſſue at the death of the deviſee.

Mr. *Noel* of the ſame ſide.

The two ſons were extremely young when the will was made, for they were but three years old when their father died; the reſidue is directed to be divided equally between them, but the teſtator has fixed no time, the reaſonable time, therefore, muſt be when his ſons came to the age of twenty-one years, which will make the whole will conſiſtent, or otherwiſe there never can be a period of time in which the ſons could divide.

Mr. *Solicitor General* for the brothers and nephews of the teſtator.

It is very true that the teſtator cannot be underſtood to give the reſidue to the ſurviving ſon, upon the other dying at any time, but it muſt be reſtrained to ſome particular time, though not to the times inſiſted on by the plaintiffs council, as to either ſon dying before the teſtator, or before the ſons age of twenty-one years, for if one of the ſons had died after the teſtator, the ſurviving ſon would have taken the whole, nor could it intend a dying before twenty-one, for if one ſon had married before twenty-one, and left iſſue, and died before that age, the whole, if this conſtruction took place, muſt go to the ſurviving ſon, which could not be the meaning of the teſtator.

The true reſtriction is, if the contingency ſhould happen to both, that is if both the ſons ſhould die without leaving lawful iſſue at their death, then to go over.

The

The rules are very well ſettled with regard to executory limitations of perſonal eſtate, for I take it, ſince the caſe of *Lord George Beauclerk* verſus *Miſs Dormer*, it is eſtabliſhed that a deviſe over after a dying without iſſue generally is void, and as clear where there are any words that confine it to a dying without leaving iſſue at the time of his death, a deviſe to take effect after ſuch a dying is not too remote; for this purpoſe he cited *Forth* verſus *Chapman*, 1 *Wms.* 663. and *Pinbury* verſus *Elken*, *Prec. in Chan.* 483. and *Target* verſus *Gaunt*, 1 *Wms.* 432.

Where the words are to the daughters equally, and their iſſue, *and for want of iſſue*, to the ſurvivor of them, it muſt mean iſſue in her who dies firſt in the life-time of the ſurvivor; the ſubſequent words, if all his children ſhould die unmarried, *or without iſſue*, muſt be conſtrued ſo as to make the will conſiſtent, and the laſt clauſe muſt be reſtrained by the former. He cited *Atkinſon* verſus *Hutchinſon*, *May* 3, 1734. as a caſe in point.

Mr. *Wilbraham* of the ſame ſide obſerved, that *Sarah* is in all the contingencies to have a moiety, which ſhews the teſtator meant they ſhould all take effect in the compaſs of one life, *Sarah*'s, for the moiety is not ſo much as given to her executor, but to her only, and therefore the deviſe over is not too remote; he cited the caſe of *Spalding* verſus *Spalding*, *Cro. Car.* 185.

LORD CHANCELLOR.

This, though very incautiouſly made, is the will of a father who is providing for a wife and children, and a father muſt be preſumed to make ſuch proviſions as would anſwer the purpoſe of portions and advancement in the world; in order to that, ſuch conſtruction ſhould be made as would enable the children to carry on trade, or provide for a wife if married, and likewiſe for their iſſue; in this view I conſider the preſent will.

The firſt difficulty of conſtruction ariſes from the deviſe of the reſidue of the teſtator's perſonal eſtate to his two ſons, who were very young at the teſtator's death; the words are, to be equally divided between them, *and in caſe of either of their deaths*, the whole to be enjoyed by the ſurvivor.

The firſt queſtion is, what is the meaning of the words *in caſe of either of their deaths, &c.*

It is admitted on all hands, theſe words muſt receive a reaſonable conſtruction, he knew they might live to be eighty years old, and have children, and therefore could not mean if they died at any time the portion ſhould go over.

It

It is contended on the part of the plaintiffs, that the words mean the death of the ſons without iſſue, in the life-time of the teſtator, but they cannot be conſtrued in that ſenſe, as the will in other places denotes caſes that may ariſe after the teſtator's death, for plainly, through the whole will, where he gives an accruer over to other children, or right of ſurvivorſhip, he means after his own death.

In caſe of the death of both or either of his daughters before, *&c.* then the legacy or legacies of her or them, *&c. together with the intereſt or increaſe thereof*, ſhould go to his ſons, *&c.* ſo that he not only directs the principal but the increaſe of intereſt to go over, and the latter clearly could not be till after his death.

The other conſtruction contended for by the plaintiffs is, that the teſtator meant to confine it to the death of his ſons without iſſue before the age of twenty-one.

It has been admitted by the defendants council to be a reaſonable conſtruction, if there were words to warrant it.

Upon reading the whole will, I am of opinion it is the true conſtruction, and if the words will warrant it, a reaſonable conſtruction alſo, and ſuch as a father may be ſuppoſed to have in view, when he was ſettling his eſtate for the benefit of his family.

Conſider the other parts of his will, where he gives portions to his daughters, for though he makes uſe of general words, yet it is plain he meant a particular period of time; for in the deviſe over to his ſons, he ſays, in caſe either of the daughters die before twenty-ſix or marriage, then to go to and be equally divided between my two ſons, which points out that it was his intent that the ſons, in caſe of that event, ſhould have the ſiſters portions abſolutely.

It is plain from the whole context this was his meaning; conſider the clauſe of maintenance, which alſo ſhews the teſtator's intent, he gives 600*l. per ann.* for the maintenance, *&c.* of the plaintiffs and their ſiſters, whilſt they ſhould continue to live with the mother, and at her charge.

I ſhould apprehend this might amount to a deviſe of the guardianſhip, but do not give an abſolute opinion.

Whilſt they ſhould continue to live with her, how long is that? Till twenty-one, for ſhe was the mother and guardian by nature, therefore her care muſt continue till a proper age; and though a guardianſhip in ſocage determines at fourteen, and ſuch infant might elect, yet in this caſe here are no ſocage lands, and conſequently the guardianſhip continues till twenty-one.

The memorandum is not by way of codicil or diſtinct inſtrument, but only added to the foot of the will, becauſe it was too long to be interlined, and therefore amounts to no more than an interlineation; the intention of it was to keep up intire the ſix hundred pounds, the ſum allotted for the maintenance of his children.

The words *inheritor, or inheritors*, made uſe of there, mean thoſe of the children who ſhould take by ſurvivorſhip, the ſhare of the children ſo dying, ſhould contribute to make up the maintenance, and this memorandum ſhould be read with the clauſe of the will, which provides for the maintenance.

A hundred pounds *per ann.* to be allowed by each girl, and two hundred pounds by each boy, and in caſe of the death of any of my ſaid children, the inheritor, *&c.*

When is that death to be? moſt clearly before their age of twenty-one, and therefore this ought to be read as an addition or interlineation to that clauſe which directs the maintenance.

If the will is to be ſo read, and means clearly a death before twenty-one, then the clauſe immediately following the maintenance is the deviſe of the reſidue, both real and perſonal, to his two ſons, to be equally divided, and in caſe of the deaths, *&c.* the whole reſidue, *&c.* ſo that here is the ſame form of expreſſion as is made uſe of in the clauſe regulating the maintenance; and where death generally is mentioned in other parts of the will, what conſtruction can be more reaſonable than to conſtrue in the ſenſe teſtator himſelf had uſed it before.

And as in the caſe of the preſent Earl of *Shaftſbury*, the court held, that notwithſtanding his marriage the guardianſhip did not determine till his age of twenty-one; ſo here the ſharing and diviſion ought to be amongſt the children of Mr. *Mendes* at their age of twenty-one, when capable of receiving it.

A guardianſhip of an infant, notwithſtanding he marries, does not determine till his age of 21.

I am of opinion the words, if both my ſons ſhould die without leaving lawful iſſue, mean a dying before twenty-one with regard to them, and the ſubſequent words, if all his children ſhould die unmarried, or without iſſue, mean as to the daughters dying before twenty-ſix or marriage; but even if they had died before twenty-one, and had lawful iſſue, I ſhould have been of opinion it would not have gone over.

This is the moſt reaſonable conſtruction; and as the ſons have attained twenty-one, no contingency hath happened with regard to them, and therefore the reſidue of the teſtator's real and perſonal eſtate veſts abſolutely in the two ſons as tenants in common, or

otherwiſe in caſe of their marriage they can make no proviſion for a wife, or any iſſue of the marriage.

This makes a conſiſtent plan of the whole will, and it is very happy that the memorandum was at the bottom of it, for from thence it is clear he intended, if both his ſons died before twenty-one, the reſidue ſhould go over, but not otherwiſe.

In conſequence of this opinion, his Lordſhip ordered the reſidue of the teſtator's eſtate to be paid to the plaintiffs.

Caſe 241. *Gregory* verſus *Moleſworth*, *March* 21, 1747.

A Plea of a former decree ſigned and inrolled was pleaded to a new bill for the ſame matter.

An infant is bound by a decree in a cauſe where he is plaintiff, as much as a perſon of full age.

Mr. Attorney General in ſupport of the plea inſiſted, that an infant is bound by a decree in a cauſe when ſhe is plaintiff, as much as a perſon of full age; and was ſo determined between *The Dutcheſs of Buckingham* verſus *Sheffield*, before Lord *Hardwicke*. (See 1 *Tr. Atk.* 631.)

LORD CHANCELLOR.

This is a plain caſe, for it would be very miſchievous if a new bill was allowed to be brought by the plaintiff here.

This is a plea of a former decree made in a cauſe relevant to the ſame matter with the preſent bill.

The queſtion will be *firſt*, whether the decree is a determination of the points between the parties.

As to this it is improper for the court to give a different judgment, becauſe there would be two contradictory judgments appearing on the ſame records.

The former decree was on a bill brought by the plaintiff's wife, to have an account of her father's perſonal eſtate, and to have a fifth as her ſhare of it; that bill charges the defendant pretends the legacy of *Margaret Moleſworth* was lapſed; this is the common and only way of bringing on the queſtion, by ſetting forth the pretences of the defendant, and therefore ſufficiently puts the point in iſſue.

The decree has directed an account to be taken of the eſtate, and expreſly that the *South-Sea* ſtock ſhould be ſold, and one fifth part reſerved for the benefit of Sir *John Moleſworth*, when he attained his age of twenty-one. This

This is as full a determination againſt the plaintiff, as if a declaration on the point that the plaintiff is not intitled.

Courts of equity, no more than courts of law, are not obliged to give reaſons for their judgment; if a man in a court of law brings his action for ſeveral demands, and he has a judgment for one only, it is as much a judgment as if there had been a particular determination upon each.

Though an action be brought for ſeveral demands, and judgment for one only, it is as much a judgment as if there had been a particular determination upon each.

A decree can be altered only by bill of review, either for error on the face of the decree, or for new matter not known at the time of bringing the firſt bill.

Here ſhe was of age during ſome of the proceedings in the cauſe, but if ſhe had continued an infant during all the time of the proceedings, ſhe is as much bound though an infant, as a perſon of full age; I know but of one caſe that is an exception, *Lady Effingham* verſus *Sir John Napper*, where, upon an appeal from Lord *Macclesfield*'s decree with regard to real eſtate, the Houſe of Lords gave Sir *John Napper* leave to ſhew cauſe, when he came of age, againſt his own decree.

But it would be moſt miſchievous with regard to perſonal eſtate, if an infant after being of age, was allowed by a new bill to diſpute any thing that was done during his minority, with regard to maintenance, education, *&c.*

An infant, after being of age, is not allowed by a new bill to diſpute any thing that was done during his minority with regard to maintenance, *&c.*

It is right to follow the rule of law, where it is held an infant is as much bound by a judgment in his own action, as if of full age; and this rule is general, unleſs groſs laches, or fraud and colluſion appear in *the prochein amy*, then the infant might open it by a new bill.

The rule at law is, that an infant is as much bound by a judgment in his own action, as if of full age.

I cannot preſume that improper proofs were made in the former cauſe, but muſt take it for granted that proper ones were given, unleſs the inrolment of the decree was opened by bill of review, and the plea to that bill diſallowed; there the court over-rules the plea, and then the cauſe is opened again, and can properly come at it, if error appears on the face of it, but as it ſtands now the plea muſt be allowed.

Rotheram

Caſe 242. *Rotheram* verſus *Fanſhaw*, *March* 25, 1748. *the laſt ſeal after Hilary term.*

A ſuit in the eccleſiaſtical court for ſubſtraction of tithes, the defendant there brings a bill to eſtabliſh a *modus*, and on the bare ſuggeſtion of a *modus* moves for an injunction to ſtay the proceedings in the eccleſiaſtical court. The injunction denied, as it would be a precedent for tripping up the heels of two courts, the eccleſiaſtical, and the court of common law.

THE defendant inſtituted a ſuit in the eccleſiaſtical court for ſubſtraction of tithes; the defendant, without pleading any diſcharge there, brings his bill in this court to eſtabliſh a *modus*; the anſwer to the bill does not admit it, and the motion now is for an injunction to ſtay the proceedings in the eccleſiaſtical court, upon the bare ſuggeſtion of a *modus* by his bill.

LORD CHANCELLOR.

An injunction is prayed on two heads; *Firſt*, On a preſumption from a conſtant non-payment of tithe hay time immemorial, there muſt have been an alienation from the perſons under whom the defendant claims, though the plaintiff is not able to produce the particular grant of thoſe tithes to his anceſtor.

Secondly, Upon a ſuggeſtion in the bill, that there has been a *modus* or compoſition conſtantly paid in lieu of tithes.

If I ſhould grant this injunction, I ſhould make a precedent for tripping up the heels of two courts, the eccleſiaſtical court, and a court of common law.

The eccleſiaſtical court have a right to retain ſuits for tithes, whether at the inſtance of a ſpiritual perſon, or lay impropriator.

There may be a ſuit too in that court for a *modus*, as well as for tithes in kind.

The court of King's Bench will not grant a prohibition unleſs you ſhew the *modus* has been pleaded in the eccleſiaſtical court and denied there; and on the ſame grounds a court of law grants a prohibition, this court grants an injunction.

The defendant likewiſe may plead a *modus* there, if admitted; the eccleſiaſtical court may go on upon the *modus*; if denied, the eccleſiaſtical court cannot proceed *propter triationis defectum*, and if ſo, it is the common ſuggeſtion for a prohibition in the court of King's Bench; but if you come there for a prohibition, you muſt firſt ſhew the *modus* has been pleaded in the eccleſiaſtical court, and denied there.

No ſuch thing has been ſhewn in this caſe; but a bill is brought to eſtabliſh a *modus*, and prays an injunction to ſtay proceedings in the eccleſiaſtical court, upon the ſuggeſtion of a *modus* only.

I cannot grant an injunction here but upon the ſame grounds as a court of law would grant a prohibition, *propter triationis defectum.*

Injunctions in this court are granted upon a ſuggeſtion of ſomething which affects the right or convenience of the party in the proceedings in the other court, or where there is a concurrent juriſdiction.

As in a ſuit for a legacy in the ſpiritual court, where the party cannot have the advantage of the diſcovery he wants, which he may have here, then this court will interfere; as where a ſuit is inſtituted in the ſpiritual court for an infant's legacy by a father his guardian, to have it paid into the father's hands, this court will not ſuffer ſuch payment to be made, but will grant an injunction, becauſe it will not allow the money of an infant to come into the father's hands, but does not grant an injunction, becauſe the ſpiritual court have not a juriſdiction in legacies, but from the general care it takes of the intereſt of infants.

Where a ſuit is inſtituted in the ſpiritual court, for an infant's legacy by a father, to have it paid into his hands, the court will grant an injunction, becauſe it will not allow the infant's money to come into the father's hands.

The modus is not admitted by the anſwer to the bill in this court, and if inſufficient you may except to the anſwer; and even if the ſuit goes on in the ſpiritual court, and a ſentence is pronounced for the tithes, it is no prejudice at all to the plaintiff in his ſuit depending here.

But if I was to grant this motion, I ſhould take away the juriſdiction of the ſpiritual court on the one hand, and the court of common law on the other.

As to the non-payment of the tithe hay, it is inſiſted, the owner of the land was formerly a purchaſer of the tithes, and has enjoyed the land and tithes together for a great length of time, which is a preſumptive evidence of his right.

But this is not a ground for an injunction in a caſe of this nature.

A lay impropriator is to be ſure different from a ſpiritual in ſome reſpects: ſince the reformation, and the acts for diſſolution of monaſteries, tithes by grants from the crown are become lay fees; ſo that in fact lay impropriators have as much power to convey a portion of tithes as any part of the land itſelf: and therefore it was ſaid, it is hard the plaintiff ſhould not in this caſe have the ſame advantage of preſumptive evidence from long poſſeſſion in the caſe of tithes, as well as in any other caſe relating to an eſtate of inheritance; and it was a ſaying of Lord Juſtice *Hale*, he would preſume even an act of parliament made in favour *of length of poſſeſſion:* but the court of Exchequer in the caſe of *The Alderman of Bury* verſus *Evans*, *Comyns's Rep.* 643. would not lay down a dif-

A lay impropriator cannot preſcribe *in non decimando* any more than a ſpiritual perſon.

ferent rule as to preſcribing in *non decimando*, in regard to lay impropriators and ſpiritual perſons, but held ſuch a preſcription equally bad againſt both.

The plaintiff might have pleaded length of poſſeſſion in the eccleſiaſtical court, and if they refuſed to determine upon the ſame evidence as a court of law would have done, it is the uſual ground for a prohibition, and the court of King's Bench has alone the cognizance of it.

Upon the whole, I do not ſee there is any reaſon at all for the injunction which is now moved; why did not the plaintiff go upon the length of poſſeſſion in the eccleſiaſtical court? he might have pleaded it there, as well as inſiſt upon it here in his bill; and if the eccleſiaſtical court would not determine upon the ſame evidence as a court of common law would have done, it is the uſual ground for a prohibition, and no other court has the cognizance of it but the court of King's Bench, and therefore I will not make ſuch a precedent, as by a ſide-wind will take away the juriſdiction of both courts at once. Lord *Hardwicke* therefore denied the motion.

Caſe 243. *Heams* verſus *Bance, among the cauſe petitions, March* 25, 1748.

A mortgagee who lent a further ſum upon bond, ſhall not be allowed to tack it to his mortgage in preference to creditors under a truſt created by the will of the mortgagor for payment of debts.

LORD Chancellor ſince *Hilary* term laſt ordered this cauſe to ſtand over, to ſearch the regiſter's book for the caſe of *Ridout* verſus *Lord Plymouth*, which had been mentioned at that time as an authority in point, but being looked into, it did not appear to be at all ſimilar to the preſent, in which the queſtion is, whether a mortgagee who lent a further ſum afterwards upon bond, ſhould be allowed to tack it to his mortgage, in preference to other creditors under a truſt for payment of debts created by the will of the mortgagor?

LORD CHANCELLOR.

The reaſon why the heir of the mortgagor ſhall not redeem the mortgage without paying the bond likewiſe, is to prevent a circuity, becauſe the moment the eſtate deſcends it became aſſets and liable to the bond; the ſame rule will hold as to a deviſee of the mortgaged premiſſes.

I have conſidered this caſe, and am inclined to think the mortgagee ſhall not be allowed to tack the bond to the mortgage, with regard to the heir of the mortgagor; the reaſon why he ſhall not redeem the mortgage without paying the bond likewiſe, is to prevent a circuity, becauſe the moment the eſtate deſcends upon him it becomes aſſets in his hands, and liable to the bond; a deviſee too of the mortgaged premiſſes for his own benefit is ſubject to the ſame rule, ſince the ſtatute of fraudulent deviſes made in favour of bond creditors.

But this is a deviſe in truſt for the payment of debts, and the deſcent is conſequently broke, ſo that, as I am at preſent adviſed, I am of opinion the mortgagee can have no priority with regard to his bond, but as to that, muſt come in *pro rata* with the reſt of the creditors under the truſt; but if the council for the mortgagee

gagee have an inclination to be heard on this point, it ſhall ſtand over.

The Attorney General of council for him ſaid, he thought the point was too ſtrong againſt *the mortgagee* to be maintained, and the court thereupon made their decree accordingly.

Buck verſus *Draper*, *March* 26, 1747. Caſe 244.

A Petition was preferred by the defendant, to diſcharge an order of the Maſter of the *Rolls*, appointing the plaintiff guardian of her daughter, upon an allegation of his unfitneſs, as being diſordered in his mind, and that the petitioner had been long before appointed guardian by the eccleſiaſtical court at *York*, and had by virtue of that appointment taken poſſeſſion of the infant's perſon and eſtate.

The eccleſiaſtical courts in the country ought not to take upon them to appoint guardians *ex officio*, without a ſuit inſtituted for that purpoſe, and by this means break in upon the juriſdiction of this court with regard to the guardianſhip of infants.

Lord Hardwicke recommended it to the Attorney General to conſider, whether a *quo warranto* might not iſſue to the eccleſiaſtical court upon ſuch an extrajudicial appointment of guardians to infants.

Lord Chancellor diſmiſſed the petition with coſts, the facts of the lunacy not being at all made out, and ſaid, he was ſurpriſed upon what pretence the eccleſiaſtical courts in the country take upon them to appoint guardians *ex officio*, without any ſuit inſtituted for that purpoſe, and by this means break in upon the juriſdiction of this court with regard to the guardianſhip of infants, and ſaid, he recommended it to the Attorney General to conſider, whether *a quo warranto* might not iſſue to the eccleſiaſtical court upon ſuch an extrajudicial appointment of guardians to infants, where no ſuit at all is depending for this purpoſe.

Brown verſus *Durſton and others*, *March* 27, 1747. Caſe 245.

THE late Sir *William Fowler*, on the 18th of *May* 1740, gave a bond to *Richard Powell*, in the penalty of two hundred pounds, for the payment of one hundred pounds.

The executor of a bond creditor of Sir *W. F.*'s, brings a bill for an account of his perſonal eſtate, and if that falls ſhort of ſatisfying the debts, prays that a ſufficient part of the real eſtate may be ſold. The real eſtate having never been aſſets of Sir *W. F.* the lands compriſed in a ſettlement made after his marriage, are not liable to his debts by ſpecialty, for they are not ſpecific liens upon the eſtate.

Sir *William Fowler* made a will, and appointed executors, but they renouncing, adminiſtration with the will annexed was granted to the defendant *Durſton*: the teſtator at his death left a ſon and three daughters, all infants.

The

The teſtator's perſonal eſtate is inconſiderable, and covered by judgments and other ſecurities, and therefore the plaintiff, the executor of *Richard Powell*, has brought his bill for an account of Sir *William*'s perſonal eſtate, and in caſe it falls ſhort of ſatisfying his debts, prays that a ſufficient part of his real eſtate may be ſold.

The defendants, the children of Sir *William Fowler*, by their anſwer inſiſt, that he did in the life-time of his father Sir *Richard Fowler*, by leaſe and releaſe of the 7th and 8th of *March* 1728, in conſideration of a marriage before had between him and Dame *Harriot Newton* his wife, and of a portion of two thouſand pounds, limit the ſeveral eſtates mentioned in the deed to the uſe of him and *Harriot* his wife, and their iſſue, and covenanted that he would within ſix months after the death of Sir *Richard Fowler* levy a fine, and ſuffer a recovery for the better aſſuring the premiſſes to the uſes in the releaſe, and had a power to revoke all the uſes in the releaſe, and to create new.

After the death of Sir *Richard Fowler*, Sir *William Fowler* did, by deed dated the 7th of *March* 1733, indorſed on the releaſe of the 8th of *March* 1728, by virtue of the power, revoke all the uſes limited by the releaſe, and appointed the eſtates contained in the releaſe, to two perſons and their heirs, in order to ſettle the ſame in the manner mentioned in the indorſed deed.

Recoveries were ſoon after ſuffered of theſe eſtates, and by leaſe and releaſe dated the 4th and 5th of *July* 1734, in conſideration of the marriage, and other conſiderations, and for providing a jointure for the defendant's mother, and for ſettling the ſaid eſtates on the iſſue male of the marriage, and for making proviſions for daughters, and younger children, in performance of the truſt created by the deed of the 7th of *March* 1733, Sir *William Fowler* did convey to two perſons, and their heirs, the ſaid eſtates to the uſe of the defendant's father for life, remainder to truſtees to ſupport contingent remainders, remainder ſubject to the proviſo made for defendant's mother, to *Newton* and *Sloane* for two thouſand years, upon truſt for raiſing portions for the daughters, and younger children of the marriage, remainder to the firſt and other ſons in tail male of Sir *William Fowler*, remainder in fee to the father.

The defendant, the preſent Sir *William Fowler*, inſiſted, that Dame *Sarah Fowler*, the widow of his grandfather Sir *Richard*, is ſtill living, and therefore ſuch part of the eſtate as was her jointure, whereof ſhe was in poſſeſſion, was not affected by the recovery ſuffered by his father, but the defendant is intitled thereto as tenant in tail male in remainder, expectant on the death of Dame *Sarah Fowler*, by virtue of the ſettlement made thereof previous to the

marriage of Sir *Richard Fowler* with Dame *Sarah*; and the other defendants, the younger children of Sir *William*, likewiſe inſiſt, that the teſtator did not die ſeiſed of any real eſtate ſubject to his debts, but long before his death had ſettled the ſame in ſuch manner that they became intitled to it on his death, as purchaſers for a valuable conſideration diſcharged of any debts or other incumbrances.

The council for the plaintiff inſiſted, that in caſe any ſuch ſettlement was made, it was executed after marriage, and merely voluntary, nor was any ſum ever paid as a portion with Dame *Harriot*, Sir *William*'s wife, and therefore ſuch ſettlement ought not to prevail againſt the teſtator's creditors, but as to them ought to be deemed fraudulent, and ſet aſide.

Mr. Solicitor General for the defendants argued, that this ſettlement is not fraudulent, though made after marriage, and though no portion was paid, for there were no debts then due from Sir *William Fowler*, that he covenanted by the firſt ſettlement to make a good ſettlement, and afterwards, when his father died, he ſuffered a recovery, and declared the uſes according to that covenant.

LORD CHANCELLOR.

The queſtion is, whether this laſt ſettlement is fraudulent and void againſt the bond creditors of Sir *William Fowler*? And as to this, the real eſtate was never aſſets of Sir *William Fowler*, and therefore the lands comprized in this ſettlement were not liable to his debts by ſpecialty, for the debts by ſpecialty are not ſpecific liens upon the eſtate; and the debtor Sir *William Fowler* has done no more by this recovery, with regard to his creditors, than what was done by his father's marriage ſettlement, for by that ſettlement the ſon of Sir *William* would be now tenant in tail, and his entailed eſtate would not be liable to his fathers debts, and the recovery, though it would let in all ſuch debts as were ſpecific liens, yet will not do ſo as to the debts by ſpecialty.

Lord Hardwicke therefore diſmiſſed the bill againſt the defendants the infants.

April 19, 1747. *Firſt ſeal after Eaſter term.* Caſe 246.

A Commiſſion iſſued out of chancery for the examination of witneſſes directed to *Sweden*; after each party had ſtruck off four, there remained four of a ſide; the plaintiff now moved that he might be at liberty to ſerve any one or two of the defendant's commiſſioners with notice of the execution of it.

A plaintiff may ſerve any two of the defendant's commiſſioners with notice of the execution of the commiſſion, and is not tied down to thoſe only as the defendant ſhould chuſe.

Mr. *Bignell* for the defendant inſiſted, that according to the rule of the court the plaintiff ought to ſerve ſuch two of the defendant's commiſſioners as he ſhould chuſe, or otherwiſe it might be in the power of the plaintiff to chuſe thoſe out of the four that he liked beſt, which might be a prejudice to the defendant.

Lord *Chancellor* ordered that the plaintiff ſhould be at liberty to ſerve any two of the defendant's commiſſioners, and that the rule could never be as Mr. *Bignel* laid it down, becauſe it would be attended with this inconvenience, that if the two particular commiſſioners choſen by the defendant ſhould happen to be abſent from the place appointed for the execution of the commiſſion, or either of them ſhould be dead, it could not be executed, and for that very reaſon the court lets four commiſſioners ſtand on each ſide to guard againſt ſuch accidents.

Caſe 247. *Hay* verſus *Hay*, *March* 28, 1748.

THE defendant by petition applies to the court for directions upon the Maſter to review his report.

The defendant obtained an order for the Maſter to tax the coſts of a trial in ejectment in the country, in which there was a verdict for the plaintiff.

The plaintiff had defended a petition for a new trial, but it was granted notwithſtanding.

The Maſter, in taxing the coſts of a former trial, allowed 17*l.* odd money to the plaintiff for his coſts, in oppoſing the petition for a new trial; he likewiſe allowed 5*l.* for the plaintiff's briefs, and 5*l.* 5*s.* for copies to council.

Lord *Hardwicke* declared he knew of no rule for allowing the coſts of ſuch a motion or petition, where the other ſide prevailed, but ſaid in this caſe, as the plaintiff was obliged to defend the firſt petition for the new trial, as it was neceſſary the court ſhould grant it on terms only, he was of opinion the Maſter had done right to allow that; but if the application for a new trial had been upon clear grounds and plain facts, then he ſhould have been of opinion the plaintiff ought not to have had his coſts.

As to the briefs, he ſaid, they might ſerve again upon the ſecond trial, and therefore diſallowed the 5*l.* 5*s.* for copies to council.

In

In the matter of Heli a Lunatick, March 31, 1748. Caſe 248.

AN application was made by the heirs at law for reſtitution of goods, taken by *Kent* and *Pain*, inn-keepers, belonging to a lunatick, and that care may be taken of his eſtate.

Where the lunacy of a perſon is in queſtion, the court will make a proviſional order as to his effects, till the point of the lunacy is determined.

LORD CHANCELLOR.

One part of the Chancellor's power in relation to idiots and lunaticks is by virtue of a ſign manual of the King, upon his coming to the great ſeal, and counterſigned by the two ſecretaries of ſtate, empowering him to take care of ſuch perſons in the right of the crown, and to make grants from time to time of the idiots or lunaticks eſtates.

The power of the chancellor over ideots and lunaticks is by ſign manual of the King, counterſigned by the two ſecretaries of ſtate, impowering him to take care of them in the right of the crown, and to make grants of their eſtates.

The queſtion is, whether a perſon can traverſe an inquiſition of lunacy without bringing the lunatick *in propriâ perſonâ* before the court, and whether the court will interpoſe by making any proviſional order for the care and cuſtody of the eſtate, till the lunacy is finally determined.

In *Fitzherbert's Nat. Brev.* under title *De idiota inquirendo & examinando* 532. it is laid down, " That though a man be found an " idiot by inquiſition taken before the ſheriff, and by their exami- " nation, *&c.* and that be returned into the Chancery, yet he who " is ſo found idiot may in perſon, or by his friends, come into the " Chancery before the Chancellor, *&c.* and ſhew the matter, and " pray that he may be examined before the Chancellor, whether he " be ideot or not, and if upon examination he be found no idiot, " then the inquiſition found before the ſheriff, and alſo the exami- " nation which the ſheriff hath made and returned thereupon, ſhall " be of no effect, but the ſame office ſhall be taken as void with- " out any other traverſe."

The ſame holds as to an inquiſition of lunacy, though the conſequences are different.

Lord *Hardwicke* made a proviſional order of the lunatick's effects, and that *Kent* ſhould produce Mr. *Hely* next day for the inſpection of the court.

Blount

Caſe 249. *Blount* verſus *Blount April*, 25, 1748.

The advantage a purchaſer receives from the wearing out of lives has never been conſidered as a reaſon by this court for his paying intereſt for the purchaſe money.

IT was prayed by petition that the plaintiff, who was purchaſer of an eſtate ſold by a decree of this court for payment of the debts of the plaintiff's father, may pay intereſt for the purchaſe money from the time of his being confirmed the beſt purchaſer the 18th of *October* 1744.

At the time the purchaſer was let into poſſeſſion of the eſtate, a ſmall part conſiſted in rack-rents, but the greateſt part was ſtanding out in reverſions upon lives; two of thoſe reverſionary eſtates are fallen in ſince the purchaſe.

It was inſiſted for the petitioners, that unleſs there is ſomething to take it out of the common rule, this is an application of courſe, and the caſe *Ex parte Manning*, 2 *P. Wms.* 410. was cited by Mr. *Tracy Atkyns*, where Sir *Joſeph Jekyl* ſaid, "that after a report of a "perſon's being the beſt purchaſer has been abſolutely confirmed, "from that time he is ſure of his title and his purchaſe, though the "tenant for life had died the next day, and from that time the life "was wearing, which is equivalent to the taking of the profits; and "in caſe the purchaſer had taken the profits, he muſt certainly have "paid intereſt, and directed the purchaſer to pay intereſt from the "time of his being abſolutely confirmed the beſt purchaſer."

The caſe of *Davy* verſus *Barber*, *January* 15, 1742, (See 2 *Tr. Atk.* 489.) was likewiſe cited to ſhew, that the contingency of lives falling in has been conſidered as the rents of the eſtate, and ſuch an advantage to the purchaſer, that the court will on that account charge a purchaſer with intereſt on his purchaſe money till paid.

Mr. Attorney General for the purchaſer ſaid, it was reaſonable he ſhould make ſome compenſation to the perſons intitled to the purchaſe-money for this advantage which has happened by dropping in of lives ſince the purchaſe, but that he ought not to be charged with intereſt for the purchaſe-money till the conveyances from all proper parties have been executed to him, which are not yet done.

Mr. *Wilbraham* of the ſame ſide inſiſted, that a purchaſer is not obliged to pay his money till he has a good title, and if it is not imputable to the plaintiff that he has been guilty of laches in not procuring a title, he ought not to be charged with intereſt: It is the vendor's buſineſs to ſee a good title is made, and not the purchaſer's; and as this is a dry reverſion, and the purchaſer has received very little advantage from it, it would be hard to make him pay intereſt from the time he has been let into poſſeſſion.

Mr. Solicitor General in reply ſaid, nothing was wanting to make the purchaſer a good title, but a bare aſſignment of a mortgage term, on paying off the mortgagee, who was very willing to take his money.

One of the eſtates was let out on three lives in 1676, upon a reſerved rent of one pound only, it is moſt probable they may all fall in at a year's diſtance at furtheſt, for it is 72 years ſince the eſtate was let out on lives, and conſequently the youngeſt of the lives muſt be turned of ſeventy.

LORD CHANCELLOR.

I am of opinion the plaintiff ſhould not pay intereſt, and ſeveral diſtinctions have been taken in caſes of this kind.

To be ſure, neither in the purchaſe of eſtates in poſſeſſion, or in reverſion, whether purchaſed under a private agreement, or purchaſed under a decree for a ſale, can it be laid down in certain that from the time of poſſeſſion, a purchaſer ſhall pay intereſt.

It is not a general rule, that a purchaſer of eſtates under a private agreement, or a decree for a ſale, ſhall from the time of poſſeſſion pay intereſt.

As to eſtates in poſſeſſion upon a private purchaſe, the court never regards execution of articles for purchaſe, but the time of the execution of conveyances, and even there, if the vendor has made default in letting the vendee into poſſeſſion, he ſhall not pay intereſt for the purchaſe money; but if he has taken poſſeſſion, the court will give ſuch intereſt as is agreeable to the nature of the land purchaſed.

The court in awarding of intereſt never regards the execution of articles for a purchaſe, but the time of the execution of the conveyances, and even then the purchaſer ſhall pay intereſt only from the time the poſſeſſion is delivered.

In biddings before Maſters, they are made general, and the court diſcourages any particular terms to be put upon thoſe biddings.

If the purchaſer has not had poſſeſſion upon execution of conveyances, he ſhall not pay intereſt at all; from the time of the delivery of poſſeſſion he ſhall.

So much for eſtates in poſſeſſion; next, as to dry reverſions; in *Owen*'s caſe, that has been mentioned, he was intitled to all the profits during the intermediate time, and he was intitled to a dry reverſion after an eſtate for life; *Owen* was tenant by the courteſy, and the court was of opinion he had created difficulties in reſpect of the conveyance which was to be made to him, that he need not to have done, and therefore were of opinion he ought to pay intereſt from the time he ought to have executed the conveyance.

The preſent is a middle caſe; the father creates a thouſand years term for particular purpoſes; the truſtees did not think proper to take poſſeſſion; the plaintiff therefore, as heir at law, took poſſeſſion, and afterwards becomes purchaſer of the eſtate, and accounts for profits before the Maſter to *Michaelmas* 1745, a year after being confirmed the beſt purchaſer.

It is ſaid he is a purchaſer of a reverſionary eſtate, but it is not ſo, he is the purchaſer of a thouſand years term, and is himſelf owner of the reverſion.

The eſtate conſiſted chiefly of lifeholds, and therefore it is inſiſted, as they are perpetually falling in, he ought not to run away with the benefit of this, and yet not pay intereſt for the purchaſe money.

And, to be ſure, in general this may be right, but I do not know yet whether he may be the purchaſer; for poſſibly the father may not make a good title, and beſides, he is not in poſſeſſion under the purchaſe, but as heir at law of his father, on the truſtees of the 1000 years term refuſing to take poſſeſſion.

But if theſe leaſes are renewed, I think it is reaſonable Mr. *Blount* ſhould account for the fines, as being part of the profits of the eſtate conveyed by the thouſand year's term.

Therefore this is a middle caſe, diſtinguiſhable from the caſe of a dry reverſion, and from *Owen*'s caſe.

Where, after a perſon is reported the beſt purchaſer, lives drop in, the court have directed the purchaſer to make ſome compenſation in reſpect to the eſtates being bettered.

Where eſtates for lives have dropt in between a perſon's being reported the beſt purchaſer by the maſter, and his taking poſſeſſion, the court have either directed a purchaſer to make ſome compenſation in conſideration of the eſtates being bettered, or otherwiſe to go before a Maſter again, and the eſtate to be put up for a new bidding.

But here no poſſeſſion was delivered to the purchaſer by virtue of his purchaſe, nor is it his default at all that the conveyances have not been made, and is ſubject to an account, and therefore no pretence for making him pay intereſt.

As to what has been ſaid of the advantage a purchaſer receives from wearing out of lives, I never knew the court take this into their conſideration as a reaſon for a purchaſer's paying intereſt.

But I will direct the Maſter to inquire what increaſe of value has ariſen by the falling in of lives ſince the purchaſe of the eſtate, and what has been received for heriots by the purchaſer, or for fines

fines in letting out eſtates again; and declare they ought to be conſidered as part of the profits of the truſt-eſtate of a thouſand years, and let Mr. *Michael Blount* account for the ſame in a ſubſequent account to be taken by the Maſter, and let him proceed in his purchaſe.

Ex parte Croxall, miniſter of the united pariſhes of St. Mary Somerſet and St. Mary Mounthaw in the city of London, April 25, 1748.

Caſe 250.

THE petition prayed, that Lord Chancellor would iſſue his warrant for levying the ſums of money mentioned in the petition, on ſeveral of the inhabitants of theſe pariſhes who had refuſed to pay the miniſter his dues according to an aſſeſſment in 1681.

A petition to Lord Chancellor to iſſue his warrant for levying the ſum therein mentioned on the inhabitants who had refuſed the miniſter his dues, according to an aſſeſſment in 1681. under the act for the better ſettling the maintenance of the parſons, &c. in the pariſhes of the city of *London* burnt by the fire. *If the Lord Mayor has done wrong in refuſing his warrant of diſtreſs, this court can iſſue their warrant for levying the ſums aſſeſſed.*

It depended upon the conſtruction on the ſtatute of 22 & 23 *Ch.* 2. *chap.* 15. intitled, An act for the better ſettlement of the maintenance of the parſons, vicars and curates, in the pariſhes of the city of *London*, burnt by the fire.

The queſtion was, whether the great ſeal has an authority under this act to iſſue ſuch warrant as is prayed, if the Lord Mayor, upon an application to him, refuſes to iſſue one.

The council for the petitioner, in ſupport of the authority of the great ſeal, cited the caſe " *ex parte Savage, rector of the united* " *pariſhes of St. Andrew Wardrobe and St. Anne Blackfriars*, and " *ex parte Wood, rector of St. Michael Royal and St. Martin Vintry*, " which came before Lord *Harcourt* on petition the 29th of *Octo-* " *ber* 1713. ſetting forth, that the petitioners had reſpectively de- " manded of the inhabitants the reſpective rates and arrears for the " houſes, &c. in their reſpective occupations, but they refuſed to " pay the ſame, and that the petitioners applied to Sir *Richard* " *Hoare*, Lord Mayor, for ſuch warrants as the act of parliament " directed him to grant for levying the ſaid money, and he refuſed " to grant ſuch warrants; wherefore it was prayed that his Lordſhip " would grant the petitioners his warrant to levy the ſeveral ſums " of money ſo reſpectively due to them, by diſtreſs and ſale of " ſuch goods of the pariſhes ſo refuſing to pay, according to the " directions of the act of parliament.

Lord *Harcourt* thinking the matter of the petition was of great conſequence to the inhabitants of the ſeveral pariſhes mentioned in the act, as well as to the clergy of the city of *London*, as no ſuch complaint ſince the making of the act had been before made to the Lord Chancellor, or Lord Keeper of the great ſeal, or to any two

of

of the Barons of the Exchequer, deſired the aſſiſtance of Mr. Baron *Bury* and Mr. Baron *Price*; and on the ſecond of *December* following it came on again in their preſence, when it appeared that ſeveral of the quarterly ſums claimed by the petitioners became due, and in arrear, when the houſes, or other hereditaments, whereon ſuch quarterly ſums were aſſeſſed, ſtood empty, or were in the poſſeſſion of former tenants or occupiers thereof; and a queſtion thereupon ariſing, whether ſuch ſums ſo aſſeſſed upon the ſeveral houſes within the ſeveral pariſhes mentioned in the act, for making up certain annual ſums of money to be paid in lieu of tithes, were become a fixed or real charge upon the houſes whereon they had been ſo aſſeſſed, ſo that the arrears which became due in the time of former tenants, or when the houſes were empty, might be levied on the ſucceeding tenants; the further conſideration of the petitions were adjourned to the 23d of *December*, upon which day the two Barons certified their opinion, " That by the ſtatute, the ſums of " money which have been duly according to the directions of the " act aſſeſſed upon the ſeveral houſes, *&c.* within the pariſhes in the " act are become real charges upon the houſes, *&c.* whereon they " were ſo aſſeſſed, ſo that the arrears which ought to have been " paid by the former occupiers of the houſes, or which became " due when the houſes ſtood empty, may be levied by diſtreſs and " ſale of the goods of the preſent occupiers; and Lord *Harcourt* " declared he intirely concurred in opinion with the Barons, and " that the petitioners were at liberty to apply to him for warrants " of diſtreſſes, as prayed by their petition; but directed them firſt " to demand from the ſeveral perſons mentioned in the petitions the " reſpective ſums due from them, that they might have an oppor- " tunity of paying them without further trouble or charge.

LORD CHANCELLOR.

The act of parliament directs, that the alderman of each re- " ſpective ward within the city of *London*, wherein any of the " ſaid pariſhes reſpectively lie, and his deputy or deputies, and " the common council-men of each reſpective ward, with the " churchwardens, and one or more of the pariſhioners of each re- " ſpective pariſh wherein the maintenance is reſpectively to be aſ- " ſeſſed, to be nominated by ſuch reſpective alderman, deputy, " common council-men and churchwardens, or any five of them, " whereof the alderman or his deputy to be one, ſhall at ſome con- " venient and ſeaſonable time aſſemble and meet together in ſome " place within each of the reſpective pariſhes in ſuch reſpective " ward wherein the maintenance aforeſaid is to be aſſeſſed, and " they, or the major part of them ſo aſſembled, ſhall propor- " tionably aſſeſs upon all houſes, ſhops, warehouſes and cellars, " wharfs, keys, cranes, waterhouſes and toſts of ground, and all " other hereditaments whatſoever, the whole reſpective ſum by

" this act appointed in the moſt equal way, that the ſaid aſſeſſors, " according to the beſt of their judgments, can make it.

Another proviſion in the act is, that if any difference ſhould ariſe in the aſſeſſment, and a pariſhioner ſhall find himſelf aggrieved by the aſſeſſing of any ſum of money in the manner aforeſaid, " That " then upon complaint made by the party aggrieved to the Lord " Mayor and court of aldermen, they ſummoning as well the party " aggrieved, as the alderman and ſuch others as made the aſſeſſment, " ſhall hear and determine the ſame in a ſummary way, and the " judgment by them given ſhall be final and without appeal.

After ſettling the manner of making aſſeſſments, and no appeals, then comes a clauſe that directs, upon refuſal of the inhabitants of the reſpective pariſhes to pay to the reſpective incumbents any ſum reſpectively payable, how the ſame ſhall be levied.

" That it ſhall and may be lawful for the Lord Mayor of the " city of *London* for the time being, upon oath to be made before " him of ſuch refuſal, to grant a warrant for the officer appointed " to collect the ſame, with the aſſiſtance of a conſtable in the day- " time to levy the ſame tithes, or ſums of money ſo due and in " arrear, by diſtreſs and ſale of the goods of the party ſo refuſing.

Then comes the proviſo, which gives juriſdiction to the great ſeal.

" Provided that in caſe the Lord Mayor or court of aldermen " ſhall refuſe to execute any of the reſpective powers to them by " this act granted, or to perform all and every ſuch thing relating " either to the aſſeſſing or levying of the reſpective ſums aforeſaid,

" That then it ſhall and may be lawful for the Lord Chancellor, " or Lord Keeper of the great ſeal for the the time being, or any " two or more of the Barons of his Majeſty's court of Exchequer, " by warrant under his or their reſpective hands and ſeals to do and " perform what the ſaid Lord Mayor and court of aldermen, ac- " cording to the true intent and meaning of this act might, or " ought to have done, and by ſuch warrant either to impower any " perſon to make the reſpective aſſeſſments, or to authorize the re- " ſpective officers appointed to collect the ſums aforeſaid, to levy " the ſame by diſtreſs and ſale of the goods of any perſon that ſhall " refuſe to pay the ſame in manner and form aforeſaid.

I muſt take it here as if the aſſeſſment was made.

The authority of the great ſeal does not extend to every caſe under this act, but only where there has been a refuſal by the Lord

Mayor, &c. to execute the powers granted to them, there the Lord Chancellor, or, &c. for the time being, are to iſſue a warrant, &c.

Here the Lord Mayor has heard the parties, and is of opinion not to grant a warrant.

In one caſe the act did not intend to leave the miniſter ſo far in the power of common council-men and churchwardens as to abide by their determination, but he has his appeal; and it does not only give an appeal to the miniſter, but to the inhabitant, for the words are, *if any variance or difference in the aſſeſſment, and a pariſhioner ſhall find himſelf aggrieved, &c. and Lord Mayor's determination is final there.*

In the other caſe where there is no controverſy about the aſſeſſment, but a refuſal to pay; and though the words are, *ſhall and may be lawful,* yet that is imperative upon the Lord Mayor, if a juſt demand.

In caſe of any variance or difference in the aſſeſſment between the miniſter and the pariſhioners, and appeal to the Lord Mayor, the court of Chancery or Exchequer have no juriſdiction, unleſs the Lord Mayor refuſes to take cogniſance, becauſe that would be refuſing to execute their own power, but if they have entered into the conſideration of the grievance in any manner, their appeal would be final.

In the preſent caſe the only act the Lord Mayor was to do, was to iſſue a warrant; he has refuſed it, and unleſs I enter into the queſtion, whether Lord Mayor ought to have iſſued a warrant, I can never judge whether he had a power to do it or no.

Here is, as it appears to me, a plain diſtinction in the act of parliament, for this warrant muſt have been founded upon an aſſeſſment; and as to the pariſhioners, if the Lord Mayor had iſſued a warrant improperly, an action of treſpaſs would have lain againſt him, and that might be his reaſon for refuſing it.

Upon the whole, I think this court has a juriſdiction to inquire whether the Lord Mayor has done right in refuſing the warrant, and if of opinion he has done wrong, I can iſſue my warrant for levying the ſums aſſeſſed; and his Lordſhip gave directions accordingly.

There being a diſpute whether part of the premiſſes were liable to the aſſeſſment, by conſent of all parties, the court referred it to arbitrators.

Callaghan

Callaghan verſus *Rochfort*, *April* 27, 1748.

Caſe 251.

A Motion was made for a commiſſion to *Cork* in *Ireland* to examine witneſſes to the credit and competency of a perſon who had given evidence in the cauſe, and againſt whoſe competency the party now moving had exhibited articles after publication paſt.

Lord Chancellor denied the motion, and ſaid, it was never allowed to exhibit articles againſt the competency of a witneſs after publication, becauſe this might have been objected to and inquired into upon the examination; and for this very purpoſe the witneſs is to be ſhewn to the clerk in court of the oppoſite party, though at the ſame time he ſaid, it might be reaſonable to allow an examination to competency *after publication*, where the objection to the competency aroſe from a matter that came to the knowledge of the party after the examination; and the proper way to apply for this, would be not by exhibiting articles, but by motion for leave to examine to this matter upon a foundation of ignorance at the time of the examination.

The court will not allow articles to be exhibited againſt the competency of a witneſs *after publication*, becauſe this might have been objected to and inquired into upon the examination.

As to the commiſſion to examine in ſupport of the articles which went to the credit of the witneſs, *Lord Hardwicke* ſaid, the court will allow ſuch articles to credit *after publication*, becauſe the matters examined to in ſuch caſes were not material to the merits of the cauſe, but only relative to the characters of the witneſſes, and yet no commiſſion was ever granted into foreign parts to ſupport ſuch articles, (and *Ireland*, though belonging to the dominions of the crown of *Great Britain* with reſpect to the juriſdiction of this court, is conſidered as a foreign part), becauſe this would introduce a certain method of delay; and if it was ever to be granted upon great neceſſity, and in a caſe of conſequence, the only ground of it muſt be, that no perſon in *England* could ſwear any thing as to the witneſſes credit: but the affidavit which has been read in this caſe to induce me to grant the commiſſion is ſilent as to this, ſo that there may be perſons here who can ſpeak both for and againſt the credit of *the witneſs*.

The court will allow ſuch articles *to the credit of a witneſs after publication*, becauſe the matters examined into in ſuch caſes were not material to the merits of the cauſe; but not where the commiſſion is to go to foreign parts, becauſe this would introduce a certain method of delay, unleſs no perſon in *England* can ſwear to the perſon's credit.

And as theſe applications are moſt frequently made for delay merely, his Lordſhip ſaid he ſhould be extremely cautious how he grants them; and as there was no abſolute neceſſity in this caſe, he denied the motion.

Caſe 252. *July* 30, 1748.

To a bill brought againſt an arbitrator, ſeeking a diſcovery of the grounds on which he made his award, he pleaded in bar that he was not obliged to ſet them forth; the court thought it unreaſonable he ſhould be put to ſo much trouble and expence, and allowed the plea.

THE bill was brought to ſet aſide an award, and the arbitrator was made a party, and ſeeks a diſcovery from him of the grounds and foundation upon which he made the award, and to ſet it forth minutely in his anſwer.

The arbitrator pleaded in bar to ſo much as ſeeks ſo particular a diſcovery, that he was not obliged to ſet forth minutely the grounds and foundation upon which he made his award.

LORD CHANCELLOR.

If there be a palpable miſtake, or miſcalculation, the party aggrieved may bring his bill againſt the party in whoſe favour the award is made, to have it rectified, and not againſt the arbitrator.

Unleſs there is corruption or partiality in an arbitrator, the party cannot ſet aſide his award; and if it ſhould be allowed to make arbitrators defendants, and give them all this trouble to ſet forth the particular reaſons upon which they founded their award, it would introduce very great inconvenience, and be a diſcouragement to any perſon to undertake a reference; if there was any palpable miſtake made by an arbitrator, or miſcalculation in an account, that had been laid before him, the party aggrieved might bring his bill againſt the party, in whoſe favour the award is made, to have it rectified, and not againſt the arbitrator.

His Lordſhip ſaid, he did not know whether there was any eſtabliſhed rule of the court with regard to arbitrators ſetting forth the reaſons of their award, and how far they were obliged to diſcover, and how far not; but if there was none, he ſhould not ſcruple to make one, becauſe it would be unreaſonable to put an arbitrator to ſo much trouble and expence, as ſuch an anſwer muſt neceſſarily give them. Lord *Hardwicke* allowed the plea.

Fonereau

Fonereau verſus *Fonereau*, *Auguſt*, 5, 1748. Caſe 253.

A Deviſe to *Claudius Fonereau*, when he ſhall have attained the age of twenty-five years, of one thouſand pounds, which the teſtator empowered his four ſons his executors, guardians, and truſtees of the will, to lay out on ſuch ſecurities as they ſhall think fit, and the intereſt or income thereof to be for or towards the education of the infant as they ſhould think fit, as alſo part of the principal to put him apprentice, and the remainder to be paid him when he ſhould have attained his age of twenty-five, and not before.

A deviſe to *A. F.* of 1000 *l.* when he attains 25, and the executors empowered to lay it out on ſecurities, and pay the intereſt thereof towards the

infant's education, as alſo a part of the principal to put him apprentice, and the remainder to be paid him at 21, and not before; the legatee died at 19, and the father applies to have the ſecurities transferred to him. *The time of 25 years is put only to poſtpone the payment, and not the veſting of the legacy, and the father as the repreſentative of the ſon intitled to it.*

A petition by the father, the repreſentative of the legatee, who died at nineteen, to have the ſecurities transferred to him.

LORD CHANCELLOR.

The queſtion is, whether the time of twenty-five years is put in, in order to poſtpone the veſting of the legacy, or only to poſtpone the payment of it?

I am of opinion it is only to poſtpone the payment.

It is true, there is a diſtinction where a legacy is given to one at his age of twenty-one, there it is not veſted; but where it is to him, to be paid at twenty-one, it is veſted; this diſtinction now is abſolutely ſettled.

But there are caſes where when a teſtator gives intereſt in the mean time, he gives a property in the principal, unleſs ſomething ariſes on the face of the will to take off the force of it.

Where a teſtator gives intereſt on a legacy in the mean time, he gives a property in the principal, unleſs ſomething appears on the will to take off the force of it.

Lord *Hardwicke* then read the will, and ſaid, if the words when he ſhall have attained twenty-five, had been left out, and it had been, I give to *Claudius Fonereau* a thouſand pounds, which I empower my executors, *&c.* to lay out at intereſt, and apply for his education, and to pay the reſidue at twenty-five, this would be annexed to the payment only.

There is a direction for diſpoſal of part of the principal to put him out apprentice; for though the word is *empower*, yet it is obligatory upon executors to lay out one thouſand pounds upon ſecurities, and they may, if they pleaſe, take the greateſt part of the principal for this purpoſe.

This is ſomething like the caſe in Lord *King*'s time, of *The Attorney General* and *Hall*, where the teſtator gave a legacy to one for life, and ſo much as he did not diſpoſe of, gave to a charity; it was held the legatee might diſpoſe of the whole: ſo here, if for the legatee's benefit, they might take almoſt the whole to place him out apprentice; as if, for inſtance, they ſhould put him to a *Turkey* merchant, where they inſiſt upon a large ſum with an apprentice.

He directed the ſecurities to be transferred to the father, who is the repreſentative of the legatee.

The eccleſiaſtical court will decree payment of a legacy immediately, where it is deviſed to *A.* to be paid at 21, and intereſt is given; otherwiſe if *without giving intereſt*, for there it will not accrue till the time comes at which the legatee would have been 21 if living.

If a legacy be deviſed to *A.* to be paid at twenty-one, and intereſt is given, the eccleſiaſtical court will decree payment immediately, the intereſt being for delay of payment; but if to *A.* to be paid at twenty-one, *without giving intereſt*, then intereſt will not accrue till the time comes at which the perſon would have been twenty-one if living.

Caſe 254. *Le Neve* verſus *Le Neve*, *December* 9, 1748. *This cauſe ſtood for judgment.*

LORD CHANCELLOR.

The agent of the defendant having full notice of the firſt articles made on her huſband's firſt marriage, this is notice likewiſe to her, and is alſo a ſufficient equity in the plaintiffs to poſtpone the ſecond articles and ſettlement, notwithſtanding theſe only have been regiſtered.

THE bill was brought by the plaintiffs *Peter Le Neve*, and *Hugh Pigot*, and *Elizabeth* his wife, late *Elizabeth Le Neve*, as the only ſurviving children of the defendant *Edward Le Neve*, by *Henrietta* his late wife, deceaſed.

The end of the bill was in general to have the execution of a truſt of leaſehold eſtates ſettled upon the late wife of *Edward Le Neve*, and the iſſue of that marriage, by articles previous to the marriage, dated *July* 1, 1718, and that the conveyances made by the defendant *Edward Le Neve*, and the defendant *Mary* his wife, to two truſtees, may be ſet aſide, and delivered up as voluntary, being made after notice of the articles of *July* 1, 1718, or of the other conveyances made in purſuance thereof, and to have the leaſehold eſtates exonerated and diſincumbered.

The facts were, that in 1718, the defendant *Edward Le Neve* intermarried with his firſt wife *Henrietta Le Neve*, who had a conſiderable fortune, and articles were executed previous to the marriage, dated *July* 1, 1718, whereby the father of *Edward*, in conſideration of *Henrietta*'s fortune, *&c.* covenanted with truſtees, to convey to them ſeveral eſtates, and ſome leaſehold, amongſt the reſt, near *Soho-Square*, in the county of *Middleſex*, to permit *Ed-*

ward Le Neve the younger to receive the rents and profits during his own life, and after his death, to pay to *Henrietta* 250*l.* a year, in caſe ſhe ſurvived *Edward*; and after the deceaſe of *Edward* and *Henrietta*, that the ſaid eſtates ſhould remain to their iſſue, in ſuch manner as *Edward* the younger ſhould by will or otherwiſe appoint, and for want of ſuch iſſue, to the uſe of *Edward Le Neve* the father, and his heirs.

The 16th of *June* 1719, a ſettlement was made in purſuance of the articles.

The marriage took effect, and *Edward* and *Henrietta* had iſſue the plaintiffs *Peter* and *Elizabeth*, and *Henrietta* died in *July* 1740, leaving no other children.

Twenty-five years after the firſt marriage, *Edward Le Neve* entered into a treaty of marriage with the defendant *Mary*, and by articles dated *November* 16, 1743, previous to the marriage, *Edward*, in conſideration of ſuch marriage, covenanted with the truſtees, the defendants *Dandridge* and *Norton*, to convey theſe very leaſehold eſtates near *Soho-Square* to them, their executors, *&c.* within three months after the marriage, in truſt to pay the defendant *Mary* out of the rents of theſe meſſuages, in caſe ſhe ſurvived him, a clear annuity of one hundred and fifty pounds for her life, for her jointure, *&c.*

The marriage took effect, and three months after, on the 20th of *January* 1743, a ſettlement was made purſuant to the articles.

The ſettled eſtate conſiſting of houſes in *Middleſex*, was ſubject to the regiſter act of 7 *Ann. c.* 20.

The ſecond articles and ſettlement were regiſtred, but not the firſt.

Edward Le Neve mortgaged the houſes likewiſe.

The bill was brought in order to ſet the ſecond articles and ſettlement out of the way, and that they may be poſtponed to the firſt articles and ſettlement, upon this equity, that the defendant *Mary Le Neve* had notice of them.

The council for the plaintiffs admit, that the regiſtring the ſecond articles and ſettlement have, in point of law, affected the leaſehold eſtates, as the ſtatute of the 7th of Queen *Ann.* gives the legal eſtate where the effect of the regiſtring has placed it.

Then the queſtion is, whether equity will enable the children of the firſt marriage to get the better of the defendant's legal right; and this will depend upon the queſtion of notice.

Firſt,

First, Whether it appears ſufficiently, *Joſeph Norton* was attorney for the defendant *Mary*, in the tranſaction of her marriage.

Secondly, Whether *Norton* himſelf had ſufficient notice of the firſt articles and ſettlement.

Thirdly, Whether that will affect *Mary* as a purchaſer, and poſtpone her articles and ſettlement notwithſtanding the regiſter act.

The *firſt* will depend upon the anſwer of the defendant *Mary*.

She has in general denied any notice of the firſt articles and ſettlement, till ſix months after the marriage, and ſays, "that the "defendant *Joſeph Norton* was ſo far from being employed as Soli- "citor for her, in tranſacting the buſineſs of the marriage articles "and ſettlement, that he had been for a conſiderable time before "employed as an attorney for *Edward Le Neve* her huſband; that "being at the time of marriage concerned for her huſband, ſhe "was thereupon induced to place confidence in him, and her huſ- "band aſſured her, he would take care there ſhould be a handſome "proviſion made for her, and recommended *Norton* as a proper "perſon to prepare the deeds, whereby ſuch ſettlement was to be "made upon her, to which ſhe conſented, and that *Norton* aſſured her "that he had taken care to ſecure her one hundred and fifty pounds "a year, by way of jointure, and did not then, or at any time "before her intermarriage, give her any notice of any former ſet- "tlement."

It has been inſiſted by the defendant *Mary*'s council, that *Joſeph Norton* was not her attorney, or agent, but her huſband's, and that the attorney for one party having notice, will not affect her with notice.

As in purchaſes, and eſpecially in mortgages, the ſame council and agents are frequently employed on both ſides, therefore each ſide is affected with notice, as much as if different council and agents had been employed.

I am of opinion ſhe has admitted enough of her ſide, to make him attorney or agent for her; for if ſhe placed confidence in *Joſeph Norton*, no matter on whoſe recommendation, if ſhe relied enough on her huſband to take his recommendation it is ſufficient; or otherwiſe it would be miſchievous and inconvenient, if this court was to take into their conſideration from whom the recommendation comes; for in purchaſes, and more eſpecially in mortgages, very frequently the ſame council and agents are employed on both ſides, and therefore each ſide is affected with notice, as much as if different council and agents had been employed.

It is material how far the caſes have gone in this point, two have been cited, *Brotherton* verſus *Hatt*, 2 *Vern.* 574. and *Jennings* verſus

ſus *Moore, Blincorn and others*, 2 *Vern.* 609. the firſt was ſhortly this, *A.* makes three ſeveral mortgages to *B. C.* and *D.* and in the laſt mortgage *B.* is a party, and agrees, that after he is paid, he will ſtand a truſtee for *D.* Decreed that *C.* ſhall be paid before *D.* for all the ſecurities being tranſacted by the ſame ſcrivener, notice to him was notice to *D.*

See how far this goes, the ſame ſcriveners were witneſſes, and ingroſſed all the ſecurities, and were in nature of agents for all the lenders, and very likely for the borrower himſelf, and notwithſtanding it does not appear Mrs. *Hatt* had perſonal notice, " yet " notice to the agent is notice to the party, and conſequently they " that lend laſt muſt come laſt, having notice of what was before " lent; and if any one, after notice, lend more money, although they " ſhould obtain the legal eſtate, yet would in equity ſtand affected " with the notice, and be bound thereby."

The ſecond caſe was no more than this, " *Blincorn* having notice " of an incumbrance, purchaſes in the name of *Moore*, and then " agrees that *Moore* ſhall be the purchaſer, and he accordingly " pays the purchaſe money, without notice of the incumbrance; " though *Moore* did not employ *Blincorne*, nor knew any thing of " the purchaſe till after it was made, yet *Moore* approving of it " afterwards, made *Blincorne* his agent *ab initio*, and therefore ſhall " be affected with the notice to *Blincorne*."

The laſt goes a great way, for *Moore* knew nothing of the tranſaction, and yet the court held, that his approving of it afterwards, made *Blincorne* his agent *ab initio*; this carries it further than the preſent, but the firſt is a clear authority,

Theſe caſes therefore ſufficiently prove it is not at all material to the plaintiffs, on whoſe advice or recommendation the defendant *Mary* intruſted *Norton*, nor does it make any difference, that it is the recommendation of the huſband, any more than of any other perſon.

The ſecond conſideration will be, if it appears clearly that *Norton* was employed by the defendant *Mary*, then whether there is ſufficient evidence of notice to him.

An objection has been taken by the defendant *Mary*'s council, that, as notice hath been denied by her anſwer, if it is ſworn to by one witneſs only, that being but oath againſt oath, it cannot prevail to eſtabliſh the fact.

Where a fact is denied by an anſwer, and ſworn to by one witneſs only, that being but oath againſt oath, it cannot prevail to eſtabliſh the fact, but then the denial muſt be clear, or otherwiſe it makes a difference.

The general rule, to be ſure, is ſo, but it admits of this diſtinction; where the denial of a defendant is clear, it has been adhered to, but where the anſwer is not a poſitive denial of the ſame fact, but only as to part, as in the preſent caſe, as to the notice to herſelf only, it makes a difference.

Many caſes where the court have decreed upon the teſtimony of one witneſs, when what he ſwears is uncontradicted by the anſwer.

And there are many caſes where the court upon the teſtimony of one witneſs, whoſe credit is unimpeached, and what he ſwears uncontradicted by the anſwer, have decreed upon this ſingle evidence.

The defendant *Mary* denies notice to herſelf, but whether there was notice to another perſon her agent ſhe paſſes by, without giving any anſwer.

Denying notice as to herſelf only, is *a negative pregnant* there was notice to her agent.

This is a denial indeed as to herſelf, but is at the ſame time, what is called at law, a negative pregnant, that there was notice to her agent.

As to the evidence of notice to *Norton*, it is extremely ſtrong, for he ſwears, that he had notice of the firſt articles ſome time before the ſecond marriage, and that he had then a copy thereof from the defendant *Edward Le Neve*, in order to take council's opinion thereon, how to be ſecure againſt the effect of them, and to contrive in what manner they might get the better of theſe articles, and therefore as to *Norton* there cannot be a ſtronger notice.

The third and laſt general queſtion is, whether the notice to *Norton* will affect the defendant *Mary*, as a purchaſer, and poſtpone her articles and ſettlement notwithſtanding the regiſter act.

This depends upon two things.

Firſt, Whether any notice whatſoever would be ſufficient to take from the defendant *Mary Le Neve* the benefit of the regiſter act.

Secondly, Whether perſonal notice to the defendant *Mary* is requiſite to poſtpone her, or whether notice to her agent is ſufficient to do it likewiſe.

As to the firſt, it is a queſtion of great extent and conſequence.

The preamble to the ſtatute of 7 *Ann. c.* 20. is in ſubſtance, "Whereas by the different and ſeveral ways of conveying lands, "*&c.* ſuch as are ill diſpoſed have it in their power to commit "frauds, and frequently do ſo, by means whereof ſeveral perſons have "been undone in their purchaſes and mortgages, by *prior and ſecret* "*conveyances*, and fraudulent incumbrances.

Then comes the enacting clauſe, " That a memorial of all deeds " and conveyances, which after the 29th of *September* 1709 ſhall be " made and executed, and of all wills and deviſes in writing, where- " by any honors, manors, lands, *&c.* in the county of *Middleſex*, " may be any way affected in law or equity, may be regiſtered in " ſuch manner as is after directed; and that every ſuch deed or " conveyance, that ſhall at any time after, *&c.* be made and execu- " ted, *ſhall be adjudged fraudulent and void againſt any ſubſequent pur- " chaſer or mortgagee* for a valuable conſideration, unleſs ſuch me- " morial thereof be regiſtered, as by this act is directed before the " regiſtring of the memorial of the deed or conveyance, under " which ſuch ſubſequent purchaſer or mortgagee ſhall claim, *&c.*"

What appears by the preamble to be the intention of the act?

Plainly to ſecure ſubſequent purchaſers, and mortgagees againſt *prior ſecret conveyances*, and fraudulent incumbrances.

The intent of the regiſter act to ſecure ſubſequent purchaſers againſt *prior ſecret conveyances.*

Where a perſon had no notice of a prior conveyance, there the regiſtring his ſubſequent conveyance ſhall prevail againſt the prior, but if he had notice of a prior conveyance, then that was not a ſecret conveyance by which he could be prejudiced.

If a ſubſequent purchaſer had notice of a prior conveyance, then that was not *a ſecret conveyance* by which he could be prejudiced.

The enacting clauſe ſays, *That every ſuch deed ſhall be void againſt any ſubſequent purchaſer or mortgagee, unleſs the memorial thereof be regiſtered, &c.* that is, it gives them the legal eſtate, but it does not ſay, that ſuch ſubſequent purchaſer is not left open to any equity, which a prior purchaſer or incumbrancer may have, for he can be in no danger where he knows of another incumbrance, becauſe he might then have ſtopped his hand from proceeding.

The enacting clauſe gives a ſubſequent purchaſer the legal eſtate, but it does not ſay he is not left open to any equity which a prior purchaſer or incumbrancer may have.

This caſe has been very properly compared to caſes on the 27 *H.* 8. for the inrolment of bargains and ſales.

That act was formed pretty much in the ſame manner with this.

The words of the enacting clauſe are, " That from, *&c.* no ma- " nors, lands, tenements, *&c.* ſhall paſs, alter or change from one " to another, whereby any ſtate of inheritance or freehold ſhall be " made or take effect in any perſon or perſons, *or any uſe there- " of*, to be made by reaſon only of any bargain and ſale there- " of, except the ſame bargain and ſale be made by writing in- " dented, ſealed, and inrolled, in one of the King's courts of re- " cord at *Weſtminſter*, or elſe within the ſame county, *&c.* where

" the

" the ſame manors, &c. ſo bargained and ſold lie, &c. and the " ſame inrollment to be had and made within ſix months next after " the date of the ſame writings indented, &c."

Nor any uſe thereof ſhall paſs from one to another.

What is the meaning of this?

Before the making of the act any paper writing paſſed the uſe, from the bargainor to the bargainee, whereby great miſchiefs aroſe, for it intangled purchaſers, affected and injured the crown, and was contrary to the rule of law, which required notoriety in purchaſes, by feoffment and livery, &c.

Under the ſtatute of inrollment of deeds, if a ſubſequent bargainee has notice of a prior, he is equally affected with that notice, as if the prior purchaſe had been a conveyance by feoffment and livery, &c.

But what has been the conſtruction of this ſtatute ever ſince? Why, if a ſubſequent bargainee has notice of a prior, he is equally affected with that notice, as if the prior purchaſe had been a conveyance by feoffment and livery, &c.

To let a perſon take advantage of the legal term appointed by an act of parliament, and protect himſelf againſt another, who had a prior equity of which he had notice, would be of miſchievous conſequence.

The operation of both acts of parliament, and conſtruction of them are the ſame, and it would be a moſt miſchievous thing, if a perſon taking the advantage of the legal form appointed by an act of parliament, might, under that, protect himſelf againſt a perſon who had a prior equity, *of which he had notice.*

The caſes put by the Attorney General are very material.

Suppoſe (ſaid he) the defendant *Mary* had by letter of attorney empowered *Norton* to tranſact the affair with her huſband, and he, by means of this agency comes to the knowledge of the prior articles and ſettlement, would not this affect the principal.

Or, ſuppoſe a purchaſer of lands in a regiſter county, orders his attorney to regiſter it, and he neglects to do it, and then buys the eſtate himſelf, and regiſters his own conveyance, ſhall this be allowed to prevail?

It certainly ſhall not; for ſuch a perſon is out of the conſequences which the regiſter act guards againſt, of impoſition from *a prior ſecret conveyance*, as he had perſonal knowledge of the firſt.

There have been three caſes on the regiſter act.

Firſt, *Lord Forbes* and *Nelſon.*

Secondly, *Blades* verſus *Blades*, *Eq. Caſ. Abr.* 358.

Thirdly,

Thirdly, *Chi-val* verſus *Nicholls*, *December* 10, 1725, *in the Exchequer*.

The firſt aroſe originally in *Ireland*, where there is a general regiſter act, and heard on an appeal to the Houſe of Lords in *England*, the 22d and 23d of *February* 1722.

The Earl of *Granard*, father of Lord *Forbes*, was ſeiſed of a large eſtate, of which he was tenant for life, with remainder to his firſt and every other ſon in tail, and had a power of leaſing for lives at the beſt rent.

The regiſter act in *Ireland* paſſed the 6th of Queen *Ann*.

Lord *Granard* granted a leaſe for three lives, at the rent of thirty pounds a year, but it was not regiſtered.

His Lordſhip being greatly in debt, came to an agreement with Lord *Forbes* his eldeſt ſon, by the agency of Mr. *Steward*, to take upon him the payment of certain debts of his father, and to ſecure a jointure to his mother-in-law, and an annuity to his father.

The eſtate was conveyed to truſtees, Mr. Juſtice *Doyne*, and Mr. Juſtice *Nutt*, during the life of the father.

Mr. *Steward* had notice of this leaſe during the treaty between Lord *Granard* and *Forbes*.

The conveyance to the truſtees being regiſtered, they brought an ejectment againſt the leſſee of the lifehold eſtate, and it was heard before Lord *Middleton Chancellor* of *Ireland* in *February* 1721 who then made a declaration rather than a decree, that the conveyance was void, as againſt the leſſee; it came on again before him the 17th of *February* 1721-2, and he then determined there was full notice of the leaſe to Lord *Forbes*, and awarded a perpetual injunction *from time to time*.

The judgment of the Houſe of Lords was, that the ſaid decree be reverſed, and that all proceedings at law of the appellants againſt the reſpondents ſhould, during the life of Lord *Granard*, be ſtayed, on leſſees paying the rents, performing the covenants, *&c.* but that after the death of Lord *Granard*, Lord *Forbes* might be at liberty to try the tenants right to the leaſe.

The decree was reverſed, not becauſe Lord *Middleton* had proceeded on a wrong principle, but had drawn a wrong inference from it, for Lord *Forbes* did not inſiſt merely on the regiſter, but that the leaſe was made contrary to the power, and therefore the

Lord Chancellor of *Ireland* was miſtaken and wrong in decreeing the leaſe to be good in every reſpect; and the Houſe of Lords ſet the decree right only as to this particular part, that after the death of Lord *Granard* the eſtate would determine, and therefore it was left open to Lord *Forbes* to diſpute whether it was a leaſe purſuant to the power, but gave no relief as to the regiſter act.

The caſe of *Blades* verſus *Blades* came before Lord Chancellor *King* the ſecond of *May* 1727.

William Blades in 1716. deviſed certain lands to his wife for her life, and after her death to his nine children; the wife enters, but does not regiſter the will; the heir at law mortgages the eſtate, and the mortgagee has it regiſtered, and upon a bill brought againſt him denies notice of the will, but it was proved in evidence that he had notice: and the court ſaid, that having notice of the firſt purchaſe, though it was not regiſtered, bound him, and that his getting his own purchaſe firſt regiſtered was a fraud; the deſign of thoſe acts being only to give parties notice, who might otherwiſe without ſuch regiſtry be in danger of being impoſed on by a prior purchaſe or mortgage, which they are in no danger of, when they have any notice thereof in any manner, though not by the regiſtry, and that they would never ſuffer an act of parliament made to prevent fraud, to be a protection to fraud; and therefore decreed for the plaintiff, looking upon the tranſaction between the heir at law and the mortgagee to be colluſive.

Lord *King* as inclinable to adhere to the common law as any Judge that ever ſat in Chancery.

I mention this not only as a material authority, but as determined by Lord Chancellor *King*, whom we all know was as willing to adhere to the common law as any Judge that ever ſat there.

The other caſe of *Chivall* verſus *Nicholls* was in the court of Exchequer, the 10th of *December* 1725. before Lord Chief Baron *Gilbert*, and is a clear authority for giving relief againſt the regiſtry act, upon an equity of notice; but then there were charges of fraudulent circumſtances beſides, and therefore is not ſo ſimilar to the preſent.

The ground of the determinations in theſe caſes is, that the taking of a legal eſtate after notice of a prior right, makes a perſon a *mala fide* purchaſer, and is a ſpecies of fraud, and agrees with the definition of *dolus malus* in the civil law.

Conſider therefore what is the ground of all this, and particularly of thoſe caſes which went on the foundation of notice only; for Lord *Forbes* was on notice only, and notice too to the agent; the ground of it plainly is this, that the taking of a legal eſtate after notice of a prior right, makes a perſon a *mala fide* purchaſer, (and not, that he is not a purchaſer for a valuable conſideration in every other reſpect); this is a ſpecies of fraud, and *Dolus Malus* itſelf; for he knew the firſt purchaſer had the clear right of the eſtate, and after

knowing

knowing that, he takes away the right of another perſon by getting the legal eſtate.

And this exactly agrees with the definition of the civil law of *Dolus Malus*, *Dig. lib.* 4. *tit.* 3. *Lex* 2. *Dolum malum Servius ita definit, Machinationem quandam alterius decipiendi cauſa, cum aliud ſimulatur, & aliud agitur: Labeo autem, poſſe & ſine ſimulatione id agi, ut quis circumveniatur: poſſe & ſine dolo malo aliud agi, aliud ſimulari; ſicuti faciunt, qui per ejuſmodi diſſimulationem deſerviant, & tuentur vel ſua vel aliena. Itaque ipſe ſic definivit, dolum malum* eſſe omnem calliditatem, fallaciam, machinationem, ad circumveniendum, fallendum, decipiendum alterum adhibitam. *Labeonis definitio vera eſt.*

Now if a perſon does not ſtop his hand, but gets the legal eſtate when he knew the right in equity was in another, *machinatur ad circumveniendum*; and it is a maxim too in our law, that *fraus & dolus nemini patrocinari debent. Co.* 3 *Rep.* 78. *b.*

A maxim in our law, that *fraus & dolus nemini patrocinari debent.*

Fraud or *mala fides* therefore, is the true ground on which the court is governed in the caſes of notice, and it is a conſequence of the deciſion of the former queſtion, that notice to the agent is ſufficient; for if the ground is the fraud or *mala fides* of the party, then it is all one whether by the party himſelf, or his agent, ſtill it is *machinatio ad circumveniendum*, and the putting a copy of the firſt articles and ſettlement into *Norton*'s hands, to take the opinion of council in what manner they could be ſet aſide, is a contrivance to circumvent.

If the ground is the fraud or *mala fides* of the party, it is all one whether by the party himſelf or his agent, ſtill it is *machinatio ad circumveniendum.*

It has been ſaid, if this woman has been impoſed on by her huſband, ſhe inſtead of cheating has been cheated.

But then who ought to ſuffer, the perſon intruſting an agent, or a ſtranger who did not employ him? He certainly who truſts moſt ought to ſuffer moſt.

He certainly who truſts moſt ought to ſuffer moſt.

Mrs. *Hatt* the third mortgagee in the caſe in 2 *Vern.* mentioned before, was impoſed on, and ſo was *Moore* in the other caſe reported there, clearly impoſed on; and yet if this was to be any excuſe, it would make all the caſes of notice very precarious; for it ſeldom happens but the agent has impoſed on his principal, and notwithſtanding that, the perſon truſting ought to ſuffer for his ill-placed confidence.

If the principal's being impoſed on by his agent was admitted as an excuſe, it would make all the caſes of notice very precarious, for it ſeldom happens but the agent has impoſed on his principal.

Therefore in both reſpects as agent and truſtee, notice to *Joſeph Norton* is notice to the defendant *Mary* likewiſe; and alſo as to the regiſtry act, here is a ſufficient equity in the plaintiff to poſtpone the ſecond articles and ſettlement notwithſtanding theſe only have been regiſtered; and his Lordſhip decreed accordingly.

Caſe 255. *Troughton* verſus *Troughton*, *February* 23, 1747.

Where there is a general power given or reſerved to a perſon for ſuch uſes, &c. 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.

HENRY *Troughton* the elder, the plaintiff's late father, agreed on the marriage of the plaintiff with his late wife, in conſideration of the fortune the plaintiff would be intitled to, to ſettle certain freehold and copyhold lands on the plaintiff and his wife and their heirs, and on the third of *July* 1740. ſurrendered a copyhold eſtate at *Berkhamſtead* in *Hertfordſhire* to himſelf for life, remainder to the plaintiffs for their lives and the life of the ſurvivor, remainder to the plaintiff his ſon in fee.

Henry Troughton the elder by leaſe and releaſe dated the 3d and 4th of *July* 1740. conveyed to two truſtees and their heirs, in conſideration of the marriage then intended between the plaintiffs, freehold lands at *Bayford* in *Hertfordſhire*, to the uſe of himſelf for life, remainder to the plaintiffs and the ſurvivor for life, remainder to their iſſue, remainder to the plaintiff his ſon in fee: *Henry Troughton* the elder covenanted for himſelf, his heirs and executors, with the truſtees, that all the premiſſes were free from incumbrances, except the title of dower which his wife *Margaret Troughton* had in the freehold lands.

The plaintiff and his late wife, by their bond of the 4th of *July* 1740. became bound to *Henry Troughton* the elder in the penalty of 600 *l.* to ſurrender within ſix months after the death of *Henry Troughton* the elder, a part of the copyhold premiſſes, to the uſe of ſuch perſons and for ſuch eſtates as he ſhould by deed or will appoint, or to pay the ſum of three hundred pounds to ſuch perſons as he ſhould by deed or will appoint; and in default of ſuch appointment, to ſurrender ſuch part of the copyhold premiſſes to his daughter *Ann Helena Troughton* in fee, or to pay her three hundred pounds, at the election of the plaintiffs, or the ſurvivor.

The plaintiffs ſoon after married, *Henry Troughton* the elder died the 24th of *November* 1744. having made his will, and thereby gave the part he had reſerved of the copyhold premiſſes to his wife *Margaret* for life, remainder to *Ann Helena* his daughter in fee; or in caſe the plaintiffs would pay the three hundred pounds, he gave this in like manner, and made *Margaret* his executrix and reſiduary legatee, who proved the will, and poſſeſſed herſelf of the perſonal eſtate, and got into her cuſtody the writings relating to the freehold and copyhold eſtates, and likewiſe the copyhold itſelf, though the plaintiffs gave notice they would elect to pay the three hundred pounds.

The

The plaintiffs diſcovered, juſt before the filing of their bill, that *Henry Troughton* the elder had previous to the marriage of the plaintiffs on the 30th of *June* 1740. ſurrendered the copyhold premiſſes to one *Sarah Runnington* for ſecuring two hundred pounds and intereſt, which is ſtill unpaid; and in *September* 1740. the plaintiff became bound with his father as a ſurety to *Sarah Runnington* for another ſum of fifty pounds.

The plaintiff has brought his bill againſt *Margaret* his mother-in-law, *Ann Helena* his half ſiſter, and *Sarah Runnington*, to the end that what is due on the mortgage of the copyhold eſtate may be paid out of the aſſets of *Henry Troughton* the elder, and that the principal and intereſt due on the bond to *Sarah Runnington* may be alſo paid thereout, and that the defendant *Margaret* may be injoined from putting the bond in ſuit given by the plaintiffs for payment of the three hundred pounds and intereſt.

The defendant *Ann Helena Troughton* ſets forth by her anſwer, that *Henry Troughton* the elder, ſubſequent to his will, by deed poll of the 28th of *July* 1741. reciting his power, and in conſideration of his love for his daughter, and for making a proviſion for her after his deceaſe, appointed that the plaintiffs, or the ſurvivor of them, ſhould within ſix months after his deceaſe ſurrender the copyhold premiſſes to the uſe of *Ann* and her heirs, or elſe pay three hundred pounds to the defendant *Ann*, her executors or adminiſtrators, the ſaid premiſſes to be ſurrendered, or three hundred pounds to be paid at the option of the plaintiffs; and by deed of equal date, for the better inforcing the deed of appointment, aſſigned the bond given by the plaintiffs to a truſtee, his executors, *&c.* in truſt for the uſe of the defendant *Ann Helena Troughton*.

And inſiſts, that the deeds of appointment and aſſignment in truſt for her, are a revocation of ſo much of her father's will as purports to be a deviſe of the copyhold meſſuage, or of the three hundred pounds, to be paid in lieu thereof, and that ſhe is now abſolutely intitled to the benefit of the alternative, in the condition of the bond mentioned, at the election of the plaintiffs, free from all incumbrances, and to the profit or intereſt due for the ſame from the teſtator's death.

The defendant *Margaret* inſiſts, that ſhe is not obliged to pay the three hundred pounds, or any part of it, towards ſatiſfying *Sarah Runnington*'s mortgage, or bond debt, but is willing to apply the perſonal aſſets of the teſtator *Henry Troughton*, as far as they will go, towards the payment of the mortgage and bond.

Mr. *Brown* for the plaintiff argued, that the three hundred pounds was to be conſidered as aſſets of the father, as it was abſo-

lutely in his power, and that the court ought to intercept this money for the plaintiff's benefit, notwithſtanding the appointment; and for this purpoſe cited the caſe of *Baintain* verſus *Ward*, *April* 24, 1741.

There *George Ward* having a power to charge his wife's eſtate with two thouſand pounds by will, gives 500 *l.* apiece to his two ſiſters, and died in debt to the plaintiff.

The queſtion was, whether that appointment ſhould defeat the creditors from having ſatisfaction out of the two thouſand pounds, as part of the teſtator's perſonal eſtate.

Your Lordſhip was of opinion, this ought to be conſidered as the perſonal eſtate of *George Ward*, and that 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; and decreed the creditors ſhould have the benefit of it.

He likewiſe cited *Jordan* verſus *Savage*, the 17th of *November* 1732.

Mr. *Capper* of the ſame ſide mentioned the caſe of *Hinton* verſus *Toy*, the 30th of *November* 1739. before Mr. *Verney* at the Rolls.

There Doctor *Broughton* charged his eſtate with 300 *l.* to the wife of *A.* for life, to the huſband for life, and to the iſſue of the marriage, and in caſe of failure of iſſue, then to ſuch perſon or perſons as ſhe ſhould direct by any appointment of hers, and for want of ſuch appointment to her heirs.

The wife executed a power to the huſband to diſpoſe of this ſum which ſhe directed to be paid to her huſband, to be employed by him to ſuch charitable uſes, *or to ſuch other purpoſes as he ſhould think fit.*

The huſband diſpoſed of it by will among his own relations.

The queſtion was, whether the three hundred pounds was to be conſidered as part of the eſtate of the huſband, and liable to ſatisfy his creditors.

The Maſter of the Rolls, (Mr. *Verney*) ſaid, " The only doubt " was, upon the words *charitable uſes*, which ſhews the wife had " ſome wiſh it might be ſo employed; but the latter words abſo- " lutely leave it to the huſband's diſcretion whether he will diſ- " poſe of it in charity, ſo that there cannot be a ſtronger inſtance

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" to prove ownerſhip; and the creditors do nor reſort to the will, " but ſhew by the appointment, that their right commences from " the wife's execution of the power; and there never was a con- " ſtruction in favour of legatees to the prejudice of creditors, unleſs " the creditors found their right under the will itſelf.

His Honour decreed it to be aſſets of the teſtator, and ſaid, that it ought to be applied to the payment of his debts, unleſs there is a ſufficient fund out of the reſt of the perſonal eſtate to diſcharge them; if ſo, the legatees right under the will is preſerved to them.

Mr. Attorney General for *Ann Helena Troughton*, the daughter, ſtated it, that ſhe had no other proviſion but this appointment, that the ſum of three hundred pounds upon the face of the articles ought to be conſidered as a proviſion for a younger child, and ſo intended by all the contracting parties.

That the father's appointment does not alter the caſe, for if he had made none, in default of that it would have gone to the daughter, and therefore cannot properly be ſaid to be his aſſets.

LORD CHANCELLOR.

The plaintiff has a plain equity to come into this court to have the mortgage and bond to *Sarah Runnington* diſincumbered out of the father's aſſets both real and perſonal, and likewiſe out of the three hundred pounds, ſo far as it can be conſidered part of the marriage agreement.

With regard to the fifty pounds bond, it appears the ſon was only a ſurety for his father, for he had the whole money, and therefore the ſon intitled to be reimburſed out of his father's aſſets.

The queſtion is *firſt*, Whether the mortgagee is intitled to tack the fifty pounds bond to the mortgage.

If a mortgagor after making a mortgage borrows money of a mortgagee upon bond, and the mortgaged premiſſes deſcend upon an heir at law, or come to a volunteer, the court will not ſuffer them to redeem the mortgage without paying the bond, *becauſe* it would occaſion *a circuity*, by putting the obligee to ſue for it out of the ſame eſtate, which are aſſets in the hands of the heir or volunteer.

But where a perſon claims the equity of redemption as a purchaſer for a valuable conſideration, without notice of the mortgage, Where there is a purchaſer for a valuable conſideration, without notice of a mortgage, the mortgagee cannot tack his bond to it, and can only have it out of the general aſſets of the mortgagor.

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the mortgagee cannot tack his bond, becauſe in ſuch a caſe the eſtate would not be liable to the bond debt, and therefore is intitled to have it only out of the general aſſets of the father.

The next queſtion is, how far the three hundred pounds that is charged by a disjunctive charge on the copyhold eſtate is liable to indemnify the plaintiff againſt this mortgage.

I am of opinion the plaintiff is intitled (if the real and perſonal aſſets of the father are not ſufficient) to be reimburſed the reſidue out of the three hundred pounds.

In conſideration of the agreement the father had entered into upon the marriage of his ſon, the ſon binds himſelf to reconvey the copyhold eſtate to the uſe of ſuch perſons, and for ſuch eſtates, as the father ſhould by deed or will appoint, or to pay three hundred pounds; *and in default of ſuch appointment to ſurrender ſuch part of the copyhold premiſſes to* Ann Helena Broughton *in fee, or to pay her three hundred pounds.*

This was part of the conſideration, which was to move from the ſon, in return for the conveyance from the father of the freehold eſtate, *&c.* and his covenant that all the premiſſes compriſed in the articles were free from incumbrances.

Then it will come to this queſtion, whether the father, or any perſon claiming from him, ſhall take back this part of the eſtate, without the ſon's having the benefit of the agreement between him and his father.

It would be contrary to all rules, for each perſon where there is an agreement muſt perform his part thereof.

It has been ſaid, this was to provide for another child a daughter, and therefore inſiſted ſhe is to be conſidered equally as a purchaſer with her brother, and has, by the council for her, been put on the ſame footing as a child intitled to a portion under a marriage ſettlement.

And to be ſure, a father and eldeſt ſon are not intitled to affect younger childrens portions by any incumbrance they may have brought on the eſtate afterwards.

But here the father might have directed the three hundred pounds to be reconveyed to his wife, or a ſtranger; and his making it a proviſion for his daughter, is a ſecondary conſideration only.

Could the wife, or a ſtranger, if appointed to them, have taken this three hundred pounds without applying ſo much as would diſcharge the mortgage? moſt certainly not!

And though it is true, that in default of appointment it was to go to the daughter, yet the father might have diſappointed her totally, as the whole was intirely at his pleaſure.

If indeed the only condition of the bond had been, that the brother ſhould convey part of the copyhold eſtate to the defendant *Ann Helena Troughton* his half ſiſter, or pay her three hundred pounds, ſomething plauſible might have been urged for her.

There were but three days difference in point of time between the mortgage and the ſettlement, when the father contracts with the ſon to reſerve to himſelf a power of diſpoſing of three hundred pounds, and conceals from his ſon the mortgage, and ſuffers the incumbrance to continue, and does not redeem it.

But as this was intended to be a proviſion for his daughter, the reſt of the father's aſſets ought to be firſt applied in diſcharge of the mortgagee's principal and intereſt.

Lord *Hardwicke* therefore referred it to a Maſter to take an account of what is due to *Sarah Runnington* for her mortgage, and on the plaintiff's payment of the principal, intereſt and coſts, *Sarah* is to convey and aſſign the mortgaged premiſſes to the plaintiff.

In caſe the plaintiff ſhall redeem the mortgage, then the maſter is to carry on the account of ſubſequent intereſt for what ſhall be ſo paid to the mortgagee.

The Maſter is alſo directed to take an account of what is due to *Sarah Runnington* for principal and intereſt on her bond, and to tax her coſts ſo far as relates to the bond.

And on the plaintiff's paying principal, intereſt and coſts on the bond, the defendant *Sarah Runnington* is to deliver it up to the plaintiff.

And in caſe the plaintiff ſhall pay the principal, intereſt and coſts on the mortgage, he declared the plaintiff ought to be conſidered as a ſpecialty creditor on the eſtate of his father, for ſo much as he ſhall have paid for principal, intereſt and coſts on the mortgage.

The Maſter is likewiſe to take an account of the perſonal eſtate of the teſtator, *Henry Troughton*, received by *Margaret* his executrix, and ſuch perſonal eſtate is to be applied in paying and reim-

burſing to the plaintiff what ſhall be ſo paid by him to *Sarah Runnington* for principal, intereſt and coſts on the bond, and in paying and reimburſing to the plaintiff what he ſhall have paid to *Sarah Runnington* for principal and intereſt on the mortgage, in a courſe of adminiſtration.

And in caſe the perſonal eſtate of the father ſhall not be ſufficient to ſatisfy and reimburſe the plaintiff what ſhall be ſo found due to him, for what he ſhall have paid to *Sarah Runnington* for principal, intereſt and coſts on the mortgage, together with ſubſequent intereſt and coſts of the reconveyance, then he declared the plaintiff is intitled to have the deficiency made good by retaining ſo much out of the ſum of three hundred pounds, and intereſt after mentioned.

And then his Lordſhip directed the bond for the three hundred pounds to carry intereſt at the rate of four and a half *per cent.* from ſix months after the teſtator's death, and that this ſhould be applied to ſatisfy the plaintiff ſo much as ſhall not be ſatisfied out of the father's perſonal eſtate.

And on the plaintiff's paying the reſidue to the defendant *Ann Helena Broughton*, ſhe was directed by *Lord Chancellor* to deliver the bond and appointment to be cancelled.

Caſe 256. *March* 21, 1747. *The Attorney General, at the relation of Robert Mapletoft, batchelor of arts, born at Byefield in the county of Northampton, and ſcholar of Clare-Hall in Cambridge* — } Plaintiff.

The Maſter, Fellows and Scholars of Clare-Hall, and William Talbot — } Defendants.

There are no particular words required in a donation to a college to create a viſitor, it is ſufficient if the intention of the founder appears who ſhould be viſitor, and technical words are not neceſſary.

THE caſe as ſtated by the plaintiff's bill was, *John Freeman* of *Billing* in the county of *Northampton*, Eſquire, by his will in 1615, directed two thouſand pounds to be laid out by his executors, in purchaſing one hundred pounds a year lands of inheritance, the rents of it to be employed and diſtributed towards the maintenance of ten poor ſcholars in the univerſity of *Cambridge*, at or in the houſe or college called *Clare-Hall*, in the univerſity for ever; *viz.* To two poor fellows, *there to be placed* by my foundation, the ſum of twenty-five pounds apiece, and to eight ſcholars the ſum of 5*l.* a year, *my kinſmen, if any be, to be the firſt preferred*, and *next to them, thoſe that are born within the county of* Northampton, and

and *next to them, thoſe that are born within the county of* Lincoln, that ſhall be fit for the ſame; the further perfecting thereof I leave to my executors.

The executors in purſuance of the will laid out two thouſand pounds in the purchaſing lands of inheritance of the yearly value of one hundred pounds and upwards, and the then maſter and fellows having accepted the ſaid donation upon the terms and conditions on which the ſame was given by the teſtator, the executors thereupon executed a deed in 1622, to which they were parties of the one part, and the maſter and fellows of *Clare-Hall* of the other; and this deed hath been ever ſince the execution thereof in the cuſtody of the maſter and fellows, and the purchaſed lands were thereby limited and ſettled for the perpetual eſtabliſhment and endowment of two fellowſhips, and eight ſcholarſhips, upon the foundation of *John Freeman* the teſtator.

From the year 1622 to 1726, the maſters and fellows of *Clare-Hall* purſued the intent and meaning of the foundation, without deviating in one ſingle inſtance; for during the firſt hundred years, every perſon elected into the ſaid fellowſhips or ſcholarſhips was either of the teſtator's blood or kindred, or born in the counties of *Northampton* or *Lincoln*.

The firſt fellow choſen into the college contrary to the will was in 1726, and there has been the ſame innovation from that time for the laſt twenty years in every ſubſequent election.

Thomas Neal, a fellow upon Mr. *Freeman*'s foundation, in 1743 reſigned his fellowſhip, whereupon the relator, then a batchelor of arts, and born at *Byefield* in *Northamptonſhire*, offered himſelf a candidate, and though there was no other candidate of *John Freeman*, the founder's kindred, or of any perſon born in *Northamptonſhire*, or *Lincolnſhire*, in which caſe the relator, by virtue of the propriety of the foundation, was intitled to be elected into the ſaid fellowſhip without the admiſſion of any competitors, not qualified as aforeſaid, yet the maſter and fellows put the defendant *William Talbot*, a perſon not related to the founder, and born in the county of *Bedford*, into nomination and competition for the fellowſhip, and he was upon the 19th of *April* 1744, elected into the ſaid fellowſhip by the maſter and fellows.

The plaintiff inſiſts that the election of the defendant *William Talbot* into the vacant fellowſhip of the teſtator *Freeman*'s foundation, being made in direct contradiction to the expreſs terms of the donation, is as ſuch *ipſo facto* a null and void election, and the relator having been the only competitor for the ſame, who was duly qualified according to the intent of the founder, and no objection of

unfitneſs imputed to him, the vacant fellowſhip ought to have been conferred upon the relator, not barely in preference to, but in excluſion to the defendant *Talbot*, who never was qualified to be a competitor for the ſame.

And therefore has brought his bill, that the propriety of the ſaid foundation of two fellowſhips, and eight ſcholarſhips, purſuant to the will of *John Freeman*, may be aſſerted and eſtabliſhed by the decree of this court, and that the fellowſhips and ſcholarſhips may, according to the true intent and meaning of the founder, be declared to have been abſolutely appropriated to, and belong in the firſt place to the teſtator's kinſmen (if any there be), and next to them, to thoſe that are born within the county of *Northampton*; and next to them, to thoſe that are born within the county of *Lincoln*, and ſhall be fit for the ſame; and that the election of the defendant *William Talbot* into the fellowſhip vacant by the reſignation of *Thomas Neal* may be ſuperſeded, and ſet aſide, and the relator forthwith admitted to and inſtated in the ſame; and that the defendant *William Talbot may come to an account with, and make full and adequate ſatisfaction to the relator for the profits, emoluments and advantage which might have been made by him, by virtue of the ſaid fellowſhip, during his poſſeſſion and enjoyment of the ſame.*

The defendant *William Talbot*, as to ſo much of the information as ſeeks any relief in all the ſeveral matters therein mentioned, pleads, that *Edward* the Third, in the 20th year of his reign, by letters patent under the great ſeal, granted licence to *Elizabeth de Burgo*, then Lady *de Clare*, to found and endow the college or hall called *Clare-Hall*, in the univerſity of *Cambridge*, for the perpetual maintenance and ſubſiſtence of a maſter, divers fellows, and ſcholars in the ſaid college or hall, who ſhould apply themſelves to the ſtudy of learning.

That *Elizabeth de Burgo* Lady *Clare* did, in purſuance of the licence, found *Clare-Hall* accordingly; and they were by *Edward* the Third's letters patents incorporated by the name of the *Maſter, Fellows* and *Scholars* of *Clare-Hall*.

That the foundreſs of *Clare-Hall*, for the better regulating the maſter, fellows and ſcholars, did make divers ſtatutes and ordinances to be perpetually obſerved, and among the ſtatutes there is one *de amotione magiſtri*, which ſays, " Si magiſter dictæ domus fuerit " convictus legitime ſuper crimine homicidii adulterii, &c. vel in " ipſius cura & regimine negligenter & doloſe ſit verſatus, &c. a ſuo " magiſterio ſit merito amovendus, et cancellarium (cujus juriſdic- " tioni viſitationi correctioni & punitioni in omnibus prædictum ma- " giſtrum qui pro tempore fuit ſubjaceri) volumus aut prædicti can- " cellarii locum tenentem, proviſo tamen ſemper quod duo doctores

vel

" vel magiſtros a dicta univerſitate ad hoc eligi volumus et etiam " aſſignari dicto cancellario vel ejus locum tenenti aſſideant in omni " proceſſu contra magiſtrum dictæ domus, ad ipſius amotionem ex " dictis cauſis, vel earum aliqua faciendam habita prius ſuper cauſa " aut cauſis amotionis hujuſmodi coram eodem cancellario aut ipſius " locum tenente et dictis doctoribus aut doctore et magiſtro vel ma- " giſtris cognitioni ſententialiter *et definitive et ſummarie et de plano* " *ſine figura judicii et etiam ſine ſcriptis cum et de conſilio et aſſenſu* " *dictorum magiſtrorum et doctorum a ſuo magiſterio volumus amoveri* " nullo eidem magiſtro ſic amoto appellationis vel alio juris com- " munis vel ſpecialis remedio contra hujuſmodi amotionis ſenten- " tiam quo modo libet valituro Quod ſi magiſter a ſuo magiſterio " ſic amotus ab hujuſmodi amotionis ſuæ ſententia ad quemcunq; " judicem qualitercunq; appellare vel aliud quodcunq; remedium " juris communis vel ſpecialis exercere vel facere exerceri aut quic- " quam aliud facere preſumpſerit, &c. volumus & ſtatuimus ut rata " et irrevocabili manente ſententia ſupradicta a ſtatu quem prius ha- " buit in domo prædicta et omni commodo quod in eâ et ex eâ " fuerat percepturus *penitus ſit privatus.*"

That amongſt the ſaid ſtatutes there is another intitled *De poteſtate magiſtri in ſocios, &c.* which ſays, " Item ſocios, diſcipulos, et mi- " niſtros, dictæ domus ipſius magiſtro immediate volumus eſſe ſub- " jectos, adeo quod ipſe poſſit & debeat pro ſuis exceſſibus corri- " pere & corrigere, ac etiam ſi ſuorum exceſſuum qualitas hoc exe- " gerit, a dicta domo et ipſius ſocietate ac commodo quocunq; ex- " inde competente eiſdem *ſummarie et de plano abſq; ſtrepitu et figura* " *judicii ſine ſcriptis amovere penitus et privare.*

" Si autem magiſter modum in præmiſſis excedat aut alicui de " dictis ſociis in præmiſſis vel aliquo eorundem gravamen inferat " aliquale, licere volumus hujuſmodi gravato ad audientiam dicti can- " cellarii, ſive procancellarii ſolummodo appellare, &c."

That amongſt the ſaid ſtatutes, there is another intitled, *De lectione ſtatutorum*, which ſays, " Item volumus quod dictus cancel- " larius magiſtrum et omnes ſocios et ſingulos domus prædictæ " annis ſingulis ſi opus fuerit poterit viſitare, et ſi quis inter eos re- " pererit corrigendum illud cum aſſenſu duorum doctorum vel ma- " giſtrorum prout in conſimilibus ſuperius eſt expreſſum debite " juxta juris et noſtrorum ſtatutorum, &c. exigentiam corrigat et " puniat."

That amongſt the ſtatutes which are intitled *Regulæ de Clare*, there is one intitled *De modo divina officia celebrandi*, which ſays, " Si " quid poſt mortem noſtram de dictis noſtris ſtatutis, &c. dubium " et emerſerit vel obſcurum quod per magiſtrum et ſocios dictæ " domus vel majorem et ſaniorem partem eorum nequeat concor- " diter terminari volumus quod per dictos magiſtrum et ſocios can-

" cellario dictæ univerſitatis vel ipſius locum tenenti abſq; moræ " diſpendio plenarie referatur ut ipſe concellarius aut ejus locum te- " nens una cum et de conſilio et conſenſu duorum doctorum (ſi " fuerint) alioqui duorum baccalaureorum, &c. hujuſmodi dubium " vel obſcurum interpretetur et declaret, &c.

" Per ea vero quæ nobis dum in hac vita fuerimus ſupra duximus " reſervanda noſtris hæredibus poſt noſtrum deceſſum, jus aliquod " quantumcunq; eis vel eorum aliquo uſi fuerimus adquiri nolumus " ullo modo."

The defendant avers that the ſaid ſtatutes are all which any ways relate to the conſtitution of a viſitor of *Clare-Hall*, nor is there in any deed or writing, any thing which relates to the appointment of a viſitor of *Clare-Hall*, ſave as aforeſaid, and inſiſts that the chancellors for the time being of the ſaid univerſity, have been ever ſince the viſitors of the ſaid hall, and that the chancellor for the time being, his deputy, or vicechancellor, hath (with the advice and conſent of two doctors, if any ſuch there be, or otherwiſe of two maſters of arts, one a regent, and the other a non-regent maſter) heard, adjudged and determined, and of right ought to hear, adjudge and determine all diſputes, complaints and controverſies concerning the election and admiſſion of any perſon into the place of one of the fellows or ſcholars of the ſaid college, and that ſuch controverſies, *&c.* have not been, and ought not to be heard, adjudged or determined before any other court, or judicature, or in any other manner whatſoever.

That at the time of the election of the defendant, the Duke of *Somerſet* was, and yet is the chancellor, and viſitor of *Clare-Hall*; and that the relator *Robert Mapletoft*, hath not appealed to the ſaid chancellor as viſitor of the college, or hall, to hear and determine the right of election, as he might, and ought to have done.

That the ſaid chancellor hath power and authority to compel the defendant to make a full anſwer upon oath, to all ſuch matters as ſhall be complained of againſt him, touching the election of fellows into the ſaid college or hall, and alſo to inforce a production of all ſtatute books, *&c.* relating to any controverſy concerning the election or admiſſion of the defendant, or the relator *Robert Mapletoft*, into the place of one of the fellows of the ſaid college or hall.

And prays the judgment of the court, whether he ought to be compelled to make any other anſwer, or whether the court ought to proceed any further in the ſuit.

Mr.

Mr. Solicitor General for the defendant.

This is a plea of great conſequence to both univerſities.

The firſt queſtion is, whether the plea doth ſufficiently put in iſſue that *the Chancellor* is the general viſitor of this college.

Secondly, whether the ingrafted fellowſhips are ſubject to the ſame ſtatutes and rules with the original fellows.

In the original foundation *Elizabeth de Clare*, the foundreſs, reſerves a power to herſelf during life to conſtrue her own ſtatutes, and afterwards that *the Chancellor* ſhall have the power of conſtruing the ſtatutes if any doubt ariſes, which alone, if it reſted there, would give him the whole viſitatorial power; but it requires him further to viſit the maſter, and all and ſingular the fellows of the college once a year.

It appears too, that upon an appeal to the chancellor, he has adjudged accordingly, and that he has a power to order all books and papers to be laid before him, without the aſſiſtance of this court, and your Lordſhip in ſeveral inſtances, as a viſitor, has ordered it to be done in the ſame ſummary manner.

There are very few foundations in either univerſity which have not had ingraftments upon them, and whoever founds new fellowſhips, that fellow, from the moment of his ingraftment, muſt be ſubject to all the ſtatutes on the original foundation.

Here the relator claims to be a fellow, and ſuch a fellow as may be choſen maſter, ſo that he is not to be taken as totally diſtinct from other fellowſhips.

Though a viſitor ſhould do him injuſtice by this final determination without appeal, yet it is better to ſubmit to this inconvenience, than let queſtions of learning be debated *ſtrepitu, et ſcriptis fori extranei.*

In the caſe before your Lordſhip, about four years ago, upon the foundation of *William* of *Durham*, of new fellowſhips, by way of ingraftment upon Univerſity college, as that was a ſociety of royal foundation, your Lordſhip, upon appeal, determined it as a viſitor in a ſummary way, and would not ſuffer it to go on in the courſe of charity cauſes, as it would be of very bad conſequence, by opening a door to the courts here, to interfere in a matter of this nature.

Mr.

Mr. *Clark* of the ſame ſide; the plaintiff claims merely on his being born in the county of *Northampton*, and ſets up a right to be admitted a fellow under Mr. *Freeman*'s foundation.

A clear ſubſtitution of a general viſitor by the foundreſs, in *Regula de Clare*, and the ſtatutes, to act in her room *in perpetuum*.

In Doctor *Bentley*'s caſe, upon the conſtruction of the ſtatutes of *Trinity* college, Lord *Raymond* held, the viſitor had a juriſdiction over the members of that ſociety, even to expulſion; and that notwithſtanding there were no expreſs words appointing a viſitor, yet, this was implied from his power.

In the caſe of *The King* againſt *The Warden of All-Souls College in Oxford*, Sir *Thomas Jones* 1741, on a mandamus to admit *Ayloffe* a fellow, he returned the charter of foundation; and that the archbiſhops for the time being were perpetual viſitors of the ſaid college; and that *Ayloffe* had not appealed to the archbiſhop, as (*de jure potuit & debuit*) and demanded judgment, whether he ſhould be compelled to make any other anſwer; and though it was objected, that no power is given to any viſitor, on a matter of admiſſion, or refuſal, though it be done in caſe of correction or removal, it was anſwered, that the power of correction and removal being a very great power, the other is incidentally given; and that the conſtitution of the viſitor *eo nomine*, gave a power; and the queſtion here being, whether the return is good, or the court may proceed further? It was reſolved, the return is good, for by the appointment of viſitors, they are made ſole judges, without appeal; and that Lord *Hale* ſaid, in the caſe of Doctor *Roberts*, on a *mandamus* to be reſtored to the place of a fellow in *Jeſus College* in *Oxford*, that there was no remedy againſt the judgment of the viſitor, though unjuſt, or though he refuſe to accept an appeal.

Mr. *Wilbraham* of the ſame ſide.

Nothing is more eſtabliſhed in courts of law, than that they will not proceed on a *mandamus* to reſtore a fellow, upon a return made, that there is a viſitor.

In the caſe of *Phillips* verſus *Berry*, 1 *Ld. Raymond* 5. Lord Chief Juſtice *Holt* ſaid, "That a corporation conſtituted for a private "charity, is intirely private, and wholly ſubject to the rules, laws, "ſtatutes and ordinances which the founder ordains, and to the "viſitor whom he appoints, and no others; and that the office of "viſitor is to hear appeals of courſe, and from him, and him only, "the party grieved ought to have redreſs; and in him the found-"der hath repoſed ſo intire confidence, that he will adminiſter "juſtice impartially, that his determinations are final, and examin-"able in no other court whatſoever.

Then the queſtion will be, whether theſe ingrafted fellowſhips ſhall be governed by the ſame ſtatutes and laws with the original fellowſhips.

One of the ingrafted fellows is now a maſter of the college, and yet the plaintiff would have them governed by different laws; this is abſurd, becauſe there muſt be then two laws, and if ſubject to the ſtatutes in common acts, preaching, doing exerciſe, *&c.* why not equally ſubject to the viſitatorial power?

The fellowſhips, one with another, in the univerſities, are not of great value, perhaps not above 24*l.* or 25*l.* a year, and therefore, if liable to be brought before courts of juſtice in *Weſtminſter-Hall*, they had better ſit down contented with any grievance than defend themſelves.

The plaintiff ſays, he hath a *right to be choſen*, excluſive of all other perſons, which is putting it upon a footing like a *conge d'ſlire* for a biſhop.

In common ſenſe, *a right to be choſen*, does in itſelf imply a competition.

A plea of a viſitor never came before the court till now, and is a juriſdiction in a ſummary way unappellable, and if not allowed, would introduce a great miſchief to both Univerſities, and therefore hoped this is a good plea.

Mr. *Attorney General* for the plaintiff.

The defendant is not a founder's kinſman, nor within the county of *Lincoln*, or *Northampton*.

I will not diſpute, that where a viſitor is clearly appointed by ſtatutes, this court will not interpoſe, but do inſiſt, in the preſent caſe, here is no general viſitatorial power.

Firſt, As to the removal of the maſter, it is plain from the general tenor of the ſtatutes it is not a general viſitatorial power, but given to the chancellor and two doctors to amove him, and not to determine as to the choice whether duly appointed, and therefore meant only to ſubject him to ſuch cenſure as he might deſerve for his bad conduct.

The annual viſitation intended to go no further than to any of the crimes the parties might have been found guilty of, and amounts to this, that the chancellor of the univerſity ſhall viſit twice a year, and puniſh for thoſe particular crimes, and ſhall not hurt the power of the maſter as to any future act.

The rules of the ſtatutes do not extend further than the corporate body extend, and therefore no perſon who is not of that corporate body can be ſubject to theſe particular rules.

The preſent foundation depends on a particular will, and the laws and rules of the teſtator are the meaſure by which it is to be governed.

Mr. Solicitor General ſays, there are few colleges without new ingraftments, but unleſs thoſe ingraftments are by applying to the crown incorporated into a particular body, they are not to be conſidered as a part of the body; and therefore I ſpeak of my own knowledge, that there have been frequent applications to the crown for ſuch an incorporation.

It is not ſaid by the will of Mr. *Freeman*, that his fellowſhip ſhould be ſubject to the laws of lady *de Clare*.

In the caſe mentioned of Univerſity college, it was determined the petitioner ought to have been choſen as the only qualified perſon, though his competitor had the majority of voices; both parties there agreed the crown was viſitor, and therefore this point was not debated, how far a new ingraftment is ſubject to the ſame viſitatorial power with the original foundation, ſo that it muſt depend on a different rule, and be conſtrued in a different way.

As to the argument of inconvenience, there is a much greater on the other ſide; is it none, that there ſhould be an arbitrary final determination, and ſubject to no appeal whatſoever?

Mr. *Brown* of the ſame ſide.

This is a particular foundation, and for a hundred years together Mr. *Freeman*'s direction for the government of theſe new erections were followed, and afterwards there was an endeavour to incorporate them into the old fellowſhips, but nothing has been ſhewn that theſe fellowſhips have any more connection with *Clare-hall*, than with the fellowſhips of another college.

It is not averred there is any viſitatorial power with regard to elections, but only with reſpect to the conduct of the fellows, where they are guilty of crimes to be corrected by the Maſter, and by appeal from him to the viſitor.

They rely on the clauſes in the *ſtatute de lectione ſtatutorum*.

A viſitor may be appointed with a partial power by a founder, and yet not have a general viſitatorial power, that he ſhould *corrigere*

gere & punire, that is in the particular inſtances before mentioned, and therefore inſiſted this is merely confined to ſuch particular power.

But whatever may be the conſtruction of the viſitatorial power with regard to the original foundation, the queſtion is, whether it ought to be extended to this particular caſe.

Mr. *Freeman* might have made the Chancellor viſitor equally as in the original foundation; he has not done it in expreſs words; can it be ſaid then there is any neceſſary implication the Chancellor was to be a viſitor here? I know of no inſtance where it has been determined a perſon is viſitor by implication only.

Mr. *Freeman* by his will makes them no more than bare truſtees to elect ſuch perſons as he directed ſhould be electable, and while reſident they were to be under the government of the college, but there is no right to chuſe fellows unleſs they come to be commorant there.

The plea ſhould have averred this was one of the followſhips of that college, and there is no allegation that the plaintiff was a fellow of that college; Mr. *Freeman* himſelf does not call them fellows of that college, but fellows of *his* ſociety.

There is an inſtance in the very ſame college, reported in 5 *Mod.* 421. Mr. *Jenning's* caſe of *Clare-hall:* The council moved upon a return to a *mandamus* to the maſter and fellows of *Clare-hall* to reſtore *Jennings* to his fellowſhip on Mr. *Dickins's* foundation. They return their ſeveral ſtatutes, *&c.* and that by one of them the Chancellor is nominated to be their viſitor, and therefore the maſter is not obliged to admit Mr. *Jennings* to his followſhip, there being a viſitor.

The council, who argued the return was inſufficient, ſaid, the ſtatutes of lady *de Clare*, who puts the maſter and fellows founded by her under the power of the Chancellor, does not ſubject thoſe fellowſhips which were founded afterwards to his power; and therefore ſince there is no other remedy, prayed a peremptory *mandamus.*

E contra it was ſaid, whether Mr. *Jennings* be or be not duly elected, the examination of it does not belong to this court, but to another juriſdiction; and here being a viſitor appointed by the ſtatutes, this court will not interpoſe.

The point was not abſolutely determined; but the Chief Juſtice ſaid, How can they bring in ſtrangers, and make them ſubject to the

the reſtrictions impoſed by the founder? Though there be a viſitor for the fellows founded by lady *Clare*, yet whether this viſitor ſhall be extended to the new fellows, is the queſtion; and whether there muſt not be a new incorporation of the ſecond fellowſhip founded by *Dickins*.

This is not a new doubt then, but aroſe upon this very caſe of *Clare-hall*, and therefore it is too hard to determine in a ſummary way; that it is in the Chancellor as viſitor when there has never been any incorporation of theſe fellows, and that this is not conſequently ſuch a property as is within the general viſitatorial power, ſuppoſing there is ſuch power.

The plaintiff's council read the charge in the bill, to ſhew that for a hundred years together, from the firſt foundation of Mr. *Freeman*, the maſter and fellows of *Clare-hall* inviolably obſerved the rules of Mr. *Freeman* the founder of the new fellowſhips.

Another charge was read to ſhew, that the maſters and fellows of this college did not attempt till a long courſe of years to incorporate theſe new fellows as part of the college, but always conſidered them as diſtinct.

Mr. *Yorke* of the ſame ſide.

A charitable foundation is not to be governed by the rules of another foundation, unleſs ſome reference is made by the founder to thoſe rules: when *ſocii*, ſubject to the rules of the founder of *Clare-hall*; but this is a queſtion previous to their election, and therefore ſtands upon another ground.

If the relator had gone before the viſitor, there is a great doubt whether the viſitor would have admitted of the appeal to him in this caſe, becauſe if a viſitor admits of an appeal where he has no right to determine it, he is liable to an action, and ſo laid down in the caſe of *Philips* verſus *Bury*, 2 *Lutw.* 1566. "Where a founder "of an eleemoſynary foundation appoints a viſitor, and limits his "juriſdiction by rules and ſtatutes, if the viſitor in any ſentence ex- "ceeds thoſe rules, an action lies againſt him; but it is otherwiſe "where he miſtakes in a thing within his power, though in this "caſe there be not any appeal over.

LORD CHANCELLOR.

I have received ſatisfaction enough at preſent to determine this plea, but not to make a final determination, for the relator is not precluded from entering into proof to falſify the plea.

It

It is a caſe of great conſequence to the colleges in the Univerſities, who have had many litigations about the powers and rights of viſitors, and how far the courts of juſtice have a juriſdiction in theſe matters; and if a determination ſhould be haſtily made that colleges are liable to informations in this court, on the foot of general charities, and accountable for miſapplications and abuſes, I am afraid it would open a door to great vexation and expence.

The Firſt Queſtion is, Whether by the plea it is ſufficiently ſhewn here is a general viſitor of this college.

Secondly, If that viſitatorial power extends to Mr. *Freeman*'s donation.

As to the *Firſt*, it appears very clearly to me there is a general viſitor of the college called *Clare-hall*, under the ſtatutes of *Elizabeth de Burgo* lady *Clare*.

Inſtead of creating a viſitor by general words, ſhe has directed by the ſtatutes, that the *Chancellor* once in every year ſhould viſit the college.

De lectione ſtatutorum.

" Item volumus, quod dictus Cancellarius magiſtrum & omnes " ſocios & ſingulos Domus prædictæ annis ſingulis, ſi opus fuerit, " poterit viſitare *& ſi quid inter eos repererit corrigendum* illud cum " aſſenſu, &c. corrigat & puniat."

If nothing more had been done than is mentioned in this ſtatute, that alone in my opinion would have been ſufficient to make him a viſitor, for there are no particular words required to create a viſitor; but it has been determined it is ſufficient, if the intention of the founder appears who ſhould be viſitor, and technical words are not neceſſary.

Si quid corrigendum, &c. makes him a general viſitor, and if he finds a perſon taking part of the revenues improperly, he may under the power given him by this clauſe remove ſuch perſon in favour of him who had the right.

In the next place, ſhe directs who ſhall conſtrue the ſtatutes, and determine any doubt, that it ſhall be *the Chancellor* with his aſſiſtants, and by expreſs words the foundreſs excludes her own heirs.

Nothing can be ſtronger than excluding her heirs, to ſhew ſhe meant to give the Chancellor a general viſitatorial power; and therefore I am clearly of opinion *the Chancellor* is viſitor of this college.

No court of law or equity can anticipate the judgment of a viſitor, or take away their juriſdiction, for their determinations are final and concluſive.

If the Chancellor of this Univerſity then is viſitor, the general powers of a viſitor are well known; no court of law or equity can anticipate their judgment, or take away their juriſdiction, but their determinations are final and concluſive.

The viſitatorial determination is *forum domeſticum*, and adjudged in a ſummary way *ſecundum arbitrium boni viri*, and therefore more convenient.

And it is a more convenient method of determination of controverſies of this nature, it is at home, *forum domeſticum*, and final in the firſt inſtance, and they ſhould be adjudged in a ſhort way *ſecundum arbitrium boni viri:* it is true this power may be abuſed, but if it is exerciſed in a diſcreet manner, it is a much leſs expence than ſuits at law, or in equity; and in general, I believe, ſuch appeals have been equitably determined.

The ſecond queſtion is, ſuppoſing there be a viſitor, whether this viſitatorial power extends to the charity founded by Mr. *Freeman.*

I am of opinion it does.

He directs two thouſand pounds to be laid out in lands, the rents and profits of which are to be employed towards the maintenance of ten poor ſcholars in *Clare-hall*, *viz.* to two poor fellows, *there to be placed*, 25 *l.* apiece, *&c.*

What is *Clare-hall?* a corporation conſiſting of maſters and fellows; and the power given by the charter was to incorporate by this name, not mentioning any number of fellows, but indefinitely.

It has been objected, here is nothing which imports they ſhould be incorporated with the old fellowſhips.

But I am of opinion it is his intention, that there ſhould be two fellows to be incorporated in that college, from the words, *there to be placed.*

To be ſure, the rules laid down by the founder as to the fitneſs of the perſon, *&c.* ought to be obſerved.

The queſtion then is, what is the conſequence of this ingraftment.

It has been ſaid, theſe fellows are not liable to the ſame rules, nor to be governed by the ſame viſitor, with lady *Clare*'s foundation.

As there are ſuch a number of ingrafted charities in colleges, it becomes a very conſiderable queſtion.

It was objected the ſtatutes can only extend over the corporation of *Edward* the third, and that the corporation cannot extend itſelf, and that Mr. *Freeman* has not by his donation made his fellows members of this corporation.

If

If *Edward* the third had made it to conſiſt of twelve fellows, a certain number then being limited, theſe new fellows could not have come in without a new incorporation; but where the number is indefinite, I ſee no rule of law to prevent the maſter and fellows of *Clare-hall* from incorporating theſe fellows.

Where there is an indefinite number, a lay corporation may incorporate new members.

A lay corporation, where the number is indefinite, may incorporate new members if they do not make an ill uſe of ſuch a power.

If they may be ingrafted into this college, they are then members, and muſt be governed by the ſtatutes of the college, and the rules of its diſcipline; and if ſo, then they are ſubject too to the viſitatorial power of the viſitor of the college; and if they are liable to it with regard to amotion, they are equally liable with regard to their coming in and election.

But it was ſaid, the viſitor will not have a right to determine as to the agreement or contract made between the maſters and fellows, and Mr. *Freeman*'s executors.

But the maſters and fellows agreeing to let in two new fellows, is ſuch an act that the viſitor has a right to examine into, and implicitly gave him a power over them; and he might have inquired into it within the year, as it was a tranſaction in that college, the whole of which is ſubject to his juriſdiction.

A viſitor a properer judge of the comparative fitneſs of a candidate than courts of law or equity.

A viſitor is a much more proper judge of the comparative fitneſs and qualification of candidates than a court of law or equity, as they are more converſant in matters of that kind.

But I am further of opinion, that the plaintiff has excluded himſelf by his information from entring into this queſtion, by expreſsly praying to be admitted a fellow of this college; and I muſt take it that every fellow of the college is a part of the college, for here is no averment that theſe new fellows are not a part of the corporation, or that they may not be maſters of this college, or enjoy any other office under the original foundation.

But though I allow the plea, the parties may deſcend to proof; and if the relator ſhould be able to ſhew they are merely nominal fellows, and allowed to live in *Clare-hall* only, for the ſake of information and inſtruction, that would be of a different conſideration.

The prayer too of the information is, " That the defendant *Talbot* may come to an account with and make full ſatisfaction to the " relator for all and every the profits, emoluments and advantages " which have been made by him from the fellowſhip during his poſ- " ſeſſion," induces me to hold ſtrongly againſt it.

Suppoſe the maſters and fellows ſhould have erred in the conſtruction of the ſtatutes, they may have innocently erred, and in ſuch a poor proviſion as this is, it would be a great abſurdity to make a fellow account for commons, *&c.* which he may have eat upon an imagination he had a right to them.

An information here is improper; the application ſhould have been to a court of law for a *mandamus* to determine the particular right between the parties.

But further, I do not approve of his turning this into an information, as the charity is already ſufficiently eſtabliſhed, (the want of which is the principal reaſon for coming into this court) when he might have had a *mandamus* to determine the particular right between the parties in a court of common law that has the proper juriſdiction.

Though it is ſaid, *boni judicis eſt juriſdictionem ampliare*, I am extremely diſinclined to encourage ſuch ſuits, which may take off theſe learned bodies from their ſtudies, and ingroſs their time very improperly.

But ſtill this allowance of the plea will not preclude the relator to ſhew from other ſtatutes, that theſe new fellowſhips are not liable to the general viſitatorial power, under the original foundation of this college.

But as I muſt at preſent take the defendants allegations to be true, the plea muſt be allowed.

Caſe 257. *Coomes* verſus *Elling and his Wife*, *March* 2, 1747.

A freeman of *London* ten years before his death purchaſed a leaſehold eſtate for the term of forty years, in the joint names of himſelf and his wife: this is a fraud on the cuſtom, and the leaſehold eſtate was directed to be ſold and applied in the like manner with the reſt of the freeman's eſtate.

THE plaintiff, ſon of *Joſhua Coomes*, an antient freeman of *London*, brought his bill for an account and ſatisfaction of the plaintiff's ſhare of his father's perſonal eſtate, partly in his own right and partly in his ſiſter *Mary*'s, as orphans of the city of *London*.

Mary died an infant and unmarried, and the plaintiff claims her ſhare as her repreſentative.

Joſhua Coomes, ten years before his death, *purchaſed of the vicar of St. Martin's a leaſehold eſtate for the term of forty years, in the joint names of himſelf and his wife*, and being alſo poſſeſſed of other perſonal eſtate, made his will, and thereby gives the plaintiff his orphanage part, and likewiſe to his daughter *Mary* a ſixth of his cuſtomary eſtate, and directs it to remain in her mother's hands (now the wife of defendant *Elling*) till her age of twenty-one or marriage, and then deviſes all the reſt and reſidue of his eſtate to his wife, deſiring her to take the trouble *and expence* of maintaining, educating and providing for his daughter *Mary*, till ſuch time as ſhe attain the age of twenty-one or maraiage, and appoints his wife executrix.

Mr. Attorney General council for the plaintiff.

The defendants ſeem to make a queſtion by their anſwer, whethe the orphanage part of the plaintiff's ſiſter, ſhe dying inteſtate, unmarried and under twenty-one, ſurvives to the plaintiff her brother, or is to be divided between him and her mother.

But as this has been ſettled by many reſolutions, and particularly in the caſe of *Harvey* verſus *Deſbouverie*, the 8th of *Auguſt* 1735, (*Caſ. in Lord Talbot's time* 130.) That the ophanage part and portion of an orphan of *London*, dying in his or her minority under twenty-one, (if ſuch orphan daughter ſo deceaſing be unmarried at the time of his or her deceaſe) *by this cuſtom of the city* ought to come among his or her brothers or ſiſters by the father, ſurviving, as well advanced as not advanced in the life of the father, though the father of ſuch orphan by his laſt will ſhould otherwiſe diſpoſe of the ſame, or die without a will, is ſo clear, he would not trouble the court with arguing it.

He alſo inſiſted for the plaintiff, notwithſtanding there was a ſtated account between him and his mother in 1739, yet in regard he is intitled to his ſiſter's orphanage ſhare, (and who being an infant had never in her life-time ſettled any account) he is not bound by the account allowed and ſigned by him, ſo far as it relates to the ſiſter, becauſe, claiming under her right, he has the ſame liberty to open the account as ſhe would have had if ſhe had been living, for there is no ground to ſay it is a ſtated account as to her; and if on opening it with regard to the ſiſter, it ſhould come out there is more due to her on account of her ſhare of her father's eſtate, that will ſhew there was an error in that account throughout, and then the plaintiff is intitled to be relieved notwithſtanding his releaſe.

He inſiſted, in the third place, that the latter clauſe in the will, deſiring the mother to take the trouble *and expence* of maintaining, educating and providing for his daughter till, *&c.* ſhewed the teſtator's intention that ſhe ſhould maintain her out of her own pocket, eſpecially as it immediately follows the deviſe to the mother of the whole teſtamentary part, it is implicitly intended that ſhe was thereout to maintain her; and therefore the mother is not intitled to any allowance for *Mary*'s maintenance, cloaths, board and education.

He inſiſted in the laſt place, that the leaſehold eſtate in St. *Martin's Lane* ought to be deemed a part of the teſtator's eſtate, and does not go to his wife by ſurvivorſhip, and that it is equally a fraud upon the cuſtom as if he had taken it to himſelf for life, remainder to the wife for life; for, as it is a jointenancy, ſhe is as much entitled to the whole by ſurvivorſhip, as if it had been limited to her in remainder only.

Mr. *Noel* and Mr. *Clarke*, for the defendants, inſiſted, this is a new point, and that there is no inſtance of a caſe of this kind before upon the cuſtom of *London*; that this was a purchaſe made by the teſtator when in health, and ten years before his death; and that his widow being made a joint purchaſer with him, it was an intereſt abſolutely veſted in her, and ſuch an intereſt that he could not have diſpoſed of unleſs he had ſurvived her, and therefore ſhe does not claim it as a gift now from her huſband, but by operation of law, the *jus accreſcendi*.

LORD CHANCELLOR.

I am of opinion, the account ſettled between the plaintiff, who was thirty years of age at that time, and the defendant his mother, ought to ſtand and not be unravelled; but ſaid he would give liberty for any of the parties to ſurcharge and falſify, and directed accordingly.

As to the point of maintenance, I think it was not the intention of the teſtator it ſhould come out of the pocket of the mother.

To remain in her hands till the daughter's age of twenty-one or marriage, meant, as the mother is left executrix, that ſhe ſhould not pay it till then.

And if his intention was, that ſhe ſhould keep the daughter's cuſtomary part and not pay it till the contingency happened, then he could not have it in his view that ſhe ſhould pay intereſt for it in the mean time.

This clauſe, *at her expence, &c.* is ſaid to be a qualification of the legacy to herſelf, and that he intended therefore the mother ſhould maintain her.

Perſons cannot ſpeak the whole at once; the teſtator certainly meant maintenance in the firſt inſtance ſhould come out of the daughter's orphanage part, and if that was not ſufficient, then I apprehend he did intend the reſt of her maintenance ſhould have come out of the reſidue of the legatory part. His Lordſhip therefore directed the expence of the ſiſter's maintenance, from the time of her father's death to her own, to be paid out of the produce only of her capital of the orphanage part, for the capital itſelf he ſaid could not be broke into.

The orphanage ſhare, and not the legatory part, ſhall pay the charge of a child's funeral.

His Lordſhip aſked Mr. Recorder *Stracey*, how the cuſtom of *London* is with regard to the funeral expences of a child of a freeman who dies after the father, whether they ought to be paid out of the legatory part of the teſtator's eſtate, or the child's orphanage ſhare.

Mr.

Mr. Recorder ſaid he did not know that it had ever been ſettled by the cuſtom of *London* out of which fund it ſhould be paid.

Lord Chancellor ſaid, I think it very juſt, and reaſonable, the child's orphanage ſhare ſhould pay it; and directed accordingly the mother ſhould be allowed what ſhe had expended in her daughter's funeral out of her capital.

With regard to the leaſehold eſtate bought by the teſtator of the vicar of St. *Martin*'s.

I am of opinion, there cannot be a clearer caſe of a fraud on the cuſtom.

If a freeman diſpoſes of his property in ſuch a manner as not to take place till after his death, it is a fraud on the cuſtom.

There are ſeveral caſes of fraud on the cuſtom of *London*, though not in ſpecie with the preſent caſe: it has been held, if a freeman diſpoſes of his property in ſuch manner as not to take place till after his death, it is a fraud on the cuſtom.

Here the freeman, poſſeſſed of a perſonal eſtate, lays out ſome of it in a purchaſe of a leaſehold eſtate for the joint lives of himſelf and his wife.

The conſequence is, the huſband might have diſpoſed of the whole.

It has been ſaid, if the wife ſurvives him; the moment he dies, this is to be taken out of his perſonal eſtate; for that it does not come to her by the gift of the huſband, but by operation of law, the *jus accreſcendi*.

A wife cannot, during the coverture, acquire any property diſtinct from the huſband.

And yet it muſt be allowed, that in his life-time he had equal power to diſpoſe of it as any other part of his perſonal eſtate; for the wife cannot during the coverture acquire any property diſtinct from the huſband.

Suppoſe *Joſhua Coomes* had taken the leaſehold eſtate for himſelf and one of his children, it had been a gift as to a moiety only; and as to the other moiety, it would be an advancement to the child, and muſt be brought into hotchpot.

Suppoſe he had taken it intirely in the name of his wife, then it would have been the eſtate of the huſband, and he might have diſpoſed of it in his life-time equally as now.

If it had been conveyed to truſtees for the ſeparate uſe of the wife in poſſeſſion, inclined to think ſuch a gift would have been good.

Indeed if the gift to the wife had been made by the huſband to truſtees, for the ſeparate uſe of the wife in poſſeſſion, this might

have

have been of a different conſideration, and I ſhould be inclined to think ſuch gift was good; but I will not give an abſolute opinion.

Upon the whole, I think the leaſehold eſtate ſo purchaſed, muſt be conſidered as part of *Joſhua Coomes*'s perſonal eſtate.

Lord Hardwicke directed it to be ſold before the Maſter, and the money ariſing from the ſale thereof to be applied in like manner with the reſt of the teſtator's perſonal eſtate.

He directed the widow's third part of the cuſtomary eſtate, and alſo the reſidue of the teſtamentary part, after debts and legacies, to be retained by the defendant *Ellen* and his wife.

And as to the remainder of the orphanage part, he declared the plaintiff to be intitled to one third in his own right, and the other third in the right of his ſiſter, and directed it to be paid to him accordingly.

Caſe 258. *Crabtree* verſus *Bramble*, *March* 4, 1747.

R. B. by articles previous to his marriage, covenanted to lay out 2000*l.* in the purchaſe of lands, and to ſettle the ſame on himſelf for life, and after his deceaſe, to *Mary* his intended wife for life, and after both their deceaſes, to truſtees to ſell, and the money ariſing from ſuch ſale, to be divided among the children of the marriage, to ſons at 21, daughters at 21, or marriage, *provided no ſale be made till one of the ſhares ſhall become payable.* The purchaſe was made accordingly after *Elizabeth* the only ſurviving child died unmarried, but had attained the age of 21. the abſolute proprietor of theſe eſtates; *Elizabeth* having taken them as land in her life-time, and done acts to ſhew ſhe intended they ſhould be conſidered as real eſtate, they muſt be held as ſuch, and go to the heir.

UPON a marriage between *Richard Bramble* and *Mary Timbrell*, by articles previous thereto, dated the 15th of *October* 1698, in conſideration of one thouſand pounds portion; *Richard Bramble* covenanted with truſtees before *Michaelmas* next enſuing, to lay out two thouſand pounds upon the purchaſe of lands to that value, and to ſettle the ſame upon truſt for *Richard Bramble* for life, and after his deceaſe, to *Mary* for life, and after both their deceaſes, to the uſe of truſtees and their heirs, upon truſt, that the eſtate ſo to be purchaſed, after the deaths of *Richard* and *Mary*, be ſold, and the monies ariſing by ſuch ſale divided among all the children of the marriage, ſhare and ſhare alike, to the ſons at twenty-one, and to the daughters at twenty-one or marriage, *provided no ſale be made till one of the ſhares ſhall become payable*; and if all the children ſhall die before any portions ſhall become payable, then the eſtate ſhall not be ſold, but after the deceaſe of ſuch children, the truſtees and their heirs ſhall ſtand ſeiſed of the ſame, in truſt for *Richard* and *Mary*, and the ſurvivor, and the heirs, executors, adminiſtrators and aſſigns of ſuch ſurvivor for ever.

The marriage took effect, and eleven hundred and fifty pounds was laid out ſoon after in the purchaſe of lands in the iſland of *Thorney* in *Suſſex*, and ſettled to the uſes in the articles.

Richard by his will directs his executors to purchaſe lands of the full value he was obliged to purchaſe on his marriage, and ſettle the ſame on ſuch perſons, and for ſuch uſes as he ought to have done, it being his intent that the marriage agreement ſhould be performed.

Richard died the 14th of *Auguſt* 1701, and a further purchaſe was made of a farm called *Raymonds* in *Suſſex*, in truſt for the uſes in the marriage articles; *Mary* the wife of *Richard*, on the death of her huſband, entered upon both the eſtates, and enjoyed them till her death, which happened the 18th of *November* 1742: *Elizabeth*, the only ſurviving daughter by *Richard*, died unmarried, and inteſtate, the 7th of *December* 1744, and the plaintiff her ſiſter, of the half blood, and next of kin, hath taken out adminiſtration, and thereby become intitled to the inteſtate's perſonal eſtate; and inſiſts, that the truſt eſtates by virtue of the marriage articles ought to be conſidered in a court of equity, as perſonal eſtate of *Elizabeth*, ſhe having attained twenty-one years in the life-time of her mother, and that the eſtates were never conveyed to *Elizabeth*, nor did ſhe ever apply to the truſtees for any conveyance, nor did ſhe do any act whereby ſhe conſidered the eſtate as real, and therefore the plaintiff has brought her bill, that the truſt eſtates may be ſold, and the money be paid to her, and likewiſe the rents in arrear ſince *Elizabeth*'s death.

The defendant *Richard Bramble* inſiſts, that as the truſt eſtates were not ſold by the truſtees, and turned into money in the life of *Elizabeth*, and as *Elizabeth* did receive the rents of the eſtates from the death of her mother to her own death, the ſame ought to be conſidered as real, and not as perſonal eſtate; and therefore, on the death of *Elizabeth*, inſiſts, the eſtates deſcended to him as her heir, on the part of the father, the defendant's grandfather, being the only brother of *Richard*, the father of *Elizabeth*.

It was proved in the cauſe, that *Elizabeth*, in 1728, let *Raymonds* farm to one *Lindop*, upon leaſe for the term of eleven years, and that he agreed to pay the yearly rent of fifty pounds to *Elizabeth*, her heirs and aſſigns, for this farm, and he did, from time to time, pay *Elizabeth* accordingly, as the ſame became due; and before the expiration of the firſt term, on the 8th of *December* 1739, *Lindop* took a further leaſe of the farm for twenty-one years, at the ſame rent, and with the uſual covenants both on the part of the leſſor and the leſſee, and paid *Elizabeth* the rent ſo long as ſhe lived.

Mr. *Solicitor General* for the plaintiff.

The queſtion is, whether this is to be conſidered as land or money; if the latter, then it goes to the plaintiff, the ſiſter of the half blood to *Elizabeth Bramble*.

Independant of any election *Elizabeth* may have made, clearly it is money; and if land is directed by marriage articles to be turned into money, in this court it is to be conſidered as perſonal eſtate.

In the caſe of *Guidot* verſus *Guidot*, after *Trinity* term 1745, a ſum of money, by articles previous to the marriage, was agreed to be laid out in the purchaſe of lands in *Great Britain*, or in ſome church, college, or other renewable leaſe, and to be ſettled to particular uſes, the laſt limitation to the huſband and his heirs.

The money was not inveſted in the purchaſe of any freehold, or leaſehold lands, but remained in money to the death of the huſband, *and as he had made no election*, Lord Chancellor held, that at the time of his death it ſtood in equity as it did in the articles, either to be laid out in freehold or leaſehold, and therefore this court will call it one or the other, according to the rule in equity, that what is agreed to be done muſt be conſidered as done, and declared that the money ought to be laid out in the purchaſe of lands of inheritance, or in church, *&c.*

In the preſent caſe, *Elizabeth made no election*, and therefore at her death it ſtood in equity as it did in the articles, and as it was there directed to be turned into perſonal eſtate, muſt be conſidered as ſuch.

He then cited the caſe of *Lingen* verſus *Sowray*, 1 *P. Wms.* 172. where, by articles before marriage, the huſband agreed to add 700*l.* to the wife's portion of 700*l.* and the ſecurities for this money were agreed to be inveſted in land, and the laſt remainder was to the huſband and his heirs; 250*l.* of the money was called in by the huſband, and afterwards placed out by him on a different truſt, and declared to be to him, his executors and adminiſtrators; this Lord *Harcourt* held to be an alteration of the nature of it, and that it ſhall be taken to be perſonal eſtate, ſince the huſband's declaring the truſt to his excutors, ſeems tantamount with his having declared that it ſhould not go to his heir.

Here, by the direction of the huſband *Richard Bramble*, after his, and his wife's death, the truſtees are to turn it into money to be divided among the children of the marriage, and therefore what is agreed to be done, muſt be conſidered as done.

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The ſecond queſtion is, whether *Elizabeth*, the only ſurviving child of the marriage, did any act to declare her election it ſhould continue land.

It has been inſiſted by the defendant in the anſwer, that ſhe has done it by letting *Raymonds* farm upon two different leaſes, one for eleven, and the other for twenty-one years, and thereby reſerving a rack-rent of fifty pounds a year to herſelf, *her heirs and aſſigns*.

There is no colour to ſay ſhe has made an election by this means, and very extraordinary ſhe ſhould make a leaſe whilſt the mother was living, who does not appear to have joined; but ſuppoſing it to be a leaſe made after the mother's death, here is no fine taken, the value in no reſpect leſſened, nor does the reſervation to her heirs and aſſigns at all hinder the ſale; for if ſhe had ſold it, the purchaſer is her aſſignee, and takes as ſuch, and therefore as ſhe has done nothing one way or the other, and left it without any act to declare her election, it will not alter the nature of it, but continues money according to the authorities cited and muſt go to the plaintiff.

Mr. *Wilbraham* of the ſame ſide.

The huſband who had an abſolute power over the two thouſand pounds, orders it to be inveſted in lands to the uſe of himſelf for life, and to the wife for life, and then directs, on the death of the ſurvivor of huſband and wife, that it ſhould be (notwithſtanding the eſtate in lands for their lives) turned into money to be divided among the children.

If the articles are to be carried into execution, according to the letter of them, then clearly the land ought to be ſold, for wherever it is agreed to be ſold, or directed to be ſold, this court will look upon it as money.

The father and mother might apprehend it would be inconvenient to let children be tenants in common of land, and as here was a child of a former venter, it might be done with a view of giving her a chance of coming in for a ſhare.

In *Doughty* verſus *Bull*, 2 *P. Wms.* 321. "The plaintiff's father "deviſed lands to truſtees in fee, in truſt to apply the profits, till ſale, "for the benefit of all his four children, and the ſurvivors and ſur- "vivor of them equally; and on further truſt, that as ſoon as the "truſtees ſhall ſee neceſſary for the benefit of the children, "they ſhould ſell the premiſſes, and apply the money for the be- "nefit of the four children equally, to be paid at twenty-one, or "marriage.

" marriage. *A.* the eldeſt of the four children attained twenty-one,
" and married, and died without iſſue, inteſtate, leaving a wife:
" the court decreed, the lands being in all events deviſed to be ſold,
" though the time for ſale was left to the executors, was perſonal
" eſtate, and *A.*'s widow muſt have a moiety of *A.*'s ſhare."

So that it was determined to be perſonal eſtate, becauſe it was ſo declared by the perſon who had the original power.

The queſtion is, whether any thing has been done by *Elizabeth Bramble*, either in the life-time of the mother, or in her own, to ſhew her election that it ſhould be real eſtate.

The granting the leaſes in the mother's life-time ſhews no more than ſhe intended to make the beſt of the land; ſhe enjoyed the lands for two years after her mother's death, and if ſhe had intended to ſell them, could not have done more for the advantage of ſelling them, than letting them out on a rack-rent, and therefore this fact is of no avail to ſhew her intention to make it real eſtate, and if ſo, then the articles ought to be ſpecifically performed; and the court will not be averſe that it ſhould fall into the hands of the plaintiff, a ſiſter of the half-blood, rather than to the defendant, a remote relation, who happens to be heir at law.

Mr. *Attorney General* council for the defendant.

Elizabeth, in 1728, made a leaſe for eleven years, and in 1739, for twenty-one years, of this farm, and reſerved a rent of fifty pounds a year, payable to her, her heirs and aſſigns, a covenant on the part of tenant to pay it to her, her heirs and aſſigns, a proviſo if the rent ſhould be in arrear, that ſhe might re-enter, and hold to her, her heirs and aſſigns, and covenants likewiſe, on the part of herſelf, her heirs and aſſigns, to perform the ſeveral intents and purpoſes of the leaſe.

The general queſtion is, whether this is, or is not, to be conſidered as perſonal eſtate?

There is no diſpute but *Elizabeth* had the equitable abſolute property, but ſays, the plaintiff, though ſhe enjoyed it as a real eſtate, yet as there is nothing done to ſhew her intention or inclination, it ſhould be conſidered as real eſtate, it ought to go according to the direction of the articles.

It is not natural to ſuppoſe the parties to the articles ſhould mean to convert it into perſonal eſtate, where it was not at all neceſſary, or of any advantage to the child, it ſhould be converted into money.

The moſt material queſtion is, whether it does not appear on all the circumſtances of the caſe, it was her intention to conſider this as her real eſtate, and if ſo, the court will not alter that merely becauſe the original truſt was to turn it into money, and merely too to take it from the heir at law.

Acts, as well as words, will declare the intention, her giving receipts for rents, as the rents of real eſtate, and as ſhe has thought proper to receive it from a tenant of real eſtate, ſhe does not conſequently receive it as money, but conſiders it as her real eſtate.

The plaintiff claims it merely as her perſonal repreſentative, and not under the articles.

It is objected, ſhe has not applied to the truſtees for poſſeſſion of the lands.

But what ſhe has done is ſtronger, for ſhe has in oppoſition to them taken the poſſeſſion.

Mr. *Noel* of the ſame ſide.

This court does not conſider abſolutely money to be laid out in land, as land, or land to be turned into money, as money, unleſs it is conſiſtent with the purpoſes for which the land was intended to be ſold; or, on the other hand, for which the money is to be inveſted in land.

As to the articles themſelves, directed firſt to be laid out in land, but for the eaſe of their children, the contracting parties had it in view to turn it into money.

Provided no ſale be made till one of the ſhares ſhall become payable.

Therefore, if that caſe did not happen, of its being neceſſary to turn the eſtate into money, in order to pay a ſhare that was become due, then they did not intend it ſhould be conſidered as perſonal eſtate.

In the caſe of *Chaloner* verſus *Butcher*, *March* 8, 1736, *at the Rolls*, the diſpute was between a repreſentative of perſonal eſtate, and an heir at law: money there on mortgage agreed to be laid out in land to the huſband for life, to the wife for life, and if no iſſue, the abſolute diſpoſal in him; he, after the wife's death without iſſue, *declared it ſhould not be laid out in land*; the court held, if the queſtion concerned the right of a third perſon, the declarations of the huſband ſhould not be read; but as it was between his perſonal and real repreſentative, they ſhould be read, and determined it upon

the declaration only; there is no pretence in the preſent caſe that *Elizabeth* ever made any declaration it ſhould be turned into money; and in the caſe of *Edwards* and *the Counteſs of Warwick*, 2 *Wms.* 171. Lord *Macclesfield* ſaid, in all caſes where it is a meaſuring caſt betwixt an executor and an heir, the latter ſhall in equity have the preference.

The enjoyment of *Elizabeth*, who had a power over it in that ſpecie, conſidering it as land, is in itſelf an evidence of her intention, that it ſhould not be turned into money.

It would be very extraordinary to ſay, that the heir ſhould be the object in reſpect to binding him by the covenants in the leaſes to make good the purpoſes and intents thereof, and yet he ſhould not be the object as to any benefit under them, but ſhould go to her perſonal repreſentative.

All the circumſtances put together are ſtrong to ſhew the party, who had a power, meant it ſhould continue as land.

And though the defendant has been called a diſtant relation, he cannot be conſidered in that light, when he is directly in the male line of *Richard* the party to the articles, as he is a grandſon of his brother.

LORD CHANCELLOR.

This is a queſtion between a perſonal repreſentative and an heir at law, and concerning a property which at preſent is exiſting as real eſtate.

It has been contended on the ſide of the plaintiff, that this which is now real eſtate, and ſtanding in truſtees names, is to change its nature, and to be conſidered as perſonal eſtate.

The general queſtion is, whether it is to be conſidered as land or money; and this will depend on two queſtions; *Firſt*, Whether on the nature of the truſt in the articles independent of any election by *Elizabeth*, it ought to be conſidered as land or money? *Secondly*, Whether *Elizabeth* has ſhewn any intention it ſhould be kept as real eſtate.

To be ſure, it cannot be ſaid to be a clear caſe, but on the face of the articles one of the weakeſt in which a perſonal repreſentative could come into this court, to turn it into money.

The truſt under the articles is, " that the eſtate, ſo to be pur-
" chaſed after the deaths of *Richard* and *Mary*, be ſold, and

" the monies ariſing by ſuch ſale divided among all the children of " the marriage ſhare and ſhare alike, to the ſons at twenty-one, and " to the daughters at twenty-one or marriage, *provided no ſale be* " *made till one of the ſhares become payable.*"

It is truly obſerved, that the contracting parties ſuppoſed there might be more children than one of this marriage, and conſequently more convenient, if ſeveral, to take their portions as money, for the proviſion being ſmall, it might be wanted to ſet them up in trade, *&c.*

Nothing is ſaid of a ſole child, but only that it ſhould be divided among the children, and by turning it into money might be done with more eaſe; but to have directed a compulſory ſale upon one child, would have been a pretty frivolous direction of a parent.

The proviſo is not, till the money ariſing by ſale ſhould become payable, *but until one of the ſhares become payable*; which is ſtill proceeding as if the whole was not to go to one.

And the very laſt clauſe is, if *all the children ſhall die before any portions ſhall become payable*, " then the eſtate ſhall not be ſold; " but after the deceaſe *of ſuch children* the truſtees and their heirs " ſhall ſtand ſeiſed of the ſame in truſt for *Richard* and *Mary*, and " the ſurvivor, and the heirs, executors, adminiſtrators and aſſigns " of ſuch ſurvivor for ever."

So that taking the conſtruction of the declaration of truſt together, the contracting parties ſeem to have had in view the caſe of ſeveral children; but the obſervations I have made are not deciſive, becauſe they do not abſolutely determine there ſhould be no ſale if one child, though they have weight ſo far that the caſe in which they directed a ſale has not happened.

The ſecond queſtion is as to the election of *Elizabeth* the daughter, whether there be any evidence in the caſe of her electing to keep this as land.

It muſt be allowed equity follows the contracts of parties, in order to preſerve their intent, by carrying it into execution, and depends on this principle, that what has been agreed to be done for valuable conſideration is conſidered as done, and holds in every caſe except in dower; and therefore where money is to be laid out in land, there the court will make it have the property of land; the ſame rule of lands to be converted into money.

No election could determine the queſtion as to thoſe claiming under the truſt, but as to thoſe only who claim as volunteers.

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The father *Richard Bramble* died in 1701. the mother in 1742. and being reduced to one child, muſt depend entirely on her acts; ſhe did not die till 1744. and therefore capable of judging, as ſhe was turned of 40.

She on the mother's death entered on the land, and from that time continued in poſſeſſion for two years, received the rents, made no application to truſtees to ſell, nor brought a bill againſt them to ſell, though ſhe had a right to apply to them to ſell, and, as *ceſtuy que truſt*, might have contracted for ſelling, and bound the truſtees.

But there is ſtill ſomething more in the caſe; ſhe made a leaſe in 1729. of the lands, reſerving a rent to her and her heirs, and likewiſe in 1739. with the ſame reſervation.

This hath been inſiſted to be a further act to ſhew ſhe approved of its continuing as land.

It was objected, the leaſes were made in the life-time of the mother, who had her life in the eſtate; but the queſtion is not, whether ſhe had a right to leaſe it out, but whether this does not amount to an approbation of its continuing as real eſtate.

Elizabeth, as ſhe was the only child of the marriage, had a right even in her mother's life-time to come into this court, to compel the truſtees to ſell the reverſion in theſe lands for her benefit.

Had ſhe any right to make an election at twenty-one after the death of the father, as ſhe was the only child of the marriage? I am of opinion that ſhe had a right to elect even during the mother's life, and that ſhe might have come into this court to compel the truſtees to ſell this reverſion for her benefit, even in the mother's life-time; and though ſhe had this right, yet inſtead of doing this ſhe makes leaſes of the lands, reſerving rent to her, *her heirs and aſſigns*.

Can there be a ſtronger evidence to ſhew her intention to continue it as real eſtate, than that ſhe had bound her heirs to make good this leaſe.

It has been ſaid, the truſtees in point of law had a right to receive the rents, and to be ſure they had; and yet ſhe enters againſt their poſſeſſion, and grants leaſes of the lands; and it was a very material obſervation of the defendant's council with regard to the heir's being liable to an action on the part of the leſſee.

The caſe of *Lingen* verſus *Sowray* in one part of it is rather for the defendant, for " the articles (ſaid Lord *Harcourt*) have in " equity changed the nature of the money, and turned it as it were " into land; and therefore, as to ſo much of the 1400 *l.* as is ſub- " ſiſting upon the ſecurities on which it was originally placed, or " on any other ſecurities *where no new truſts have been declared*, it " ought to be conſidered as real eſtate.

This court, if one may uſe the expreſſion in a court of juſtice, rather leans to an heir at law.

This court rather leans to an heir at law.

But what uſe does Lord *Harcourt* make of the words *Executors and Adminiſtrators* in that caſe? why, ſays he, "as to the 250*l.* of "the 1400*l.* which was called in by the huſband, and afterwards placed out on ſecurities on a different truſt, that ſhall be "taken to be perſonal eſtate; for placing it out thus, I take to be "an alteration of the nature of it, ſince the huſband's declaring the "truſt *to his executors and adminiſtrators*, ſeems tantamount with "his having declared that it ſhould not go to his heir."

See how far that goes in the preſent caſe: the huſband there could not do otherwiſe than declare the truſt to his executors and adminiſtrators, and yet the court held that it ſhould not go to his heir.

Here *Elizabeth* reſerved to her, her heirs and aſſigns, and ſaid by the plaintiff's council ſhe could not do otherwiſe; and very true ſhe could not; and yet, though ſhe could not reſerve otherwiſe, there is equal reaſon in the preſent caſe to hold it as her intent it ſhould go to *her heir*, as in *Lingen* verſus *Sowray*, to the executors; and this will be ſufficient to determine the queſtion as between the repreſentative of the perſonal eſtate and *the heir*, and it was truly ſaid by Lord *Macclesfield* it has been the rule of the court to give the turn of the ſcale in favour of the heir.

Lord Macclesfield ſaid it was the rule of the court to give the turn of the ſcale in favour of the heir.

And therefore as I find it land, and the abſolute proprietor took it as land, and did acts to ſhew ſhe intended it ſhould be conſidered as real eſtate, I ſhall conſider it as ſuch; and therefore the bill muſt be diſmiſſed, but without coſts.

Cooke verſus *Gwyn and Wight and others, the ſecond ſeal, Michaelmas Term* 1748.

Caſe 259.

THE bill was brought againſt the defendant *Gwyn* for a forecloſure, and againſt the defendant *Wight* for a diſcovery of his incumbrance on the mortgaged premiſſes, and for delivery of a moiety of the eſtate in poſſeſſion of the defendant *Wight* to the plaintiff.

The court will not determine matters in a ſummary way upon motion, that have been reſerved between parties, till after the maſter has made his report.

Mr. *Wight* by his anſwer inſiſted on a prior incumbrance upon *Gwyn*'s eſtate, and claimed to be tenant by the curteſy of the whole eſtate; and that his ſon had the fee of it under an old ſettlement.

At the hearing of the cauſe, Lord Chancellor decreed that *Gwyn* ſhould redeem or ſtand foreclоſed, and that the conſideration of the matters in queſtion, between the plaintiff and the defendant *Wight*,

ſhould be reſerved till after the maſter had made his report in relation to *Gwyn*.

The maſter reported the defendant *Gwyn* had not redeemed the plaintiff by the time limited, and that report was confirmed.

The plaintiff, inſtead of ſetting down the cauſe upon the equity reſerved between him and the defendant *Wight*, applies now by motion for the delivery of the poſſeſſion of the moiety in mortgage to him.

LORD CHANCELLOR.

The court, where they have at the hearing of a cauſe reſerved any of the matters in queſtion between the parties, till after the maſter has made his report, will not determine thoſe matters in a ſummary way upon motion, but the plaintiff ſhould have ſet it down in the ordinary courſe upon the equity reſerved.

A receiver may be granted on motion, notwithſtanding the reſervation of all matters under the decree, for this is a mere proviſional order.

If the plaintiff had indeed moved for a receiver, and had laid a proper caſe before the court for that purpoſe, I would have granted the motion notwithſtanding the reſervation under the decree; becauſe this would have been a mere proviſional order, and would not have affected the queſtion between the parties.

Caſe 260. *Anonymous. Michaelmas Term, Nov.* 10, 1748.

The defendant being a priſoner in *York* gaol, and the demand ſo trifling it would not bear the expence of removing him by *habeas corpus* to the *Fleet*, it was moved, to ſave this expence, that for want of appearance the bill might be taken *pro confeſſo*; the court refuſed to do it in this ſummary way.

MR. *Wilbraham* moved that a bill of revivor might be taken *pro confeſſo* againſt a defendant, a priſoner in *York* gaol for want of an appearance, without the expence of removing him by *habeas corpus* to the *Fleet* and bringing him into court, as the demand againſt him by the bill was ſo trifling that it would not bear the charge of the journey from *York*.

After the act for making proceſs in courts of equity effectual againſt perſons who abſcond, there was a doubt whether it extended to bills of review, but it is now ſettled that it does, and therefore the plaintiff muſt have recourſe to the ordinary remedy.

Lord Chancellor ſaid, he could do nothing in this ſummary way, but the plaintiff muſt proceed in the uſual method pointed out by the 5th of the preſent King, *c.* 25. the act "for making proceſs "in courts of equity effectual againſt perſons who abſcond and can- "not be ſerved therewith, or who refuſe to appear;" and though for ſome time after making this act there was a doubt whether it extended to bills of revivor, where defendants refuſed to appear to ſuch bill, yet it is ſettled now that it does; and therefore you muſt upon this occaſion have recourſe to the ordinary remedy, and his Lordſhip denied the motion.

Biſhop

Biſhop verſus *Church and others*, *Dec.* 8, 1748. Caſe 261.

A Motion was made for an injunction upon the following caſe: The plaintiff was the reſiduary legatee, and ſurviving executrix of her huſband, to whom *Church* and one *Owen* had given a joint bond for payment of a ſum of money: *Church* one of the obligors died, and the plaintiff was indebted upon her own private account to *Owen* who was become a bankrupt.

B. a reſiduary legatee, and ſurviving executrix of her huſband, to whom *C.* and *O.* had given a joint bond, *C.* died, and the plaintiff was indebted on her own private account to *O.* who is a bankrupt; the bill brought againſt his aſſignees for an injunction, and to ſet off what was due to her as executrix againſt the debt from herſelf to the bankrupt. Injunction denied: for as ſuch a ſet-off could not be done at law, there is no inſtance of its being allowed here; for the debts are due in different rights, and 2 *Geo.* 2. does not comprehend it.

The plaintiff's bill therefore was brought againſt his aſſignees for an injunction, and to ſet off what was due to her as executrix, *&c.* againſt the debt due from herſelf to the bankrupt.

Lord Chancellor denied the injunction; and as to the ſet-off, ſaid, that it was admitted this could not be done at law, nor did he know of any like inſtance here: the debts are due in different rights: the act of parliament of 2 *Geo.* 2. *c.* 22. *ſect.* 13. does not comprehend this caſe; nor is it within 5 *Geo.* 2. for preventing the committing of frauds by bankrupts, for here was no mutual credit between the parties, and this matter had been determined the ſecond of *April ex parte Hope.*

If this court was to go into inquiries of this ſort, an account muſt be taken of the teſtator's whole eſtate, till it was ſeen if there was a ſurplus ſo as thereout to make *a ſet-off.*

Another conſequence would ariſe; it is often doubtful whether executors can take a reſidue, which might draw on infinite expence if it ſhould be allowed of in the like inſtances.

Anonymous. Hilary Term, *Jan.* 24, 1748. Caſe 262.

ABOUT five years ago a bill was brought by ſeveral perſons claiming to be heirs at law to the Duke of *Buckingham*; the defendants likewiſe inſiſted on being heirs at law, and iſſues were directed to try it: the plaintiffs were not found to be heirs at law, but the defendants only, who have ſet down the cauſe upon the equity reſerved.

A defendant cannot revive but in one inſtance, and that is after a decree to account, becauſe in that caſe he is conſidered as an actor; for till the account is taken it is not known on which ſide the balance lies.

The

The plaintiffs now move to adjourn the cauſe till the repreſentatives of ſome of the parties are brought before the court.

Lord Chancellor ſaid, a defendant cannot revive but in one inſtance, and that is after a decree to account, becauſe in that caſe a defendant is conſidered as an actor; for until the account is taken it is not known on which ſide the balance lies; but even in a bill brought for an account, till the cauſe is heard, if there is an abatement, the defendants cannot revive; and therefore it is the plaintiffs only, who ought to ſee there are proper parties; and if they have in this caſe neglected to do it, and ſhould be defective in this particular when the cauſe comes on again, I ſhall not let it ſtand over upon paying only the coſts of the day, which is the uſual method, but ſhall diſmiſs their bill out of court with coſts to be taxed.

Caſe 263. *Stiles* verſus *Cowper*, *March* 8, 1748.

Sir *J. C.* lets a building leaſe of ſixty-one years of a houſe in *Lincoln's Inn Fields* to *W.* who aſſigns over the leaſe to the plaintiff for the remainder of the term.

IN 1700 Sir *John Cowper*, the father of the defendant, who was intitled to an undivided moiety of houſes with Mr. *Henley* in *Portugal Row*, *Lincoln's Inn Fields*, and by a private act of parliament empowered to make a partition, and to let out his moiety on a building leaſe for ſixty-one years, made a leaſe of part thereof for ſixty-one years to Mr. *Ward*, reciting therein the power given to him by the act of parliament of leaſing, and a liberty to the leſſee to quit after the firſt twenty years on giving proper notice.

He rebuilds the houſe, and lays out 5000*l.* for that purpoſe, and pays the reſerved rent of 40*l.* to Sir *J. C.* till he died. On his death the defendant became intitled as firſt remainder man in tail: for ſix years he thought proper to receive rent, and then brings an ejectment, and recovers at law for want of the uſual covenants in the building leaſe. The plaintiff brought his bill for an injunction, and to be quieted in poſſeſſion. *A new leaſe directed to be executed with proper covenants, and the plaintiff to hold the premiſſes for the remainder of the term.*

Mr. *Ward*, ſome time before 1716, aſſigns over the leaſe to *Haſkins Stiles* for the remainder of the term, who in the year 1716 rebuilds the houſe, and lays out above 5000*l.* for this purpoſe, and conſtantly pays the rent reſerved under the leaſe of 40*l. per annum* to Sir *John Cowper* till 1729, when the leſſor died, who was only tenant for life; and on his death the defendant, his eldeſt ſon, became intitled to it as the firſt remainder-man in tail.

From the year 1729 to 1735 the defendant thought proper to receive the rent from Mr. *Stiles*, and during that time the tenant, at his own expence, built new offices.

It appeared to the court, upon reading the leaſe, that the covenants uſual in building leaſes were not inſerted here.

The defendant after this acquieſcence, and receiving the rent, brings an ejectment againſt the plaintiff for the poſſeſſion, as deviſee of Mr. *Stiles*, and recovers at law for want of the aforeſaid covenants.

The plaintiff brings his bill here for an injunction to ſtay the defendant's proceedings at law, and to be quieted in the poſſeſſion of the houſe, under the leaſe and aſſignment.

LORD CHANCELLOR.

Though the acceptance of rent under a leaſe by iſſue in tail, will bind them, where they claim *per formam doni* from the leſſor, yet this alone will not bind the remainder-man in tail, who claims the leaſehold eſtate by purchaſe, but is a circumſtance however in favour of the leſſee; and when the remainder-man lies by, and ſuffers the leſſee or aſſignee to rebuild, and does not by his anſwer deny that he had notice of it, all theſe circumſtances together will bind him from controverting the leaſe afterwards.

But the defendant's council alledging, if the houſe ſhould be burnt down, the plaintiff, by the leaſe, is expreſſly exempted from rebuilding, and might, the next day after ſuch accident of fire, give notice to quit; his Lordſhip directed a new leaſe to be executed with the proper and uſual covenants, for the reſidue of the term.

And upon executing ſuch leaſe, his Lordſhip decreed the plaintiff to hold and enjoy the premiſſes in queſtion quietly for the reſidue of the term in the leaſe, againſt the defendant, but no coſts to be paid on either ſide.

Hume and his wife verſus *Edwards and his wife*, *May* 24, 1749. Caſe 264.

THIS cauſe came before the court on petition, and a queſtion aroſe, whether upon a deficiency of a teſtator's aſſets to pay all the legacies, a deviſee of an annuity for life, charged on the teſtator's perſonal eſtate, ſhould abate in proportion with other legatees, or whether he ſhall be conſidered as a ſpecific legatee, and conſequently not liable to abate with general legatees.

A deviſee of an annuity for life charged on the perſonal eſtate, where there is a deficiency of aſſets, ſhall abate in proportion with the other legatees: determined on the authority of *Halton* verſus *Medlicot*, before Sir *Joſeph Jekyl*.

Lord Chancellor ſaid, he believed there was a caſe where ſuch a deviſee of an annuity was looked upon as a ſpecific one, and determined, therefore, he ſhould not abate, but directed the petition to ſtand over, that he might look for this caſe.

On the 27th of *May* 1749 his Lordſhip ſaid, the caſe of *Halton, executor of General Pepper* verſus *Medlicot*, was an authority in point, that an annuitant for life on the perſonal eſtate muſt abate in proportion with other legatees, and is not to be conſidered as a ſpecific legacy.

General *Pepper* by his will gives *A.* 140*l.* out of his perſonal eſtate, to purchaſe her an annuity of 20*l.* a year for her life, if ſhe continued in his ſervice, and if that ſhould not be ſufficient, his executor had directions to advance her a further ſum to purchaſe this annuity.

Upon a deficiency of aſſets, it was inſiſted *A.* ſhould abate in proportion with the other legatees; Sir *Joſeph Jekyl* was of that opinion, and ordered ſhe ſhould abate upon the whole ſum of 140*l.*

His Lordſhip, on the authority of this caſe, ordered the annuitant here ſhould abate in proportion with the legatees.

Caſe 265. *May* 26, 1749. *The firſt day of Trinity term.*

A plaintiff, where the injunction has been diſſolved upon the merits, or for want of ſhewing cauſe, cannot by amending his bill, and the defendant's obtaining a *dedimus* to take his anſwer to it, move for an injunction, but on the anſwer's coming in, he may move for an injunction on the merits.

MR. *Solicitor General* moved to diſcharge an order obtained by the plaintiff from the Maſter of the *Rolls* upon this caſe.

The bill was brought for an injunction, and on the defendant's praying a *dedimus*, to take his anſwer in the country, it was granted of courſe: on the coming in of the anſwer, the defendant moved to diſſolve the injunction, unleſs cauſe, and the plaintiff ſhewing no cauſe, the injunction was diſſolved.

The plaintiff afterwards amends his bill, and on the defendant's praying a *dedimus* to take his anſwer to the amended bill, moves again for an injunction before the Maſter of the *Rolls*, who was of opinion, he was intitled to it, and made an order accordingly.

The motion was now to diſcharge the Maſter of the *Rolls*'s order for irregularity.

LORD CHANCELLOR.

I am of opinion it ought to be diſcharged for irregularity.

When an injunction has been diſſolved upon the merits, or for want of the plaintiff's ſhewing cauſe why the injunction ſhould not be diſſolved on the defendant's order *niſi*, he cannot by amending his bill, and the defendant's obtaining a *dedimus* to take his anſwer to the

the amended bill, move for an injunction; for if he could, he might amend his bill *toties quoties*, and by that means keep up the injunction againſt the defendant *in infinitum*; but if on coming in of the defendant's anſwer to the amended bill, he thinks there are ſufficient grounds ariſing out of the anſwer to ſupport an injunction, he may move for it upon the merits.

But an injunction granted on a *dedimus*, to take an anſwer to an amended bill, is contrary to the rule and practice of the court, and therefore let the Maſter of the *Rolls*'s order be diſcharged.

Can verſus *Read*, *June* 1, 1749. *Trinity term*. Caſe 266.

THE motion in this cauſe was for an injunction on an offer to pay the money into court, for which the defendant's action at law is brought.

A debtor to a bankrupt's eſtate, paying the debt to one aſſignee, is not a diſcharge, he ſhould have taken a receipt likewiſe from the co-aſſignee. Otherwiſe as to an executor, becauſe they have each a power over the teſtator's whole eſtate, and conſidered as diſtinct perſons.

Lord Chancellor, in giving his reaſons for continuing the injunction, ſaid, he never knew any determination that a debtor to a bankrupt's eſtate, paying the debt to one aſſignee, and taking his receipt, would be a diſcharge; but if the aſſignee did not bring this ſum to account, and was inſolvent, he doubted whether the debtor to the bankrupt's eſtate would not be liable to pay it over again; for though payment to one executor is good, becauſe they have each a power over the whole eſtate of the teſtator, and conſidered as diſtinct perſons, yet aſſignees of bankrupts are in the nature of truſtees, and unleſs the debtor to bankrupt's eſtate had taken a receipt from the co-aſſignee, it is not an abſolute diſcharge.

Hearle verſus *Greenbank*, *and Andrew and others*, *aſſignees of the eſtate and effects of Winſmore*, *a bankrupt*, verſus *Greenbank*, *Hearle and others*, *May* 30, 1749. Caſe 245.

THE end of the original bill was, that *William Worth*'s will, and the will or diſpoſition made by *Mary Winſmore*, in virtue thereof, may be confirmed and eſtabliſhed by a decree of this court, and that *Greenbank*, *&c.* may be compelled to execute the truſts under *Mary*'s will, and to account with the plaintiffs for the real and perſonal eſtate of *William Worth* and *Mary Winſmore* deceaſed, and that if the defendant *Mary Winſmore*, the daughter of the teſta-

Lord Hardwicke ſaid, there was no precedent either in a court of law or equity, where it has been held, a power over real eſtate executed by an infant is good, and declared as he could find none, he would make none, and that the diſpoſition Mrs. *Winſmore* in this caſe has attempted to make, could not take place.

trix *Mary*, makes out her title to all or any part of her late mother's freehold, copyhold, or leaſehold eſtates, that then ſhe may either convey her right therein to the plaintiffs, or elſe, that ſo far as the value of the eſtate ſhall extend, the ſame ſhall be taken by her in or towards ſatisfaction of the eight thouſand pounds deviſed to her by the will of her mother, and that the plaintiffs may be decreed an equivalent for the eight thouſand pounds, to the value of the ſettled eſtates.

The end of the croſs bill was, that the defendant *Greenbank* may account with the plaintiffs for the perſonal eſtates of *Dorothy Price* and *William Worth*, and for the rents and profits of ſuch part of their freehold, copyhold and leaſehold eſtates, as ſhall appear to belong to the plaintiffs, and deliver the poſſeſſion of the ſaid freeholds, copyholds and leaſeholds to the plaintiffs, and that all other neceſſary parties may join in conveying and ſurrendering the ſame to the plaintiffs, or as they ſhall direct.

William Winſmore, who was a tradeſman in *Worceſter*, in *March* 1739 intermarried with *Mary Worth*, the only child and heir of Doctor *William Worth*, archdeacon of *Worceſter*, who was very rich, without the knowledge or conſent of her father, Mr. *Winſmore* being at that time upwards of forty years of age, and ſhe not quite ſixteen.

The marriage was kept ſecret for many months, and when it broke out, Doctor *Worth* was at firſt greatly enraged at it, but *Winſmore* pretending that if the Doctor would let him have fourteen hundred pounds, part of three thouſand pounds, his wife's portion, independant of her father, he would make a ſuitable ſettlement; Doctor *Worth* did accordingly pay the ſum to him, and, in appearance, was reconciled to him; but Doctor *Worth* diſcovering ſoon after a fraud intended on him by *Winſmore*, and no ſettlement made, ſhewed an utter averſion to him, and would never be reconciled to him afterwards.

Winſmore being in inſolvent circumſtances, a commiſſion of bankruptcy iſſued againſt him, the 3d of *March* 1740. and *Johnſon* and others were choſen aſſignees.

On the 2d of *June* 1741 his wife was brought to bed of a daughter, the defendant *Mary Winſmore*, and afterwards Mr. *Winſmore* proving an unkind huſband, ſhe withdrew from him in *December* 1741, under the influence and perſuaſion of her father, who on thoſe terms became reconciled to her.

In *Auguſt* 1742 Doctor *Worth* died, but before his death he made his will, dated the 5th of the ſame *Auguſt*, and thereby deviſed "all

" all his freehold, copyhold, and real eſtates, whatſoever and where-
" ſoever, and all his leaſehold eſtate to *Wood* and *Greenbank*, their
" heirs, executors, adminiſtrators and aſſigns, upon truſt that they
" ſhould apply the rents, iſſues and profits thereof, *to and for the*
" *ſole and ſeparate uſe of his daughter* Mary, *wife of* William Winſ-
" more, *during her life, and at her diſpoſal, and not to be ſubject to*
" *the debts, power or controul of her ſaid huſband, but that her re-*
" *ceipt, notwithſtanding her coverture, ſhould be effectual for the ſame,*
" *and upon further truſt that they ſhould permit and ſuffer his ſaid*
" *daughter, by any deed or writing to be by her executed, in the*
" *preſence of three or more credible witneſſes, (notwithſtanding her*
" *coverture) to give, deviſe and bequeath all his ſaid freehold, copyhold*
" *and leaſehold eſtates, to ſuch perſon and perſons as his ſaid daughter*
" *ſhould think fit, ſhe having a particular regard to his poor relations*
" *in* Cornwall.

" All the reſt and reſidue of his goods, chattels, and perſonal
" eſtate, after payment of his debts, legacies and funeral expences,
" he gave to *Wood* and *Greenbank*, in truſt *for his daughter, and*
" *for her ſeparate uſe and diſpoſal, and not ſubject to the debts, power*
" *or controul of her huſband*;" and of his will appointed *Wood* and *Greenbank executors.*

On the 24th of *December* 1742, Mrs. *Winſmore* died at *Ryegate*, in *Surry*, where ſhe had, ever ſince her leaving her huſband as aforeſaid, lived ſeparate, but before her death, ſhe, in purſuance of the power given to her by her father's will, did on the 16th of *October* 1742, duly execute her power of appointment and diſpoſition delegated to her by her father's will, over his whole real and perſonal eſtate, by a writing ſigned and ſealed in the preſence of three witneſſes, and in the form of her laſt will and teſtament, " where-
" by ſhe gave and bequeathed to her daughter *Mary Winſmore*
" one hundred pounds a year, until the age of ten years, and after,
" the further ſum of fifty pounds a year till ſhe attains the age
" of twenty-one; *the ſaid ſums to be applied by her executors for the*
" *education and maintenance of her ſaid daughter according to their*
" *diſcretion*:" She alſo gave and deviſed " to her ſaid daughter
" 8000*l. to be paid her when ſhe ſhall attain the age of twenty-*
" *one years, but if her ſaid daughter ſhould die before the ſaid*
" *age, without iſſue living at her death, then ſhe bequeathed the ſaid*
" 8000*l. to her couſins* Henry Worth, Eſquire, *and* Francis Hearle,
" Eſquire, *to be equally divided between them:* and after giving ſe-
" veral other legacies, charges all her real and perſonal eſtate which
" ſhe was intitled unto by virtue of her father's will, with the pay-
" ment thereof, and appointed *Greenbank, &c.* joint executors,
" guardians and truſtees to her daughter till twenty-one; *and all*
" *the reſt, reſidue and remainder of her real and perſonal eſtate,*
" *which ſhe was intitled unto, or intereſted in, ſhe gave and deviſed to*

" *the plaintiffs, their heirs, executors and adminiſtrators, for ever, as* " *tenants in common, and not as joint-tenants.*"

William Winſmore's certificate was allowed in *September* 1742, and the aſſignment of the wife's eſtate from the commiſſioners to the aſſignees was in *June* 1744.

Mr. Attorney General for the plaintiffs, made this queſtion, whether Mrs. *Winſmore*, under the ſanction and authority given her by her father's will, could diſpoſe of the real eſtate, as ſhe has done by her will, notwithſtanding her infancy.

There was no intention of Doctor *Worth*'s appears to poſtpone the time for his daughter's diſpoſing of his real eſtate any more than his perſonal.

She recites the power, but it is objected, that being an infant, ſhe is incapable of making any alienation of her real eſtate.

It is admitted on the other ſide, that as a feme covert, ſhe might diſpoſe of real eſtate, though not properly by a will, yet by an inſtrument in the nature of a will.

A perſon may clearly by a power enable one to do an act, who is in herſelf incapable of doing it: If a feme covert makes a leaſe, it is abſolutely void, but if an infant makes a leaſe, it is not abſolutely void, for he may confirm it when of age; an infant likewiſe may preſent to a church, ſo that they may do ſeveral things where they may be enabled by authority, though they cannot do it merely of themſelves.

For this purpoſe *Cro. Jac. fol.* 80. was cited, and *Co. Lit. fol.* 45. *b.* an infant ſeiſed of land holden in ſocage, may by cuſtom make a leaſe at the age of fifteen years, and ſhall bind him, which leaſe was voidable at common law. The year book of the 37 *H.* 6. *fol.* 5. *Placito* 9. is to the ſame effect; and in *Cro. Eliz.* 652. it is laid down that an infant may do by cuſtom, what he could not otherwiſe by law, *Noy's Rep. fol.* 41. that a grant of a copyhold by an infant is good: What is it gives him a capacity? The law conſiders the cuſtom of the place as enabling him to do an act, which he could not otherwiſe have done.

To apply theſe caſes, the whole eſtate here is given to truſtees, to permit her to receive rents during life; can it be denied, that ſhe could have applied the rents as ſhe thought fit? now this ſhe could not have done by law, and yet ſhe certainly might by this delegated power.

There

There is no caſe where there has been a determination in point, and therefore muſt be governed by the reaſon of the thing.

Lord Chancellor ſtopped the plaintiffs council, and mentioned the following one in *Moore* 512. *where it is ſaid by Sir* Francis Moore arguendo, *that where cuſtom allows an infant to make a feoffment at* 15 *years of age, if he makes a feoffment to the uſes which he ſhall appoint by his will, if he makes a will, that which is void as being his laſt will, becauſe he is an infant, yet ſhall ſerve to declare the uſe of the feoffment.*

The council for the plaintiffs inſiſted this was no authority, but only *arguendo*; and as the diſpoſition under the will of Mrs. *Winſmore* aroſe from the appointment, if taken otherwiſe would clearly overturn the intention of *Doctor Worth*, and therefore hope the court will think ſhe had a proper power to diſpoſe of the real eſtate.

The next queſtion is, whether the daughter of Mrs. *Winſmore* muſt not accept of the eight thouſand pounds that is given her under her mother's will, according to the terms of the will, or if ſhe claims contrary to it, renounce the will *in toto*.

Nothing is a more known rule in this court, than where a perſon will take benefit by a will, he is not to contradict or contravene the will, where it is not for his advantage, and therefore ſhe muſt take according to the intention of the teſtatrix, and cannot claim the eſtates deviſed away from her.

The next queſtion is, whether the ſurplus intereſt ſhall accumulate till the daughter of Mrs. *Winſmore* is of age, or ſink into the reſidue for the benefit of the reſiduary legatee.

The appointing a particular maintenance of different ſums at different periods, ſhews clearly her intention the ſurplus intereſt ſhould not accumulate.

As to the ſum of fourteen hundred pounds, whether this is not in part payment by Doctor *Worth* of Mrs. *Winſmore*'s legacy from a collateral relation Mrs. *Price*, or whether it is a bounty from the father.

I apprehend it to be ſo clearly in part payment of Mrs. *Price*'s legacy, that the other is too forced a conſtruction to have any weight.

As to Mr. *Winſmore*, the huſband's being tenant by the curteſy, though this court has conſtrued a huſband to be tenant by the cur-

teſy of a truſt, yet that does not extend ſo far as to make him tenant by the curteſy, where it is a truſt created by a teſtator clearly with an intention to exclude the huſband; in ſupport of this he cited *Sandys* verſus *Dixwell*, before Lord *Hardwicke*, *December* 8, 1738. (*Tr. Atk.* 607.)

Mr. *Evans* of the ſame ſide argued, That an infant may appoint a guardian by deed, and by the law has a power of alienating property: and in the caſe of *Arlington* verſus *Sir Walter Cavalry* in 1732. the infant then but one year old, conveyed by deed under hand and ſeal, and held to be good.

The cuſtom of gavelkind empowers an infant to diſpoſe of real eſtate at the age of fifteen.

Mr. *Huſſey* of the ſame ſide argued, that Mrs. *Winſmore* took no more than an eſtate for life, with a power or diſpoſition to diſpoſe of the fee.

He cited 3 *Leon.* 51. to ſupport this diſtinction, that where an eſtate is firſt given for life, a power to diſpoſe as the deviſee for life ſhall think fit, does not make the eſtate for life merge, but is ſtill ſubſiſting, and the latter is conſidered only as a power, and not an expreſs deviſe in fee. *Vide Tomlinſon* verſus *Dighton*, 1 *P. Wms.* 149.

An infant or feme covert may deliver ſeiſin, becauſe one cannot prejudice himſelf, nor the other her huſband: for the ſame reaſon he may preſent to an advowſon, becauſe he does not prejudice himſelf, as he is not intitled to the profits: for the ſame reaſon he may grant copyholds; and this principle ſeems to be the teſt on which all theſe caſes are tried.

Mr. *Noel* to this point ſaid, an infant may be vouched in a common recovery, and alſo bound by aid prayer.

Mr. *Wilbraham* for the aſſignees under the commiſſion of bankruptcy againſt *Winſmore*.

That there is ſuch an intereſt in Mrs. *Winſmore* under *Doctor Worth's will*, as muſt make her huſband tenant by the curteſy.

He admitted that Doctor *Worth* intended to veſt his eſtate in truſtees for the ſole and ſeparate uſe of his daughter; that the direction is to pay to her the rents and profits of his real eſtate during her life, and that they ſhall by any deed, *&c.* ſuffer his daughter to diſpoſe of all his freehold, *&c.*

But

But then he inſiſted, that truſts are to be governed as near as may be by the ſame rules as uſes were at common law; and ſo much as is not diſpoſed of reſults back to the grantor, and that the truſt is a deſcendible intereſt, and will paſs in the ſame manner as in the caſe of a legal eſtate.

He alſo inſiſted, when this equitable intereſt was given to receive the rents and profits for her life, the whole reſidue of the intereſt in the fee devolved upon her; for if the remaining part of the equitable intereſt was not in abeyance, then it was *in Doctor Worth*, and conſequently deſcended upon his heir.

The teſtator directs, that the very act of deviſing and giving ſhould be the act of the daughter, and therefore is not a mere execution of a power, but the very gift of the daughter herſelf, and ſhe is the compleat owner of the fee-ſimple of the truſt.

A power is given to this lady to diſpoſe of it in her life-time, and not barely to take effect after her death; if ſo, then ſhe had ſuch a power as gave her the total intereſt, and might have deſcended to her daughter; for there was no other way of the daughter's taking it, becauſe the mother took it by deſcent from her father, and the daughter as deriving from the mother.

The next queſtion is, whether Mrs. *Winſmore* took ſuch an intereſt as ſhe could diſpoſe of in her ſituation, *infancy!*

It is admitted to be the law in gavelkind, that an infant of fifteen may make a feoffment of land, but then it muſt be very particular, for it muſt be for money, and a conſideration of *five ſhillings* would not be ſufficient.

In the caſe of copyholds mentioned, that is in the caſe of an infant Lord, and is merely for the intereſt and advantage of the copyholder, and the infant is only *inſtrumental*, and it is always *cui Dominus conceſſit.*

In general, I do not know any inſtance where infants have been allowed to execute theſe ſort of powers, which will affect the intereſt; and the preſent is a power coupled with an intereſt, and requires as much ſtability of mind to execute as a feoffment.

The reaſon why the law of moſt countries fixes it to a certain period of age when a perſon ſhall have power to diſpoſe, is, that it would otherwiſe be liable to perpetual controverſy in particular caſes, whether the perſon has capacity or diſcretion to diſpoſe or not.

It is ſaid, whenever a power is executed it becomes a part of the original deed or will under which the power is given.

This ſeems to be abſurd, becauſe they cannot circumſcribe it by any rule but real diſcretion, and it would be more convenient to adhere to the general rule of law, that infants cannot diſpoſe of real eſtate till twenty-one, or they may as well ſay that ſuch a power given to a lunatick is good, for ſuch a perſon may as well be capable of diſpoſing as an infant in arms.

Mr. *Capper* for the creditors of Mr. *Winſmore* inſiſted, that the obtaining his certificate will not make any alteration ſo as to make it a new acquiſition, and go to him, but will belong to his creditors; for this veſted by the commiſſioners firſt aſſignment, and a ſecond aſſignment upon any property falling into poſſeſſion, is rather *ex abundanti cautelâ*, and not abſolutely neceſſary; and for this purpoſe cited 1 *P. Wms.* 382.

Mr. Solicitor General, council for the daughter of Mrs. *Winſmore*, ſaid, in the caſe of *Jewſon* verſus *Moulſon*, before Lord *Hardwicke*, *October* 27, 1742. (2 *Tr. Atk.* 417.) It is laid down that creditors of a bankrupt muſt take in the ſame manner as the bankrupt himſelf would do in caſe the wife was living; but though he is dead here, yet the child of the marriage has the ſame right with the mother, and has an equity to be provided for, as well as the wife of the bankrupt.

The huſband made no ſettlement on the wife and the children of the marriage, and beſides received fourteen hundred pounds of the wife's fortune, ſo that he had within one hundred pounds, a moiety of the wife's fortune under Mrs. *Price*'s will, which is more than what he ought to have, and therefore the infant daughter is intitled to the remainder of this legacy as a proviſion.

As to the point of the ſurplus intereſt of the eight thouſand pounds, there is a circumſtance in this legacy which ſhews it veſted before the time of payment, becauſe if ſhe dies before twenty-one leaving iſſue, it veſted in her, and goes to her repreſentatives, and therefore it is the intention of the teſtatrix it ſhould veſt in her for the benefit of the infant's family, and not with any view to the reſiduary legatee, and is poſtponed only on account of her tender years, being little more than a year old.

The laſt queſtion, and the principal one is, whether Mrs. *Winſmore*'s is a good deviſe of the real eſtate.

I will conſider the opinion of law firſt with regard to the infant's diſcretion.

The law of *England* draws the line at the age of twenty-one, and therefore all courts muſt look upon a child of nineteen as a child of five years old; and you are by the law concluded from ſaying, ſhe is more capable at one period of her age than another; and this not only for the ſake of herſelf, but for the ſake of her heirs.

There are exceptions indeed to this general rule, but it is where infants are mere conduit pipes or inſtruments that do not fall within the reaſon of the law; for he has no diſcretion there to exerciſe, as in a preſentation to a church, becauſe the ordinary will take care that he is *perſona idonea* who is preſented, and therefore *a ſucking child*, in the lap of the mother, may preſent.

An infant as an executor may apply aſſets properly, but cannot there do an act which would make him guilty *of a devaſtavit*.

Powers in the law language are divided into powers appendant and powers collateral.

As to powers that are naked authorities; he that is in by virtue of the power is in by the grantor of the power, and was ſo conſidered a good while; but then in the modification of eſtates they hold in courts of law, where they are coupled with an intereſt, they might be releaſed or extinguiſhed, and where they flow from an intereſt, they were conſidered as modes of ownerſhip; and with this view courts of law conſtrue them liberally as part of the old ownerſhip belonging to the grantor of the eſtate.

The law has ſaid, that an infant may execute a naked authority; but I doubt whether a private perſon could give ſuch a power to an infant coupled with an intereſt, becauſe this is reverſing the law; for the infant is ſeiſed in fee, and ſhe will affect the inheritance at a time when the law ſays ſhe is incapable of doing it, and is introducing a new ſort of invention, in contradiction to the law.

And therefore it is an exceeding doubtful thing, whether a private perſon could give ſuch a power.

May 31, 1749. *Hearle* and *Greenbank et econtra.* The Solicitor General went on for the defendant *Mary Winſmore* the infant.

Inability of infancy is a natural inability: before the ſtatute of uſes, all theſe powers were merely uſes; an infant could not by bargain and ſale convey the uſe of the land, becauſe equity follows the law, and he was equally unable to convey the uſe.

The

The only thing that looks like an authority is what fell from your Lordſhip; one part of Sir *Francis Moore*'s argument led him to aſſert this propoſition, that it ſhould ſtand good as a declaration of the uſes of a feoffment, though it is void as a will; but the matter there was intirely compounded, ſo that it does not appear of what opinion the court was.

In a late caſe of *Oake* verſus *Heath* before your Lordſhip, you was pleaſed to ſay, that where a power was executed by way of will, and the appointee died before the teſtatrix, it lapſes as much as if it had been a deviſe to a perſon of perſonal eſtate or real, and legatee dies in the life-time of the teſtator, and if the power is to be executed by a will, that will is ſubject to all the formality and ceremony as in any other common caſe of a will.

The ſtatute of wills gave a power to deviſe to every perſon whatever; and though it does not ſay he ſhall not deviſe, yet the law operates upon it, and will not ſuffer an infant to do it who is under a legal inability to deviſe.

Wherever a man makes a ſettlement, and a limitation to his firſt and every other ſon for life with a power, as each ſhall come into poſſeſſion, to make leaſes and a jointure, there is not an inſtance to be ſhewn where it has been held that an infant, on whom this power devolves, could make a leaſe or a jointure; and there have been numberleſs acts of parliament to enable an infant to make a jointure, and others to enable them to make leaſes, which implies it cannot be done without.

Lord Chancellor ſaid, there were inſtances of guardians being appointed, in caſe the limitation ſhould take place in an infant, to make leaſes for him.

Mr. Solicitor General: This is ſtrong for my client, becauſe it ſhews the opinion of mankind that infants could not do thoſe acts, and therefore appoint a guardian who muſt himſelf too be of age.

He inſiſted, there can be no rational conſtruction put on this will, to ſhew the teſtator had any idea of his daughter's diſpoſing of real eſtate before her age of twenty-one.

At the time of his will Mrs. *Winſmore* was a young woman of nineteen, who had gone through the peril of childbirth, in good health, and not at all likely to die in two years time, ſo that he had no other view but to make her a *feme ſole*, becauſe the bankruptcy of the huſband happening in 1740, he was guarding againſt his fortune's falling into the huſband's hands.

Sole

Sole and ſeparate uſe of my daughter, is always in contradiction to the huſband.

He was not contented with ſaying it affirmatively, he goes on and ſays it negatively, her receipt ſhall be good and valid notwithſtanding her coverture; this is what he is providing for.

The next thing, as the marriage here, might continue during her life, is, to give her power to diſpoſe notwithſtanding her coverture; ſo that this is the only impediment the father is endeavouring to remove.

There is not a word in Doctor *Worth*'s will that ſays ſhe ſhall do it notwithſtanding her infancy, or notwithſtanding any other cauſe, objection or impediment.

To ſhew it in a ſtrong light, let me ſuppoſe ſhe had loſt her ſenſes, and had granted, being a lunatick, by deed or will; would this have been an execution of the power? and yet a lunatick in the eye of the law is not more incapable of doing an act than an infant.

The next queſtion is, whether the infant can claim the lands contrary to the will, and yet be intitled to her legacy of eight thouſand pounds likewiſe?

The rule, as laid down by the other ſide, is, you cannot take by the will in one reſpect, and reject it in another.

But the queſtion here is, how it will be if the teſtatrix has taken upon her to deviſe lands to which ſhe had no right, and whether in ſuch a caſe, if the deviſee inſiſts upon a perſonal legacy under the will, ſhe cannot ſet up a claim to the lands contrary to the will.

The will here cannot be read in evidence to a jury, becauſe the teſtatrix executed it under age, and conſequently had no power to deviſe; therefore if we are right in our firſt poſition it is no will, it is abſolutely void, and according to the caſe in *Siderfin* cannot be read.

The rule is, you ſhall make good the whole will if you elect to take by that will, but cannot hold where it is no will; for you ſhall not make good the whole will, when in law it is no will at all.

As to the point of the huſband's being *tenant by the curteſy*, it is rightly determined that a huſband may be tenant by the curteſy of a truſt eſtate, becauſe the greateſt property of the kingdom is now under truſt, but was never finally determined till the caſe of *Caſburne* verſus *Inglis* before your Lordſhip in *Hilary Term* 1737, 1 *Tr. Atk.*

Atk. 603.) where you held a huſband might be tenant by the curteſy of an equity of redemption.

This will not affect the preſent caſe, becauſe here the intention of the teſtator is to take from the huſband all power of this eſtate, and that he ſhould have nothing to do with it.

Suppoſe in this caſe a legal conveyance was directed to be made, the truſtees muſt convey to perſons in truſt for her life, for her ſole and ſeparate uſe.

In the caſe of *Bennet* verſus *Davis*, 2 *P. Wms.* 317. there were no truſtees interpoſed, and yet the Maſter of the *Rolls* held the huſband to be a truſtee for the heirs.

Therefore the court will never hold the huſband to be tenant by the curteſy contrary to the plain intention of the teſtator, and notwithſtanding he has placed truſtees here to prevent his being ſo.

Mr. Attorney General's reply.

Firſt, as to the ſurplus intereſt of the eight thouſand pounds.

The maintenance is not given out of the intereſt of the eight thouſand pounds, but out of the general eſtate, for not a word is ſaid out of what fund it ſhould ariſe; and if this eight thouſand pounds was ſevered, which it may be by this court, and not produce any intereſt, yet the infant is intitled to maintenance notwithſtanding; and there is no preſumption that teſtator intended this intereſt ſhould accumulate for the benefit of the infant.

Next, as to the principal point, where ſhe charges all her eſtate freehold, *&c.* with the legacies.

This depends on two things.

Firſt, whether Doctor *Worth* intended ſhe ſhould have this power during her infancy.

Secondly, if he did intend, then, whether this would not have been good in law, much more in equity.

To ſhew firſt this was the intention of the teſtator, the daughter at this very time was ſeparate from the huſband, and abſolutely refuſed to live with him.

As to the ſecond thing:

There is no rule of law that prevents ſuch an intention from taking effect; the only one pretended is, that an infant cannot diſpoſe of real eſtate at twenty-one.

This is not applicable to the preſent caſe, but only where an infant takes in his own right, and not where he takes by a power from another perſon.

As in the inſtance put by Sir *Francis Moore* in Lord *Buckhurſt*'s caſe, of a cuſtom for an infant to alien at fifteen by feofment.

A uſe by this caſe appears plainly to be declared by a feofment, which could not be deviſed by a will.

It is ſaid this does not operate by way of execution of her power, but by way of diſpoſing of her intereſt.

Her will begins with ſaying, In performance of the power, *&c.*

It is a rule, where a perſon has two ways of doing a thing, and it cannot be done one way, it ſhall be done another, *ut res magis valeat quam pereat*; ſo that if it cannot be diſpoſed of by way of intereſt, yet it ſhall be a good diſpoſition by way of power, and ſo laid down in the caſe of *Rich* verſus *Beaumont*, *Feb.* 9, 1727.

This, ſaid Lord Chancellor, is the only inſtance of a caſe made by the direction of the Houſe of Lords for the opinion of the judges.

Mr. Attorney General laid it down, that a letter of attorney to an infant to ſell real eſtate is good, and he may ſell under that power.

Lord Chancellor aſked, if there was any caſe determined to this purpoſe.

Mr. Attorney General anſwered, he knew of none, but went on general principles.

Upon the point of the eight thouſand pounds deviſed to the infant *Mary Winſmore*, and whether ſhe may ſtill claim the real eſtate;

He ſaid, though a will of real eſtate by an infant cannot be read as a will, yet it may be read ſo far as to ſhew the intention of the teſtatrix, that ſhe ſhould not have both the eight thouſand pounds and the real eſtate too; and for this purpoſe cited the caſe of *Noys* verſus

verſus *Mordaunt*, 2 *Vern.* 581. and therefore the will having no operation in law does not make it leſs a will.

As to the point *of tenant by the curteſy*;

If the court is of opinion this is not a good execution of the power, yet the huſband cannot be tenant by the curteſy, becauſe, in order to comply with the intention of the teſtator, your Lordſhip will direct the conveyance to be to the ſeparate uſe of the wife for life, then to truſtees to preſerve the contingent remainders which may ariſe out of the execution of the power; and conſequently, as there was no eſtate of inheritance in the wife during the coverture, he huſband is not intitled to be tenant by the curteſy.

Mr. *Wilbrabam*'s reply in the croſs cauſe for the aſſignees of *Winſmore*.

He inſiſted the huſband was tenant by the curteſy.

If the reſidue of the intereſt after the eſtate for life was not in the wife, where was it? The law will not ſuffer the fee to be in abeyance, and Mr. Solicitor General admitting, if the power is not well executed, the real eſtate deſcended upon *Mary Winſmore* the infant as heir to her mother, I apprehend the mother muſt have the inheritance; or elſe, what was there to deſcend upon the infant?

Lord Chancellor, thinking the principal point intirely new, took time to conſider till the third of *Auguſt* 1749, on which day he gave judgment.

LORD CHANCELLOR.

Mrs. *Winſmore* had four kind of eſtates.

Firſt, a leaſehold eſtate ſettled on the marriage of her father and mother, by a deed of the third of *December* 1642, made after marriage, but purſuant to an agreement before, for the term of ninety-nine years; the term expired, and was renewed on a leaſe for three lives, and ſo ſtood at Doctor *Worth*'s death.

The leaſe for lives Miſs *Winſmore* is intitled to as a ſpecial occupant, being a freehold deſcendible, and conſequently the huſband could have no right, nor his aſſignees as ſtanding in his place.

This being a freehold leaſe came to Mrs. *Winſmore*, and the daughter was intitled as a ſpecial occupant, being a freehold leaſe deſcendible, and conſequently the huſband could have no right, nor his aſſignees as ſtanding in his place. I mention this to lay it out of the caſe.

The leaſe for lives Miſs *Winſmore* is intitled to as a ſpecial occupant, being a freehold deſcendible, and conſequently the huſband could have no right, nor his aſſignees as ſtanding in his place.

The

The next kind is the perſonal eſtate that moved from *Dorothy Price*, the aunt of Mrs. *Winſmore*.

She, upon the 24th of *Auguſt* 1761, made her will, *and thereby deviſed ſeveral copyholds, which are chattels, and leaſeholds, together with the reſidue of her real and perſonal eſtate, to her niece* Mary, *the daughter of Doctor* William Worth.

And under this will Mrs. *Winſmore* was intitled to about three thouſand pounds.

There is no doubt but this part has ſurvived to the huſband, and the aſſignees under the commiſſion of bankruptcy, as ſtanding in his place, are intitled, and are not affected by the power in Doctor *Worth*'s will.

But upon that a queſtion has been made on behalf of the infant daughter, the conſideration of which I ſhall at preſent poſtpone.

The next kind is the perſonal eſtate of Doctor *Worth*, the reſidue of which is to be *for the ſeparate uſe* of Mrs. *Winſmore*, and to be at her diſpoſal.

The rule is, where a perſonal eſtate is given to the ſeparate uſe of a feme covert, ſhe is conſidered as a feme ſole, and may diſpoſe of it, and all the accruer upon it ſtands clear of any objection becauſe ſhe was above the age of ſeventeen; for ſeveral of the books go ſo far as to ſay, an infant above fifteen may give perſonal eſtate by will.

Where a perſonal eſtate is given to the ſeparate uſe of a feme covert, ſhe is conſidered as a feme ſole, and may diſpoſe of it, and all *the accruer*, as ſhe is beyond the age of ſeventeen.

The next kind is the real eſtate of the father.

And here the queſtion is, whether Mrs. *Winſmore*'s will is an execution of the power given her under the will of the father.

I ſhall divide it into three queſtions:

Firſt, Whether the power has been well executed:

Secondly, Whether the plaintiffs in the original cauſe, who claim the reſidue of the real eſtate under the will of Mrs. *Winſmore*, are intitled in equity:

Thirdly, Whether the defendant *William Winſmore*, the bankrupt, is intitled to be *tenant by the curteſy* of his wife's eſtate, there being a child of the marriage.

The firſt is a very conſiderable queſtion, and has never been determined.

There is no precedent, either in a court of law or equity, where it has been held, a power over real eſtate executed by an infant is good; and as I can find no precedent for it, I will make none.

As to the general queſtion concerning powers in the large ſenſe of the word;

There are ſeveral kinds of powers infants may execute:

An infant may execute a power is where he is a mere inſtrument only.

As where an infant is a mere inſtrument or conduit-pipe, and his intereſt, not concerned.

Lord *Coke*, in his *Comment on Litt. p.* 52. *ſec.* 66. ſays;

Delivering ſeiſin is a mere miniſterial act, *and requires no judgment or diſcretion*; but though the latter words are expreſſed generally, the law antiently was not ſo; and in *Co. Litt.* 128. *a.* Lord *Coke* himſelf cites a paſſage out of the *Mirror*, in which it is expreſsly ſaid, *an infant cannot be an attorney.*

As in the ſenſe of an attorney in a court of juſtice he cannot be; but when we ſpeak of an infant's being an attorney, it is a good deal different from theſe kind of powers.

Before the ſtatute of *Uſes*, the power was over the uſe, therefore all things neceſſary to be done over legal eſtates were done by way of conditions; and this was the method of exerciſing an authority over the legal eſtates; and at law an infant might perform a condition where it was for his benefit.

As to other kind of powers by an infant, I find no ſort of authority.

It is ſaid an infant may preſent to a church.

The ſtrong ground the law goes on, in regard to an infant's preſenting to a church, is, there can be no inconvenience, becauſe the biſhop is to judge of the qualification of the clerk preſented.

What is the reaſon? Becauſe a preſentation is not a thing of profit, of which the guardian can make any benefit; but the ſtrong ground the law goes on is, there can be no inconvenience, becauſe the biſhop is to judge of the qualification of the clerk preſented.

It has been ſaid, an infant may declare the uſe of a fine or common recovery, where he ſuffers it without a privy ſeal, and the uſe is good, and the fine and recovery ſhall ſtand.

Why

Why does the law allow it? becauſe, for want of a remedy; for as the matter of record ſtands, the law ſuppoſes he was of full age, and will not preſume a judge or commiſſioners would take the fine upon any other terms; and the deed to lead the uſes being part of the fine, ſhall likewiſe ſtand, and therefore all this ariſes from a want of remedy.

The reaſon why the law allows a fine and recovery ſuffered by an infant to be good, is, that it ſuppoſes he was of full age, and will not preſume a judge will take a fine upon any other terms, and a deed to lead the uſes, being part of the fine, ſhall likewiſe ſtand.

But it is ſaid an infant may, by the cuſtom of *Kent*, and of ſeveral manors, alien his eſtate; and if he may do it by cuſtom, why not by a power?

Now a cuſtom is *lex loci*, and is preſumed in law to have a reaſonable commencement, juſt the ſame as if a private act of parliament was made to give an infant ſuch a power, and a cuſtom being *lex loci*, it ſtands as ſtrong upon this, as if an act of parliament had been made for that purpoſe.

By the cuſtom of *Kent*, an infant may alien his eſtate; for cuſtom is *lex loci*, and being ſo, it ſtands as ſtrong upon this, as if a private act of parliament had been made for that purpoſe.

The caſe in *Moore* 512. has a reſemblance to a power, but it is only put by Sir *Francis Moore arguendo*, at the bar, and no authority is cited to ſupport it.

In *Brooke's Abr.* 230. and *Rolls* 611. 'tis laid down, "that if after "the ſtat. of 32 *H.* 8. a man ſeiſed of land infeoffs *A.* and *B.* of this, "to the uſe and intent to perform his will, and then by his will re- "citing the ſaid feoffment, and feoffees to ſtand ſeiſed to the ſaid uſe, "declares his will to be, that the ſaid feoffees and their heirs ſtand "ſeiſed of this to the uſe of *J. S.* and the heirs of his body, this "is a good deviſe of the land by the intention of the deviſor, "though by no poſſibility the feoffees can ſtand ſeiſed to the "ſaid uſe."

This caſe differs very little from the caſe put by *Moore*, which ſhews the land may be deviſed by cuſtom, but not the uſe, and therefore I take this caſe not to be law.

The council for the plaintiffs have gone further, and inſiſted a *feme covert* may exerciſe ſuch a power, and cited the caſe of *Rich* verſus *Beaumont*, *in the Houſe of Lords*.

It was ſo determined in the caſe of *Lady Travel*, *before Lord Chancellor King*; ſo in the common caſe, where a power is given to a woman tenant for life, to execute leaſes, and if ſo, it was argued, why not to an infant of the age of diſcretion?

It has been ſaid too, that the diſability of a feme covert is not more favoured in law than the diſability of an infant, or is rather a ſtronger diſability.

In a marginal note in the caſe of *Moore* verſus *Huſſey*, in *Hob.* 95. and which note is allowed to be his own, is this obſervation, Coverture was not at common law ſo far protected as was infancy; and ſome other diſabilities, *(ſcilicet) non ſanæ memoriæ, ouſter le mere* and impriſonment, though a woman covert hath no leſs judgment than diſcovert.

The ſeparate examination of a feme covert on a fine is good, becauſe when delivered from her huſband her judgment is free.

But her diſability doth not ariſe from want of reaſon; and it is upon this ground that the ſeparate examination of a feme covert on a fine is good, becauſe when delivered from her huſband her judgment is free.

But an infant's diſability is altogether from want of capacity.

Co. Litt. 246. *a.* "the dying ſeiſed of a diſſeiſor ſhall take away "the entry of the wife after the death of her huſband, as well for "that ſhe herſelf when ſole might have entered and recontinued "the poſſeſſion; *as alſo it ſhall be accounted her folly, that ſhe would "take ſuch a huſband which could not enter before the diſcent.*"

A dying ſeiſed ſhall not after the huſband's deceaſe take away the wife's entry, for no laches can be imputed to her, as after coverture ſhe could not enter without her huſband.

But there, if the woman were within age at the time of her taking huſband, then the dying ſeiſed ſhall not after the deceaſe of her huſband take away her entry; becauſe no folly can be accounted in her, for that ſhe was within age when ſhe took huſband, and after coverture ſhe cannot enter without her huſband. Co. Litt. 246. b.

So in 10 *Co.* 43. *a. Mary Portington*'s caſe, "the uſage (ſaith he) "has always been upon a common recovery againſt huſband and "wife, to examine the wife, and to grant a dedimus poteſtatem to "take her acknowledgment upon examination, as in the caſe of a "fine." *But a common recovery againſt an infant, although he appears by guardian, ſhall not bind the infant; for the infant has not ſuch a diſpoſing power of the land as the huſband and wife have, but is utterly diſabled by law to convey or transfer his inheritance or freehold to others during his minority.*

There is an abſolute diſability in an infant, to diſpoſe of his inheritance.

So that in law there is a total abſolute diſability in an infant, that by no manner of conveyance can he diſpoſe of his inheritance.

But then it has been inſiſted here is no ſort of inconvenience, for Mrs. *Winſmore* being above the age of nineteen was as diſcreet as if ſhe had attained the age of twenty-one, and the court may judge whether ſhe had diſcretion enough to execute ſuch a power.

This is of ſuch latitude and extent, that I own I ſhould be very ſorry, as preſiding in a court of juſtice, to be intruſted with; for it does not come in queſtion till after the death of the infant, and no perſonal inquiry or examination can then be had of her judgment and diſcretion.

For this I ſhall refer to *Hob.* 225. *in pleading, an age certain muſt be ſet down, and not left upon telling twelve pence, or meaſuring a yard of cloth, as ſome books are, that the court may judge it an age of diſcretion*; for cuſtom muſt not abrogate the law *of nature*; the law will not admit it in the caſe of a cuſtom, then why ſhould it in the execution of a power?

This is the general reaſon that determines my opinion.

And if the law had been otherwiſe, it muſt have happened in abundance of inſtances, for powers are given to infants to raiſe money, to make leaſes, *&c.*

Infants come in the courſe of ſucceſſion into poſſeſſion, and yet it has never been held he could exerciſe any ſuch power over real eſtate; and the applying for ſeveral private acts of parliament ſhew the ſenſe of mankind in this reſpect. Such an application was made in the caſe of the preſent Sir *Thomas Parkins.*

It has never been held an infant could exerciſe ſuch a power over real eſtate, and the applying for private acts of parliament ſhew the ſenſe of mankind in this reſpect.

In the caſe of *Evelyn* verſus *Evelyn*, 2 *P. W.* 603. the caſe of Lord *Kilmurray* verſus Doctor *Grey*, is more fully ſtated than in any other place. "By the ſettlement a power was reſerved of charging "divers of the lands at any time during his life with three thouſand "pounds: a perſon borrowed this ſum of the Doctor, and having "executed his power while an infant, died ſoon after he came of "age. The plaintiff his ſon brought his bill to redeem, on pay-"ment of the principal ſum borrowed; but the court decreed it "on the common terms, becauſe here was a power given him by "act of parliament to raiſe the money, and immediately to give ſe-"curity, which was actually done."

I ſent for the regiſter book of this caſe, *Eaſter term* 1712, and there it looks as if it was a general power executed by virtue of a private act of parliament.

I then ſent for the record of the act of parliament, and there is an expreſs clauſe to make all acts relating to the ſettlement, or in purſuance of any power therein, good, and that notwithſtanding his minority they ſhall be as valid as if he had attained the age of twenty-one.

Therefore when Lord *Kilmurray* made a ſettlement with ſuch reſervation, with the approbation of his truſtees, the act of parliament operated upon it.

Taking it therefore in general, I am of opinion an infant cannot execute ſuch a power.

The next Conſideration is, if there is any thing particular in this power.

Firſt, As to the penning of the power:

That they ſhould permit and ſuffer his daughter by any deed or writing, &c. *(notwithſtanding her coverture) to give*, &c. *all his freehold*, &c.

What had the father therefore in view? why, to exclude the diſability of coverture, and this was all he intended to guard againſt; and if he likewiſe intended to exclude the diſability of infancy, he would have taken care equally to expreſs it.

The power is, to ſuffer his daughter, *notwithſtanding her coverture*, to diſpoſe of all his real eſtate; and if he had intended to exclude the diſability of infancy, he would equally have taken care to expreſs it, and *expreſſio unius eſt excluſio alterius*.

The daughter at the time of his death was upwards of nineteen years of age; and though he might think it right to give her this power during coverture, yet not ſo during her infancy.

It is plain his view was to prevent the huſband's influence, and to make all ſafe during her infancy:

Therefore from the penning of this power, a ſtrong objection ariſes againſt her executing it during infancy, for *expreſſio unius eſt excluſio alterius*.

The conſtruction of law on a power coupled with an intereſt, is very different from a naked power over another perſon's eſtate.

The conſtruction of law on ſuch a power as the preſent, which is coupled with an intereſt, is very different from a naked power over another perſon's eſtate, and that diſtinction has been taken in the caſes of feme coverts.

The whole legal eſtate here is given to truſtees.

Firſt, As to the rents and profits, to the uſe of Mrs. *Winſmore* for life; and in the ſecond place, to permit and ſuffer Mrs. *Winſmore* to give and diſpoſe of the lands, *&c.* by deed or will, *&c.*

So that ſhe had an equitable intereſt in the lands, *&c.* and the equitable reverſion in fee deſcended upon her.

If ſhe does not diſpoſe of it, where will it veſt? *in herſelf!* If not diſpoſed of by her in her life-time, where will it deſcend? *to her daughter!*

If this then is a power to be exerciſed over her own inheritance, I am of opinion, it is ſuch a power as an infant cannot exerciſe.

But ſuppoſe the execution of the power is bad, yet it is ſaid the plaintiffs have an equity to compel the infant to let them take the real eſtate, for ſhe ſhall not take both by the will, and againſt the will.

In general this rule is right, and founded on proper premiſſes but a wrong concluſion; for this purpoſe ſee the caſe of *Noys* verſus *Mordaunt*, in 2 *Vern.* 581.

I am of opinion the infant in the preſent caſe is not to be compelled to make her election.

For the inſtrument here being void as to the real eſtate, there is no inſtance where an infant has in ſuch a caſe been compelled to make an election, for here is properly no will at all as to the lands.

Where an inſtrument is void as to the real eſtate, an infant is not compelled to make an election, whether ſhe will take by or againſt the will, for as to the lands it is properly *no will at all.*

It is like the caſe where a man executes a will in the preſence of two witneſſes only, and deviſes his real eſtate from his heir at law, and the perſonal eſtate to the heir at law; this is a good will as to perſonal eſtate, yet for want of being executed according to the ſtatute of frauds and perjuries, is bad as to the real eſtate; and I ſhould in that caſe be of opinion, that the deviſee of the real eſtate could not compel the heir at law to make good the deviſe of the real eſtate, before he could intitle himſelf to his perſonal legacy, becauſe here is no will of real eſtate for want of proper forms and ceremonies required by the ſtatute.

But the diſtinction between this caſe and that of *Noys* and *Mordaunt* is, there a father had diſpoſed of his whole eſtate for the benefit of his children; here Mrs. *Winſmore* is giving her whole real eſtate from her child, and therefore does not fall within that benevolent equity the court exerciſed in that caſe.

But what I principally rely on is, that here is no inſtrument which would paſs the real eſtate.

The next queſtion is, if the aſſignees, the plaintiffs in the croſs cauſe, as ſtanding in the place of Mr. *Winſmore* the bankrupt, have a right to the rents and profits of Mrs. *Winſmore*'s real eſtate, as conſidering him in the light of *a tenant by the curteſy.*

I am of opinion Mr. *Winſmore* could not be conſidered as *tenant by the curteſy.*

Under

The rents under Dr. *Worth*'s will being to be applied to the ſeparate uſe of the wife, and the truſtees who had the fee in all the real eſtate being to permit her to diſpoſe of it, the whole legal eſtate of the inheritance was in them, and therefore neither in law or equity was the huſband tenant by the curteſy.

Under Doctor *Worth*'s will, the rents and profits are to be applied to the ſole and ſeparate uſe of Mrs. *Winſmore*, and the truſtees who had the fee in all the teſtator's real eſtate, were to permit and ſuffer her to diſpoſe, *&c.*

What was the effect of this? the whole legal eſtate of the inheritance was in the truſtees.

However, it is ſaid, a huſband may be tenant by the curteſy of a truſt.

But conſider what is neceſſary to make *a tenant by the curteſy*; the wife muſt have the inheritance, and there muſt be likewiſe a ſeiſin in deed in the wife during coverture.

It is true ſhe had the inheritance, becauſe it deſcended till the execution of the power; but then the father, whoſe eſtate it was, has made the daughter *a feme ſole*, and has given the profits to her *ſeparate uſe*; therefore what ſeiſin could the huſband have during the coverture; he could neither come at the poſſeſſion, nor the profits.

Was there then any equitable ſeiſin of the huſband?

None at all; and to admit there was, would be directly contrary to the father's intention, and therefore neither in law or equity was the huſband *tenant by the curteſy*.

Another queſtion has been made, with regard to the intereſt of the eight thouſand pounds given by the will of Mrs. *Winſmore* to her daughter.

I am of opinion, under the circumſtances of this caſe, ſhe is not intitled to the intereſt.

Where legacies are given payable at a certain time, they carry no intereſt, for till the day of payment comes it is not demandable; but if given to a child, the court will allow it by way of maintenance.

The general rule is, where legacies are given payable at a certain time they carry no intereſt, for intereſt is for delay of payment, and conſequently till the day of payment comes no intereſt is demandable.

But I do admit at the ſame time, where a legacy is given by a father to a child, though the legacy is not payable but at a certain time, yet the court allows intereſt.

But in all theſe caſes the ground the court goes on, is giving intereſt by way of maintenance.

Here

Here Mrs. *Winſmore* has allotted maintenance for her daughter from the general fund of her perſonal eſtate: there is another thing obſervable, the contingency in her will, of the daughter's dying before twenty-one; I agree it is a condition ſubſequent, but ſtill it ſhews the view of the teſtatrix, and that ſhe ſaw it might never be her daughter's, and therefore to give her intereſt would be contrary to the intention of the teſtatrix.

There are ſeveral caſes where this court have made a great ſtretch to give children intereſt on legacies, particularly *Acherley* verſus *Vernon*, 1 *P. Wms.* 783, but that went on particular circumſtances.

Therefore I am of opinion ſhe can have no more intereſt than the maintenance in the mean time.

As to the eſtate left by Mrs. *Dorothy Price*, the aunt of Mrs. *Winſmore*, that muſt belong to the aſſignees of Mr. *Winſmore* under the commiſſion of bankruptcy againſt him, as ſtanding in the place of the huſband.

But then it is inſiſted, as Mr. *Winſmore* had made no proviſion for his wife, or the iſſue of the marriage, that his aſſignees ſhall not be permitted to touch this, till they have made ſome proviſion for the iſſue of the marriage.

And ſo it was held in two caſes before Lord Chancellor *Cowper*; and I was alſo clearly of the ſame opinion in the caſe of *Jewſon* verſus *Moulſon*, *October* 27, 1742. (2 *Tr. Atk.* 417.)

But I can find no caſe where the court have done it in the caſe of aſſignees of a bankrupt after the death of the bankrupt's wife: and here too the iſſue of the marriage is ſo well provided for, that I am of opinion the court ought not to make this the firſt precedent of it, whatever they might do in a caſe not ſo circumſtanced.

But the preſent is not ſuch a caſe, as would incline the court to make a ſtride further than any of the former caſes have gone.

His Lordſhip declared, that as to the real eſtate deviſed by the will of Doctor *Worth* to his truſtees, the will of Mrs. *Winſmore* being made during her infancy, was not a good execution of the power relating thereto contained in Doctor *Worth*'s will, and that the inheritance of ſuch real eſtate is deſcended to the defendant *Mary Winſmore* the infant, who is heir at law both of Mrs. *Winſmore* her mother, and of Doctor *Worth*; and that the defendant *William Winſmore* the bankrupt is not intitled to be *tenant by the curteſy* thereof.

He alſo declared that the leaſehold eſtate, compriſed in the ſettlement made on the marriage of Doctor *Worth* with *Mary Price*, dated the 3d of *December* 1722. which is now held by leaſe for lives, belonged to Mrs. *Winſmore* by virtue of the ſettlement, and on her death came to the infant her daughter and heir, and therefore directed both bills, ſo far as they ſeek any relief touching the ſaid leaſehold eſtate, or touching the real eſtate of Doctor *Worth*, to be diſmiſſed without coſts.

He alſo declared that the reſidue of Doctor *Worth*'s perſonal eſtate, being given by his will in truſt for the ſeparate uſe of Mrs. *Winſmore*, was not ſubject to the debts, power or controul of her huſband, and alſo the rents and profits of Doctor *Worth*'s real eſtate deviſed to her ſeparate uſe accrued during her life, and the profits and proceed of both theſe funds ought to be conſidered as the ſeparate perſonal eſtate of Mrs. *Winſmore*, not ſubject to the debts or power of her ſaid huſband; and that the ſame are well diſpoſed of by the will of Mrs. *Winſmore*, ſhe being above the age of ſeventeen at the time of making her will; and therefore directed the croſs bill brought by the aſſignees under the commiſſion of bankruptcy againſt Mr. *Winſmore*, ſo far as it ſeeks any relief touching the perſonal eſtate of Doctor *Worth*, or the rents and profits of his real eſtate, to be diſmiſſed without coſts.

He alſo declared that the legacy of eight thouſand pounds given by Mrs. *Winſmore*'s will to her daughter, ſubject to the contingencies therein mentioned, will not carry intereſt till the ſame ſhall become payable according to the will, and that the annual ſums thereby reſpectively given for her maintenance ought to be deemed as given in lieu of intereſt.

And in the croſs cauſe his Lordſhip alſo declared, that what the late Mrs. *Winſmore* was intitled to under the will of her aunt *Dorothy Price* belonged to her huſband, and is now veſted in the aſſignees under the commiſſion of bankruptcy againſt him, who are the plaintiffs in that cauſe.

He alſo declared that the copyhold eſtates of *Dorothy Price*, though for life, yet being by the cuſtom of the manor, whereof the ſame are parcel, a chattel intereſt, the ſame, and alſo the rents and profits thereof received by Doctor *Worth* in his life-time, or his executor ſince his deceaſe, ought to be deemed part of her perſonal eſtate, and brought into the account before the Maſter; and it being admitted that the ſum of fourteen hundred pounds was paid by Doctor *Worth* to Mr. *Winſmore* after his marriage with his wife, on account of what ſhe was intitled to, he declared the ſame ought to be deemed as paid in part of the perſonal eſtate of *Dorothy Price*.

Potter verſus *Potter*, *July* 26, 1749. *the laſt ſeal after Trinity Term.* Caſe 268.

A Bill was brought by the deviſee of all the eſtate real and perſonal of the late archbiſhop *Potter*, to eſtabliſh the will and codicils, and to carry the truſts of them into execution.

When the heir at law by his anſwer to a bill brought to eſtabliſh a will, admits it to be duly executed, and to the purport as ſet forth, ſaying at the cloſe of it, he is the heir at law of the teſtator, is not ſufficient to intitle him to the inſpection of the title deeds and writings belonging to the eſtate.

The heir at law, who is made a defendant, does not controvert either the will or codicils, but admits they were duly executed, and to the purport as they are ſet forth in the bill.

It was moved to day in behalf of the heir at law, that all the title deeds and writings of the late archbiſhop's eſtate might be produced for his inſpection, without pointing out in whoſe cuſtody they are, or ſpecifying the nature or ſubſtance of the deeds he requires.

The Attorney and Solicitor General council with the motion, inſiſted, that notwithſtanding motions of this kind are generally made, where an heir at law that is diſinherited is the plaintiff, yet there was equal juſtice, that he ſhould have the inſpection of the deeds, where he is the defendant, becauſe where the eſtate is totally deviſed away from him, it is but natural equity that he ſhould be ſatisfied, whether he is lawfully diſinherited.

Mr. *Capper* of the ſame ſide cited the caſe of *Smith* verſus *Smith*, before Lord *Hardwicke* in 1745. in ſupport of the motion.

LORD CHANCELLOR.

I do not remember, nor do I believe, ſuch motion as is now made in behalf of the heir at law was ever granted, where he is a defendant to a bill of this kind.

Though I will not ſay but upon ſome particular circumſtances he may be intitled to what is now prayed.

As, ſuppoſe he ſhould in his anſwer inſiſt upon ſome old entail which has not been barred by a recovery, and conſequently ſtill exiſting, or controvert the legality of the will, or the execution of it, or inſiſt that only a part of the real eſtate is deviſed away, and of courſe the remainder deſcends, and he expreſly claims it as heir at law.

But in the preſent caſe the heir at law does not ſo much as deny any one circumſtance, either as to the execution of the archbiſhop's will,

will, or his power of deviſing, but admits the whole, as it is ſet forth by the plaintiff in his bill.

And barely ſaying at the cloſe of his anſwer, that he is the heir at law of the teſtator, is not ſufficient to intitle him to an inſpection of the deeds; beſides, he does not ſo much as point out what the deeds are that he wants to inſpect, nor the ſubſtance of them, which he might do though not in his cuſtody.

Upon the whole, here is no pretence for what the heir at law prays by the motion, and therefore he muſt take nothing by it.

Caſe 269. *Turwin* verſus *Gibſon*, *July* 31, 1749.

A ſolicitor who is in diſburſe for his client has a right to be paid out of a duty decreed to an adminiſtrator, and a lien upon it, before the bond creditors of the deceaſed; nor can the adminiſtrator controvert this rule, by inſiſting on applying the aſſets in a courſe of adminiſtration.

IT was inſiſted by the petitioner *Margaret Turvin*, as ſhe is the repreſentative of *Arthur Harding* her firſt huſband, and he has left bond debts, that *Wade*, the ſolicitor for *Arthur Harding*, who was the plaintiff in the original cauſe, has no right to be paid out of the ſum decreed for the plaintiff in preference to *Harding*'s bond creditors.

LORD CHANCELLOR.

I am of opinion that a ſolicitor, in conſideration of his trouble, and the money in diſburſe for his client, has a right to be paid out of the duty decreed for the plaintiff, and a lien upon it, before the bond creditors of the deceaſed plaintiff, and it is conſtantly the rule of this court; neither can the adminiſtratrix controvert this rule, by inſiſting upon applying the aſſets in a courſe of adminiſtration.

Upon another petition a ſhort time before, Lord Chancellor laid down the ſame rule.

Caſe 270. *March* verſus *Head*, *July* 31, 1749.

A woman who had 1000 *l.* in articles before marriage had no other proviſion than only a covenant from the huſband, that he would conſider himſelf as a freeman of *London*: On her father's death ſhe became intitled to 1500 *l.* more, and applies for a further proviſion. *The court, from the care it takes of the intereſt of feme coverts, will on an acceſſion of fortune to the wife, oblige the husband to make a further proviſion.*

A Woman who had a thouſand pounds to her fortune, had no other proviſion under articles before marriage than only a covenant from the huſband, that he would conſider himſelf as a freeman of *London*, and if ſhe ſurvived him, ſhe ſhould have ſuch ſhare of his perſonal eſtate as belongs to the widow of a freeman.

Upon the death of the wife's father and mother, ſhe as next of kin became intitled to eighteen hundred pounds more.

The huſband and wife live ſeparate; an application was made now on behalf of the wife for a further proviſion, on this addition of fortune.

LORD CHANCELLOR.

This court, according to the power it exerciſes, and care that it always takes of the intereſt of *feme coverts*, will either, where there is no proviſion at all for the wife, on money coming to her, oblige the huſband, before he is permitted to touch it, to make ſome proviſion for her; or where there is a ſlender proviſion only made before, on an acceſſion of fortune to the wife, if it be conſiderable, (not if a trifle only) oblige the huſband to make a further proviſion.

I think in the preſent caſe, the proviſion made for the wife a very ſlender one, and of a very precarious nature; and therefore I will refer it to a Maſter to receive propoſals for a further proviſion on the behalf of the wife, in proportion to this acceſſion of eighteen hundred pounds; and ordered it accordingly.

Hall verſus *Hall*, *July* 31, 1749.

Caſe 271.

AN application was made to the court to compel a young gentleman, who has been placed at *Eton* ſchool by his guardian, to return there again.

The guardian is a proper judge at what ſchool to place his ward, and the court will not indulge the infant in being put to a private tutor, or going to another ſchool, and if he refuſes to go will take a proper courſe to compel him.

The lad of ſixteen years of age being preſent in court, and having no reaſonable grounds of complaint againſt the maſter of the ſchool, Lord Chancellor would not indulge him in being put to a private tutor, or going to another ſchool; but ſaid, his guardian was the proper judge at what ſchool to place him, and where he had ſent him, was a ſchool of very great reputation: and that if he ſhould refuſe to go, he would take the proper courſe to compel him.

A young gentleman who had been placed at the Univerſity of *Cambridge*, on abſenting himſelf, and refuſing to return, was ſent back by Lord *Macclesfield* in the cuſtody of his own tipſtaff.

His Lordſhip mentioned an inſtance in Lord *Macclesfield*'s time, of a young gentleman who had been placed by his guardian at the Univerſity of *Cambridge*, and on his abſenting himſelf from thence, and refuſing to return, Lord *Macclesfield*, on application to him by the guardian, ſent him to the Univerſity in the cuſtody of his own tipſtaff.

Here the lad agreed to go back to *Eton*, and was indulged by the court in a fortnight's time for that purpoſe.

Caſe 272. *Harris* verſus *Harris*, *February* 7, 1750.

A decree for a ſale of an eſtate in mortgage, the maſter reported a ſtated ſum due to the mortgagee for principal and intereſt, and report confirmed, as the mortgage is at 5 *per cent.* and there is another mortgagee and creditors beſides, from the time of the Maſter's report being confirmed, it ſhall carry only 4 *per cent.*

THE plaintiff, a mortgagee, brought a bill in conjunction with ſeveral bond creditors, againſt the heir at law of the mortgagor, for a ſale of the mortgaged premiſſes.

There was a decree accordingly, and the mortgagee was directed to be paid his principal and intereſt in the firſt place, out of the money ariſing from the ſale.

The Maſter made a report of a ſtated ſum due for principal and intereſt, and the report was confirmed.

The plaintiff, the mortgagee, moved to day that the Maſter might compute ſubſequent intereſt and coſts upon the ſum reported due.

The eſtate ſold under the decree, produced about a thouſand pounds more than would pay the original mortgage; and one of the defendants is a ſubſequent mortgagee; but there was not near enough ariſing from the ſale to pay the ſecond mortgagee, and the bond creditors.

The reſt of the plaintiffs, and the defendants, oppoſed the motion, and endeavoured to take a difference between the preſent bill and a bill of foreclоſure, inſiſting, that in the latter, the court directs the Maſter to allow ſubſequent intereſt upon the ſum reported due, becauſe it is a compenſation to the mortgagee for being kept out of his money, by the court's allowing time to the mortgagor to redeem.

But here a ſale is prayed in the firſt inſtance, and the intereſt of the creditors are concerned, and therefore it would be hard to give intereſt upon intereſt in favour of one creditor to the prejudice of the reſt.

LORD CHANCELLOR.

This caſe differs from the common one of a foreclоſure, and it would be rather too much to give ſuch an advantage to the mortgagee over the reſt of the creditors, eſpecially as the mortgage carries five *per cent.*

His Lordſhip therefore propoſed to his council, that from the time of the Maſter's report being confirmed, it ſhould carry only

four *per cent.* the plaintiff acquieſcing in this propoſal, his Lordſhip gave directions accordingly.

Farrant verſus *Lovel*, *February* 12, 1750. Caſe 273.

A Bill was brought by a ground landlord to ſtay waſte in an under leſſee, who held by leaſe from the original leſſee.

The court will grant an injunction at the ſuit of a ground landlord to ſtay waſte in an under leſſee, who holds by leaſe from the original leſſee.

LORD CHANCELLOR.

A certificate being produced of the waſte, I am of opinion the plaintiff has the ſame equity as in other caſes of injunctions.

As where there is tenant for life, remainder for life, remainder in fee, yet the court, on a bill brought by remainder-man in fee, to ſtay waſte in the firſt tenant for life, will, notwithſtanding the intermediate eſtate for life, upon a certificate of the waſte, grant an injunction.

A remainder-man in fee may have an injunction to ſtay waſte in the firſt tenant for life, notwithſtanding an intermediate eſtate for life.

So, where a mortgagee in fee in poſſeſſion commits waſte by cutting down timber, and the money ariſing by the ſale of the timber is not applied in ſinking the intereſt and principal of his mortgage, the court, on a bill brought by the mortgagor to ſtay waſte, and a certificate thereof will grant an injunction.

If a mortgagee cuts down timber, and does not apply the money ariſing from the ſale in ſinking the intereſt and principal, the mortgagor may have an injunction to ſtay waſte.

So, likewiſe, where there is only a mortgage for a term of years, and the mortgagor commits waſte, the court, on a bill by the mortgagee to ſtay waſte, will grant an injunction, for they will not ſuffer a mortgagor to prejudice the incumbrance.

So, where the mortgagor commits waſte, the court will grant the mortgagee an injunction, for they will not ſuffer the mortgagor to prejudice the incumbrance.

For theſe reaſons his Lordſhip granted an injunction to ſtay waſte.

Rattray

Caſe 274. *Rattray* verſus *Darley*, *February* 7, 1750.

R. and his wife filed an original bill, to which the defendant put in his plea, and it was allowed: *D.* filed a croſs-bill againſt *R.* and his wife, to which they put in their anſwers, and exceptions were taken; then *R.* and his wife filed their amended bill againſt *D.* who appeared, and prayed ſix weeks time to put in his anſwer to the amended bill, after *R.* and his wife ſhall have anſwered the croſs-bill. *The plaintiff in the croſs-bill having procured a report that the anſwer of* R. *to it was inſufficient*, R. *by that means loſt the priority of ſuit.*

MR. *Rattray* and his wife filed an original bill againſt *Darley* the 14th of *May* 1750, who, on the third of *July*, put in a plea and anſwer, and the plea was allowed. On the 17th of *May* *Darley* filed a croſs-bill againſt *Rattray* his wife, to which, on the 25th of *October* laſt, they put in their anſwers, to which he filed fifty-five exceptions: on the 13 of *December* laſt, *Rattray* and his wife filed their amended bill againſt *Darley*, to which he appeared on the 24th of *December*, and upon a ſuggeſtion that the plaintiffs in the original cauſe have loſt their priority of ſuit by means of their amended bill, and have alſo put in an inſufficient anſwer to the croſs-bill: *Darley* moved before the Maſter of the *Rolls* the firſt day of this term, *that he might have ſix weeks time to put in his plea, anſwer, or demurrer, to the amended bill, after the defendants* Rattray *and his wife ſhall have anſwered the plaintiff* Darley's *croſs-bill.*

His Honour gave *Darley* a month's time.

The plaintiffs in the original bill, apprehending this to be irregular, moved to day that the order made in theſe cauſes on the 23d of *January* may be diſcharged.

It was inſiſted for the motion by Mr. *Tracy Atkyns*, that if an anſwer appears upon the records of the court, and has never been referred for inſufficiency, the court will not examine whether it is ſufficient or not.

That the bare taking exceptions to an anſwer can never be ſaid to affect it in any reſpect, for they are little more than a memorandum delivered by one clerk in court to another, and is a private tranſaction, and not of record.

That the plaintiff muſt take another ſtep to ſubſtantiate his exceptions, and procure an order to refer them, and muſt alſo have a report of the inſufficiency of the anſwer, or elſe, to all intents and purpoſes it will be conſidered as an anſwer, notwithſtanding the exceptions, and if ſuch a practice was allowed, it would be attended with ill conſequence to the proceedings of this court, for then, a plaintiff to elude juſtice, would have nothing to do, but to take exceptions, and by that means gain time, and delay the plaintiff in the progreſs of the cauſe.

And therefore inſiſted that the ſpecial order for time is irregular, and ſhould have been a general one only.

Mr.

Mr. *Woodford*, council for the plaintiff in the croſs-cauſe, and defendant in the original, inſiſted, that if a plaintiff in an original bill, after the croſs-bill is filed, amend his bill in things material, it is, as to the amendments, a new bill, and the plaintiff in the original bill ſhall be bound to anſwer the croſs-bill, which was filed prior to the amendments made to the original bill, before ſuch time as the plaintiff in the original bill ſhall have an anſwer to his amendments; and as the amended bill muſt be anſwered all together, ſo the priority ſeems in ſuch caſe to be loſt as to the whole.

He cited for this purpoſe the caſe of *Buckeridge* verſus *Blundel*, before Lord Chancellor *King*, in *H. T.* 1726. and the caſe of *Steward* verſus *Roe*, 2 *P. Wms.* 435.

And inſiſted, that as the plaintiff in the croſs cauſe did on the 28th of *January* obtain an order to refer the exceptions, it is plain this is no affected delay, but that he is in earneſt to proceed on his exceptions, and therefore the order was regular, and ought not to be diſcharged.

LORD CHANCELLOR.

As the anſwer to the croſs-bill is not reported inſufficient, I do not lay much ſtreſs on the argument, that the plaintiffs in the original bill have loſt their priority (*Vid. the caſe of Long* verſus *Burton*, *November* 12, 1741. before Lord *Hardwicke*.)

The ſubſtantial objection on the part of the motion is, that here is an order obtained for time to anſwer an amended bill, after the anſwer is put in to the croſs-bill, to which there are exceptions only delivered to the plaintiff's clerk in court, in the original bill, but no proceedings ſince to get a report of the anſwer's being inſufficient.

The Maſter has not yet determined, nor the court, whether this be an inſufficient anſwer; and therefore the queſtion is, if it ought not to be conſidered to all intents and purpoſes as an anſwer.

But as the plaintiff in the croſs-cauſe, ſince he obtained the order of the 23d of *January*, has got a ſubſequent one for referring the exceptions; I will not give an opinion now, but let this motion ſtand over till the ſecond ſeal after the term, and in the mean time, let the plaintiff in the croſs-cauſe procure the Maſter's report.

N. B. Darley, the defendant in the original, and plaintiff in the croſs bill, procured the Maſter's report, that the anſwer of *Rattray* was inſufficient, and by that means the latter loſt his priority.

Caſe 275. *Birch* verſus *Sir Lyſter Holt*, *February* 28, 1750.

LORD CHANCELLOR.

Where there is a motion to put a mill-dam into the ſame ſituation it was in before it was cut down, the court will not grant it, while the right is unheard and undetermined, but will put it in the moſt expeditious way of being tried.

I Have known numbers of applications to this court in the nature of an injunction, or rather for leave to re-erect a nuſance, and to put a mill-dam, as in this caſe, into the ſame ſituation it was in before it was cut down, but as this is prayed by the preſent motion, while the right is unheard and undetermined, the court have as conſtantly denied the motion, as it came before them, and all that they have done, is to put it in the moſt expeditious way of being tried.

The caſe relied on by the plaintiff's council was *Arthington* verſus *Fawks et al'*, 2 *Vern.* 356.

His Lordſhip, to accelerate the determination of the right, directed the defendant to bring an action of treſpaſs, and every thing to be admitted on both ſides neceſſary for trying the mere right.

Caſe 276. *March* 22, 1750. *At the laſt ſeal before Eaſter term.*

Bill by huſband and wife for a demand in her right, the huſband dies, it is in the nature of a choſe in action, and ſurvives to her, and the cauſe does not abate.

A Bill was brought by a huſband and wife, for a demand in the right of the wife, the huſband dies.

LORD CHANCELLOR.

It is in the nature of a choſe in action, and ſurvives to her, and the cauſe does not abate by the huſband's death.

Caſe 277. *Done* verſus *Peacock*, *March* 22, 1750. *Fourth Seal before Eaſter term.*

Where one, out of ſeveral defendants, obtained an order to plead, anſwer or demur, but not to demur alone, and demurred to the bill as containing different matters, and inconſiſtent,

A Motion was made by Mr. *Evans* to diſcharge an order, where one, out of ſeveral defendants, had obtained an order to plead, anſwer and demur, but not to demur alone, becauſe he had evaded the order; for after demurring to the bill, as containing different matters, and inconſiſtent with each other, he anſwers to nothing more than the charge of combination and confederacy only, and this is what he muſt abſolutely do to ſupport even his demurrer, which, without it, muſt have fallen to the ground, and therefore cannot be conſidered as an anſwer.

and anſwered nothing more than the charge of combination and confederacy only, *the court inclined to think it was not anſwering purſuant to the order.*

Lord Chancellor inclined to think that this is not anſwering in purſuance of the order, but as the demurrer might ſoon be determined, the delay would be of very little conſequence to the plaintiff, and therefore would not diſcharge the defendant's order for time.

In 1 *Vern.* 463. *Heſter* verſus *Weſton*, it is laid down, that where a man demurs, for that the bill contains ſeveral matters not relating one to the other, and in ſome whereof the defendant is not concerned, if by the anſwer defendant doth more than barely deny combination and confederacy, he over-rules his demurrer.

Where a man demurs, for that the bill contains ſeveral matters not relating one to the other, if he does more than deny combination and confederacy, he over-rules his demurrer.

Stapleton verſus *Conway*, *March* 30, 1750.

Caſe 278.

LORD *Hardwicke* ſaid in this cauſe, that if a contract is made in *England* for a mortgage of a plantation in the *Weſt-Indies*, no more than legal intereſt ſhall be paid upon ſuch mortgage, and if in ſuch caſe there is a covenant in the mortgage for payment of eight *per cent.* intereſt, it would be within the ſtatute of uſury, notwithſtanding this is the rate of intereſt where the land lies.

Where a contract is made in *England* for a mortgage of a plantation in the *Weſt-Indies*, no more than legal intereſt ſhall be paid upon ſuch mortgage.

Taylor verſus *Lewis*, *December* 20, 1750. *among the cauſe petitions.*

Caſe 279.

THE queſtion was, whether the client that has already paid his ſolicitor, who ſatisfied the clerk in court his whole bill, is liable to make good the fees of *the ſix* clerk, where the *ſixty* clerk abſconds, or is inſolvent.

The council for the plaintiff cited 2 *P. Wms.* 460. *Farewell* verſus *Coker*, and relied upon an order of Lord Keeper *Bridgman*'s, which limits the number of under-clerks. *Thurſday the 18th of June*, 20 *Car.* 2. 1668.

It was inſiſted by the council for Mr. *Reynardſon* the ſix clerk, that he is not obliged to deliver papers to the plaintiff until he is paid his fees, and relied upon an order of Lord *Clarendon*'s.

A ſix clerk is not obliged to deliver papers to the plaintiff till his fees are paid, though the plaintiff had paid his ſolicitor who had ſatisfied the clerk in court his whole bill.

Lethieullier

Caſe 280. *Lethieullier* verſus *Tracy*, *December* 20, 1750.

Sir *W. D.* by his will deviſed all his eſtates purchaſed or to be purchaſed to *M. D.* his daughter for life, with remainder to truſtees to preſerve, &c. remainder to the firſt ſon in tail male, and to the ſecond, &c. in tail

SIR *William Dodwell* by his will deviſed all his eſtates already purchaſed, or to be purchaſed by his truſtees, to *Mary Dodwell* his daughter and only child for life, with remainder to truſtees and their heirs, to preſerve contingent remainders, remainder to the firſt ſon in *tail male*, and to the ſecond and every other ſon of the daughter *Mary Dodwell* in tail *general*, and in default of ſuch iſſue, remainder to the daughters of his daughter *Mary Dodwell*; and in caſe his daughter died without iſſue of her body living at her deceaſe, remainder to Sir *Henry Nelthorpe* in tail; and in default of iſſue by him to *Smart Lethieullier* for life, with remainder to his ſons in tail male, and in default of ſuch iſſue remainder to *Charles Lethieullier*.

general; and in default of ſuch iſſue, remainder to the daughters, &c. and if *M. D.* died without iſſue, remainder to Sir *H. N.* in tail, with ſeveral remainders over. *M. D.* after 21 marries, and ſubſequent to it executes a deed, by which ſhe conveys the reverſion in fee of the lands purchaſed expectant on the ſeveral remainders under the will to *G. B.* and his heirs, in truſt for ſeveral uſes and covenants to levy *a fine ſur conceſſit* to the uſes of the deed, and recites the limitations under the will in the order mentioned; then with a proviſo that the uſes declared by the deed ſhall not take place till after all the limitations under the will. *A fine levied accordingly.* It was inſiſted *M. D.* had by the fine forfeited her eſtate for life; but the court held it was only a fine of the reverſion, as the deed expreſly recites all the intervening eſtates for life under the will, and limits uſes after all theſe.

The daughter arrives at her age of twenty-one and marries, and ſubſequent to her marriage executes a deed bearing date the 31ſt of *December* 1746. by which ſhe conveys the reverſion in fee of the lands purchaſed by the truſtees under the will, expectant on the ſeveral remainders under the will, to *George Brampſton*, Eſq; and his heirs, in truſt for the ſeveral uſes and purpoſes therein declared; and covenants to levy *a fine ſur conceſſit* to the uſes of the deed, and in the deed and fine recites the limitations under the will in the words and order in which they are mentioned there, with an expreſs proviſo that the uſes declared by the deed ſhall not take place till after all the limitations under Sir *William Dodwell*'s will.

A fine was levied accordingly in *Hilary* term 1746.

In *January* 1749. an order was obtained by petition to Lord Chancellor for a conveyance from the truſtees of all the lands purchaſed under the will of Sir *William Dodwell*, according to the limitations therein; and particularly that the laſt remainder in fee might be conveyed to the daughter of the teſtator the petitioner, late *Mary Dodwell*, and now *Mary Tracy* the wife of *Thomas Tracy*, Eſq;

After the pronouncing of this order, Mr. *Tracy*'s council being of opinion, that a conveyance to her in purſuance of this order,

being ſubſequent to the deed of 1746, and the fine, would defeat them both, applied to the court to vary this order; and inſtead of the laſt remainder in fee being conveyed to Mrs. *Tracy*, that it might be conveyed to *George Bramſtone*, Eſq; and his heirs, in truſt for the ſeveral uſes, intents and purpoſes of the deed and fine in 1746.

Mr. *Smart* council for the *Lethieullliers*, two of the remaindermen, prayed the petition might ſtand over, that he might have an opportunity of inſpecting the deed and fine on their behalf, to ſee if Mrs. *Tracy* had not forfeited her eſtate for life by levying this fine, as according to the ſtate of it in his brief, it ſeemed to be a fine of her eſtate for life.

Lord Chancellor ordered the deed to lead the uſes of the fine, and the fine itſelf to be read; and then ſaid, that it appeared to him plainly to be a fine of the reverſion, becauſe it expreſly recites all the intervening eſtates under the will, and limits uſes after all theſe.

I will ſuppoſe, for argument's ſake, that Mrs. *Tracy* had levied *a fine ſur conceſſit* of her eſtate for life; yet as it is a truſt eſtate, and there are limitations to truſtees to preſerve contingent remainders, I am of opinion the fine would not work a forfeiture of her eſtate for life, becauſe it cannot at all hurt or affect the ſubſequent remainders, as there are truſtees under the will to preſerve *them*, and therefore ſuch a fine would in equity operate at moſt as a grant only of ſuch intereſt as ſhe had a power to grant.

If *M. D.* had levied *a fine ſur conceſſit* of her eſtate for life, yet as it is a truſt eſtate, and there are limitations to truſtees to preſerve, *&c.* the fine would not have worked a forfeiture of her eſtate for life, becauſe it cannot affect the ſubſequent remainders, as there are truſtees to preſerve them.

Mr. *Smart* objecting, that the expreſſion in the indenture of fine, all lands, *&c.* of which Mrs. *Tracy* was ſeiſed, muſt refer to an eſtate in poſſeſſion, for it does not ſay *lands ſhe was ſeiſed of in reverſion*:

Lord Chancellor ſaid there was no weight in this objection, becauſe the technical expreſſion is, lands, tenements and hereditaments of which ſhe now ſtands ſeiſed in reverſion, *and not that ſhe was ſeiſed of a reverſion in lands, &c.*

Mr. *Smart* alſo objected to the proviſo in the deed, that the fine ſhould not affect or operate upon the eſtate for life of Mrs. *Tracy*, or any other of the particular eſtates recited to be by the will of Sir *William Dodwell* limited in uſe to the ſeveral perſons precedent to the reverſion in fee in Mrs. *Tracy*.

LORD CHANCELLOR.

The proviſo that the limitations in the deed ſhould not diſturb Mrs. *Tracy*'s eſtate for life under the will *ex abundanti*; for if there had been no ſuch proviſo, the uſes of the deed would not have controuled Mrs. *Tracy*'s eſtate for life under the will.

The proviſo in the deed, that the limitations thereby created ſhould not diſturb or defeat the eſtate for life to Mrs. *Tracy*, *&c.* under the will, is *ex abundanti*; and if there had been no ſuch proviſo, ſhould have been clearly of opinion that the uſes of this deed would not have controuled the eſtate for life to Mrs. *Tracy* under the will.

But on the importunity of Mr. *Smart*, his Lordſhip directed the petition to ſtand over to the next day of petitions, to give the remainder mens council an opportunity of inſpecting the deed and fine.

January 21, 1750-51. *the petition in the cauſe of Lethieullier and Tracy came on again.*

LORD CHANCELLOR diſallowed all Mr. *Smart*'s objections, and declared the Maſter had done right in altering the ſettlement to the ſhape it now is, and that the exception to it ſhould be over-ruled, and the plaintiffs forthwith to execute the ſame.

Where *a fine ſur conceſſit* is levied by a tenant for life, reverſioner in fee expectant on ſeveral limitations in a deed or will, a court of equity will never conſtrue ſuch a fine to work a wrong.

Lord *Hardwicke* ſaid, where *a fine ſur conceſſit* is levied by a tenant for life, reverſioner in fee expectant on ſeveral limitations in a deed or will, a court of equity will never conſtrue ſuch a fine to work a wrong, but operates only on the truſt to preſerve the contingent remainders, and not on the legal eſtate; for Lord *Talbot* in the caſe of *Hoſkins* and *Hoſkins*, and myſelf, in a cauſe that came before me afterwards, were of opinion, that a perſon ſo intruſted levying a fine creates no wrong, but operates ſo as to grant all the conuſor had a power to grant; for whatever may be the conſtruction of ſuch a fine levied by tenant for life of a lifehold eſtate at common law in equity, it would not be conſidered as a forfeiture.

Elizabeth

Caſe 281.

Elizabeth Rigden, widow, one of the daughters of George Everinden deceaſed, by Ann his wife alſo deceaſed, William, Thomas and George Rigden, the only children of William Rigden and Sarah his wife both deceaſed, who was another of the daughters of George Everinden by Ann his wife, } Plaintiffs.

Margaret Vallier widow, another daughter of the ſaid George Everinden by Ann his wife. } Defendant.

March 25, 1741. *Lord Chancellor gave judgment.*

GEORGE Everinden being ſeiſed of an eſtate in *Kent*, of the tenure of gavelkind, by *deed poll* dated the 5th of *Auguſt* 1710. in conſideration of natural love to his wife and children, did give, grant and confirm to his two daughters *Margaret* the defendant, and *Hannah*, the rents and profits of his two meſſuages and lands in *Lyninge* in his own occupation, during the life of his wife, equally to be divided betwixt them, paying five pounds yearly out of the premiſſes laſt mentioned to *Ann* his wife for her life, by half yearly payments, and after his wife's deceaſe to his two daughters *Margaret* and *Hannah*, to hold to them and their heirs, *equally to be divided betwixt them.*

G. E. ſeiſed of a gavelkind eſtate, by deed poll, in conſideration of natural love to his wife and children did grant to his two daughters *Margaret* and *Hannah* the rents of his lands in *L.* equally to be divided betwixt them, paying 5 *l.* to the mother during her life, and after her deceaſe to his two daughters, to hold to them and their heirs, *equally to be divided betwixt them. Lord Hardwicke was of opinion that the words in the limitation to the daughters created a tenancy in common, whether the inſtrument be conſidered as a deed or a will.*

At the end of the deed was a clauſe, by which he gives the reſidue of his perſonal eſtate, after debts and funeral expences, to his daughters, *to be equally divided* between them.

On the 28th of *April* 1714. *George Everinden* died, leaving *Ann* his widow and five children, *viz. Margery* deceaſed, the plaintiff *Elizabeth*, and *Sarah* the mother of the other plaintiffs, the defendant, and *Hannah* the late wife of *John Dixon*, both deceaſed, which *Margaret* and *Hannah*, on their father's death, entered on the premiſſes granted to them, and paid the five pounds a year to their mother till her death, which happened the 9th of *September* 1718.

Hannah

Hannah died the 10th of *April* 1728. leaving one ſon, *Richard Dixon* an infant, and the defendant *Margaret*, who married afterwards *William Vallier*, and continued in poſſeſſion from the death of her ſiſter *Hannah*, and accounted for a moiety of the rents and profits to *John Dixon* to the time of the death of his ſon *Richard*, which happened on the fifth of *February* 1730.

On his death the plaintiffs and the defendant were his heirs at law, and alſo heirs of *Hannah*, by the cuſtom of gavelkind; *Margery* the other daughter being dead without iſſue, and *John Dixon* the father of *Richard* having after the deceaſe of *Hannah* married another wife, and thereby, according to the cuſtom of gavelkind, forfeited his eſtate as tenant by the curteſy, the plaintiffs and defendant became intitled to *Hannah*'s moiety of the premiſſes, and the rents and profits thereof; but the defendant has ever ſince *Hannah*'s death been, and now is in poſſeſſion of the whole, being twenty pounds *per ann.* and not only received the rents, but cut down and ſold the timber, and has the title deeds in her poſſeſſion.

The defendant inſiſts, that the premiſſes were given by her father under *the deed poll*, to hold to her and her ſiſter as jointenants, and not as tenants in common; and that ſhe by ſurviving her ſiſter is become intitled to the whole, and refuſes to account for the rents or timber, or to produce *the deed poll* or title deeds.

But the plaintiffs inſiſt, that the deed poll being a grant to them and their heirs for ever, *equally to be divided between them*, and operating as a covenant to ſtand ſeiſed, they were tenants in common, and not jointenants; and *Hannah*'s moiety did not ſurvive to the defendant, but deſcended to her ſon, of which ſhe herſelf was ſo ſenſible, that on *Hannah*'s death ſhe accounted for a moiety of the rents to *John Dixon* for the uſe of his ſon till his death, but now abſolutely refuſes to account.

The bill therefore is brought for an account of the rents of the premiſſes and money raiſed by ſale of timber, and that the plaintiffs may be paid their proportions, and that the title deeds may be brought into court, or otherwiſe ſecured for the perſons intereſted.

LORD CHANCELLOR.

The queſtion in this caſe is, whether the limitations in the deed poll of the 5th of *Auguſt* 1710. executed by *George*, are a jointenancy, or a tenancy in common.

The deed begins as a deed poll, but is in fact a diſpoſition of his real and perſonal eſtate, and to take effect after his death.

This may be good as a covenant to ſtand ſeiſed; but if it was to be conſidered as a conveyance it would not be good, becauſe there is no tranſmutation of poſſeſſion.

The preſent point is a very litigated one in the books.

Equally to be divided is now eſtabliſhed to be a tenancy in common in a will, or if it was *equally* only, without the ſubſequent words annexed to it, would be ſo conſtrued.

The word *equally* only will make a tenancy in common in a will.

But then it is inſiſted to be otherwiſe in the caſe of a deed; and though I do not find any ſolemn determination of this ſort, yet the diſtinction to be ſure is often made in the books.

In the caſe of *Fiſher* verſus *Wigg*, in 1 *P. W.* 14. and 1 Lord *Raym.* 622. there was a ſurrender of a copyhold eſtate to the uſe of *A. B.* and *C.* and their heirs, *equally to be divided betwixt them and their heirs reſpectively.* This was held by Mr. Juſtice *Gould* and *Turton* a tenancy in common, by reaſon of the apparent intent of the ſurrenderer, againſt the opinion of Lord Chief Juſtice *Holt* who thought it a jointenancy.

I do not find that this judgment has been reverſed, ſo that it is undoubtedly an authority.

The caſe in 2. *Vent.* 367. in Chancery, is alſo to the ſame purpoſe, where a covenant to ſtand ſeiſed to the uſe of *A.* for life, and afterwards to two *equally to be divided*, and their heirs and aſſigns for ever, was adjudged by the Lord Keeper *North* to be a tenancy in common.

I have had the regiſter ſearched for this caſe, and cannot find it; but notwithſtanding it was not entered, it might have been ſo determined, and is ſo cited by Mr. Juſtice *Turton* in *Fiſher* verſus *Wigg*.

Hammerton verſus *Clayton*, 14 *Car.* 2. *Rot.* 43. was adjudged a tenancy in common upon the ſame words; but this caſe is not much to be depended upon, becauſe at the end of Lord *Raymond*'s report of *Fiſher* verſus *Wigg* it is ſaid to be cited by Sir *Edward Northey* only, and the caſe was not to be found.

In the caſe of *Smith* verſus *Johnſon*, *Paſch.* 32 *Car.* 2. in the court of King's Bench, there was a Feofment to two and their heirs, *equally to be divided between them, to the uſe of them and their heirs:* upon the breaking of the caſe, *Scroggs* Chief Juſtice, and *Dolben* Juſtice, were of opinion that it was a tenancy in common; but *Jones* Juſtice was of another opinion, upon the difference between a deed and a will.

But notwithſtanding there was a rule in that caſe for judgment *niſi*, yet nobody being ſatisfied with the opinion, the rule was upon motion ſet aſide, and it was made an *ulterius concilium*, and ended afterwards by the death of the parties.

In the preſent caſe I think it a tenancy in common, whether the inſtrument be conſidered as a deed, or a will.

The arguments of Mr. Juſtice *Gould* and *Turton*, in the caſe of *Fiſher* and *Wigg*, are more agreeable to the reaſon of the thing, and Lord Chief Juſtice *Holt*'s more ſubtle.

No perſon has more reverence for the arguments of Lord Chief Juſtice *Holt* than I have; but in *Fiſher* and *Wigg* the arguments of the other two judges are more agreeable to the reaſon of the thing, and his more ſubtle and finely ſpun.

As ſurrenders of copyhold eſtate are often made by the ſurrenderer *in extremis*, and when he is *inops conſilii*, they are to be conſidered as wills and conſtrued favourably.

That was a queſtion upon a copyhold eſtate; and there Mr. Juſtice *Gould* and Mr. Juſtice *Turton* held it ought for that reaſon to be conſtrued favourably, and contrary to the rules concerning conveyances at common law; and that they are to be conſidered as wills, becauſe the ſurrender is oftentimes made by the ſurrenderer *in extremis*, when he is *inops conſilii*; but Lord Chief Juſtice *Holt* was of opinion, as to raiſing and paſſing eſtates, copyholds ought to be governed by the rules of the common law, and that a ſurrender to uſes is only a direction, and the ſurrenderee is in by the grant of the lord, and not within the ſtatute of Uſes; and therefore held the caſe was to be conſidered as a grant at common law.

Here I muſt conſider it as *a covenant to ſtand ſeiſed*, for there is no livery, and is to take effect after his deceaſe, which could not be good, as a conveyance of a freehold, to take effect *in futuro*.

It would be very inconvenient to conſtrue a covenant to ſtand ſeiſed, different from conveyances at common law.

But here there are words of regulation, or modification; and I do not ſee any harm in giving them a reaſonable conſtruction to anſwer the intention.

There are other reaſons which weigh with me, and greatly ſtrengthen my opinion. Here is a father making proviſion for all his children: ſuppoſe one of them had died and left children, if a jointenancy, it muſt have gone from them, and ſurvived to the other ſons and daughters of the grantor, which could never be his intention.

If two perſons advance money upon a mortgage, tho' the conveyance be made to them jointly, it ſhall be a tenancy in common.

This court has taken a latitude upon the foot of intention; if two perſons advance money upon a mortgage, though the conveyance be made to them jointly, it ſhall be a tenancy in common.

In

In the caſe of advancing money jointly by two perſons for a purchaſe, it has been ſaid indeed that the chance is included, and the intereſt ſhall ſurvive; but then it muſt be underſtood where two perſons purchaſing, advance in moieties, for if there is a diſproportion in the ſums it would be otherwiſe.

The grantor ſeems to have put his own conſtruction upon this deed by diſpoſing of his perſonal eſtate in the ſame words, and which is admitted to be a tenancy in common; and therefore it would be extraordinary to ſay he meant differently in one from the other.

This is as near a teſtamentary caſe as can be, and I do not ſee but it might have been proved as a will: the caſe of *Kibbet* verſus *Lea* was on a deed, and yet proved; and ſince that determination there has been another of the name of *Jackſon* and *Trimmer*, in the court of King's Bench, about a year ago.

The caſe here ſo near a teſtamentary one, it might have been proved as a will.

No objection to this conſtruction ariſes from the word *grant*, for a grant muſt be conſtrued equally the ſame with the words *deviſe* or *bequeath*, if in a will; and this is *quaſi* a teſtamentary act, and therefore muſt be conſidered as a will.

The word *grant* muſt be conſtrued, as the words bequeath or deviſe in a will, for this is *quaſi* a teſtamentary act, and therefore muſt be conſidered as a will.

Notwithſtanding this is my opinion, yet if the defendant chuſes to have the queſtion determined by common law judges, I will give him an opportunity of doing it; but as the eſtate in queſtion is of ſo ſmall a value, I will not ſend it to be determined by a whole court, becauſe the preſent method (though a right one) of ſetting down ſuch caſes in their ſpecial paper of cauſes, introduces a number of arguments, and a conſiderable expence; but I will direct it to be heard and argued, as is often done, before two judges only at their chambers: and mentioned Lord Chief Baron *Parker*, and Mr. Juſtice *Burnet*.

When the eſtate in queſtion is of ſmall value, inſtead of ſending it to be determined by a whole court, it may be directed to be heard and argued before two judges at their chambers.

Mr. Attorney General, who was council for the defendant, declaring himſelf well ſatisfied with Lord Chancellor's opinion, he made a decree according to the prayer of the bill, but at the ſame time ſaid he would direct the account of the rents and profits to be carried back only one year before the filing of the bill, as it was not filed till nineteen years after the death of *Hannah*, *viz.* the twenty-eighth of *November* 1749.

Caſe 282. *July* 23, 1751, *Edmund Robinſon, an infant, by his next friend,* } Plaintiff.

William Robinſon, Clerk, and others, Defendants.

On a caſe made by order of Lord *Hardwicke* for the opinion of the judges of the court of King's Bench, they held that *L. H.* muſt by neceſſary implication, to effectuate the manifeſt intent of the teſtator, be conſtrued to have taken an eſtate in tail-male, notwithſtanding the expreſs eſtate deviſed to *L. H.* for his life, and no longer.

UPON the 27th of *July* 1723, *George Robinſon*, of *Boehym* in the county of *Cornwall*, Eſq; makes his will, atteſted by three witneſſes, and after giving to his wife one guinea, and to his father-in-law a groat, he gives and deviſes in the words following:

"I give and deviſe all my real eſtate whereſoever to *John Hill*, "*Thomas Lukey*, and *Sampſon Sandys*, and their heirs, to the uſes "following:" (here the teſtator directs them to raiſe a thouſand pounds for a particular purpoſe, and then goes on, and ſays,) "My "will is, and I bequeath all my ſaid real eſtate, excepting my eſtate at "*Endyllion*, and all my preſentations in the ſaid county, to *Lancelot* "*Hicks*, of *Plymouth* in the county of *Devon*, Gentleman, for and "during the term of his natural life and no longer, provided he alter "his name and take that of *Robinſon*, and live at my houſe of "*Boehym*; and after his deceaſe *to ſuch ſon* as he ſhall have lawfully "to be begotten, taking the name of *Robinſon*; and for default of "*ſuch iſſue*, then I bequeath the ſame to my couſin (the defendant) "*William Robinſon* of *Landewedrick*, and his heirs for ever: and af- "ter ſeveral legacies, the teſtator gave all the reſt of his goods and "chattels, together with his ſaid eſtate at *Endyllion*, to the ſaid *Wil-* "*liam Robinſon*; and made him ſole executor of his will."

On the 30th of *September* 1728 the teſtator died without iſſue, leaving the defendant *William Robinſon* his heir at law, and *Lancelot Hicks* did after the teſtator's death take upon him the name of *Robinſon*.

Lancelot Hicks had two ſons, *George* his eldeſt ſon, and the plaintiff *Edmund* his younger ſon; and *George* was called by the name of *Robinſon* and died in *March* 1738 an infant, in the life-time of *Lancelot Hicks* his father and of the plaintiff his younger brother.

In *July* 1745 *Lancelot Hicks* died, leaving the plaintiff *Edmund Hicks*, alias *Robinſon*, his only ſurviving ſon.

The plaintiff brought his bill in the court of Chancery for the execution of the truſts in the ſaid teſtator's will, and that a ſufficient part of the real eſtate might be ſold to diſcharge the debts and incumbrances

brances affecting the ſame, and that the reſidue of the ſaid eſtate might be conveyed to the plaintiff.

The defendant *William Robinſon* by his anſwer inſiſted, that by the teſtator's will *George Hicks*, alias *Robinſon*, the elder brother of the plaintiff, was tenant for life in remainder of the teſtator's eſtates immediately expectant on the eſtate deviſed to his father, and that ſuch eſtate was a veſted remainder in him, and that no other ſon of *Lancelot Hicks* could under the teſtator's will take an eſtate or intereſt in the lands thereby deviſed; and that on the death of ſuch ſon the defendant as heir at law of the teſtator, or by virtue of his will, became ſeiſed in fee of the reverſion of the eſtates of the teſtator immediately expectant on the eſtate deviſed for life to *Lancelot Hicks*, and that on his death the defendant became ſeiſed in poſſeſſion thereof, ſubject to the charges and incumbrances thereon.

Lord Chancellor gave his opinion in this cauſe the 23d of *July* 1751.

The queſtion is, Whether the plaintiff *Edmund Robinſon* took any eſtate under the will of *George Robinſon*.

I can find no place where the word *ſon* has been conſtrued to give an eſtate-tail in the firſt taker, but in the caſe of *Byfield* in the time of Queen *Elizabeth*, cited by Lord Chief Juſtice *Hale* in the cauſe of *King* verſus *Melling*.

Byfield's caſe in Queen *Elizabeth*'s time the only one where the word *ſon* has been conſtrued to give an eſtate-tail in the firſt taker.

I do not know what weight to give to this caſe, becauſe, though I have looked into *Cr. Eliz.* and all the cotemporary reporters, yet I cannot find it reported; and notwithſtanding it was mentioned by Lord Chief Juſtice *Eyre*, in the caſe of *Dubber* verſus *Trollop*, yet he ſtates it from the caſe of *King* verſus *Melling*, and ſo does every one who cites it in any caſe ſubſequent to *King* and *Melling*, and therefore it is probable *Hale* quoted it from a manuſcript, and upon ſuch an authority as this is, I cannot juſtify it to myſelf to conſtrue the word *ſon* to give an eſtate-tail in the caſe before me, becauſe the deviſe to *Lancelot Hicks* is to him for life, and no longer, and conſequently by no implication whatſoever can this be conſtrued to be an eſtate-tail in him.

Byfield's caſe is not to be found in *Cro. Eliz.* or any of the cotemporary reporters, and therefore cannot be allowed to be an authority. The deviſe in the preſent caſe being to *L. H.* for life, and no longer, cannot by any implication whatſoever be conſtrued to be an eſtate-tail in him.

But I do not intend to give an abſolute opinion; and if the parties approve of it, I will make a caſe for the judgment of the court of King's Bench.

The direction *to alter the name of Hicks*, and take that of *Robinſon*, means bearing the name of *Robinſon*, and therefore could not deſert it, as he might have done if it had been *taking* only; but ſtill it is a condition ſubſequent only, and did not diveſt the eſtate.

The direction to alter the name of *Hicks*, and take that of *Robinſon*, means bearing the name of *Robinſon*, and therefore could not deſert it, as he might have done if it had been taking only; but ſtill I think this was a condition ſubſequent and did not diveſt the eſtate, and the ſon who was but juſt born would have a reaſonable time to take the name.

Lord Chancellor ſaid, after mentioning the caſe of *King* verſus *Melling* in *Ventr. Reports*, that the argument of Lord Chief Juſtice *Hale* in *Ventris* was not copied from his own argument, but the arguments in the caſe of the *Seven Hundreds of Cirenceſter*, and a caſe upon alienations, were copied verbatim from a manuſcript of *Hale*.

Upon the 9th of *November* 1751 the cauſe came on again before *Lord Chancellor*, when his Lordſhip ordered that a caſe ſhould be made for the opinion of the Judges of the court of King's Bench upon the will of the teſtator *George Robinſon*; and the material facts appearing in the pleadings upon the following queſtion:

Whether any and what eſtate or intereſt in the premiſſes in queſtion is, by virtue of the ſaid will, veſted in the plaintiff *Edmund Robinſon* the infant: and it was ordered that the ſaid caſe ſhould be ſtated as of a deviſe of a legal eſtate to *Lancelot Hicks*, and the ſeveral perſons to take in remainder after him, without regard to any truſts.

N. B. The above queſtion has been under the conſideration of the court of Chancery in another cauſe, which was as follows:

Upon the death of *George Robinſon*, his widow brought a bill in Chancery againſt *William Robinſon* his heir at law, and *Lancelot Robinſon* his deviſee, and to have a performance of the articles made upon her marriage; and a croſs bill was brought by the ſaid *Lancelot Robinſon* to prove his will, and to have an execution of the truſts thereof.

Sir *Joſeph Jekyl*, in a cauſe between the widow of the teſtator and *W. R.* the heir at law, declared that *L. R.* was intitled only to an eſtate for life, with remainder *to the eldeſt ſon, and but one ſon for his life*, and that the remainder will go over to *W. R.* the heir at law of the teſtator.

Upon hearing the cauſes before Sir *Joſeph Jekyll*, on the 17th of *April* 1733, the following remarkable declaration was inſerted in the decree: "His honour declared that by the ſaid teſtator's will the "defendant *Lancelot Robinſon* is intitled to an eſtate for life in all the "eſtates of the ſaid *George Robinſon*, except the eſtate of *Endyllion*, "with remainder *to the eldeſt ſon, and but one ſon*, of the defendant "*Lancelot Robinſon* for his life, they performing the condition in the "ſaid will; *and that the remainder will go over to the defendant* William Robinſon *the heir at law of the ſaid teſtator.*"

A copy

A copy of the opinion of the judges of the court of King's Bench, in the caſe of Robinſon *againſt* Robinſon, *the 1ſt of December* 1756.

We are of opinion, that, upon the true conſtruction of the will of *George Robinſon*, *Lancelot Hicks*, therein mentioned, muſt by neceſſary implication, to effectuate the manifeſt general intent of the teſtator, be conſtrued to have taken an eſtate in tail male, he and the heirs male of his body taking the name of *Robinſon*, notwithſtanding the expreſs eſtate deviſed to the ſaid *Lancelot* for his life and no longer.

Mansfield.
J. Deniſon.
M. Foſter.
J. E. Wilmot.

Burdon verſus *Kennedy*, *July* 23, 1757.

Caſe 283.

LORD CHANCELLOR.

WHERE an execution by *elegit* or *fieri facias* is lodged in a ſheriff's hands, it binds goods from that time, except in the caſe of the crown, and a leaſehold eſtate is alſo affected from that time; and if the debtor ſubſequent to this makes an aſſignment of the leaſehold eſtate, the judgment creditor need not bring a ſuit in ejectment, to come at the leaſehold eſtate, by ſetting aſide the aſſignment, but may proceed at law to ſell the term, and the vendee, who is generally a friend of the plaintiff, will be intitled at law to the poſſeſſion, notwithſtanding ſuch aſſignment.

A leaſehold eſtate is affected by an *elegit* or *fieri facias* from the time it is lodged in a ſheriff's hands; and if the debtor ſubſequent to this makes an aſſignment of it, the judgment creditor may proceed at law to ſell the term, and the vendee will be intitled to the poſſeſſion, notwithſtanding ſuch aſſignment.

But in the preſent caſe here is only an equity of redemption in the debtor in the leaſehold eſtate, and an execution lodged will not affect this, as the legal eſtate is in the mortgagee; and conſequently, by the common equity of this court, he may come here to redeem a ſubſequent incumbrancer, and likewiſe to diſcover whether there was any and what conſideration for the aſſignment.

Butler

Caſe 284. *Butler* verſus *Raſhfield*, *Auguſt* 2, 1751.

If there be a ſequeſtration *niſi*, for want of an anſwer, againſt a member of parliament, and he puts in an anſwer before the order is made abſolute, and exceptions are taken to the anſwer, the court *will enlarge the time for ſhewing cauſe* till it appear whether the anſwer is ſufficient.

MR. *Evans* ſhewed cauſe why an order *niſi* for a ſequeſtration, for want of an anſwer from a member of the Houſe of Commons, ſhould not be made abſolute.

The cauſe ſhewn was, an anſwer come in; but it was inſiſted on the part of the plaintiff, as exceptions were taken, that it is no anſwer, and therefore the order ought to be made abſolute. Mr. *Evans*, *e contra*, cited Lord *Clifford*'s caſe, 2 *P. Wms.* 385. where it is laid down by Sir *Joſeph Jekyl*, that if there be a ſequeſtration *niſi* againſt a peer for want of an anſwer, and the peer puts in an anſwer which is inſufficient, yet the order for ſequeſtration ſhall not be abſolute, but a new ſequeſtration *niſi*; and at the ſame time Mr. *Goldſborough*, who was then the regiſter, ſaid this was the courſe of the court.

LORD CHANCELLOR.

If there be a ſequeſtration *niſi* for want of an anſwer againſt a member of parliament, and he puts in an anſwer before the order is made abſolute, and exceptions are taken to this anſwer, the court *will enlarge the time for ſhewing cauſe* till it ſhall appear whether the anſwer is ſufficient or not.

Mr. *Goldſborough*, who ſaid it was the ſtanding rule of the court there ſhould be a new ſequeſtration *niſi* in this caſe, was a very good officer, but yet I ſhould think what I have mentioned is the proper medium: but his Lordſhip at preſent allowed the cauſe, as it was the courſe of the court.

Caſe 285. *Parry* verſus *Owen*, *Auguſt* 3, 1751.

The wife and executrix of an attorney brought a bill for money due for buſineſs done by her huſband as the defendant's attorney. A demurrer to the relief as a remedy is *at law* under the ſtatute of 2 *Geo.* 2. *for the better regulation of attorneys and ſolicitors.* Lord Chancellor allowed the demurrer.

A Bill brought by the executrix of an attorney, for money due from the defendant for buſineſs done by her huſband as his attorney, and to be paid what ſhall be found due on an account, and ſtates the delivery of a bill by the plaintiff.

The defendant demurred to the relief; and for cauſe of demurrer ſhewed, the remedy was at law, and that an act of parliament has pointed out a ſummary way; the ſtatute of 2 *Geo.* 2. *cap.* 23. *ſect.* 22.

Lord Chancellor allowed the demurrer.

Parſons verſus *Freeman*, *November* 9, 1751. Caſe 286.

ON articles before the marriage of *Richard Freeman* and his wife, upon his undertaking to do ſome acts for her benefit, ſhe covenanted that ſhe would join with him in ſuffering a recovery of an eſtate that belonged to her, and ſettle it to him and his heirs.

On a huſband's promiſing to do acts for a wife's benefit, ſhe, in articles before marriage, covenanted to join in ſuffering a recovery of her eſtate, and ſettle it to him and his heirs.

Mr. *Freeman* made his will in 1729, and took upon him to deviſe this eſtate to the defendant; but not having performed the contract, or the acts he had obliged himſelf to do by the articles, *Freeman* afterwards comes to a new agreement with his wife, that he ſhall not take her eſtate *inſtanter* in fee, but ſubject to an appointment *of the huſband and wife*, and in default of ſuch appointment, to the uſe of *Richard Freeman* and his heirs.

The huſband made his will, and deviſed this eſtate to the defendant, but not having done what he obliged himſelf to do, came to a new agreement with his wife, that he ſhall not take her eſtate *inſtanter* in fee, but ſubject to an appointment of the huſband and wife, and in default thereof, to the uſe of the huſband and his heirs.

A recovery was ſuffered by Mr. *Freeman* and his wife, and the uſes of that recovery declared to be to the purpoſes of the deed; he died afterwards, in the life-time of his wife, without ever making any appointment with her, or revoking his will.

The recovery ſuffered, the uſes declared to the purpoſes of this deed: he died in the wife's life-time, without making any appointment, or revoking his will.

The queſtion was, whether the recovery ſuffered by *Richard Freeman* and his wife, and the uſes of that recovery as declared by them, are a revocation of his will.

The recovery ſuffered by Mr. *Freeman* and his wife, and the declaration of it, to the uſes of the deed, is a revocation of Mr. *Freeman*'s will.

Mr. *Noel* for the plaintiff inſiſted, that the recovery is clearly a revocation as to this eſtate.

There are two general rules.

Firſt, Where a man has an eſtate in fee at the time of making his will, and makes a feoffment afterwards, though he takes an eſtate to himſelf in fee again, it is a revocation.

Secondly, where what is done, relates and extends to the whole eſtate, it will be conſidered the ſame in equity as at law.

And for theſe purpoſes, he cited *Marwood* verſus *Turner*, 3 *Wms.* 163. there "tenant in tail-male, remainder to himſelf in fee, "deviſes his lands to *J. S.* and then ſuffers a recovery to the uſe

" of himſelf in fee, and dies without iſſue male; this is a revo-
" cation of the will."

This determination ſhews, that the principle I have laid down is fully eſtabliſhed, with regard to ſubſequent acts after making a will.

Though a will, I muſt allow, takes in all perſonal eſtate acquired afterwards, yet it cannot poſſibly take in a real eſtate acquired afterwards.

It is laid down in *Rolls Abr.* 616. that a feoffment after a will, though declared to the uſes of a will, is a revocation.

The deed to lead the uſes of the recovery amounted to a new agreement; for, inſtead of letting it reſt as it did on the articles, the huſband and wife conveyed the eſtate in fee upon a different conſideration.

In the caſe of *Pollen* verſus *Huband*, *Eq. Caſ. Abr.* 412. Sir *J. H.* by will of the 12th of *February* 1708. " gives all the reſidue
" of his real and perſonal eſtate to *J. P.* and the heirs males
" of his body, with remainders over; afterwards, by leaſe and
" releaſe, the 30th of *Auguſt* 1709, Sir *J. H.* together with *J. S.*
" his truſtee, convey ſeveral lands in *Warwickſhire* to truſtees and
" their heirs, to the uſe of himſelf for life; and that the truſtees
" ſhould execute ſuch conveyance thereof, as Sir *J. S.* by writing
" under his hand and ſeal, or by his laſt will and teſtament ſhould
" appoint: Sir *J. S.* died in 1710, without altering or revoking
" the ſaid will, or making any other appointment touching the real
" eſtate: the queſtion was, whether this leaſe and releaſe were a
" revocation of the will or not; and it was decreed, *that the leaſe*
" *and releaſe were a revocation of the will.*"

There was a caſe of *Tickner* verſus *Tickner*, before Lord Chief Juſtice *Lee*, about a year ago, which was as follows:

" *Robert Tickner* ſeiſed in fee of the eſtate in queſtion of gavel-
" kind, died inteſtate, and left two ſons, *Henry* and *Robert*, who
" entered on his death, and became ſeiſed in gavelkind; *Robert*,
" being poſſeſſed of an undivided moiety, made his will, and de-
" viſed it to his wife *Elizabeth Tickner* and her heirs.

" After making his will, by a deed of partition between *Robert*
" and *Henry Tickner*, and by fine, all the gavelkind eſtate which
" *Robert* had deviſed, was allotted intirely to *Robert*, to ſuch uſes
" as he ſhould appoint by deed or writing, and in default of ſuch
" appointment, to him in fee.

" A verdict was found in ejectment, ſubject to the opinion of " Lord Chief Juſtice *Lee*, who, after mature deliberation, held this " tranſaction to be a revocation of the will."

Mr. *Wilbraham*, council of the ſame ſide.

Though there had been no expreſs agreement, yet the acts done amount to a new agreement.

The conſequence of the recovery is, they have connected their legal and equitable eſtates together, and conveyed them by the deed, to make a tenant to the *præcipe*.

It is laid down in *Moore* 107, that if a uſe is declared by an indenture, yet the parties may alter the indenture at any time, till the eſtate is executed by the fine, and the ſecond deed ſhall control the firſt.

In *Jones* verſus *Morley*, *Salk.* 677. it was reſolved, " that if a " fine had been levied purſuant to a covenant in a marriage agree- " ment, no parol averment could have been allowed to declare " other uſes, or that the fine was not to the uſes of that deed, and " all parties had been eſtopped to aver the contrary by parol; but " by deed ſubſequent, and before the fine, other uſes may be aver- " red, though they were declared by writing and not by deed; for, " by the variance, there was room to inquire and receive informa- " tion, that the old agreement was relinquiſhed.

" That this is a good revocation of the uſes of the firſt deed, " though it be but a writing; for where the conveyance enures by " way of tranſmutation, the uſe is according to the intent of the " party, and it is no matter how that intent is manifeſted, ſo as it " may be known."

He cited likewiſe the caſe of *Stapleton* verſus *Stapleton*, (1 *Tr. Atk.* 2.)

Till uſes are declared, and whilſt it lay in ſuſpence, whether Mr. and Mrs. *Freeman* would jointly declare uſes or not, it veſted in Mrs. *Freeman*, as being her eſtate.

Suppoſe the eſtate had been limited to the huſband in tail, with ſuch a power of appointment, till appointment, the fee cannot be in abeyance, and therefore muſt revert back to the perſon, who had the original dominion over this eſtate.

Therefore, if it is a reſulting uſe, it would come to Mrs. *Freeman*, and muſt be a declared new uſe to come to him; and if ſo, it

is

is an acquired eſtate, and conſequently a revocation of the will, as he gained a better eſtate than he had before.

Mr. *Evans*, alſo council of the ſame ſide.

Either by having gained a new eſtate upon a new uſe executed to the huſband, or on a ſolemn act by the huſband and wife, it is a revocation.

The reaſon, why, in the rule already laid down, a ſecond deed will revoke the firſt, is, becauſe it reſts in agreement only, till the fine levied, or recovery ſuffered.

The wife, who was tenant in tail, with remainder to her nephew, covenants by marriage articles to limit a part of her eſtate to the huſband in fee, on his doing what he agreed on his part to complete the articles.

He not having performed his contract, they come to a new agreement, that he ſhould not take the eſtate *inſtanter* in fee, but ſubject to the appointment both of huſband and wife, therefore the recovery ſuffered was not intended to complete the articles, buupon a different conſideration.

The fee, veſted in Mr. *Freeman* under the deed, was upon a new uſe executed, and not a uſe contracted for by the articles, but variant from what is deviſed by him; but if the court ſhould not be of opinion it is a new uſe, yet ſtill the very act of ſuffering a recovery, ſhall be conſidered as an intention in Mr. *Freeman* to revoke his will.

It is material, this is not ſuch an uſe, only as he ſhall appoint, but ſuch uſes as the huſband with his wife ſhall appoint.

Upon the whole, it is manifeſtly done with an intention to depart from the articles, and not in conformity to them.

The Attorney General, for the deviſee under the will, ſaid, the true queſtion was, whether the recovery ſuffered by Mr. and Mrs. *Freeman* after the marriage articles is a total, or a partial revocation of the deviſe made by Mr. *Freeman*'s will.

Mrs. *Freeman*, at the time of the marriage, was ſeiſed in tail of one part of the eſtate in queſtion, in fee of another.

It is neceſſary to conſider what eſtate it was Mr. *Freeman* had before the will, and what he intended to paſs by the will.

He

He had only the truſt of an eſtate in fee, and under the will has deviſed nothing more but that truſt in fee.

The operation of the recovery is, that it conveys the legal eſtate, and bars the eſtate-tail Mrs. *Freeman* had, the uſe is diſpoſed of, and the inheritance diſpoſed of by the limitation to the huſband and wife, and their appointments, therefore the fee cannot be ſaid to be *in abeyance.*

The ſecond queſtion will be, what operation the recovery has in equity, and what is the conſequence with reſpect to the equitable intereſt?

Though the legal uſe, till appointment, may be ſaid to veſt in the wife, yet the equitable uſe veſts in the huſband, then the recovery will operate only, ſo as to leave the huſband ſuch eſtate as he had before.

Where a perſon makes a will, and afterwards a ſubſequent conveyance, ſo far as it is conſiſtent with the will, it is no revocation; ſo far as it is inconſiſtent, it is.

He cited *Coward* and *Marſhal*, *Cro. Eliz.* 721. " Where a man " deviſed lands to his younger ſon and his heirs, and afterwards took " a wife, and by another will in writing, he deviſed the lands to " his wife for life, paying yearly to his ſon, and his heirs, ſuch a " rent, held to be no revocation, but in this caſe *both wills may* " *ſtand together*, unleſs the latter be contrary to the firſt will, or " that there be an expreſs revocation; and here his intention appears " to be only to provide for his wife, whom he afterwards eſpouſed, " and not to alter the will as to his ſon.

Lord Chancellor ſaid, the ſubſequent act appeared to be only a codicil, and does not come up to the preſent caſe, the codicil being part of the will.

All the caſes cited were mere legal queſtions; as the eſtates in every one of them were legal eſtates.

The caſe of *Tickner* verſus *Tickner* was a new conveyance, and did not reſt upon the partition only.

Mr. *Solicitor General* of the ſame ſide.

A general rule is to be drawn from the caſes, that there is a ſort of revocation which does not depend on the intention of the teſtator.

As where a man only takes back the very eſtate he deviſed by a new conveyance, and yet is held to be a revocation.

The converting an equitable into a legal fee, is not within this rule, but depends upon other conſiderations, and the preſent is a caſe of this ſort.

The reaſon why a perſon who firſt made a will, and then ſuffers a recovery to the ſame uſes, is a revocation, depends on artificial reaſoning, being conſidered as a new conveyance.

That the converſion of a legal into an equitable eſtate or truſt, will not be a revocation.

In the caſe of Lady *Mary Vernon* verſus *Jones*, 2 *Vern.* 241. " *A.* " deviſed lands to truſtees to pay his debts, and then to pay his wife " 200*l. per ann.* for her life: the teſtator lived ſeveral years, and his " debts were increaſed from 2000*l.* to 10000*l. A.* by deed and " fine conveys his lands to the ſame truſtees to ſell to pay his debts, " and the ſurplus to him and his heirs, and his wife joins in the " fine and conveyance: this was determined to be no revocation of " the wife's 200*l. per annum.*

In the caſe of *Ogle* verſus *Cook*, the 20th of *February* 1748, before your Lordſhip: " A real eſtate was deviſed, and after the de- " viſe it was conveyed to be ſold, in order to pay a debt due to " Mr. *Coke*, and conveyed to him in fee for that expreſs pur- " poſe, and in truſt for himſelf as to the reſidue; held to be no " revocation."

This was determined, I apprehend, on the common principle of a perſon who is ſeiſed in fee making a will, and then mortgaging the eſtate, there in law the whole fee is gone, and yet in equity, a revocation of the will *pro tanto* only.

The caſe of all other revocations depends upon the implied intention of the teſtator, and after making a will, no act ſhall revoke it, but where the act done is inconſiſtent with his will, and even then, where it is only a partial inconſiſtency, it is but a revocation *pro tanto.*

When a man, after making a will, demiſes to the ſame perſon for forty years, this is a revocation *pro tanto* only.

In the caſe of *Lamb* verſus *Packer*, " *A.* by will deviſed to his " ſon a meſſuage of 99 years, if three lives lived ſo long, paying " his ſiſter 40*l. per ann.* for her life, and afterwards makes a leaſe " to *B.* of the ſame meſſuage for 99 years, if three lives lived ſo " long

" long, paying 50*l. per ann.* to the leſſor and his heirs; it was decreed " at the *Rolls*, that the leaſe was a revocation of the deviſe; but " upon appeal to the Lord Keeper, decreed to be *no revocation*, " and that the daughter ſhall be paid her annuity. 2 *Vern.* 495."

At the time of making the will, the teſtator had no legal eſtate, but, in the notion of this court, a bare equitable fee.

What is done between the huſband and the wife? Nothing but a conveyance of the legal eſtate.

The bare conveyance of the legal eſtate will make no alteration as to the will.

It was limited upon the recovery to ſuch uſes as the huſband and wife ſhall appoint, and for default of ſuch appointment, the huſband has it in fee.

The alteration by the recovery is only *the contingent appointment of uſes*, and not inconſiſtent with the will in any reſpect.

If Mr. *Freeman* had had a legal eſtate, it could not have been diſtinguiſhed from the rule of a recovery's being a new conveyance, but clearly he had only an equitable fee.

It has been ſaid, here was a new agreement, but the conſequence does not follow; if it was a partial agreement, it is no revocation; if there had been ſuch an agreement to ſubject it to this contingent partial revocation by letting in the appointment as to ſome of his intereſt, it would have been only a partial revocation, and the equitable fee he had in him is not diſturbed by any act the huſband has done by the recovery.

But as the appointment was never made by the huſband and wife, the recovery is no alteration of the old equitable fee Mr. *Freeman* had in him at the time of making the will.

LORD CHANCELLOR.

The caſes have been determined on very nice and artificial reaſons, upon an inclination the law always ſhews to favour an heir, and to prevent him from being diſinherited, where the intention of the teſtator is doubtful.

The law leans to an heir, and artificial reaſoning allowed to prevent his being diſinherited.

If the huſband had been ſeiſed of the abſolute legal eſtate at the time of making the will, and afterwards had ſuffered a recovery, and declared the uſes to be ſuch as he and his wife ſhould appoint; this would have been a revocation.

If

If a perſon ſeiſed in fee, deviſes an eſtate in fee to *J. S.* and by a conveyance takes back an eſtate from *J. S.* in fee, that is a revocation.

The caſe of the feoffment, where the teſtator takes back the old uſe, is a prodigious ſtrong caſe.

That conſtruction muſt ariſe from a preſumed intention, that the teſtator would not have made a new conveyance, without an intention to revoke his will.

But this muſt be underſtood with ſome reſtrictions and limitations.

Where a common recovery is to a particular purpoſe, it ſhall revoke no further than to anſwer that purpoſe.

If the conveyance or recovery be for a particular purpoſe, then it ſhall revoke no further than to anſwer that purpoſe, as where a teſtator creates an eſtate for years, or for life, in the lands deviſed, it ſhall operate no further.

This is the rule of law, but it has been thrown out as a doubt, whether there may not be ſome difference in equitable eſtates.

The ſame conveyance which would be a revocation of a deviſe of a legal, will be equally a revocation of a deviſe of an equitable eſtate.

I am of opinion that the ſame conveyance which would be a revocation of a deviſe of a legal, will be equally a revocation of a deviſe of an equitable eſtate, and it would be very dangerous to property if it was otherwiſe.

But ſtill the ſame rule holds as at law, if for a particular purpoſe only, it ſhall be underſtood to be a revocation *pro tanto* only.

Where a conveyance of the whole eſtate in law is only meant for a ſecurity, the revocation ſhall be *pro tanto* only.

In all the caſes where it is a conveyance of the whole eſtate in law, and is only meant for a ſecurity, the revocation ſhall only be for that particular purpoſe, to let in the incumbrance, for the teſtator himſelf has drawn the line, how far the revocation ſhall go, and his intention is plainly ſhewn.

By marriage articles, the wife contracts, that on the huſband's doing ſome certain acts, ſhe will convey her eſtate to him and his heirs.

It has been ſaid Mr. *Freeman* has not done the acts on his part, and therefore was not intitled to an equitable eſtate in the lands; but though this may admit of ſome niceties, I will take it he had an equitable eſtate.

Being ſo ſeiſed he made his will, and deviſed his equitable intereſt to a perſon and his heirs.

Afterwards

Afterwards, he and his wife ſuffer a recovery, and do not declare the uſes to the huſband in fee abſolutely, but to ſuch uſes as he and his wife ſhould appoint.

No appointment was ever made by him and the wife; ſhe ſurvived him, and at his death the fee veſted in him and his heirs.

It has been inſiſted on the part of the plaintiff, that the recovery, and the deed to lead the uſes has made an alteration in the eſtate.

The queſtion is, as to that part of the articles, where the huſband was to have the fee in the wife's eſtate.

So far I am of opinion with the defendant, that where a man has an equitable intereſt in fee in an eſtate, and deviſes it, and afterwards makes a conveyance of the legal eſtate to the ſame uſes, this is no revocation.

Where a man has an equitable intereſt in fee in an eſtate, and deviſes it, and makes a ſubſequent conveyance of the legal eſtate to the ſame uſes, it is no revocation.

Whether the conveyance is made by feoffment, by leaſe and releaſe, or by fine and recovery, it makes no alteration, for that is inſtrumental, provided he takes it on the ſame limitation he did before.

If a man ſeiſed of a legal eſtate deviſes it, and afterwards conveys it in truſt for a particular purpoſe, this is no revocation, but that does not prove it to be no revocation in all caſes.

I am of opinion, it is in this caſe plain, the huſband and wife came to a new agreement; for, *before*, he was to have an abſolute inheritance, but, by the *recovery*, took the eſtate ſubject to the joint appointment of the huſband and wife, and was executed by the declaration of uſes under the common recovery.

It has been ſaid, the eſtate veſted in him till appointment made, and will open, when made, to let in the uſe of the appointment, and therefore, ſtill he had the ſame eſtate as at the time of making the will.

I am of opinion this cannot be maintained.

I will put this caſe: Suppoſe a man ſeiſed in fee of an eſtate deviſes this, and afterwards on a ſettlement, by leaſe and releaſe takes an eſtate to himſelf for life, with a limitation to *a ſon when born, and the heirs of his body*, without any truſtees to preſerve contingent

A man ſeiſed in fee of an eſtate, deviſes it, and afterwards by deed takes an eſtate for life, and to a ſon when born, and the heirs of his body, without any truſtees to preſerve, &c. this is a revocation of the will.

remainders,

remainders, it might be ſaid, this was for a particular purpoſe to let in a ſon when born, and did not in the mean time make any alteration of the former eſtate, but this has been clearly held to be a revocation of the will.

Mr. *Freeman* took a fee differently qualified, conveyed differently, diſpoſable differently, and cannot be ſaid to be only for a particular purpoſe, and therefore I am of opinion the recovery is a revocation of the will.

The caſe of *Tickner* verſus *Tickner*, comes very near the preſent, it was not merely to effectuate a partition, but for another purpoſe, and therefore Lord Chief Juſtice *Lee* held, it amounted to a revocation; and I am, for the ſame reaſon, of opinion, the recovery here is alſo a revocation.

Caſe 287. *Pitt* verſus *Snowden*, *January* 20, 1752.

A receiver appointed by this court has a power to diſtrain for rent, and need not apply for a particular order for that purpoſe, unleſs there be a doubt who had a legal right to the rent.

LORD *Hardwicke* ſaid in this cauſe, that receivers appointed by this court have a power, where they ſee it neceſſary, to diſtrain for rent, and need not apply firſt to this court for a particular order for that purpoſe; and that he had often wondered at their doing it, as it gave the tenant an opportunity of conveying his goods off the premiſſes in the mean time, for the court never makes an immediate order for a diſtreſs, but allow on ſuch applications a future day for a tenant to pay.

If there ſhould be any doubt who had a legal right to the rent, then the receiver, as he muſt diſtrain in the name of the perſon who has that right, would very properly make an application to the court for an order.

Caſe 288. *Anon. December* 18, 1752.

A bill in this court to reſtrain nuſances extends to ſuch only as are nuſances at law, and the fears of mankind, though reaſonable ones, will not create a nuſance.

A Motion was made for an injunction to ſtay the building of a houſe to inoculate for the ſmall pox in *Cold Bath Fields*.

For the motion the following caſes were cited, 2 *Roll. Abr.* 139, 140. *Hawk. Pl. Cro. book* 1. *p.* 199. *ca.* 75. *ſect.* 11. 1 *Lut.* 169.

LORD CHANCELLOR.

The application is to be conſidered in two lights:

Firſt, Whether the thing complained of be a nuſance?

Secondly, If a nuſance, whether of a publick or a private nature?

Now it is not ſettled, that a houſe for the reception of inoculated p tients is a nuſance.

Upon an indictment of that kind, there hath been lately an acquittal after a trial at *Rye* in the county of *Suſſex*.

The notion of a private nuſance is, where it affects only particular perſons, as in ſtopping up antient lights, *&c.*

It then becomes a publick nuſance when it affects many perſons, though it may likewiſe at the ſame time be of a private nature too, as in the caſe of a hole in the King's highway, *&c.*

The preſent nuſance, if any, is a publick one.

For it is not confined to the particular property of the plaintiffs, becauſe it is in the nature of terror to diffuſe itſelf in a very extenſive manner.

But bills to reſtrain nuſances muſt extend to ſuch only as are nuſances at law.

And the fears of mankind, though they may be reaſonable ones, will not create a nuſance.

Had it been a nuſance, the proper method of proceeding would have been by information, in the name of the Attorney General.

Upon the circumſtances of this caſe, I am of opinion, I ſhould not be juſtified in granting the injunction which is now prayed, and therefore muſt deny the motion.

Garth verſus *Cotton*, *February* 5, 1753. Caſe 289.

LORD *Hardwicke* having taken time to conſider of the caſe, this day delivered his opinion.

The plaintiff's father was tenant for 99 years, if he ſhould ſo long live, without impeachment of waſte, except voluntary waſte, remainder to truſtees to preſerve contingent remainders, remainder to his firſt and other ſons in tail male, remainder to Sir *John Cotton* in fee.

G. tenant for 99 years, if he ſo long live, without impeachment of waſte, except voluntary, remainder to truſtees to preſerve, *&c.* remainder to his firſt, *&c.* ſons in tail male, remainder to Sir *J. C.* in fee.

The

G. before a ſon born, and Sir *J. C.* agreed to cut down timber upon the eſtate, and that Sir *J. C.* ſhould not take advantage of its being waſte, and the money ariſing from it to be divided between them.

The tenant for 99 years, and Sir *John Cotton*, before a ſon was born of the former, agree by articles, (which recite that the plaintiff's father was ſeiſed *of an eſtate for life*, and was indebted by mortgage, *&c.*) that the plaintiff's father ſhould cut down the timber upon the eſtate, and that Sir *John Cotton* ſhould not take advantage of its being waſte, and that the money ariſing from it ſhould be divided between them.

Timber cut to the amount of 2000 *l.* *G.*'s ſon born ten years after attained 21. and ſuffered a recovery of the eſtate to himſelf and his heirs.

Timber was cut down to the amount of two thouſand pounds, as appeared by the defendant Sir *John Cotton*'s anſwer; the plaintiff was afterwards born on the 20th of *May* 1704. ten years after the articles were executed, has ſince attained his age of twenty-one, and ſuffered a recovery of the eſtate to himſelf and his heirs.

The ſon intitled to recover ſatisfaction for ſo much value of his inheritance as the late Sir *J. C.* received under the agreement, and his executors admitting aſſets, 1000 *l.* with intereſt at 4 *l. per cent.* to be computed from the filing of the bill directed to be paid to the plaintiff the ſon of *G.* by the executors of Sir *J. C.*

The general queſtion is, whether the plaintiff is intitled to ſatisfaction for ſo much as Sir *John Cotton* received out of the inheritance of the eſtate by ſale of the timber before the plaintiff came *in eſſe*, and conſequently before he had any eſtate in the land, and while the remainder to him veſted in contingency. It is admitted to be a new queſtion, and that the plaintiff can have no remedy at law; but if intitled to any, it muſt be in equity.

Several matters are to be conſidered.

I will mention ſome that are in their nature plain, and others that are more doubtful.

The cutting the timber was a wrong act: Sir *John Cotton* had no preſent right: the inheritance was in him, but ſubject to open, on the father of the plaintiff having iſſue a ſon: the plaintiff's father might have brought treſpaſs, and ought to have done it, upon account of the privity between him and the remainder-man of the inheritance: the articles were between perſons that had not power to do it: there were ſeveral falſe recitals in the articles, as that the plaintiff's father had a freehold eſtate, *&c.* There cannot be a ſtronger proof of colluſion: both join to injure the remainder-man if the event of his coming *in eſſe* happened before the deſtruction of the timber was compleated.

This caſe will depend intirely on the nature of the eſtate there was in the truſtees, and the conſequence reſulting from it.

The

The four principal things for the conſideration of the court are,

Firſt, The intent and uſe of creating limitations to truſtees to ſupport contingent remainders.

Secondly, What eſtate ſuch truſtees take at law, and what actions they can maintain at law?

Thirdly, What is the nature of ſuch a truſt in equity, and what remedy they have here?

Fourthly, How they are chargeable for a breach of truſt, and how other perſons may be affected by it?

Firſt, Inſerting truſtees to ſupport contingent remainders took its riſe from two great caſes, *Chudleigh's*, 1 *Co.* 120. *a.* and *Archer's*, 1 *Co.* 66. *a.* though not brought in uſe till after the uſurpation.

Chudleigh's and *Archer's* caſe gave riſe to the inſerting truſtees to preſerve contingent remainders.

The defect that called for a remedy was, the want of a veſted eſtate in feoffees to uſes: in *Chudleigh's* caſe, the judges run into refined and ſpeculative reaſoning; one thing the majority of them went on was, that ſuch a right in the feoffees to ſupport the contingent uſes would introduce a perpetuity, if it was not capable of being barred: the law was not then ſettled, but afterwards in *Archer's* caſe, (which is placed firſt in *Coke's Reports*, though ſubſequent) this point was adjuſted; and alſo in the argument of *Pollexfen* it was fully ſtated and allowed in the caſe of *Hales* and *Riſley*.

The want of a veſted eſtate in feoffees to uſes was the defect that called for a remedy.

Secondly, It was formerly a queſtion, whether truſtees took any eſtate at all, except only a right of entry in caſe of forfeiture; but this was ſoon ſettled in *Cholmeley's* caſe, 2 *Co.* 50. *a.* A leaſe to *A.* for life, remainder to *B.* during the life of *A.* is a good remainder. 41 *Ed.* 3. *Fitz.* title *Waſte* 53. *Duncombe* verſus *Duncombe*, 3 *Lev.* 457. If it is ſo after an eſtate for life, it is much ſtronger after an eſtate for years, as was rightly argued by Lord Chief Juſtice *Lee* in the caſe of *Smith* and *Parkhurſt*, *alias Dormer* verſus *Forteſcue*, 14 *Geo.* 2. *in B. R.* If there is a diſſeiſin they muſt bring the aſſiſe, they have an intereſt in the timber, but not to cut it down; yet they could not ſue at law, the owner of the inheritance only could ſue; and the ſtatute of *Glouceſter*, 6 *Ed.* 1. *ch.* 5. gives the writ of waſte to the ſame perſons.

Settled in *Cholmeley's* caſe, that truſtees took an eſtate; doubted till then whether they had any more than a right of entry in caſe of forfeiture.

Thirdly, It is right to conſtrue it in the moſt liberal manner: woods and mines are part of the inheritance, and the deſtruction of the former, and exhauſting the latter, might take away the beſt part of the inheritance. The queſtion is, what remedy the truſ-

tees may purſue in this court? The preſent truſtees are not only enabled to make entries, *&c.* as is uſual, but *to do all and every other lawful act and acts*, and they may take all remedies in law and equity.

The truſtees might have had an injunction to ſtay waſte before the contingent remainder-man came *in eſſe*.

I am clear they might have had an injunction to ſtay waſte before the contingent remainder-man came *in eſſe*; vide *Dayrell* verſus *Champneſs*, *Eq. Caſ. Abr.* 400. The books go ſtill further: A bill may be brought in behalf of an infant *in ventre ſa mere* to ſtay waſte. 2 *Vern.* 711. The truſtees in this caſe might have done it: ſuppoſe they had, and an injunction had been granted, and afterwards the timber had been felled, it had been a contempt of the court. On what terms ſhould the parties offending have been diſcharged? This court would not have fined them, but they could have cleared the contempt only on the terms of making ſatisfaction, and that might have been by paying the value of the timber. To whom ſhould it have been paid? Not to the tenant for years, he could have no right; nor to *the remote remainder-man*; but it ſhould have been laid up for the contingent uſes; for without directing this, compleat juſtice could not have been done.

Truſtees to preſerve contingent remainders may be guilty of a breach of truſt, and are puniſhable for it.

Fourthly, Notwithſtanding what is ſaid in *Pollexfen* 250. the Duke of *Norfolk*'s caſe at the end, that truſtees for preſerving contingent remainders are not puniſhable in equity though they break their truſts, yet that obſervation was not attended to by Lord Chancellor *Harcourt* in the caſe of *Pye* verſus *George*, *Salk.* 680. *Michaelmas Term* 1709. and in the caſe of *Piggot* verſus *Piggot*, in the ſame term, and alſo in the caſe of *Manſell* verſus *Manſell*, 2 *P. Wms.* 610. it was held they might be guilty of a breach of truſt; and it was alſo ſettled that a voluntary grantee under the truſtee, *without notice*, would be liable to the truſts. Suppoſe the truſtees in this caſe had conſented to the felling and the ſale of the timber, and had covenanted not to bring a bill for an injunction to ſtay waſte, they would have been liable. The words of Lord *King* (who was not diſpoſed to extend the power of this court), in the caſe of *Manſell* verſus *Manſell*, are remarkable: "Should the court (he ſaid) hold it no "breach of truſt, or paſs it by with impunity, it would be making "proclamation, that the truſtees in all the great ſettlements in *Eng-*"*land* were at liberty to deſtroy what they had been intruſted only "to preſerve." But in this caſe the truſtees have not acted; that will excuſe them, if they had not notice.

An alienee is not affected by the act of the truſtee, but by notice of the truſt.

In all alienations by truſtees the alienee is not affected by the act of the truſtee, but by notice of the truſt. All the parties here claim under the will of , and it is recited in the articles. It would be ſtrange to ſay the plaintiff's father and Sir *John Cotton* would have been liable if the truſtees had joined, and yet are not ſo now. Suppoſe the truſtees had joined in the ſale of the eſtate to a purchaſer

purchaſer with notice of the truſt, and mines had been opened and exhauſted, and afterwards a ſon had been born, according to the caſe of *Manſell* verſus *Manſell*, this court would have decreed a reconveyance of the eſtate, and their decree would not have been compleat without giving a ſatisfaction for what had been taken away.

There have been ſeveral objections raiſed.

Firſt, That the interpoſition of the truſtees to preſerve contingent remainders will not alter the legal right of the tenant for life, and the remainder-man of the inheritance; but it is demonſtrable it was deſigned to abridge the legal rights of the tenant for life to deſtroy, *&c.* by forfeiture, and the legal rights of the latter to accept by ſurrender. It is true the firſt owner of the inheritance *in eſſe* ſhall have timber blown down, *Lewis Bowle*'s caſe, 11 *Co.* 79. *b.* and *Aleyn* 81. an eſtate in contingency is no eſtate, and the trees muſt become the property of ſomebody, and therefore the firſt remainder-man of the inheritance in being takes them:—but in the preſent caſe there is contrivance and colluſion contrary to conſcience.

The firſt owner of the inheritance ſhall have timber blown down, for the trees muſt become the property of ſomebody.

The ſecond objection, That there is no remedy at law: but this caſe depends on principles of equity, that is, the point of fraud and colluſion, which eſtabliſhes the authority of this court often contrary to and beyond the rules of law; conſider how this determination coincides with reſolutions at law.

The point of fraud and colluſion eſtabliſhes the authority of this court often contrary to and beyond the rules of the law.

There is a diſtinction at law between eſtates that go over, which ariſe by operation of law, and by limitation of the party, the former may go back and open, the latter not.

An action of trover lies by the remainder-man for the trees. If there be tenant for life, remainder for life, remainder in fee; if tenant for life commits waſte in trees, and afterwards he in remainder for life dies, the remainder-man in fee may bring action of waſte. *Paget*'s caſe, 5 *Co.* 76. *b.* The common law has intended a remedy in caſe of waſte, which may be by a perſon where the eſtate was out of him by wrong, and afterwards reveſted in him. *Co. Litt.* 356. *a.*

Tenant for life, remainder for life, remainder in fee, if tenant for life commits waſte in trees, and afterwards remainder for life dies, remainder-man in fee may bring action of waſte.

A biſhop after reſtitution of temporalities has a fee; the freehold when he dies is in the king. If tenant for life, by demiſe of the biſhop's predeceſſor, commits waſte during the vacancy, the ſucceſſor ſhall have an action for it. *Co. Litt.* 356. *a.* *Fitz. Nat. Brev.* 112. And this action is not given him by the ſtatute of *Marlbridge*. 2 *Inſt.* 151, 152. 39 *Ed.* 3. 15. *b.* 2 *Ro. Abr.* 824. *Pl.* 3, 4, 5, 6, 7. If it was, he might ſue for waſte done in the time of his predeceſſor, which he cannot do; but this remedy is by the policy of the law.

If tenant for life, by demiſe of a biſhop's predeceſſor, commits waſte during the vacancy, the ſucceſſor ſhall have an action for it.

This

This court will grant an injunction to ſtay waſte of trees for ornament, or belonging to a manſion-houſe.

This court will go further than the common law can, as in the caſe of an intermediate eſtate for life there is no remedy at law for waſte. *Mo.* 454. 1 *Rol. Abr.* 377. 1 *Vern.* 23. 2 *Freeman* 35. 2 *Shower* 59. But this court will grant injunction to ſtay waſte of trees for ornament, or belonging to a manſion-houſe.

A firſt tenant for life gave leave to a ſecond, who was without impeachment of waſte, to cut timber; but the court granted an injunction, for he ought not to do waſte before the eſtate to which the privilege was annexed came into poſſeſſion.

In *Abrahall* and *Babb* Lord *Nottingham* cites a caſe that went much further, and preſerved the contingent intereſt of the inheritance: the firſt tenant for life gave leave to the ſecond, who was ſo without impeachment of waſte, to cut timber, and yet the injunction was granted. The caſe of *Flemming* and the Biſhop of *Carliſle* went on the ſame ground, becauſe he ought not to do waſte by anticipation, and before the eſtate to which the privilege was annexed came into poſſeſſion. *Robinſon* verſus *Lytton*, *December* 12, 1744. went much further.

The third objection. Suppoſe a bill might have been brought by the truſtees to ſtay waſte, yet it does not follow that this bill is now proper for an account. The general run of caſes are of injunction, becauſe that is the moſt immediate relief; but it does not follow this method is not proper, and only one caſe cited to ſupport that reaſoning. *Jeſus College* verſus *Bloom*, *November* 19, 1749. (*vide ante p.* 262.) This point was not abſolutely determined in that caſe: I was of opinion the college might bring trover, and therefore it widely differs from this caſe where no remedy can be at law.

Objection the fourth. If ſuch bill may be brought, yet no decree could be for the value of the timber, or that the money ſhould be laid out for the benefit of the contingent remainders; and in ſupport of this, *Whitfield* verſus *Bewet*, 2 *P. Wms.* 240. was relied upon; but the difference between that and the preſent caſe, is the colluſion and contrivance in this.

Objection the fifth. The great length of time. But there is no ſtatute of limitations in the way, nor are there any lacks to be imputed to the plaintiff.

The bill was brought within three years after the plaintiff was of age: the inconvenience is not greater than in an action at law by a remainder-man in fee after the death of the intermediate tenant for life: the plaintiff here agrees to accept ſo much for ſatisfaction as the defendant confeſſes in his anſwer to have received, ſo that there is no difficulty in directing the account.

Where the uſe of the recovery is declared to be to the recoveror and his heirs, it does not create a new eſtate, but he is in of the antient uſe.

Objection the ſixth. On the recovery ſuffered by the plaintiff the reverſion is diſcontinued by it; and Lord *Coke* ſays, after waſte is done regard is to be had to the ſtate of the inheritance, which muſt continue the ſame at the time of the action brought. *Co. Litt.* 356.*a*. That certainly is law: but the uſe on the recovery is declared to the plaintiff and his heirs; and in Lord *Derwentwater*'s caſe, 6 *Geo.* 1. this was held to be the antient uſe agreeable to *Abbot* and

Burton. 2 *Salk.* 590. and ſo was *Martin* and *Strahan*, *Hilary* 16 *Geo.* 2. in the court of King's Bench, and afterwards affirmed in the Houſe of Lords.

Objection the ſeventh. That ſomething new ariſes in the ſtate of the cauſe, as it now ſtands, by the revival on the death of Sir *John Cotton* ſince the argument at bar. If an action of waſte would lie for the plaintiff againſt Sir *John Cotton*, yet that the remedy is gone by the death of Sir *John Cotton*, and conſequently an action of trover will not lie againſt the executor of the perſon that converted. Of this I give no opinion. Trover may be brought by an executor; and it ſeems ſtrange and contrary to juſtice that thoſe actions ſhould not lie againſt executors as well as for them: but be that as it will, yet the plaintiff is intitled to relief in this court in many caſes where at law the action *moritur cum perſona*, and parties may have remedy here afterwards. Before the fourth and fifth of *William* and *Mary* *Co.* 24. *ſect.* 12. there was no remedy at law againſt an executor of an executor, yet equity gave it, and it was laid down as a rule by Lord *Nottingham*, and he ſaid the common law would come to it in time. His prediction proved true, for it was determined ſo at law two years before the ſtatute. *Eaton College* verſus *Beauchamp*, 1 *Ch. Caſ.* 121. 2 *Mod.* 293.

Trover may be brought againſt an executor of the perſon who converted the timber to his own uſe.

To go further: In all caſes of fraud the remedy does not die with the perſon, but the ſame relief ſhall be had againſt his executor. Colluſion in this court is the ſame as fraud.

In all caſes of fraud the remedy does not die with the perſon, but the ſame relief ſhall be had againſt his executor.

This general argument *ab inconvenienti* was uſed on both ſides, which is of weight, eſpecially in a new caſe. On the part of the defendant it was ſaid, by this means timber would be locked up, and give occaſion for queſtions to ſpring up after a great length of time. Theſe are much leſs than the inconveniences on the other ſide, if contingent remainder-man can have no remedy in this caſe. The law allows of as many tenants for life as are in being at the ſame time; moſt family eſtates are in ſettlement, and frequently the firſt owner of the inheritance in being is a remote remainder-man. The remainder-man in fee might collude with the firſt taker, and though there are ever ſo many contingent remainders intervening, they might deſtroy the woods and exhauſt the mines, and when a ſon is born he will have nothing left to ſupport the family. There being truſtees will not alter the caſe, if they have not notice of it. Artifices to ſupport neceſſitous and extravagant tenants for life increaſe daily: in *Fermor*'s caſe, 3 *Co.* 79. the reſolution was contrary to the ſtatute of Fines, but the judges reſpected the general miſchief.

Arguments *ab inconvenienti* are always of weight, but more particularly in a new caſe.

If the original limitations had been ſubſiſting, I muſt have directed the money to be laid out and ſettled; but as they are barred, and the plaintiff has the fee in the eſtate, he muſt have the money.

As to intereſt. The condition of the timber when felled does not appear, nor whether any, and how much was uſed in repairs, nor how much is grown up ſince; I ſhall direct it therefore to be computed no further back than from the filing of the bill.

" His Lordſhip declared, that on all the circumſtances of the caſe " the plaintiff is intitled to recover ſatisfaction in this court for ſo " much value of his inheritance, as the defendant's teſtator exhauſted " and received by virtue or colour of the articles entered into be- " tween him and the plaintiff's late father, who was tenant only for " the term of ninety-nine years if he ſhould ſo long live; and or- " dered that the maſter to whom he referred it ſhould compute in- " tereſt on the ſum of 1000*l.* admitted by the anſwer of Sir *John* " *Hynde Cotton* deceaſed, to have been received by him from the " time of filing the plaintiff's bill, after the rate of four *per cent. per* " *annum*, and tax the plaintiff his coſts; and that what ſhall be ſo " found due to the plaintiff for the 1000*l.* intereſt and coſts be con- " ſidered as a demand by ſimple contract on the eſtate of Sir *John* " *Hynde Cotton* deceaſed, and be anſwered and paid to the plaintiff " by the defendants the executors, they having admitted aſſets of " their teſtator Sir *John Hynde Cotton* by their anſwer to the bill of " revivor."

Caſe 290. *Worſeley* verſus *Johnſon*, *November* 19, 1753.

T. S. ſeiſed in fee of lands deviſed the ſame *to his wife for life*, and after her deceaſe to *R. B.* and the heirs of his body, and for want of ſuch iſſue to be ſold, and divided amongſt *his relations*, according to the ſtatute for diſtribution of inteſtates eſtates, where no will is made; and by the ſaid will deviſed his houſes in *Foſter-lane* to his wife, her heirs and aſſigns for ever.

THOMAS *Serjeant* being ſeiſed in fee of lands called *Crick*, in the county of *Northampton*, of 90*l.* a year, deviſed the ſame to his wife for her life, and after her deceaſe, to his kinſman *Ralph Bucknell*, and to the heirs of his body, and for want of ſuch iſſue, to be ſold, and divided amongſt *his relations*, according to the ſtatute for diſtribution of inteſtates eſtates, where no will is made; and by the ſaid will deviſed his houſes in *Foſter-lane* to his wife, her heirs and aſſigns for ever.

iſſue to be ſold and divided amongſt *his relations* according to the ſtatute of diſtributions, where no will is made.

The wife is no relation to the huſband, and the next of kin take the whole excluſive of her, both by the words of the will, and the intention of the teſtator.

Thomas Serjeant died in 1726, leaving his widow, who afterwards married *John Lydiard*, ſince deceaſed, and alſo left two aunts, *Dorothy Hook*, and *Caſſandra Higginbottom*, both ſince dead, who were ſiſters of *Henry Serjeant*, the father of the teſtator, and his next of kin.

Ralph

Ralph Bucknell, before Mrs. *Serjeant*'s ſecond marriage, died without iſſue in 1727, and ſhe being adviſed, that herſelf, and the teſtator's next of kin thereupon became intitled to the inheritance in fee in the eſtate of *Crick*, in ſuch ſhares as they would have been intitled to his perſonal eſtate, in caſe he had died inteſtate, by virtue of the ſtatute of diſtributions, and that her intereſt in the inheritance, and the money to ariſe from the ſale of the ſaid premiſſes was ſo veſted in her, that ſhe might diſpoſe of it by deed or will.

Before her ſecond marriage, the wife, with conſent of Mr. *Lydiard*, conveyed theſe lands, amongſt other things, to truſtees, their executors and adminiſtrators, for 99 years, determinable upon the death of *Suſannah Lydiard*, late *Serjeant*, for the uſes therein mentioned, and reſerved a power to herſelf of diſpoſing of this eſtate by will.

Afterwards, reciting her firſt huſband's will, and his deviſe of the ſaid eſtates, and that ſhe was intitled to diſpoſe of a ſhare that ſhould ariſe by ſale thereof, ſhe gave all her right and title thereunto, and all her ſhare ariſing by ſale thereof, to the plaintiff, his heirs, executors, adminiſtrators and aſſigns, for ever, and died in *January* 1750.

The repreſentatives of *Dorothy Hook* and *Caſſandra Higginbottom*, the teſtator's aunts, claim the whole money ariſing from the ſale of *Crick*, in excluſion of the plaintiff, inſiſting the wife of the teſtator *Thomas Serjeant* was not intitled, being no relation, within the words of the teſtator's will, or his intention, nor a relation within the ſtatute of diſtribution.

Mr. *Clarke* for the teſtator's next of kin, cited the caſe of *Davis* verſus *Bailey*, *February* 8, 1747-8, there the words of the will were, " I give the reſidue of my perſonal eſtate to truſtees, to place " out at intereſt, and to permit my wife to receive the produce " thereof for her life; and after her deceaſe, I give it to ſuch of " my relations as would have been intitled under the ſtatute of diſ- " tributions, in caſe I had died inteſtate, in ſuch ſhares as the law " directs: *Lord Hardwicke, was of opinion, that the wife in that caſe* " *was not to be conſidered as a relation, and her repreſentative not in-* " *titled to any of the huſband's reſidue as ſtanding in her place.*

A. gives the reſidue of his perſonal eſtate to truſtees, who are to permit his wife to receive the produce for her life, and ſays, after her deceaſe, I give it to ſuch of my relations as would have been intitled under the ſtatute of diſtributions in caſe I had died inteſtate: *the wife not to be conſidered as a relation.*

Mr. *Wilbraham* of the ſame ſide, argued, that in conſtruction of law, a wife is not properly *a relation* to a huſband, for that word means next of blood, which a wife is not, but is nearer than next of kin, and ſtands in the ſame light as a king and ſubject, or ſubject and king, guardian and ward, or ward and guardian.

A wife

A wife or huſband, in law, are but one perſon, and cited a caſe out of 1 *Vern.* to ſhew that where a deviſe was to a huſband and wife, and a third perſon, it was held a jointenancy in moieties, and the huſband and wife to take only a moiety, as being but one; he alſo cited 2 *Mod.* 20, & 21.

LORD CHANCELLOR.

Do you mean that the will intended *relations* at the determination of the eſtate tail, for I think it will in a great meaſure depend upon this.

Mr. *Wilbraham* ſaid, that the teſtator did certainly mean ſo, and that he never had is wife in view, but intended, if this remote contingency did happen, thoſe who were the next relations ſhould take, and who were ſuch when the event took place, and not relations at the time of his death, and therefore the repreſentative of the wife is not intitled to any ſhare in the eſtate to be ſold.

Mr. *Coxe*, likewiſe of council for the defendant, ſaid, that in the civil law, the wife was not conſidered as a relation to the huſband in the ſame light with the next of kin, becauſe ſhe is called *affinis*, they *conſanguinei*.

Mr. *Attorney General* for the plaintiff ſaid, there was no occaſion to enter into a nice diſcuſſion how far the wife is a relation to a huſband, for the plain meaning of the words here, is, that it ſhould be left to the law to determine it, and that ſuch perſons ſhall take under the word *relations*, as the ſtatute of diſtribution would give it to, in caſe he died inteſtate; and can the council for the defendants deny that the ſtatute gives the wife a ſhare in an inteſtate's eſtate?

LORD CHANCELLOR.

The caſe of *Davis* verſus *Bailey* comes ſo near the preſent, that it is neceſſary I ſhould look into it, and therefore let this cauſe ſtand over till *Tueſday* ſeven-night, and in the mean time deſire to have a copy of that decree.

Worſley verſus *Johnſon came on again November* 26, 1753.

LORD CHANCELLOR.

THE bill is brought by the plaintiff, as executor of *Suſanna Lydyard*, againſt the defendants, who are the next of kin of *Thomas Serjeant*, for a ſale of his real eſtate, which he deviſed in the manner as has been already ſtated, and what he now claims is one moiety thereof under the ſtatute of diſtributions, as the repreſentative of Mr. *Serjeant*'s wife.

This queſtion depends on the conſtruction of the will ariſing out of the words, and the intention of the teſtator.

In the courſe of the cauſe I have changed my opinion, which at firſt leant in favour of the wife.

What is the ſenſe to be put on the word relation? In the will it is uſed in an improper manner, it ſignifies, in grammar, an abſtract quality, any relation that ariſes in ſocial life; but in vulgar acceptation, it is transferred to a perſonal ſenſe, and is ſo uſed in this will, as if he had ſaid *kindred*, which is the word in the ſtatute, and where the will refers to the ſtatute, it muſt be taken as the ſtatute takes it.

Strictly, the wife is no relation to the huſband; relation, in dictionaries, means *conſanguinei* and *affinis*, but by the ſtatute it means kindred by blood only.

Relation, in dictionaries means *conſanguinei* and *affinis*; in the ſtatute, kindred by blood only.

The wife is no relation by blood, nor by affinity: See *Calvin's Lexicon*, title *Affinitas*; the wife, ſays he, *non affinis eſt, ſed cauſa affinitatis*; *affinis ab eodem ſtipite*. *Skinner*, title *Cognatio, Parentela*.

The wife *non affinis eſt, ſed cauſa affinitatis*.

If the wife was next of kin, ſhe muſt exclude all the reſt.

The ſtatute of 21 *Hen.* 8. *c.* 5. *ſec.* 3. intitled *What fees ought to be taken for probate of teſtaments*, ſays, " in caſe any perſon die in- " teſtate, the ordinary ſhall grant adminiſtration of the goods of " the perſon deceaſed, *to the widow* of the ſame perſon deceaſed, or " *to the next of his kin*, diſtinguiſhing more clearly between them " than the ſtatute of diſtributions.

The ſtatute of *H.* 8. diſtinguiſhes more clearly between a wife and the next of kin, than the ſtatute of diſtributions.

This, then, is the ſenſe of the word *relation*, but if that would not anſwer the apparent intention, it muſt give way to it.

I think, if the ſtrict ſenſe of the word does not take in the wife, it falls in with the intention, for he gives his wife the rents of the eſtate for life, and then to his nephew in tail.

Nothing can be more improbable, than to imagine he had in view his wife's being alive at the determination of the entail, to ſhare in the diſtribution of the money at that time.

Should it go at fifty or one hundred years diſtance, ought it to go to the remoteſt repreſentative of his wife, even in this caſe to the repreſentative of the ſecond huſband of the wife?

The word *my* relations means exactly the ſame as my own relations.

Suppoſe he had ordered a diviſion *between my own relations*, as the ſtatute directs, this plainly would have included relations in blood only, and can never in common parlance mean his wife; and the words *my relations* mean the ſame as *my own*.

The caſe of *Davis* verſus *Baily* is in point, and I can find no difference, for there the deviſe was, " to ſuch of *my relations* as " would have been intitled by the ſtatute of diſtributions.

His Lordſhip diſmiſſed the plaintiff's bill without coſts.

Caſe 291. *Evelyn* verſus *Evelyn*, *January* 14, 1754.

The queſtion was, whether the perſonal eſtate of a brother who died inteſtate ſhall go wholly to his brother, or be divided equally between him and the grandfather. Lord *Hardwicke* of opinion it belonged intirely to the brother, and that the grandfather had no right to ſhare in the diſtribution with him.

IN a former cauſe it was decreed, that the Maſter ſhould take an account of the perſonal eſtate of *Charles Evelyn*, come to the hands of Sir *John Evelyn* his executor, and that the clear reſidue of the perſonal eſtate ſhould be laid out in *South Sea* annuities in the name of the accountant general, and placed to the credit of this cauſe, and he was to declare the truſt thereof for the benefit of *John Evelyn*, ſon of *Charles Evelyn*; ſince the decree, *videlicet*, On the 4th of *December* 1752, *John Evelyn* died a batchelor of fourteen years of age, leaving *Charles Evelyn* his only brother, who claims, as next of kin, the reſidue of his late father's perſonal eſtate, and all the other perſonal eſtate of *John Evelyn* deceaſed, but on account of his infancy, adminiſtration of the goods, *&c.* of *John Evelyn* was granted to *Wiliam Evelyn*, for the benefit of *Charles Evelyn*.

Sir *John Evelyn*, the grandfather of the inteſtate, and of *Charles Evelyn*, inſiſting he was in equal degree of kindred to the inteſtate with

with *Charles Evelyn*, the preſent bill is brought againſt Sir *John Evelyn*, to account for the perſonal eſtate of *Charles Evelyn* deceaſed, the father of the plaintiff *Charles Evelyn*, and that the ſame may be paid to the plaintiff, as part of *John Evelyn*, the teſtator's perſonal eſtate, and that the ſame, together with all other the perſonal eſtate of the inteſtate, may be placed out for the benefit of the plaintiff *Charles Evelyn*.

The defendant Sir *John Evelyn*, by his anſwer, inſiſted, that he being grandfather of the inteſtate, is in equal degree of kindred to him, with the plaintiff *Charles Evelyn*, and equally intitled with him to a diſtributive ſhare of the teſtator's perſonal eſtate.

The cauſe was heard laſt *Michaelmas* term, and after conſideration, *Lord Chancellor* gave judgment to day.

The queſtion is, whether the eſtate ſhall go wholly to the plaintiff the brother, or be divided between him, and the defendant the grandfather, as being equal, that is, ſecond in degree by the civil law.

The ſtatute of diſtribution muſt be the rule of determination in theſe caſes.

The rules laid down after the general direction in the act, are only ſo many ſpecifications of particular caſes.

This queſtion has been thrice determined in *Weſtminſter-hall* for the brother; firſt in the caſe of *Pool* and *Whiſhaw*, the 9th of *July* 1708, againſt the grandmother, by the unanimous opinion of the court; they were ſo deliberate, that they heard civilians before they determined it: and in the caſe of *Norberry* verſus *Richards*, heard by the late Maſter of the *Rolls*, and might perhaps have been founded on the former authority; and it is ſucceſſive determinations make the law.

Twice determined; firſt, in *Pool* verſus *Whiſhaw*, and afterwards in *Norberry* verſus *Richards*, and ſucceſſive determinations make the law.

But it as been ſaid, notwithſtanding, by the council for the grandfather, that theſe determinations are erroneous, for they are in equal degree by the civil law; the common law indeed makes a difference, for the brother is in the firſt degree, and the grandfather in the ſecond degree; but that law only takes place in matrimonial caſes, and by the civil law, they are both in the ſecond degree.

Yet I am of opinion that the deciſion in *Pool* verſus *Whiſhaw* is right, and I ſhall abide by it till I ſee it reverſed.

I have ſeen notes of Lord Chief Baron *Ward*, and Baron *Price*, they are looſe ones indeed, but it appears by them that Doctor *Lane* was heard.

Lord

Lord Chief Baron *Dod*'s note is ſhort, but plainer than the former; it is ſaid there, Doctor *Lane* argued, that this caſe was not to be determined by the ſtatute, but by the civil law; and yet they all held, that there was no ſuch uſage ſince the ſtatute, and diſmiſſed the grandfather's bill.

This act was 83 years ago, and made on purpoſe to ſettle people's eſtates, but if it was *res integra*, I think there are juſt grounds to prefer the brother.

The words of the ſtatute muſt be taken together, amongſt the next of kin, *pro ſuo cuique jure*, according to the laws in ſuch caſes, and if by ſettled determinations, an equality or preference had been given, that is confirmed by this ſtatute.

As to the conſequence; Firſt, The civil law is no part of the law of *England*, any further than it has been received here; and this with regard to perſonal eſtate.

Secondly, In real eſtates there is no degree between brothers, as held in *Ventris* 413. *Collingwood* and *Pace*, and in *Blackborough* verſus *Davis*, 1 *P. Wms.* 41. the court relied on the old uſages of *England*.

This alone would be ſufficient to ſupport the determination in *Poole* verſus *Whiſhaw*, that it anſwers the intention of the act.

Before *the Novells*, the father took all the child's fortune, the mother none, the grandfather of the child, if no grandchildren, took the whole *viz.* the paternal grandfather.

But it was argued from the civil law, that there is a ground for it: before the *Novells*, the father took all the child's fortune, the mother none at all; the grandfather of the child, if there were no grandchildren, took the whole, that is the paternal grandfather, becauſe the child was in pupillage to him, if there was no father, *Code* 6. *Lex* 48 & 49.

The Novells were never admitted intirely in any part of Europe, but all follow ſome uſages of their own.

I do not find that it is any where ſaid the *Novells* were ever admitted in any part of the weſtern empire; no country in *Europe* admits them intirely, but all follow ſome uſages of their own: *the Novells* probably were determinations in the *Prætorian* courts, which *Juſtinian* in compiling his body of law adopted.

The 118th *Novell*, *c.* 2. lets in the brothers and ſiſters with the father and mother, excluding the grandfather, for, by aſcending higher, it would admit ſuch a number of perſons, as muſt exclude brothers and ſiſters.

Novell 118. *c.* 2. lets in the brothers and ſiſters with the father and mother, excluding the grandfather, as is obſerved by the commentators, and it would be abſurd to make that *Novell* admit the

grandfather, &c. becauſe, by aſcending ſtill higher, it would admit a greater number of perſons, almoſt to the excluſion of brothers and ſiſters.

Vinius, *p.* 654. ſays, there are caſes in which perſons in the ſame degree, or perhaps nearer, may take, to the excluſion of thoſe in equal degree.

This probably had prevailed in the *Prætorial* court, and adopted there might be *jus potius*.

Arguments of inconvenience, have been alluded to in courts of juſtice, and it would be a very great one in the preſent caſe, to carry the portions of children to a grandfather; the grandfather by the courſe of nature is old, muſt be ſuppoſed to have been provided for, and may very probably be in a dying condition, and not want it; the grandchild, on the contrary, is an infant, and a proviſion neceſſary for him to maintain him, and ſet him out in the world; beſides ſuch a determination would be contrary to the very nature of proviſions among children, as every child may very properly be ſaid to have a *ſpes accreſcendi*.

It would be a very great inconvenience to carry the portions of children to a grandfather, for it would be contrary to the very nature of proviſions amongſt children, as every child may properly be ſaid to have *ſpes accreſcendi*.

I would not be underſtood, that the argument of inconvenience alone, has weight enough to decide the queſtion, but it is a reaſon at leaſt for not unſettling former determinations; and if I was to vary in opinion, it would tend to alter diſtributions made ſince 1708, and diſturb the peace of families.

" Therefore, in favour of the plaintiff, let the former decree be " carried into execution, between the parties to this ſuit, in like " manner as it ought to have been between the parties to the origi- " nal cauſe, and let the ſeveral accounts thereby directed be taken, " and carried on before the Maſter; and as to ſo much as ſhall be " coming under the decree for the ſhare of *John Evelyn*, the infant, " who is dead, and alſo the ſurplus of all other the perſonal eſtate " of *John Evelyn* the infant; His Lordſhip declared, that the ſame " belongs wholly to the plaintiff *Charles*, his ſurviving brother, and " the defendant Sir *John Evelyn*, the grandfather, has no right to " ſhare the diſtribution with him, and referred it to the Maſter, " to take an account of the perſonal eſtate of *John Evelyn*, the in- " fant deceaſed, and that what ſhall be coming for the clear ſur- " plus of the perſonal eſtate of *John Evelyn* the infant, he directed " to be applied for the benefit of the plaintiff *Charles Evelyn*, his " ſurviving brother, and placed out at intereſt in ſecurities, in like " manner as was directed concerning the ſhare of the infants by " the former decree.

Caſe 292. *January* 29, 1764. *ex parte Vennor and others, guardians of John Vennor of Wellſborne in the county of Warwick, Gentleman, on the behalf of him as a minor under the age of* 21 *years.*

An application to the court to ſet aſide a writ of *ad quod damnum*, on a ſuggeſtion of ſurprize upon the inhabitants of the neighbouring villages, when the inquiſition was taken thereon; and for want of a new road being ſet out, (in lieu of the road taken away by the perſon who ſued out the writ) in his own ground. Lord *Hardwicke*, on all the circumſtances of this caſe, of opinion there was no ſurprize, nor neceſſary the new road ſhould be ſet out by the perſon who ſues out the writ, in his own ſoil.

A Writ of *ad quod damnum* lately iſſued directed to the ſheriff of *Warwickſhire*, commanding him by the oath of honeſt and lawful men of the county, to inquire whether it would be to the King's prejudice, or of any other, if he ſhould grant to *George Lucy*, Eſquire, a licence, that he may incloſe a certain cart-road or cart-way in the pariſh of *Charlcot* in the ſaid county, leading from thence to the town of *Stratford upon Avon* through ſeveral cloſes and incloſed grounds in the writ mentioned, which road is to contain 1328 yards of land in length and nine yards in breadth, as the ſame hath for many years laſt paſſed been uſed and enjoyed, to hold the ſame ſo incloſed to the ſaid Mr. *Lucy* and his heirs for ever; ſo that inſtead of the ſaid way he make another road or cart-way in his own ſoil as convenient for paſſing through the ſame. And the petition further ſet forth, that Mr. *Lucy* having obtained the ſaid writ, cauſed a jury to meet at his houſe in *Charlcot* of the 4th of *October* 1754. being three days before the quarter-ſeſſions holden for the county of *Warwick*, without any notice given for that purpoſe, at which time and place an inquiſition was taken before the under-ſheriff, in and by which the jurors therein named ſaid it would not be to the prejudice of the King, or of any other, if he ſhould grant to Mr. *Lucy* a licence to incloſe the road or way in the writ mentioned, to hold it ſo incloſed to him and his heirs for ever; ſo that inſtead of the ſaid road he do in his own ſoil ſet out one other cart-road as convenient for paſſengers through the ſame, as in and by the writ is mentioned and directed.

And it was repreſented by the petition, that the cart-road ſo intended to be incloſed is a large, ſpacious and open road, greatly uſed by coaches, waggons, &c. paſſing between *Stratford* and *Warwick*, and that the road intended to be made uſe of inſtead thereof is not 800 yards round about, but is a very hilly and uneven road, and no materials near thereto for the repairing the ſame. And the petitioner further ſet forth, that a very trifling part of the road ſo intended to be uſed is in the ſoil of Mr. *Lucy*, though the writ requires a new road to be ſet out altogether in the ſoil of Mr. *Lucy*, but on the contrary thereof near three parts out of four of the ſame goes through Mr. *Vennor*'s grounds, and ſhould Mr. *Lucy* obtain a licence for the incloſure, it would leſſen Mr. *Vennor*'s eſtate near 20 *l.* a year, as the ſtopping up ſo great a road would be the means of driving the whole country through Mr. *Vennor*'s eſtate.

The petition further ſet forth, that they had no knowledge of the writ being ſued out till the day before the ſame was executed, when Mr. *Vennor* by accident heard that a jury was to meet at Mr. *Lucy*'s houſe on the 4th of *October* about changing the roads, on which day Mr. *Vennor* attended in his grounds from ten in the forenoon till after one, expecting the jury would have come to have viewed the ſame in that time, but after waiting to no purpoſe, he went to Mr. *Lucy*'s houſe, who told him the jury had viewed the roads, but gave him no opportunity of ſpeaking to the jury.

The petition further ſet forth, that after being informed ſuch writ was executed, and that the inquiſition taken thereon was in favour of Mr. *Lucy*, the petitioner gave notice they ſhould appeal againſt the ſame at the next quarter-ſeſſions, which were held at *Warwick* on the *Tueſday* following, and the petitioners did after the writ was executed apply to the under-ſheriff for a copy of the writ and inquiſition, that they might be certain what road was intended to be incloſed, and what was intended to be uſed inſtead thereof, that they might be able ſufficiently to inſtruct their council; but he declared he had left them with Mr. *Lucy*, and your petitioner did then apply to Mr. *Lucy* and his attorney, and to the clerk of the peace for the ſame, but to no purpoſe, but could not procure a copy until the morning the appeal was tried: And the petition further ſet forth, that two of the jurors who took the inquiſition appeared at the ſeſſions, and voted as juſtices on behalf of Mr. *Lucy*, and ordered the writ and inquiſition to be recorded; *for theſe reaſons and for as much as Mr.* Lucy *does not ſet out any new road, or give one yard of land in lieu of the road intended to be taken away, the petitioners prayed that the writ and inquiſition taken thereon may be ſet aſide, and a new writ awarded, and in the mean time all further proceedings on the ſaid writ of* ad quod damnum, *and the inquiſition already taken, may be ſtayed, or ſuch other relief as may ſeem meet.*

At the ſame time a petition was preſented by the inhabitants of ſeveral neighbouring towns where the road intended to be made is, ſtating the ſame matters, and making the ſame objections as in Mr. *Vennor*'s petition, and praying likewiſe the writ of *ad quod damnum* might be diſcharged, and which was argued by council, and came on to be heard with Mr. *Vennor*'s petition.

Mr. *Wilbraham* for the petitioners.

The conſtant form of the writ *ad quod damnum* is, that the perſon applying ſhould carry the new road through his own land.

The preſent application is to ſet the writ aſide for Mr. *Lucy*'s not doing what the writ requires, and likewiſe upon a ſuggeſtion of ſurprize in taking the inquiſition on the writ of *ad quod damnum*.

I do allow that no notice is abſolutely required, but then throughout the law, in every office of inquiſition, the King is to be ſatiſfied, or ſubject, that there is no damage to either, and that it ought to be done in the openeſt manner imaginable.

In the Year-books, 34 *Edw.* 3. it is laid down the inquiſition is to be taken in good towns openly, and not privily; the ſame again was held in 36 *Edw.* 3.

The ſame rule prevails in the ſtatute of *Henry* 8. relating to eſcheators, where it is declared every perſon is to give evidence openly on pain of *forty pounds.*

In the caſe of Sir *Oliver Butler*, 2 *Ventr.* 344. the writ was executed the day it bore date, and at thirty miles diſtance from the place.

Here the writ was executed only on the 4th of *October* 1754. and the appeal to the quarter-ſeſſions was heard upon the 8th of the ſame *October*. Six juſtices againſt two were for regiſtring the inquiſition.

The ſtatute 8 & 9 *W.* 3. *ch.* 16. gives the appeal. The quarter-ſeſſions in this caſe being an appellate juriſdiction, there ought to be a reaſonable time allowed for perſons appealing, to lay the whole facts before the court.

The inquiſition was ſigned on the *Friday*, Mr. *Lucy*'s ſteward kept it till the *Wedneſday* morning till within one hour before the appeal came on.

Mr. *Robinſon* council of the ſame ſide.

The expreſs condition of the writ is, that the perſon ſuing out the writ ſhould lay out the new road at his own expence, but not one ſyllable of evidence has been given to the jury about it; the petitioner Mr. *Vennor* likewiſe applied to the under-ſheriff for a copy of the writ; he anſwered it was not in his power to give it, it was in Mr. *Lucy*'s hands; and the petitioner could not procure a copy till the *Wedneſday*, the very day of the appeal; he cited 7 *Mod. alias Farreſley*, on the conſtruction of 8 & 9 *W.* 3.

Mr. Attorney General of council for Mr. *Lucy.*

Whether the road turned, or ſet out, be to the damage of the country, is not the queſtion now; the only queſtion is, whether the execution of the writ has been done ſurreptitiouſly and fraudulently, and without the perſons who are affected by it, having an opportunity

opportunity of objecting to any damage that might enſue to the country, and if ſo, whether it ought to be quaſhed.

The material point for the conſideration of the court is, whether there has been any ſurprize in this caſe.

It was done with notoriety, for the petitioners were fully informed of it: as to the execution of the inqueſt of office, no preciſe form of notice is required either in the church or market-place, but is left intirely to the diſcretion of the under-ſheriff.

The notice was given on the 30th of *September* to the perſons who were to attend as the jury.

The perſons ſummoned on the jury were men of fortune and reputation, and the greateſt part of them have eſtates in *Charlcot*, where Mr. *Lucy*'s ſeat is, and where the road is turned.

Though the act of parliament directs the appeal to be at the next quarter-ſeſſions, yet if Mr. *Vennor* had deſired time, the juſtices would have indulged him by putting it off to another quarter-ſeſſions.

The hearing on the appeal laſted ſeveral hours, the evidence of the new road being half a mile about was laid before the juſtices, the particular damage to Mr. *Vennor*, likewiſe was inſiſted upon, and attempted to be proved.

But ſuppoſing the juſtices have done right in confirming the inquiſition, yet the petitioners council inſiſt that the new road ought to go through the ſoil of the perſon who ſues it out.

Theſe are words of courſe in every writ of this kind, and never meant to be ſtrictly purſued.

Sir *Oliver Butler*'s caſe was a ſurreptitious execution of a writ of inquiſition as to a market, the inquiſition there was executed the day after the writ bore date.

The only caſe in equity was mentioned by your Lordſhip, which was in 1721. before Lord *King*, *the Earl of Saliſbury* verſus *Archer*, there the writ of *ad quod damnum* iſſued the 20th of *April*, the jury came twenty miles from the place, was executed the day after the teſte of the writ, and there was a beginning to incloſe before the quarter-ſeſſions at *Wincheſter*, ſeven juſtices out of thirteen were of opinion they could not enter into it, the appeal not being at the next quarter-ſeſſions after the inquiſition.

LORD CHANCELLOR.

In cases upon writs of *ad quod damnum*, this court muſt judge according to rules of law.

Applications of this nature do not come frequently before the court; but when they do, this court, as an *officina brevium*, muſt judge according to rules of law.

The only proper queſtion is, whether there has been any ſurprize in the execution of this writ on the perſons petitioning, by preventing them from laying evidence before the jury at the time of the inquiſition, or before the juſtices on the appeal; and whether Mr. *Vennor* is not too late now to take it up.

The inconvenience to the publick in theſe caſes not inquirable here, being a juriſdiction belonging to the quarter-ſeſſions only.

The inconvenience to the publick in caſes of this nature is not to be tried before me; for if I was to enter into it, I ſhould be ſetting up my juriſdiction in oppoſition to a juriſdiction appropriated by act of parliament to the quarter-ſeſſions only.

I am of opinion therefore I can take no further notice of this head of inconvenience, than as it may be auxiliary to the ſurprize ſuggeſted by the petition.

If the jury had manifeſtly done contrary to the general good of the country, it might have afforded a ſtrong corroborating evidence of ſurprize.

The writ of *ad quod damnum* was teſted the 17th of *September*; notice was given on *Monday* the 26th to attend on *Friday* the 30th.

Sufficient if the inquiſition is executed in a fair and open manner.

It is not the ſhortneſs of the time, where the law has not preſcribed any particular time, which is alone ſufficient evidence of ſurprize; that the inquiſition is taken and executed in a fair and open manner is all that is required.

Then it comes to this, whether there was an intention of ſurprize, or any actual ſurprize?

Neither have been made out to my ſatisfaction.

Mr. *Lucy* ſwears he directed the ſheriff to ſummon a fair and impartial jury, and out of the towns in the neighbourhood.

All the towns but one from which the jury came, were contiguous to the road.

This was Mr. *Lucy*'s direction: and the under-ſheriff ſwears he gave orders to his officers to ſummon the gentlemen who lived neareſt the road.

They

They appear to be perſons of great fortune; Sir *Charles Mordaunt* the knight of the ſhire was amongſt them: it is not at all probable theſe gentlemen would do an unpopular thing in turning the road, which is a circumſtance at leaſt to ſhew fairneſs.

The clauſe in the act of parliament to be ſure is drawn in a very extraordinary manner, but it is not neceſſary to obſerve upon that in the preſent caſe.

One general anſwer to the whole in regard to the appeal is, that Mr. *Vennor*, *&c.* did actually appeal to the quarter-ſeſſions, and the matter was fully heard.

The place is within four miles of *Warwick*; the quarter-ſeſſions was held there, and the trial laſted four hours.

No evidence has been laid before me that there was any material witneſs, who could not be had then from the ſhortneſs of the time.

Though the appeal by the act of parliament is directed to be at the next quarter-ſeſſions, yet it is in the power of the juſtices to adjourn the quarter-ſeſſions itſelf to another day, or they might have adjourned this particular matter to a ſubſequent ſeſſions.

Though the appeal is directed to be at the next quarter-ſeſſions by 8 & 9 *W.* 3. the juſtices may adjourn it to a ſubſequent ſeſſions.

Another point which has great weight with me is, whether the appeal to the quarter-ſeſſions is not waving the objection of ſurprize with reſpect to the male-execution of the writ, and I rather think it is a waver of it.

In the caſe before Lord Chancellor *King*, in 1721, the appeal was to the *Eaſter* quarter-ſeſſions, and the objection was, that the incloſure was before *Chriſtmas* quarter-ſeſſions, and therefore it was diſmiſſed becauſe it was not the next immediate quarter-ſeſſions.

It has been truly ſaid, the ſtatute has put the juſtices in the room of the traverſe.

Suppoſe before the act of parliament the petitioners had traverſed the inquiſion, and iſſue had been taken upon it, and a verdict had been found for the inquiſition;

Could the petitioners afterwards have applied to this court upon a ſuggeſtion of ſurprize, and a fraudulent and clandeſtine execution of the writ? certainly they could not.

It has been ſaid that, in order to comply with the writ, Mr. *Lucy* muſt ſet out a way in his own ground which will communicate with the highway; the *terminus ad quem* for the benefit of the country,

but it is not neceſſary the whole new road ſhould go through his own ſoil.

Where a new road is made, and the pariſh can be at no further expence with regard to the old one, the inhabitants ought to repair the new for the future.

Here Mr. *Lucy* has bound himſelf and his heirs to keep the road in repair, which is more than is abſolutely neceſſary; for I am of opinion, after he had once made the new road, as it is eſtabliſhed in the room of another in the very ſame pariſh, who can be at no further expence with regard to the old road, as it is taken into Mr. *Lucy*'s park, the inhabitants ought to have repaired the new road when made for the future.

Where the new road lies in another pariſh, then the perſon who ſued out the writ, and his heirs, ought not only to make it, but keep it in repair.

But if the new road had lain in another pariſh, there he ought not only to have made it, but he and his heirs ought to have kept it in repair; becauſe the inhabitants of another pariſh have gained no benefit from the old road being laid into Mr. *Lucy*'s park, as they had nothing to do with the repair of it.

Upon the whole, as there does not appear to me to have been any ſurprize at the time of the inquiſition, and the matter was fully laid before the juſtices on the appeal, I ought not to ſet aſide the writ; therefore the petition muſt be diſmiſſed.

Caſe 293. *Blower* verſus *Morrets*, *Monday April* 1, 1754, at *Powis Houſe*.

Where coſts are decreed to all parties out of a real eſtate, though one of them, who was intitled to receive coſts, died before they were taxed, they do not *moritur cum perſona*, but his heir at law is intitled.

BY a decree in this cauſe coſts had been decreed to all parties out of a real eſtate; one of the parties, who was intitled to receive coſts, dies before they had been taxed.

It was inſiſted that, as to this perſon, the coſts *moritur cum perſona*.

Lord Chancellor ſaid, he thought this a ſevere rule, and that a diſtinction might be taken in the preſent caſe as the coſts are by the decree made a lien on real eſtate; and upon aſking the bar, if they knew any authority to warrant ſuch a diſtinction, Mr. *Hoſkins* ſaid, Your Lordſhip took the diſtinction in Lord *Oxford*'s cauſe, and Mr. *Bignell* mentioned that the Maſter of the Rolls had taken the ſame diſtinction in a caſe of *Howard* verſus *Hall* at the laſt ſeal.

If any thing had remained to have been done and undecreed, the repreſentative of the deceaſed party by reviving would have been intitled to the coſts, even if they had not been directed to ſtand a charge on the real eſtate.

Here every thing was ſettled by the decree, and therefore nothing left which could make a bill of revivor neceſſary; if there had been any thing remaining to be done, the repreſentative of the deceaſed

party

party by reviving the cauſe would have been intitled to the coſts decreed, even if they had not been directed to ſtand a charge on the real eſtate. Lord Chancellor ordered the cauſe to ſtand over till *Wedneſday* to look into; and upon its coming on that day, *his Lordſhip* ſaid, the general rule that there can be no revivor by executor or adminiſtrator for coſts, when coſts have not been taxed, is upon this principle, that coſts are looked upon as a wrong, and therefore *moritur cum perſona*. All theſe caſes have been determined where coſts are decreed perſonally, otherwiſe where they have been decreed out of real eſtate.

The caſe of *Johnſon* verſus *Leake*, and which was heard before me on the 25th of *July* 1752, was as follows:

" There was a decree for a ſum againſt an executor, with coſts " out of aſſets; the executor pays the ſum, but not the coſts; and " then the plaintiff dies, and a bill is brought to revive for coſts.

" It was objected, that a bill to revive for coſts only was impro- " per, and that the payment out of aſſets was only incident to the " coſts in reſpect to the ſum decreed.

" I ordered the cauſe to ſtand revived; for the rule not to revive " for coſts only, I thought a hard rule, the coſts being frequently " more than the debt; and this caſe was not within the rule, for it " was not a decree *in perſonam*, but executory, and to be paid out of " aſſets; and if the executor had died, the plaintiff might have re- " vived againſt the repreſentative of the teſtator, and might have " purſued the aſſets into whatever hand they came."

A decree for a ſum againſt an executor with coſts out of aſſets is not a decree *in perſonam*, but executory; and if he dies the plaintiff may revive againſt the repreſentative of the teſtator, and purſue the aſſets.

I think this a very reaſonable diſtinction; this court has followed the rule of law, where there is a judgment, coſts are aſcertained and taxed; but if no judgment, the coſts are loſt.

An executor or adminiſtrator could not have a writ by *journeys accounts*, nor an heir at law, for that writ lay only between the ſame parties; ſo that at law all coſts are perſonal; but here, where there is a fund to anſwer coſts, and which is made liable, the repreſentative by reviving will be intitled.

The writ by journeys accounts lies only between the ſame parties, neither an executor, nor adminiſtrator, nor heir can have it.

Let the maſter tax the coſts of *Benjamin Morret* and his wife, the heir at law of the perſon who was intitled to the coſts according to the decree, and let what ſhall be found due on the taxation be paid out of the money which aroſe out of the ſale of the real eſtate, and now lying in the *Bank*.

Caſe 294. *December* 12, 1753; *and April* 25*th and* 29*th*, 1754.

Smart Lethieullier, Eſq; and Richard Rogers, Gent. and others, by original bill. } Plaintiffs.

Mary Tracy, the wife of Thomas Tracy, Eſq; late Mary Dodwell, and others, } Defendants.

And

Smart Lethieullier and Richard Rogers, Gentlemen, ſurviving executors and truſtees of Sir William Dodwell, by ſupplemental bill, } Plaintiffs.

Dodwell Tracy, an infant, by Thomas Tracy his father and guardian, } Defendant.

EXTRACTS from the will of Sir *William Dodwell*, upon which the points in this cauſe depended:

Lord *Hardwicke* of opinion to confine the contingency in the will of Sir *W. D.* of his daughter's dying without iſſue of her body living at her death, to the death of Sir *H. N.* a remainder man under the will before twenty-one, and that the ſubſequent limitations to Sir *H. N.* after attaining twenty-one, and to *S. L.* and *C. L.* are not contingent but veſted remainders.

Firſt, I give and deviſe all my manors, lands, *&c.* in the counties of *Glouceſter*, *Middleſex*, *Buckingham*, *Kent*, and the city of *London*, and elſewhere in his Majeſty's dominions, to my daughter *Mary Dodwell*, during her natural life; and from and after the determination of that eſtate, to ſeveral truſtees therein named, and their heirs, during the life of my ſaid daughter, in truſt, to preſerve the contingent remainders, *&c.* herein after limited, from being deſtroyed: *And from and after the deceaſe of my ſaid daughter, to the uſe of the firſt ſon of the body of my ſaid daughter*, lawfully to be begotten; *and to the heirs male of the body of ſuch firſt ſon*, lawfully to be begotten: *and for default of ſuch iſſue, to the ſecond, third, fourth, fifth, ſixth, and every other ſon* of my ſaid daughter, lawfully to be begotten, ſeverally and ſucceſſively as they ſhall be in priority of birth and ſeniority of age, *and the heirs of their reſpective bodies*, lawfully to be begotten, ſeverally and ſucceſſively as they ſhall be in priority of birth and ſeniority of age; *and for want of ſuch iſſue, to the daughter or daughters* of my ſaid daughter *Mary Dodwell*, ſeverally, *and to the heirs of their reſpective bodies*, lawfully to be begotten.

Then comes a proviſo to raiſe portions for younger children, charged upon the real eſtate and eſtates to be purchaſed with the perſonal eſtate.

Item, I do hereby give and deviſe unto the ſaid truſtees, *&c.* and to the ſurvivors of them, all my mortgages, ſtock, annuities, bonds, ready

ready money, plate, and all other my perſonal eſtate that I ſhall die poſſeſſed of, or be intitled unto, at the time of my deceaſe, and not otherwiſe diſpoſed of by this my will, *upon truſt*, after payment of debts and legacies, that they ſhall convert the ſaid ſtock, annuities, and other perſonal eſtate, into money, and lay out ſuch money in the purchaſe of lands of inheritance, in the ſaid county of *Glouceſter* or ſome other adjacent county, to be ſettled *upon my ſaid daughter and her iſſue*, in ſuch manner as I have already deviſed my ſaid manors, woods, wood-grounds, tenements, rents, annuities, and hereditaments.

And upon this further truſt, that the rents and profits of the lands ſo to be purchaſed (when purchaſed) and alſo the rents of all my meſſuages, lands, tenements and hereditaments, ſhall be laid out by my truſtees, *&c.* in the purchaſe of other lands of inheritance in the ſame counties, to be ſettled in the ſame manner, and to the ſame uſes, as the lands ſo purchaſed with my ſaid perſonal eſtate are directed to be ſettled. *And I do* hereby further will and direct, that the ſaid truſtees ſhall from time to time receive, as well the rents and profits of my ſaid manors, meſſuages, lands, *&c.* herein before by me deviſed to my ſaid daughter during her minority, *as alſo the rents and profits of the lands ſo purchaſed with my ſaid perſonal eſtate, and profits of my ſaid real eſtate*, and lay out the ſame in the purchaſe of other lands of inheritance in the ſame county or counties, to be conveyed and ſettled in the ſame manner, as the lands ſo directed to be purchaſed by and with my ſaid perſonal eſtate ſhall be ſettled.

And in caſe that my ſaid daughter ſhall depart this life without iſſue of her body living at her deceaſe, then I do hereby give and deviſe unto the ſaid truſtees, and their heirs, all my manors, meſſuages, lands, tenements, woods, wood-grounds, rents, annuities and hereditaments whatſoever, *until my couſin Sir Henry Nelthorpe*, Baronet, ſon of my niece Dame *Elizabeth Nelthorpe* deceaſed, by Sir *Montague Nelthorpe*, Baronet, alſo deceaſed, *ſhall attain the age of one and twenty years*; and alſo all my perſonal eſtate, to be laid out in the purchaſe of lands as aforeſaid, upon truſt, that they or the ſurvivor of them, or the heirs of ſuch ſurvivor, ſhall from time to time receive the rents and profits thereof annually, as well of the eſtates ſo to be purchaſed, as of all other the premiſſes ſo as aforeſaid deviſed to them, and lay out the ſame in the purchaſe of lands of inheritance in the ſaid county of *Glouceſter*, or ſome other adjacent county, and alſo the rents and profits of ſuch lands ſo to be purchaſed by the rents and profits of the premiſſes, *until my ſaid couſin Sir Henry Nelthorpe ſhall attain ſuch age of one and twenty years*; then I will that they or the ſurvivor of them, or the heirs of ſuch ſurvivor, ſhall convey the lands ſo purchaſed to the ſame uſes and upon the ſame truſts, as I by this my will do deviſe all my ſaid manors, meſſuages, lands, tenements, rents, annuities, hereditaments and premiſſes, after

ter my ſaid couſin Sir *Henry Nelthorpe* ſhall have attained his age of one and twenty years as aforeſaid.

Item, I give and deviſe all my manors, meſſuages, &c. *unto my ſaid couſin Sir* Henry Nelthorpe, *after he ſhall have attained his age of one and twenty years (he taking upon him the name of* Dodwell) *for and during the term of his natural life,* without impeachment of waſte; and from and after the determination of that eſtate, to them the ſaid truſtees and their heirs, during the life of my ſaid couſin Sir *Henry Nelthorp,* in truſt, to preſerve the contingent remainders herein after limited from being deſtroyed: *and from and after his deceaſe to the firſt and every other ſon in tail male; and for default of ſuch iſſue, to the daughter and daughters of the ſaid Sir* Henry Nelthorpe, *and the heirs of their body and bodies:* and in default of ſuch iſſue, *or in caſe my ſaid couſin Sir* Henry Nelthorpe *ſhall happen to die before he attains his ſaid age of twenty-one years and without iſſue, then I give and deviſe the ſame manors and premiſſes to* Smart Lethieullier (*he the ſaid* Smart Lethieullier *taking upon him the name of* Dodwell) *for and during the term of his natural life, without impeachment of waſte:* and from and after the determination of that eſtate, to the ſaid truſtees and their heirs, during the life of the ſaid *Smart Lethieullier,* in truſt, to preſerve the contingent remainders herein after limited from being deſtroyed, *&c. and from and after his deceaſe, to the firſt and other ſons of the ſaid* Smart Lethieullier *in tail male; and for default of ſuch iſſue, to* Charles Lethieullier *(he taking upon him the name of* Dodwell) *for and during the term of his natural life, without impeachment of waſte;* and from and after the determination of that eſtate, to the ſaid truſtees, during the life of the ſaid *Charles Lethieullier,* in truſt, to preſerve contingent remainders herein after limited from being deſtroyed; *and from and after his deceaſe, to the firſt and other ſons of the ſaid* Charles Lethieullier *in tail male; and for default of ſuch iſſue, then* ——

There having been ſeveral orders in the cauſe of *Lethieullier* and *Tracy* in relation to a ſettlement to be made of the eſtates purchaſed purſuant to the will of Sir *William Dodwell,* and the decree made the 9th of *July* 1728 for carrying the truſts thereof into execution, and that the ſettlement ſhould be made with the approbation of the maſter, he, by his report of the 22d of *July* 1752, certified, that he had ſettled the conveyance accordingly. The plaintiffs took the following exception to the maſter's report:

" For that he hath, between the limitation to the daughters of " the ſaid *Mary Tracy* and the heirs of their reſpective bodies, and the " eſtates limited to the ſaid *Smart Lethieullier* and to the ſaid *Charles* " *Lethieullier,* and their iſſue male ſucceſſively, inſerted theſe words: " *And in caſe the ſaid* Mary Tracy *ſhall depart this life without iſſue of* " *her body living at her deceaſe;* whereas, according to the intent and

" meaning of the ſaid will of Sir *William Dodwell*, it ought to be, " *and in default of ſuch iſſue.*"

Mr. *Tracy Atkyns*, of council for the defendants, againſt the exception taken by the plaintiffs in the ſupplemental bill to the Maſter's report.

The queſtion upon which this exception will depend is, whether the remainder to the *Lethieulliers* is *a contingent* or a veſted remainder under the will of Sir *William Dodwell.*

Firſt, Whether the words make a contingent remainder.

The teſtator could not poſſibly make uſe of properer words for the purpoſe of creating a contingent remainder; and in order to ſhew this, permit me to mention two rules laid down by Lord *Coke* to determine what are contingent eſtates.

The firſt is *Lovie's* caſe, 10 *Rep.* 85. *a.* " That where it is dubi- " ous and uncertain, whether the uſe or eſtate limited *in futuro* ſhall " ever veſt in intereſt or not, then the uſe or eſtate is *in contingency*; " becauſe upon a future contingent it may either veſt or never veſt, as " the contingent ſhall happen."

To apply this to the preſent caſe:

If Mrs. *Tracy* dies *without leaving iſſue*, the eſtate limited to the *Lethieulliers in futuro* veſts; but if ſhe dies and *leaves iſſue living at her death*, the eſtate to the *Lethieulliers* does not veſt.

Then it is dubious whether the eſtate limited to the *Lethieulliers* will ever veſt in intereſt or not, and falls exactly within the rule in *Lovie's* caſe.

The ſecond rule is, " If a particular eſtate upon which the remain- " der depends may determine before the remainder may commence, " then the remainder is contingent." Lord *Coke* 3 *Rep. p.* 20. *Boraſton's* caſe.

So here the eſtate for life to Mrs. *Tracy*, which is the particular eſtate whereon the remainder to the *Lethieulliers* depends, may determine before their remainder may commence.

For Mrs. *Tracy* may die, which determines *the particular eſtate*, and yet if ſhe leaves iſſue living at her deceaſe, the remainder to the *Lethieulliers* does not commence, becauſe their remainder cannot take place unleſs ſhe dies without iſſue; and therefore, according to the rule in *Boraſton's* caſe, it is a *contingent remainder*.

Next as to the intention of the teſtator.

There is nothing upon the face of the will, to warrant the conſtruction the plaintiffs would put upon it.

It was of his drawing; the words he uſes are not to be ſuppoſed the work of chance, but of deſign and intention, becauſe Sir *William Dodwell* was of the profeſſion of the law, and being concerned chiefly in conveyancing, he muſt know the force and legal operation of theſe words.

The ſituation of the teſtator at the time of making the will is material, he was very near *ſeventy*, the age of his daughter alſo, at that, time ſhe was only *one year* old, his ſituation likewiſe with reſpect to the limitations are proper ingredients in the conſideration of this caſe.

The *Lethieulliers* were not at all related to him in conſanguinity, very remote even in affinity, great if not doubly great Nephews to Sir *William Dodwell's firſt wife.*

The teſtator being ſo old, and his daughter ſo young, he muſt of courſe foreſee a long minority; is it probable therefore he ſhould extend the chance of the *Lethieulliers* ſucceeding to his eſtates beyond the death of his daughter without iſſue of her body living at her deceaſe?

Were not the odds very great, conſidering how extremely young ſhe was, that ſhe did not live to be of age; and can it be ſuppoſed that for the ſake of ſuch diſtant relations, or hardly any relations at all, he would keep ſo large a property locked up for ſo great a length of time?

Mrs. *Tracy* being an infant of three years old only when he died, ſhe might not probably have iſſue in 18 or 20 years after his death; that iſſue might live 20 years more, which is a period of no leſs than 40 years, and yet die before they were of a proper age to bar theſe remainders, and the iſſue of that iſſue in the ſame manner, and ſo on *in infinitum.*

This would have been creating a perpetuity, which the teſtator knew, is what the law will by no means endure; and therefore it is natural to ſuppoſe would chuſe the words that he has here made uſe of ſhould convey no other meaning and import than what is contended for in behalf of the defendants; and that I am right in inſiſting that the remainder to the *Lethieulliers* is a *contingent remainder*, and cannot take place, unleſs Mrs. *Tracy*, the daughter of the teſtator, ſhall depart this life *without iſſue of her body living at her deceaſe.*

For

For from the obſervations that have been made on the ſituation of the teſtator at the time he made his will, the age of his daughter, and the very remote relationſhip in which the *Lethieulliers* ſtood to him; this appears to be the obvious and proper conſtruction; and the Maſter, as he was very well warranted to do, having peruſed the very words of the will, which correſpond too with the intention of the teſtator, it is humbly inſiſted there is no foundation for the exception taken by the plaintiffs to the Maſter's report, and that it ought to be over-ruled.

Lord Chancellor. It is extremely plain to me, that the teſtator Sir *William Dodwell* intended to make a ſtrict intail; nothing ſhews it more ſtrongly than the clauſe in the will, which obliges the remainder-man to take the name of *Dodwell.*

As to his real eſtates he was ſeiſed of at the time of making his will, they are deviſed as legal eſtates, and no truſt created of them.

Then with regard to the other branch of his eſtate, the perſonal eſtate is by the will directed to be laid out in land to be conveyed to truſtees. To what uſes? Why, to the ſame as he had ſettled his real eſtate he left at the time of his death.

Firſt queſtion. Whether the limitation to Sir *Henry Nelthorpe* is contingent *in caſe Mrs.* Tracy *ſhould die without iſſue of her body living at her deceaſe*, or if he attained twenty-one, that it ſhould be a veſted remainder.

And alſo, Whether the remainder to the *Lethieulliers* are likewiſe contingent remainders.

The firſt limitation under the will is to the teſtator's daughter for life, then to her firſt ſon *and the heirs male of his body* only.

This is a meer ſlip and overſight, becauſe the remainder to the other ſons is to them *and the heirs of their bodies* generally.

Then he provides portions for the younger children of his daughter *Mary Dodwell*, now Mrs. *Tracy*, and then comes the deviſe to the truſtees; then a power to them to receive the rents and profits, *&c.* till his daughter ſhould attain her age of twenty-one years.

And then follows the clauſe which created the difficulty:

And *in caſe my daughter ſhall depart this life without iſſue of her body living at her death.*

Then

Then he gives all his manors, *&c.* to the ſaid truſtees, until his couſin Sir *Henry Nelthorpe* ſhould attain his age of twenty-one years.

The deviſe to the truſtees is not an abſolute but a determinable fee, in caſe Sir *H. N.* died before 21. without iſſue.

This is a remainder, and a contingent remainder, and the deviſe to the truſtees is not, as was contended, an abſolute fee, but a determinable fee, in caſe Sir *Henry Nelthorpe* ſhould die before twenty-one without iſſue.

Then follow the words which ſhew a continuation of the power in the truſtees of receiving the rents and profits, as well of the eſtates to be purchaſed as of all other the premiſſes, and laying out the ſame in the purchaſe of other lands of inheritance, *&c.* the very ſame he had before given during the minority of Mrs. *Tracy* his daughter.

Then comes a ſubſtantive independant clauſe.

Item, I give and deviſe all my manors, meſſuages, &c. to my ſaid couſin Sir *Henry Nelthorpe*, after he ſhall attain his age of twenty-one years (he taking the name of *Dodwell*) for life, with limitation to his ſons and a limitation to his daughters.

And in default of ſuch iſſue, or in caſe my ſaid couſin Sir *Henry Nelthorpe* ſhall happen to die before he attain his age of twenty-one years and without iſſue, then to *Smart Lethieullier*, he taking upon him the name of *Dodwell*, for his life, *without impeachment of waſte*, remainder to his firſt and other ſons in tail male, remainder to *Charles Lethieullier*, (he taking upon him the name of *Dodwell*) for his life without impeachment of waſte, remainder to his firſt and other ſons in tail male; and for default of ſuch iſſue, then [*a blank left in the will.*]

All the limitations of the real eſtate are, as I ſaid at firſt, limitations to the truſtees in caſe Sir *Henry Nelthorpe* ſhould die before twenty-one, and is contingent only during his minority.

To be ſure it is very awkwardly penned.

But his view was, as his daughter was extremely young, and therefore might die before Sir *Henry Nelthorpe* attained twenty-one, to accumulate the rents and profits in the mean time till theſe contingencies were determined, and had certainly a reſpect to this double minority.

So that after Sir *Henry Nelthorpe* attained twenty-one, his remainder, and all the ſubſequent limitations as are ſubject to the contingency, but are veſted ones.

Item, I give and deviſe all my manors, &c. I take to be a ſubſtantive deviſe, and not at all relative to the former deviſe to the truſtees upon the contingency of Mrs. *Tracy*'s dying without iſſue, *&c.*

Suppoſe Sir *William Dodwell* had lived till Sir *Henry Nelthorpe* attained twenty-one, would not this deviſe to him have been a veſted remainder?

I am of opinion it would, and all the ſubſequent remainders would have been ſo likewiſe.

This I take to be the meaning of the teſtator, and not to defeat all the limitations to the families he had adopted, and laid under an obligation of taking his name upon this ſingle contingency of his daughter having iſſue at the time of his death.

The words are, *In default of ſuch iſſue*, not merely in default of iſſue of Sir *Henry Nelthorpe*, but of all other perſons who take under this will, and are before mentioned.

Where the general intent appears to make a ſtrict ſettlement, though ſome one limitation may, according to the words, ſeem contingent, yet the general intent ſhall prevail.

Where the general intent is to make a ſtrict ſettlement, though ſome one limitation may ſeem contingent, yet the general intent ſhall prevail.

This conſtruction is very agreeable to the rule of law, and the intention appearing upon the face of Sir *William Dodwell*'s will is much ſtronger in ſupport of the preſent determination than in any of the caſes.

The caſe of *Napper* verſus *Sanders*, *Hutton* 118. is very ſtrong to ſhew the intent ſhall controul the words; there was a limitation determinable upon the death of huſband and wife.

Margaret Sanders ſeiſed in fee makes a feoffment to the uſe of herſelf for life without impeachment of waſte, and after to the feoffees for 80 years, if one *Nicholas Sanders* and *Elizabeth* his wife ſhould ſo long live; and if the ſaid *Elizabeth* ſurvive *Nicholas* her huſband, then to the uſe of *Elizabeth* for life without impeachment of waſte, and after the deceaſe of the ſaid *Elizabeth*, to the uſe of *Poſthumous Sanders*, ſon of the ſaid *Nicholas* and *Elizabeth* in tail; and for default of ſuch iſſue, to the uſe of *Elizabeth*, wife of *John Napper*, and *Dorothy Sanders* and *Frances Sanders*, one of the leſſors, and to the heirs of their bodies, remainder to the right heirs of *Margaret* the feoffor; *Margaret Sanders* dies, and *Dorothy* dies without iſſue, the feoffees enter, *Elizabeth Sanders* dies, *Nicholas* yet alive, and *Poſthumous* dies without iſſue; *John Napper* and his wife and ſaid *Frances* entred, and were poſſeſſed until the defendant, as ſon and heir of *Margaret*, ouſted them.

The queſtion was, Whether the remainder in tail to *Poſthumous* and the remainder in tail to *Elizabeth* and *Frances* were contingent or executed; and it was reſolved by all the court, that the remainders were not contingent on the eſtate for life, which was to come to *Elizabeth Sanders*, wife of *Nicholas*, but were veſted preſently; and it was agreed that the eſtate for life, if ſhe ſurvive her huſband, was contingent, and when that had happened, being by way of limitation of an uſe, it ſhall be interpoſed when the contingency happened; as in *Chudley*'s caſe, *Coke*, *lib.* 1. *fo.* 133. and judgment was entered for the plaintiff.

This was beſides a conſtruction of uſes in a feoffment, therefore more difficult to be come at than in a will, where intention has great weight, and the court more liberal in purſuing that intention.

And yet in that caſe the contingency of *Elizabeth* ſurviving *Nicholas* was held only to affect her eſtate for life, and not the ſubſequent limitations.

So in like manner, *In caſe my daughter ſhall depart this life without iſſue of her body living at her deceaſe*, is a contingency which affects only the limitations to the truſtees under Sir *William Dodwell*'s will, till Sir *Henry Nelthorpe* attain his age of twenty-one, but not the ſubſequent limitations to Sir *Henry Nelthorpe* after he ſhould attain his age of twenty-one, or to the *Lethieulliers* in caſe he died before twenty-one and without iſſue.

Brown and *Cutter*, Mr. Juſtice *Raymond*'s *Reports* 427. upon a ſpecial verdict in *B. R. John Cheek* had iſſue four ſons, *Humphry*, *Robert*, *Anthony* and *John*, and made his will in writing thus:

Firſt, I will that my wife ſhall have and enjoy all my houſes, *&c.* in *Thames Ditton* during her natural life, if ſhe do not marry; but if ſhe do marry, then I will that my ſon *Humphry* ſhall preſently after his mother's marriage enter and enjoy the ſaid premiſſes to him and the heirs male of his body; and for default of ſuch iſſue, to my ſon *Robert* and the heirs male of his body, with remainders to his other ſons, and ſo over to ſtrangers.

The queſtion was, Whether the remainder to *Humphry* was a contingent or veſted remainder.

Mr. Juſtice *Jones* delivered the opinions of all the judges, except the chief. The intention of the deviſor being the pole ſtar that ought to guide the judges in the expoſition of wills, it is neceſſary to conſider what eſtate the teſtator intended for his wife by his will; I am of opinion that he intended her an eſtate only *durante viduitate*, which Lord *Coke* ſays, *Co. Lit.* 42. *a.* is, in judgment of law, an

eſtate for life determinable; and in pleading, the grantee ſhall ſay, that by virtue thereof he was ſeiſed for life, which being premiſed, the queſtion will be, whether the wife has an eſtate *durante viduitate*; the words are, I will that my wife ſhall have and enjoy all my houſes, lands, *&c.* during her natural life, if ſhe do not marry; for what is an eſtate during widowhood, but an eſtate to continue till ſhe doth marry; then the words, but if ſhe do marry after my death, is no more than, in caſe the eſtate ſhall determine, then I will that my ſon *Humphry* ſhall preſently enter, *&c.* by which it is moſt plain that here is no contingent remainder, but an eſtate veſted in *Humphry* to take effect in poſſeſſion upon the marriage or death of the wife.

That the intent of the deviſor was ſuch, appears by the limitation, for he intended the land ſhould go to his ſons, and their iſſues male, and not to the females, which would not be if this ſhould be a contingent remainder.

So, in that caſe, where the teſtator gives the eſtate to his wife for life, and in caſe ſhe marry, then to his ſon *Humphry* immediately after his mother's marriage, though *Iſabel* the wife did not marry, yet it was adjudged to be a veſted eſtate in *Humphry*.

This was a much ſtronger conſtruction than in the preſent caſe, and even a rejecting of words to come at the intention, which there is no occaſion of doing here, but retaining the words, the whole may be conſiſtent.

As to my own caſe of *Bellaſis* verſus *Uthwaite*, *Hill.* 1737, it depended upon the particular penning of the will.

Sheffield and *Lord Orrery*, *December* 4, 1745, likewiſe before me, depended on the conſtruction of a very obſcure will of *John* Duke of *Buckingham*: it being taken for granted, that the houſe was leaſehold, I gave my opinion that it went over.

But that will was ſo very particularly penned, no argument can be drawn from it, which can be applicable to the preſent, or any other caſe.

I determined that the limitation to Mr. *Sheffield* was good by conſtruing the words, If I have no lawful iſſue, to mean iſſue at the time of the teſtator's death.

On the whole, it was clearly the intention of the teſtator in the preſent caſe, to confine the contingency of Mrs. *Tracy*'s dying without iſſue of her body living at her death to Sir *Henry Neltborpe*, dying

ing before twenty-one, and that the ſubſequent limitations to Sir *Henry Nelthorpe*, after attaining twenty-one, and likewiſe to the *Lethieullier*s, are veſted remainders, and therefore the firſt exception muſt be allowed.

N. B. After *Lord Chancellor* had given his opinion, Mr. *Murray*, who was of council for the defendants, ſtarted a new point, that if the words *in caſe my daughter ſhould die without iſſue living at her death*, did not make the limitation to Sir *Henry Nelthorpe* after he attained his age of twenty-one, and the ſubſequent limitations to the *Lethieullier*s, a contingent remainder, yet it will ſtill remain a queſtion, whether theſe words will not give Mrs. *Tracy an eſtate in tail by implication*.

Becauſe, if the words ſhould not have this conſtruction, there is a caſe may happen which would be attended with great hardſhip and abſurdity, that the eldeſt ſon of Mrs. *Tracy* may die, leaving a daughter, an only child, and yet as the limitation to the firſt ſon of Mrs. *Tracy* is only in tail male, ſuch daughter would be ſet aſide in favour of ſtrangers, and no proviſion being made for her under the will, by any charge upon the real eſtates, or any otherwiſe, ſhe muſt ſtarve, unleſs Mrs *Tracy*, by being conſidered as tenant in tail, attained her age of twenty-one, as incident to ſuch eſtate, can ſuffer a recovery, and by that means, in caſe of the accident of a daughter's being the only child born of her ſon, have it in her power to provide for her.

Lord Chancellor ordered that the cauſe ſhould ſtand over, upon this ſingle point, till the firſt day of exceptions after *Chriſtmas*.

Lethieullier verſus *Tracy*, *April* 25, 1754.

The words in the will, *if my daughter depart this life without iſſue of her body living at her deceaſe*, do not give her an entail by implication, but to the iſſue living at her deceaſe, an eſtate by purchaſe.

THIS cauſe came on again upon the queſtion reſerved, Whether the defendant Mrs. *Tracy*, by the words of Sir *William Dodwell*'s will, *in caſe my daughter ſhall depart this life without iſſue of her body living at her deceaſe, takes an eſtate tail by implication?*

The Attorney General, Mr. *Murray*, of council for the defendant.

The true queſtion is, what is the conſtruction upon the deviſe of the real eſtate, Sir *William Dodwell* was ſeiſed of at the time of his death, for the eſtates to be purchaſed by the truſtees, with the perſonal eſtate and rents, and profits of the real, are to be ſettled in the ſame manner, and therefore liable to the ſame conſtruction.

The power of barring or not barring remainders, has never been taken into conſideration on queſtions of entails under wills, for courts of law, upon legal deviſes, muſt conſtrue them as they are.

It is moſt manifeſt the teſtator in this caſe meant ſo far to make a ſettlement of this eſtate, that it ſhould go to the iſſue of his daughter, and Sir *Henry Nelthorpe* muſt take, upon failure of the very ſame iſſue, when of age, as under age.

Whether the limiting of an eſtate in tail male only to his eldeſt grandſon is a ſlip in the teſtator or not, is not the queſtion; for moſt of the caſes in this court have been owing to inadvertency, but the whole will turn upon this, whether the teſtator did not intend to provide for iſſue *in infinitum*.

He cited 1 *Mod.* 54. *Love* verſus *Windham*, 1 *P. Wms.* 759. *Langley* verſus *Baldwin*, *Sid.* 47. *Holmes* verſus *Plunkett*, 1 *Lev.* 11. *Wyld* verſus *Lewis*, *E. T.* 1738. 1 *T. Atk.* 432.

N. B. *The laſt was principally relied on by the defendants council.*

Richard Wyld, at the outſet of his will, ſays, as to all my worldly eſtate I diſpoſe of as follows, and then deviſes to his wife *Elizabeth*, now the wife of the defendant, all his lands, *&c.* not ſettled in jointure generally; and then follow theſe words, If it ſhall happen that my ſaid wife *Elizabeth* ſhall have no ſon or daughter by me begotten on the body of the ſaid *Elizabeth*, and for want of ſuch iſſue, then the ſaid premiſſes to return to my brother *John Wyld*, if he ſhall be then living, and his heirs for ever, only paying to his two brothers, *A.* and *B.* the ſum of 150*l.* within one year after the deceaſe of the ſaid *Elizabeth*.

Elizabeth had a daughter born after the death of the teſtator, and who is ſince dead.

The bill was brought by *John Wyld*, the brother of the teſtator, and his heir at law, to reſtrain the defendants from committing waſte; and the queſtion was, what eſtate *Elizabeth* took by the will, whether in tail, or for life only.

Your Lordſhip ſaid, in that caſe it ſeemed clear from the words of the will, As to all my worldly eſtate, *&c.* the teſtator intended a diſpoſition of the whole, and therefore the objection that the grandchildren by conſtruction of the plaintiffs council are liable to be excluded, is a very ſtrong argument for conſtruing this an eſtate tail, *and the inclination to avoid this abſurdity* has been the principal reaſon for conſtruing words of the ſingular number in a collective ſenſe, as including the deſcendants of the firſt taker.

Great ſtreſs, you was pleaſed to ſay, had been laid upon the word *ſuch*, as if it reſtrained the word *iſſue* to mean only ſuch ſon or daughter, and that the precedent words, if *Elizabeth has no ſon or daughter*, will not raiſe an eſtate tail by implication.

But you was of opinion the words, if *Elizabeth has no ſon or daughter* muſt be taken in the ſame ſenſe as having no iſſue, and then the word *ſuch* will have no weight, but will amount to the ſame thing as if he had ſaid for want of iſſue, and the words, having no iſſue, or dying without iſſue, have been always conſidered in the ſame light both in law and equity.

And if preceding words are proper to create an eſtate tail, the legal operation of them, your Lordſhip ſaid, cannot be controlled by theſe ſubſequent proviſions.

The bill there was diſmiſſed.

Mr. *Tracy Atkyns* of the ſame ſide.

If the teſtator had meant to give his daughter a bare eſtate for life, it is natural to ſuppoſe he would have added the words *without impeachment of waſte*, as he has done in the limitations to Sir *Henry Nelthorpe* and the two *Lethieulliers*; but as he has not done this, it is not an improbable conjecture he intended by the ſubſequent words, *and in caſe that my ſaid daughter ſhall depart this life without iſſue of her body living at her deceaſe*, to give her *an entail*, and that her eſtate for life ſhould merge in the inheritance; elſe it muſt ſeem extremely odd upon the face of the will that the laſt remainder-man may cut down all the timber upon the eſtate, and yet the only child of the teſtator ſhould not be able upon any emergency to raiſe one ſhilling.

So, that conſidering Mrs. *Tracy* as a bare tenant for life, which is contended for by the plaintiffs council, it makes the teſtator guilty of the greateſt abſurdity, as well as void of natural affection, to tye up his daughter's hands ſo ſtrictly, and yet leave ſtrangers at full liberty to commit what waſte, and make what havock they pleaſe with his eſtate.

But if the teſtator's meaning and intention was, what is inſiſted on by the defendants council, that his daughter ſhould by theſe ſubſequent words take an eſtate tail, it accounts in the moſt natural manner imaginable for the teſtator omitting to make her tenant for life *without impeachment of waſte*, and at the ſame time acquits him of uſing his daughter hardly, becauſe, by giving her an eſtate-tail, he knew, as incident to ſuch eſtate, ſhe would be diſpuniſhable of waſte.

The

The material part of the exception is, that the Maſter in the ſaid ſettlement hath, *&c.* (*vide this exception*) *Whereas*, according to the intent and meaning of the will of Sir *William Dodwell*, it ought to be, *and in default of ſuch iſſue.*

But as the words in the will are general, *without iſſue of her body*, it is *nomen collectivum*, and takes in the whole generation *ex vi termini*; what right then have the council for the plaintiffs to make the teſtator ſpeak their meaning inſtead of his own?

When he intends to confine it to the immediate antecedent limitation, he does in every other part of the will make uſe of the word *ſuch*; as for inſtance, after the remainder to Mrs. *Tracy*'s firſt ſon in tail male and to the ſecond, third, and other ſons, and the heirs of their reſpective bodies, he ſays, for want of *ſuch* iſſue, then to her daughter and daughters, *&c.* the ſame after the limitations to Sir *Henry Nelthorpe*'s ſons, and the *Lethieulliers* ſons.

But in the laſt limitation to his daughter, the teſtator leaves out the word *ſuch*, and puts it, *if ſhe die without iſſue*; he left out *ſuch* deſignedly, and with great propriety here, becauſe there are no immediate antecedent words to which it could refer; for between the limitation to her firſt and every other ſon and her daughters, and the preſent deviſe, there are ſeveral intervening diſtinct clauſes, making at leaſt two ſheets of his will, quite foreign to the limitations of the eſtate.

Therefore, I beg leave, as the council for the plaintiff were ſo extremely fond, the laſt time the exception was argued, of introducing ſubſtantive independant clauſes, to inſiſt this is clearly one.

For being a new ſentence, the word *and*, with which it begins, ought to have the ſame conſtruction as if it had been *item*, *or alſo in caſe my daughter ſhall depart this life*, *&c.* there being no ſort of connection with the immediate preceding clauſes, as they relate to truſtees receiving rents, laying them out in lands, and to an allowance for his daughter's maintenance and education at different periods of her age.

So that the teſtator plainly intended to give, by implication, an eſtate tail to his daughter and her iſſue indefinitely.

The great objection, I apprehend, will be the teſtator's limiting in a former part of the will an expreſs eſtate for life to his daughter; I ſhall, by way of anſwer, take the liberty of borrowing ſome of Lord *Hale*'s arguments in the caſe of *King* and *Melling*, and apply them to the limitation to the defendant under her father's will.

" We

" We are, ſaid he, in the caſe of an eſtate-tail created by " a will, and the intention of the teſtator is the law to expound the " teſtament; therefore a deviſe to a man and his heirs male, or a " deviſe to a man, *and if he dies without iſſue, &c.* are always con- " ſtrued to make an entail. It muſt be admitted, that if the deviſe " were 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.

" My ſecond reaſon, ſaid Lord *Hale*, is from the manner of the " limitation, which is to his iſſue, and of his body, *&c. phraſes* " *agreeable to an eſtate-tail*, and the meaning of a teſtator is to be " ſpelled out by little hints. 4 *Jac. Robinſon*'s caſe. A deviſe to *A.* " for life; and if he died without iſſue, then to remain, *A.* took an " entail.

" It is objected, ſaid Lord *Hale*, that the limitation is ex- " preſsly *for life*, and from thence ariſes the great difficulty; but I " anſwer, that though the words do weigh the intention that way, " yet they are balanced by an apparent intention that weighs as " much on the other ſide, that as long as *Barnard* ſhould have chil- " dren, the land ſhould never go over to *John*, for there was as much " reaſon to provide *for the iſſue of the iſſue* as the firſt iſſue.

" Again: It is poſſible that he did not intend him but an eſtate for " life, and it is by conſequence and operation of law only that it be- " comes an eſtate-tail."

I need not give your Lordſhip the trouble of an application, for every word in Lord Chief Juſtice *Hale*'s reaſoning upon that caſe ſpeaks equally ſtrong to the preſent caſe.

I ſhall not preſume to ſtate the caſe of *Wyld* verſus *Lewis* again, becauſe it has been laid ſo fully before your Lordſhip already; but only beg leave to inſiſt, that it does in a great meaſure take away the force of the argument drawn from the word *ſuch* by the council of the other ſide, becauſe if ſupplied, which I hope, for the reaſons I have already given deduced from the will of Sir *William Dodwell*, ſhall not be; *yet the word* ſuch *here, no more than in the other caſe, will not have any weight, but amounts to the ſame thing as if he had ſaid for want of iſſue; and the words having no iſſue, or dying without iſſue, have been always conſidered in the ſame light both in law and equity.*

The preſent is not ſo ſtrong a caſe, becauſe certainly *ſons and daughters*, in the plural number, of Mrs. *Tracy* may with much more legal propriety be conſtrued in a collective ſenſe as including all the de-

ſcendants of the firſt taker, when as in *Wyld* verſus *Lewis* it was *only ſon and daughter* in the ſingular number.

All the arguments of intention from any clauſes in Sir *William Dodwell*'s will ſubſequent to the laſt limitation to Mrs. *Tracy*, which are uſed to ſhew the teſtator meant to give her an eſtate for life only, may be thrown out of the caſe; for, according to the authority of *Wyld* verſus *Lewis*, *if the preceding words are proper to create an eſtate-tail*, the *legal operation of them cannot be controuled by thoſe ſubſequent proviſions*.

And though much ſtreſs has been laid upon the caſe of *Blackbourne* verſus *Edgly*, in 1 *P. Wms.* yet even there Lord *Macclesfield* (notwithſtanding the determination of *Bampfield* verſus *Popham*, 1 *P. Wms.* 54, when Lord Keeper *Wright* was greatly aſſiſted) exploded the notion that words of implication ſhould not turn an expreſs eſtate for life into an eſtate-tail, and ſaid, that if I deviſe an eſtate to *A.* for life, *and after his death without iſſue*, then to *B.* this will give an eſtate-tail to *A.*

I hope therefore, upon the whole, Mrs. *Tracy* will be conſidered *as tenant in tail* in all the eſtates, or at leaſt in the lands her father died ſeiſed of, being a legal and not an equitable deviſe.

Mr. *Noel*, for the plaintiff, diſtinguiſhed the caſe of *Langley* verſus *Baldwin* from the preſent, becauſe the teſtator having omitted there to limit the eſtate beyond the ſixth ſon of *A.* and as there might be a ſeventh who was not intended to be excluded, therefore to let in the ſeventh and ſubſequent ſons to take, the court held the words, in caſe *A.* ſhould die without iſſue male of his body, did in a will make an entail.

But here the eldeſt ſon of the tenant for life has an eſtate-tail, and may bar the remainder if he arrives at twenty-one, and by that means provide for his daughters if he ſhould die without iſſue male, and therefore is not liable to the ſame objection of hardſhip as in that caſe where the ſeventh ſon would have been totally diſinherited.

He relied principally on the caſe of *Luddington* verſus *Kime*, reported in 3 *Lev.* 432. Lord *Raymond* 203. *Eq. Caſ. Abr.* 183. there *J. S.* deviſed to *A.* for life without impeachment of waſte, and if he ſhall have iſſue male, to ſuch iſſue male and his heirs for ever; and in caſe *A.* dies without iſſue male, to *B.* and his heirs; the court held that *A.* took an eſtate for life, the remainder contingent to his iſſue male in fee; for the words, And in caſe *A.* dies without iſſue male, are not to be taken ſubſtantially and abſolutely, but relatively to what was ſaid before; and theſe oblique words cannot be intended to deſtroy

by implication the eſtate expreſsly deviſed before to the iſſue male of *A.*

The caſe of *Bampfield* verſus *Popham*, 2 *Vern.* 449. is no authority on this point, becauſe a deed produced at the ſecond argument in this cauſe put an end to the queſtion.

The council for the plaintiff have no authority to reject the words living at her deceaſe, becauſe thrown in by the teſtator to ſhew his intention, that if his daughter left no iſſue living at the time of her death, then the remainder-men to whom he deviſed the eſtates ſhould preſerve his name and family by taking the name of *Dodwell.*

Mr. *Wilbraham*, of the ſame ſide, aſked in what manner the defendants council inſiſted the Maſter ſhould limit the eſtates in the conveyance to be ſettled by him.

Lord Chancellor ſaid, if he underſtood them right, they intend to limit the eſtates purchaſed under the truſts ſince the teſtator's deceaſe to Mrs. *Tracy* for life, and to her firſt ſon and the heirs male of his body, then to the ſecond and every other ſon in tail general, then to daughters in tail general, and then to Mrs. *Tracy* and the heirs of her body.

It was admitted by the defendants council to be their intention the eſtates ſhould be ſo ſettled.

Mr. *Wilbraham* ſaid, as it happens that the female line is by a ſlip unprovided for, there being no limitation to the daughter of the eldeſt grandſon of the teſtator, the defendants council would make the ſubſequent words in the will, *if my daughter ſhould depart this life without iſſue of her body living at her deceaſe*, create an eſtate-tail in her, ſo as to enable her to provide for the contingency of the eldeſt ſon dying, and leaving a daughter only.

As your Lordſhip was, at the former hearing, of opinion to confine the contingency of Mrs. *Tracy*'s departing this life without iſſue of her body living at her deceaſe to Sir *Henry Nelthorpe*'s dying before twenty-one, and he is dead under age and without iſſue, I apprehend there is no occaſion to inſert theſe words in the conveyance of the truſt eſtates, but that, after the limitations to Mrs. *Tracy* and her iſſue, the next immediate limitations may be to Mr. *Smart* and Mr. *Charles Lethieullier.*

With regard to the caſe of *Wild* verſus *Lewis*, the words there, In caſe my wife have no ſon or daughter by me, I beg leave to inſiſt, is the ſame thing, as if he ſaid, In caſe my wife have no iſſue, there being no other iſſue but ſons or daughters.

Blackburn and *Edgeley*, 1 *P. Wms.* 600. comes the neareſt of any caſe to the preſent; for notwithſtanding there was the ſame expreſſion there as well as here, *dying without iſſue*, yet Lord *Macclesfield* ſupplied the word *ſuch*, and confined it to the ſons and daughters of his ſons, and was of opinion that theſe words, *dying without iſſue*, did not give an eſtate-tail to *Ewer Edgeley* by implication.

We hope, upon the whole, your Lordſhip will think the law has gone far enough, and that the court will make a ſtand and not carry the conſtruction of eſtates-tail by implication ſtill further than any of the caſes have yet gone.

Mr. *Murray* Attorney General's reply:

The general queſtion is, What limitations are to be inſerted in the conveyance of the truſt eſtates?

By what rule is it to be governed? Why, by the conſtruction of law upon the deviſe of the legal eſtate of which Sir *William Dodwell* died ſeiſed, and will equally extend to the truſt eſtates; for there cannot be two rules of conſtruction, one in a court of law, and another in a court of equity.

Your Lordſhip cannot here, any more than at law, introduce words which are not in the will.

The ſingle queſtion is, Did the teſtator intend a remainder to Sir *Henry Nelthorpe* and the *Lethieullers*, except upon a total failure of iſſue of his daughter's body?

It has been ſaid in this caſe here is the word *ſuch*, but that is begging the queſtion; for in the limitation to Sir *Henry Nelthorpe* it is, in caſe my couſin Sir *Henry Nelthorpe* ſhall happen to die before he attain his ſaid age of twenty-one years *and without iſſue*; but if it had been *ſuch* iſſue, it could not have meant a qualified iſſue, but general, becauſe it is limited to ſons and daughters of Sir *Henry Nelthorpe*, and therefore ſuch muſt refer to iſſue generally.

Suppoſe Mrs. *Tracy* had died during the minority of Sir *Henry Nelthorpe*, leaving a ſon, could the truſtees have taken the eſtate? I apprehend not; as the contingency has not happened of Mrs. *Tracy*'s dying without iſſue living at her deceaſe.

Now, though poſſibly the teſtator might intend that the children of his grandaughters ſhould take preferably to the great-grandaughter, the daughter of his eldeſt ſon, as being nearer to himſelf; yet, I apprehend, he clearly meant to provide for the deſcendants of his own

own body, before he limits the eſtate over to the remote remainder-men.

Sir *William Dodwell* is providing for the iſſue of his daughter, and therefore it never can be imagined, as he has limited the eſtate to the heirs general of his grandaughters, ſo as that the remainder-men cannot take without failure of iſſue of them, that he was not equally intending, the iſſue of that iſſue, in a direct line, the great-grandaughter, ſhould alſo take before the remainder-men.

The power of barring remainders by a common recovery, is never an argument againſt conſtruing an eſtate-tail by words of implication, being only a conſequence, and therefore will have no weight in determining this queſtion.

In the caſe of *Wyld* verſus *Lewis* there was no doubt but the ſon or daughter of the teſtator's wife would have taken for life; but unleſs the court conſtrued it an eſtate-tail by implication to the firſt taker, the grandchildren could not have taken, but it would have gone to a remainder-man, a collateral relation, the brother of the teſtator, excluſive of the immediate deſcendants in a right line.

In *Blackburn* verſus *Edgeley* the court ſaid, "it did not appear the "teſtator intended *Hewer Edgley*'s ſons daughters ſhould take, for "he might think that on *Hewer Edgley*'s dying without iſſue male "his name and family would be determined, for which reaſon he "might limit it over to the daughters of *Hewer Edgeley* himſelf."

But if the court had been of opinion, from the words of the will, it was the intention of the teſtator there that *Hewer Edgeley*'s ſons and daughters ſhould take, then Lord *Macclesfield* would have conſtrued the words, If *Hewer Edgeley* died without iſſue, to give an eſtate-tail by implication to him, in order to provide for the daughters of his eldeſt ſon; ſo nothing can be drawn from thence which will affect the preſent caſe, if your Lordſhip ſhould be of opinion the teſtator here meant to give the preference to the iſſue of the eldeſt ſon of his daughter before the remainder-men.

His own iſſue muſt naturally be ſuppoſed to be the firſt objects of his care, and was the primary proviſion intended by him; and what ſhews it ſtrongly, is, that he did not oblige the perſon who ſhould marry his daughter, or any of the female deſcendants of his daughter, to take his name; becauſe he thought ſuch an injunction might prevent his daughter from marrying to advantage, as other families might retain the ſame regard to a family name as himſelf, and therefore only lays this injunction on his great-nephew Sir *Henry Nelthorpe*, a collateral relation, and on the *Lethieullier*s, ſtrangers to the teſtator.

If the teſtator could have ſo great a regard to the welfare of his grandchildren, is it not very probable that it would equally extend to all the immediate iſſue of his body, *in infinitum*, in excluſion of remainder-men, one of which was only a collateral relation, and the others diſtant ones of his firſt wife?

A near contingency, or a remote one, will not weigh with the court in determining this queſtion; but however the fact is, that there is only one ſon born of Mrs. *Tracy*, who is ſeven years old, and ſhe has never had any children ſince; ſo that the accident may as well happen as not, it being an equal chance whether, if he leaves iſſue, it is a ſon or daughter; and if the latter, ſhould the conſtruction prevail which the plaintiffs council contend for, ſuch daughter would be totally unprovided for, and the eſtate go to ſtrangers, in prejudice to the teſtator's immediate lineal deſcendant, his great grandaughter, the daughter of his eldeſt grandſon.

I reſt the whole therefore upon this; whether the teſtator intended that all the iſſue ſhould take before remainder-men, or that remainder-men ſhould take before the iſſue female of his eldeſt grandſon.

Lord Chancellor directed the cauſe to ſtand over till the 29th inſtant.

Lethieullier verſus *Tracy*, *April* 29, 1754. *The cauſe ſtood for judgment.*

LORD CHANCELLOR.

THIS comes before the court upon an exception taken to the Maſter's report, whereby he approves of a conveyance to be made of the eſtates purchaſed purſuant to the will of Sir *William Dodwell* and the decree in the cauſe.

And likewiſe on a ſupplemental bill, in order to bring the infant *Dodwell Tracy*, the ſon of the defendant Mrs. *Tracy*, and grandſon of the teſtator, before the court.

The exception is taken by *Smart Lethieullier* and *Richard Rogers*.

" For that the Maſter in the ſettlement hath, between the limi-
" tation to the daughters of Mrs. *Tracy* and the heirs of their re-
" ſpective bodies, and the eſtate limited to *Smart Lethieullier* and
" to *Charles Lethieullier* and their iſſue male ſucceſſively, inſerted
" theſe words, and in caſe the ſaid *Mary Tracy* ſhall depart this
" life without iſſue of her body living at her deceaſe, *whereas ac-*

" *cording to the intent and meaning of the will of Sir* William Dod-
" well *it ought to be, and in default of ſuch iſſue.*"

This bill brings the whole matter before the court, and therefore I may properly determine the points now before me.

There are two queſtions:

Firſt, Whether the words in *that* caſe, *my ſaid daughter depart this life, &c.* are ſufficient, and co-operate ſo in conſtruction of law, as to turn all the ſubſequent remainders into contingent ones.

Secondly, If they have not that operation, whether the teſtator intended that all the iſſue of Mrs. *Tracy* ſhould take and enjoy before the *Lethieulliers*, and whether theſe words will not give Mrs. *Tracy* an eſtate-tail by implication, and conſequently a power to bar the remainders by a recovery.

As to the firſt queſtion, I have already given my opinion, that the words will not make the limitation to the *Lethieulliers* a contingent remainder.

I have no doubt from the words of the will, but that the truſt eſtates to be purchaſed with the perſonal eſtate, and the rents and profits of his real, and to be ſettled to the ſame uſes with the legal eſtate of Sir *William Dodwell*, are liable to the ſame conſtruction, though there be ſome caſes which may be contrary, and ſeem to diſtinguiſh between legal and equitable eſtates.

Taking that to be ſo, there can be no queſtion but Sir *William Dodwell* intended to make as ſtrict a ſettlement as he poſſibly could, and I think the preſumption of that intention is ſtrengthened by the blank in the will.

For after the limitations to ſo many perſons under the will, he could not bring himſelf even then to limit it to his own heirs, but had it in his thoughts to limit it over ſtill further.

This is a circumſtance at leaſt in favour of his intention to make a ſtrict ſettlement.

The conſequence is, that he has either uſed words to ſupport the intention, or he has failed in point of law.

If the words have the operation of turning the eſtate for life into an eſtate-tail by implication, it would give Mrs. *Tracy* a power to bar the remainders, in caſe I had been of opinion to extend the contingency to the *Lethieulliers*, and the accident had happened of

Mrs. *Tracy*'s ſurviving her ſon, and he had left only a daughter, ſhe could not even then be ſaid to take by the will, but it would deſcend in fee to the mother, the daughter of the teſtator, and ſhe might by that means provide for ſuch daughter of her ſon.

But I will not go over this part of the caſe again; *Luxford* verſus *Lee*, 3 *Lev.* as I have before obſerved, is very ſtrong for this purpoſe.

Theſe words, *if ſhe depart this life, &c.* ſeem to me from the whole tenor of the will to be relative to the truſt created by the will.

The teſtator's view was, as his daughter and Sir *Henry Nelthorpe* were both infants, to increaſe and accumulate the bulk of his real eſtate, for after adding to his daughter's maintenance, he directs the perſonal eſtate to be laid out again in further purchaſes.

He in the next place conſiders Sir *Henry Nelthorpe* in the ſame light, and gives the ſame direction during his minority for accumulation of real eſtates; it is plainly therefore a truſt of theſe profits during the minority of Sir *Henry Nelthorpe*, and an accumulation of them juſt in the ſame manner.

But when he comes to the limitations to the *Lethieulliers*, the teſtator makes no accumulation of profits, but deviſes to them in the manner mentioned in the will, with a limitation to the truſtees to preſerve contingent remainders.

What could be his meaning in this? Why, the teſtator imagined his daughter might die a minor during the infancy of Sir *Henry Nelthorpe*, and that he likewiſe being very young at that time might alſo die before he came of age, and therefore was providing againſt both the accidents, which more and more induces me to be of opinion theſe words do not make a contingency to the *Lethieulliers*, but with reſpect to them muſt be conſidered as *a veſted remainder*.

I ſhall now give an opinion as if I was doing it upon a ſpecial verdict.

Upon the words, *If my daughter depart this life without iſſue of her body living at her deceaſe*, my opinion is, that they are to be conſidered as if he had added *during the minority of Sir Henry Nelthorpe*; and this determines the firſt queſtion.

But ſuppoſing they do not affect the ſubſequent remainders, then ſecondly, whether the teſtator did not intend that all the iſſue of Mrs. *Tracy* ſhould take and enjoy before the *Lethieulliers*, and whether

ther theſe words will not give Mrs. *Tracy* an eſtate-tail by implication; and for this reaſon particularly, as there is no other way of letting in *the daughter of the eldeſt ſon* but by giving the firſt taker ſuch eſtate by implication.

It is certainly true, that there are ſeveral caſes in law where the words, *if he die without iſſue*, have been held to create an eſtate-tail by implication.

A great misfortune to *Weſtminſter-hall* there is no report of Lord Ch. J. *Hale* himſelf of the caſe of *King* verſus *Melling*, nor any copy of his argument, for it is very imperfect in *Ventris*, eſpecially as to the caſes ſaid to have been cited by *Hale*.

I cannot help ſaying that it is a great misfortune to *Weſtminſter-hall* there is no report of Lord Chief Juſtice *Hale* himſelf of the caſe of *King* verſus *Melling*, nor any copy of his argument, for it is very imperfect in *Ventris*, eſpecially as to the caſes ſaid to have been cited by *Hale*.

But however, there are ſeveral caſes, where a limitation for life at the outſet of a will hath been by ſubſequent words turned into an eſtate-tail in this court in order to provide for the iſſue; but there is no caſe comes up to this; the reaſon is that if the connecting words were turned into words of limitation, they would give an eſtate-tail; as a deviſe to *A.* and if he die without iſſue, then to *B.* or to *A.* for life, and if, *&c.* then to *B.* by conjoining them they give an inheritance.

But in the preſent caſe, turn theſe words of contingency into words of limitation, *If my daughter depart this life without iſſue, &c. during the minority of Sir Henry Nelthorpe*; they will not give an intail, but will give *to the iſſue living at her deceaſe, &c.* an eſtate by purchaſe, for then they will run thus:

To Mrs. *Tracy* for life, to her firſt ſon and the heirs male of his body, to the ſecond and every other of her ſons and the heirs of their reſpective bodies, to her daughters and the heirs of their reſpective bodies, remainder to ſuch iſſue as ſhe ſhall leave at the time of her death in the minority of Sir *Henry Nelthorpe*.

So that theſe words will make this particular ſpecies of iſſue take by purchaſe; and place theſe words in what manner you pleaſe, they can make no limitation in tail.

But then it is ſaid, it is extremely hard the daughter of the ſon ſhould be totally unprovided for.

It is apprehended by the council on both ſides, that the miſtake in the will was letting in daughters of his ſecond and other ſons, and that the intention of the teſtator was to prefer his grandaughters to the great grandaughters, the daughters of the eldeſt and other ſons of Mrs. *Tracy*; but it would be too much to conſtrue theſe

words to make an intail by implication, merely becauſe a caſe may happen in which a great grandaughter of the teſtator may be unprovided for, eſpecially as it is admitted the teſtator meant to preſer his grandaughters, being nearer to him in point of relation than his great grandaughter, the daughter of his eldeſt grandſon.

This brings it very near the caſe of *Blackburn* verſus *Edgeley*, for there the court ſupplied the word *ſuch*.

Beſides, in this caſe the ſon of Mrs. *Tracy* when twenty-one may bar all the limitations; and though it is inſiſted on, and very truly, the power of ſuffering a common recovery is a conſequential one; and courts of juſtice, as was done in the caſe of *Shaw* and *Weigh*, *Eq. Caſ. Abr.* 125. will conſtrue according to the line of ſucceſſion without being influenced by the effect it may produce; yet there have been caſes where it is a meaſuring caſt, in which the conſideration of barring his had weight; as in the caſe of *Bampfield* verſus *Popham*, where notwithſtanding it was objected that unleſs the words, iſſue male of *Popham* created an eſtate-tail in him, a poſthumous ſon would not take; yet it was anſwered by the court, that though it might have been intended ſuch poſthumous ſon ſhould take, this was but a remote miſchief or contingency, whereas it was very obvious that the teſtator meant it ſhould not be in the power of *Popham* to bar the remainders, which it was plain he could do if he had an eſtate-tail; ſo that this being a miſchief near and eaſy to be foreſeen, it was certainly in the intent of the teſtator to obviate and prevent the ſame.

This is a caſe that proves by the authority of very great men (for it received a ſolemn determination before Lord Keeper *Wright*, Lord Chief Juſtice *Holt*, Lord Chief Juſtice *Trevor*, Sir *John Trevor* Maſter of the Rolls, and Mr. Juſtice *Powell*, who all gave their opinions, that *Popham* had only an eſtate for life) that where the intention of creating an eſtate-tail is not plain, but very doubtful and uncertain, judges will lay hold of any circumſtance rather than put it in the power of a perſon upon a remote contingency to bar all ſubſequent remainders.

Where the intention of a teſtator in creating an eſtate-tail is not plain, but very doubtful, judges will lay hold of any circumſtance rather than put it in the power of a perſon, on a remote contingency, to bar all ſubſequent remainders

This is my opinion, and therefore let the firſt exception be allowed, for *Smart Lethieulkier* and *Charles Lethieullier*'s eſtate muſt, according to the teſtator's intent and meaning, be limited to them, and to their firſt and other ſons in tail male reſpectively, as *remainders veſted*, and to take place upon failure of iſſue of Mrs. *Tracy* generally.

Caſe 295. *Ex parte Hellier, April* 30, 1754.

The execution of a ſecond will is a revocation of the firſt, and the cancelling the ſecond afterwards does not ſet up the firſt again.

THERE was a queſtion in a cauſe before Sir *George Lee* as judge of the prerogative court, whether the execution of a ſecond will is a revocation of the firſt, though the ſecond is afterwards cancelled, and whether ſuch cancelling ſets up the firſt will again? Sir *George Lee* gave ſentence that it was a revocation, and that the cancelling the ſecond did not ſet up the firſt.

A petition was preferred to Lord Chancellor on the part of the principal defendant in that cauſe, for a full commiſſion of delegates, and alſo a croſs petition, praying that the commiſſion may iſſue to judges of the common law and civilians only.

LORD CHANCELLOR.

Diſcretionary in the court whether they will grant a full commiſſion of delegates.

It is in the diſcretion of this court, whether they will grant a commiſſion of delegates to judges of the common law and civilians, or to them and lords ſpiritual and temporal.

I have granted a full commiſſion where the juriſdiction of biſhops is in controverſy, or any queſtion is depending that concerns the canon and eccleſiaſtical law.

Where legal and eccleſiaſtical matters come in queſtion the judges in both are appointed.

The principal intention in granting full commiſſions is, where legal and eccleſiaſtical matters come in queſtion; and in order to balance the objection of a partiality to one law more than to the other, and to obviate this, the judges in both are appointed.

Where it is a mere matter of law a commiſſion iſſues to judges and civilians only.

The preſent matter is upon the point of a will, and altogether a queſtion of law; and therefore I ſhall diſmiſs the petition of the party appellate, and according to the prayer of the croſs petition direct a commiſſion of delegates to judges and civilians only.

Caſe 296. *Sparrow* verſus *Hardcaſtle, Eaſter term, May* 6, 1754.

The eſtates deviſed under the Will of *C. A.* muſt remain unaltered to the teſtator's death, for any alteration or new modelling makes it a different eſtate, and occaſions a different conſtruction at law.

ON the 28th of *July* 1716, *Cyril Arthington* made his will, and thereby deviſed unto Sir *Walter Hawkſworth* and others, their heirs and aſſigns, all his manors, meſſuages, tithes, tenements and hereditaments whatſoever, in the county of *York*, or elſewhere in *England*, and all his eſtate, right, title and intereſt therein, either in law or equity, upon truſt to pay all his juſt debts out of the rents

and

and profits, by leaſing, &c. and ſubject thereto in truſt for his nephew *Cyril Arthington*, the plaintiff's father, for life, remainder to his firſt and other ſons in tail male, and for want of ſuch iſſue, in truſt for his nephew *Sandford Arthington* in like manner, and for want of ſuch iſſue, in truſt for his nephew the defendant *Thomas Hardcaſtle*, in like manner, and for want of ſuch iſſue, in truſt for his nephew *Cyril Hardcaſtle*, in like manner, and for want of ſuch iſſue in truſt for his nephew *Sandford Hardcaſtle*, in like manner, *remainder in truſt for his own right heirs for ever.*

On the 13th of *October* 1720, the teſtator made a codicil to his will, reciting that he had made his will as aforeſaid, but having juſt reaſon to be diſpleaſed with his nephew *Cyril Arthington*, and with *Thomas Hardcaſtle*, and *Cyril Hardcaſtle*, three deviſees mentioned in his will, did, on ſerious conſideration, think fit to alter the ſame as to them only, and did thereby revoke and make void all deviſes in the will made to them, or any of them, or any of their heirs, as fully as if the ſame had never been made.

On the 21ſt of *November* 1723, he made another codicil, reciting or mentioning the ſaid will, and the firſt codicil, and did thereby declare, that being then reconciled to his nephew *Cyril Arthington*, he conſidered he was his next heir at law, and that it would be a great piece of hardſhip, if not injuſtice, to diſinherit him, he therefore, on further conſideration, thought fit, and did thereby revoke and make void the ſaid codicil, ſo far as related to his nephew *Cyril Arthington*, and his heirs, but not with reſpect to *Thomas Hardcaſtle* and *Cyril Hardcaſtle*, and their reſpective heirs; and did thereby will, that his ſaid in part recited will, and all deviſes and bequeſts therein, ſhould ſtand and remain in their original full force and effect with reſpect to *Cyril Arthington and his heirs.*

By indenture dated the 20th of *November* 1723, made between *Cyril Arthington* the teſtator of the one part, the ſaid Sir *Walter Hawkſworth* and Sir *Walter Calverly* of the other part, for divers good conſiderations, he the ſaid *Cyril Arthington* did grant to Sir *Walter Hawkſworth*, &c. and their heirs, *all the advowſon, donation and right of patronage* of, in and to the rectory and pariſh church of *Addle*, and all the eſtate, right, title, intereſt, property, claim and demand whatſoever, of him the ſaid *Cyril Arthington*, of, in and to the ſaid advowſon, *to hold to them and their heirs*, to the only uſe and behoof of them and their heirs and aſſigns for ever.

And by another indenture dated the 21ſt of *November* 1723, between the ſaid parties, reciting the firſt mentioned indenture, it was thereby witneſſed that the true intent and meaning of the ſaid recited grant, and of the parties, was, and is, that the advowſon, donation and right of patronage was and is ſo granted, upon truſt

that the ſaid Sir *Walter*, *&c.* or the ſurvivor of them, and his heirs, ſhould preſent to the ſaid church when the ſame ſhould become void, ſuch ſon of *Robert Jackſon*, the then incumbent, as ſhould at any time after ſuch vacancy, or at any time within five months next after ſuch vacancy be by law qualified to be preſented to the ſaid church.

And in caſe there ſhould be two or more ſuch ſons ſo qualified, that then ſuch of the ſaid ſons, as the ſaid *Cyril Arthington, or his heirs*, by writing under his or their hands and ſeals nominated, ſhould be preſented, and in default thereof, the truſtees ſhould preſent ſuch of the ſaid ſons as he or they ſhould think meet.

And in caſe at the time of the firſt, or any future vacancy of the ſaid church, there ſhould be living a ſon or ſons of *Robert Jackſon*, who ſhould then be by law incapable to take ſuch church, the truſtees ſhould preſent ſuch clerk thereto as by the ſaid *Cyril Arthington or his heirs* ſhould be nominated, and in default of ſuch nomination, ſuch clerk as they ſhould think meet.

So that every ſuch clerk ſo to be preſented during the incapacity of ſuch ſon or ſons of *Robert Jackſon*, ſhould become bound to the truſtees in ſuch ſum of money, and with ſuch ſecurities, as the truſtees ſhould direct, to reſign ſuch church ſo ſoon as any ſon of *Robert Jackſon* ſhould be qualified to be admitted thereto, and that ſuch clerk, giving ſuch ſecurity, ſhould be by the ſaid truſtees requeſted to reſign ſuch church, it being the true meaning thereof, that no clerk thereof ſhould at any vacancy of the church be preſented thereto, during the incapacity of any ſon of *Robert Jackſon*, to take ſuch church, or be preſented thereto, who ſhould refuſe to enter into ſuch ſecurity, to reſign the ſame; the church being intended to be a proviſion and preferment for ſuch of the ſons of *Robert Jackſon* as ſhould be by law qualified to be preſented thereto.

Provided, that in caſe at the time when the church ſhould firſt become vacant, or at the time of every future vacancy, there ſhould be no ſon of *Robert Jackſon* living, or in caſe any ſon of *Robert Jackſon* being by law qualified to take ſuch church, ſhould neglect or refuſe to accept a preſentation thereto, that in any of the ſaid caſes, the truſtees ſhould ſtand ſeiſed of the advowſon, donation and right of patronage of the church, *in truſt for* Cyril Arthington and his heirs, *and on requeſt ſhould convey over the ſame to his or their uſe.*

And in the ſame caſe of there being no ſon of Robert Jackſon *living at the time of ſuch vacancy, or of refuſal to accept ſuch preſentation as aforeſaid*, the truſtees ſhould preſent ſuch clerk to ſuch church as *Cyril Arthington or his heirs* ſhould in writing nominate to be pre-

ſented, and in default of ſuch nomination, *then ſuch clerk ſhould be preſented as the ſaid truſtees ſhould think meet.*

Cyril Arthington the grantor and teſtator died ſoon after, without iſſue.

And *Cyril Arthington* his nephew was his heir at law, who is alſo ſince dead, and left *Cyril Arthinton* his ſon and heir at law, who is alſo dead under age, and without iſſue, leaving the plaintiffs his ſiſters, and heirs at law.

Robert Jackſon the father died ſoon after the death of *Cyril Arthington* the father, whereby the church became vacant, and the defendant *William Jackſon* his ſon being duly qualified, hath ſince been preſented to the ſaid church by the ſaid truſtees, and is now the incumbent.

The two truſtees are dead, and the defendant Sir *Walter Blacket* is the ſon and heir of Sir *Walter Calverley*, the ſurviving truſtee, and the legal eſtate in the advowſon is in him.

The plaintiffs by their bill charge that the truſt is determined on *William Jackſon*'s being preſented, and the advowſon and right thereto ought to be aſſigned to them, the heirs at law of *Cyril Arthington*, and that in caſe the church ſhould become vacant, they would have a right to preſent thereto.

For that the ſecond codicil being executed before the conveyance and deed of truſt, the ſaid deed and conveyance as executed afterwards, is a revocation of the will *pro tanto*, and revokes the truſt of the advowſon, which, by conſtruction, might otherwiſe be in the iſſue male of the deviſee *Cyril Arthington* the nephew, or for want thereof, go over according to the deviſes in the ſaid will.

For, as the bill charges, by ſuch expreſs act and deed the teſtator did limit and retain the ſaid advowſon *to his own right heirs.*

Their bill, therefore, is brought for the heir of the ſurviving truſtee to convey the legal right and title in and to the ſaid advowſon, rectory and pariſh church to the plaintiff, and that the indenture of conveyance, and deed of truſt therein reſpectively, dated the 20th and 21ſt of *November* 1723, may be delivered up to the plaintiffs.

The defendant *Thomas Hardcaſtle*, otherwiſe *Arthington*, the ſon of *Sandford Hardcaſtle*, the laſt remainder-man under the will of the teſtator, being in poſſeſſion of the reſt of the real eſtates deviſed thereby, by his anſwer inſiſts, notwithſtanding the conveyance of the advowſon, and the truſt thereof, he is in equity intitled thereto

under the will and codicils, as deviſee of the real eſtate, and that it ought to be conveyed to, or to the uſe of the defendant, and the heirs male of his body, in regard the teſtator intended to give the benefit of one preſentation only, to one of the ſons of *Robert Jackſon*, but when that purpoſe was ſerved, then the advowſon ſhould go along with the reſidue of his real eſtate; and that, admitting the deeds were executed after the ſecond codicil, they ought only to revoke the ſaid will *pro tanto*, and not intirely as to the whole inheritance of the advowſon, and diſunite and ſeparate it from all the reſt of his real eſtate, eſpecially as it is of the yearly value of three hundred and fifty pounds, and that the plaintiffs, as heirs general of the teſtator, have not any right or title to the advowſon, other than the reverſion in fee thereof, after the eſtate-tail therein now veſted in the defendant, and therefore inſiſts, that he is intitled to the benefit of the truſt thereof, and that Sir *Walter Blacket* ſhall be decreed to convey the legal eſtate of the advowſon to them.

There was a ſingle witneſs in the cauſe who proved that both the deeds were executed by *Cyril Arthington* the uncle, and Sir *Walter Calverly*, at the ſame time, and after the ſecond codicil.

LORD CHANCELLOR.

I ſhall make only one queſtion, Whether the grant of the advowſon made by the teſtator to two perſons and their heirs, and the declaration of truſt at the ſame time, are a revocation of the will, or not?

It depends on a ſhort fact.

His Lordſhip then ſtated the caſe from the will, the deeds, and the codicils.

There is a material clauſe at the end of the declaration of truſt of the advowſon.

If there be no ſon of *Robert Jackſon* living at the time of ſuch vacancy, or in caſe of a refuſal to accept as aforeſaid, the truſtees ſhould preſent ſuch clerk, *&c. and in default of ſuch nomination, then ſuch clerk ſhould be preſented as the ſaid truſtees ſhould think meet.*

A caſe put under the deed itſelf, in which theſe very truſtees may have a right of nomination and preſentation.

After the death of *Cyril Arthington* the teſtator, a vacancy happens, and one of the ſons of *Robert Jackſon* is preſented, and the truſt ſerved.

And

And the bill is brought by the plaintiffs, as heirs at law of the teſtator, and *Cyril Arthington* his nephew, for the purpoſes before mentioned.

The general principle on which the queſtion depends, and enforced by caſes, is, that a man at the time of making a will muſt have a diſpoſing capacity and mind.

That he muſt at the time be ſeiſed of the eſtates he deviſes.

And ſuch eſtates muſt remain in the ſame plight, and unaltered, to the time of the teſtator's death; for any alteration, or new modelling, will make it a different eſtate, and occaſion a different conſtruction at law, unleſs in ſome exceptions, which I ſhall mention by and by.

It has been determined, and muſt be agreed to be law, that if a man ſeiſed in fee makes a will, yet, if he afterwards executes a feoffment in fee, this is a revocation; nay, has been held ſo, if there was no livery on that feoffment, becauſe it imports an intention in the teſtator to revoke.

A feoffment in fee executed after a will, is a revocation, even if there was no livery; not inrolled.

idem as to a bargain and ſale, though

The ſame as to a bargain and ſale, which, though not inrolled before the teſtator's death, is a revocation.

Lord *Lincoln*'s caſe, *Eq. Caſ. Abr.* 411. which turned upon a conveyance by *Edward* Earl of *Lincoln*, to truſtees, in conſideration of an intended marriage with Mrs. *Calverley*, and though proved there never was any intention of ſuch marriage, but a mere whim of the earl, yet determined with great deliberation in this court, and afterwards in the Houſe of Lords, to be a revocation of his will.

A conveyance from the *E.* of *L.* to truſtees, in conſideration of an intended marriage with *C.* though there never was ſuch intention, determined to be a revocation of his will.

The courts have gone further ſtill, and held, that if a man was ſeiſed in fee, and afterwards thinking he had only an eſtate-tail, ſuffers a recovery, in order to confirm his will, *yet this is a revocation of it.*

If a man ſeiſed in fee, thinking he had an eſtate-tail only, ſuffers a recovery to confirm his will, yet it is a revocation of it.

But in the preſent caſe a diſtinction has been attempted to be taken, which is, that the teſtator being ſeiſed of the legal eſtate, and having the ſame day executed a deed for a particular purpoſe only, muſt be conſidered as one intire tranſaction, and not a revocation: and it is inſiſted, that the teſtator's declaring the truſt to himſelf and his heirs, is the ſame thing as if he had left the truſt to reſult to him and his heirs, and would have paſſed by the deviſe of the land, and muſt be conſidered as part of the old eſtate.

I find

I find no authority for this, and am of a different opinion.

It has been ſaid, that if a man ſeiſed in fee makes a will, and afterwards a conveyance in fee in truſt, and then declares the truſt only as to part, that the reſidue ſhall not be revoked.

But I think otherwiſe. If a man ſeiſed in fee of a truſt, and afterwards deviſes it to another, and then takes the legal fee-ſimple, I thought this no revocation in the caſe of *Parſons* and *Freeman*, in *Michaelmas* term 1751, (*vide ante* 741.) but it was not the principal point, and only ſaid *obiter*.

I find a caſe in the books appoſite to the point now in queſtion, and which gives great countenance to my opinion. *Roll's Abr.* 616. *pl.* 3. *Dyer* 73. *pl.* 10. between *Mountague* and *Jeffreys*.

If a man, having feoffees to his uſe, before the ſtatute of 27 *H.* 8. had deviſed the land to another, and afterwards the feoffees make feoffments of the land to the uſe of the deviſor, and after the ſtatute, the deviſor died, the land ſhall paſs by the deviſe, for after the feoffment the deviſor had the ſame uſe as he had before.

I looked into *Dyer*, but do not find the point determined; but there is plainly a reference in it to the caſe of *Mountague* and *Jeffreys*, *M.* 38, 39. *El. B. R.*

Lord Chief Juſtice *Roll* mentions more points determined in that caſe than are ſtated by any of the reporters, and therefore probably he had a much better note of *Mountague* verſus *Jeffreys* than any other perſon beſides.

The uſe at law was the beneficial and profitable intereſt, the ſame as a truſt in equity, and which remained in the ſame plight after the feoffment as before, and the feoffees there granted the dry legal eſtate to the deviſor.

But the diſtinction relied upon is, that this is a conveyance made for a ſpecial particular purpoſe to ſerve the truſt only created for the benefit of Mr. *Jackſon's ſons*, and when that was ſerved ought to affect the eſtate no further, and is compared to the caſe of mortgages and ſecurities for money.

A mortgage for a term of years, made ſubject to a will, is, in point of law, only a revocation *pro tanto*; but mortgages in fee, though otherwiſe at law, are conſidered as partial revocations in equity.

The excepted caſes out of the general rules of revocations have been confined to mortgages and ſecurities for money, and to conveyances for raiſing money to pay debts.

The excepted caſes out of the general rules of revocations are confined to mortgages and conveyances for raiſing money to pay debts.

Hall verſus *Dunch*, 1 *Vern.* 329. *A.* deviſes lands, and then makes a mortgage thereof in fee, this is a revocation in law, but otherwiſe in equity: before Sir *John Churchill*, *Maſter of the Rolls*; an appeal to the Lord Chancellor *Jeffreys*, who confirmed the decree.

A mortgage in fee after a deviſe, is a revocation in law, otherwiſe in equity.

Vernon verſus *Jones*, 2 *Vern.* 241. was the caſe of a wife and children unprovided for, but notwithſtanding that, Mr. *Vernon* has reported it with *a quæry*.

The caſes were certainly right, becauſe they were mortgages ſecurities for money.

But that the deed of grant here is a revocation of the will, is as clear as the ſun.

Conſider on what the caſe of mortgages and ſecurities depends.

They depend on the general grounds of being conveyances for a particular purpoſe, and on their being pledges for money only, and though the conveyance be of a real eſtate, yet, in the conſideration of this court, the thing conveyed is conſidered merely as a perſonal intereſt, for it has no quality of a real eſtate, and therefore is no revocation of the deviſe of real eſtate at all, the teſtator having only created a chattel intereſt, and is the ſame thing as if he had created a term for years for a particular purpoſe, which is in point of law a chattel intereſt.

Though in the caſe of mortgages the conveyance be of a real eſtate, yet, in the conſideration of this court, the thing conveyed is regarded merely as a perſonal intereſt, for having no quality of a real eſtate, it is no revocation of the deviſe of a real eſtate.

But, compare this with the preſent caſe, here the legal eſtate is actually conveyed by the grant, ſo likewiſe is the truſt by the ſubſequent deed, for the profits of the accruer of the advowſon are conveyed.

The latter part of the declaration of the truſt is very material to ſhew, that not only the whole legal eſtate, but the whole truſt is parted with, for the heir of the grantor is to preſent, and therefore makes a total alteration, has to the laſt day of the ſix months to preſent, and after this, the truſtees, and the heir at law of the ſurviving truſtee, ſo that the beneficial intereſt is given to them, not that the caſe wants the aſſiſtance of this circumſtance, but it is an ingredient, and deviſees muſt take it bound generally by this new declaration of the teſtator.

If the diſtinction, contended for by the defendant's council, was to prevail, it would overturn a great number of authorities.

It is not to be controverted, but that the favour of courts to heirs at law, I mean judicial favour, has prevailed in ſome inſtances; and Lord *Trevor* takes up this very conſideration in the caſe of *Arthur* verſus *Bockenham*, *reported in Holt's Caſes* 750; which, though I do not allow to be a book of authority, yet, in this inſtance, ſeems to be a copy from his Lordſhip's manuſcript.

There having been an uniform ſeries of opinions in this point, it ought not to be varied.

Upon the whole, there having been an uniform ſeries of opinions in this point, it ought not to be varied: *and therefore I am of opinion, in this caſe, that the will was revoked by the deed.*

But as the priority between the will and the grant depends upon the evidence of one witneſs only, who ſwears to a fact thirty years ago, if Mr. *Hardcaſtle*, the defendant, will try upon an iſſue the priority of the will and grant, I will direct ſuch iſſue.

Lord Chancellor allowed the defendant time to conſider, till the 10th of *May* 1764.

N. B. *The defendant, upon that day, declined trying this fact upon an iſſue, and acquieſced under the decree.*

Caſe 297. *The Attorney General* verſus *Bowles and others*, *July* 24, 1754.

W. B. by will, the third of *May* 1745, gave 500*l.* *to T. W. and J. B.* on truſt, to lay out 200*l.* in building a ſchoolhouſe, *&c.* and the remaining 300*l.* to be laid out in land, *or ſome real ſecurity*, to be a maintenance for the maſter; the executrix refuſing to pay the 500*l.* an information, brought in the name of the Attorney General, to have the truſts of the will, in reſpect to this charity, carried into execution. What the teſtator has directed to be done, with regard to the 300*l.* is contrary to the ſtatute of Mortmain, 9 *Geo.* 2. and void; but the 200*l.* may be laid out in building a ſchoolhouſe, on any lands in the village of *N.* though not in the purchaſe of lands.

WILLIAM BOWLES, Eſq; being poſſeſſed of a large perſonal eſtate, on the 3d of *May* 1745 made his will, and gave five hundred pounds to be raiſed out of his perſonal eſtate unto the defendants *Thomas Wavell* and *Joſeph Bowles*, their executors and adminiſtrators, upon truſt, that they ſhould lay out part thereof in building a ſmall ſchoolhouſe in the village of *New-church*, with a little houſe adjoining for a ſchoolmaſter; and thereby directed, that the purchaſe of the ground and expences of building ſhould not exceed two hundred pounds; and the remaining three hundred pounds, he directed, ſhould be laid out in land, *or ſome real ſecurity*, to be a maintenance for the maſter: all which he appointed to be done with the advice of the proprietor of *Longbridge*, and the vicar and churchwardens of *New-church*, for the time being, or any two of them.

The

The teſtator died in *July* 1748, and his widow and executrix ſoon after proved the will, but refuſed to pay the five hundred pounds to the truſtees; upon which they brought the preſent bill, in the name of the *Attorney General*, at their relation, to have the truſts of the will, in reſpect to this charity, carried into execution; and that the executrix may pay the truſtees the five hundred pounds, with intereſt, to be applied for the charitable purpoſes directed by the will.

The principal queſtion in the cauſe is, Whether the deviſe of the five hundred pounds is within the ſtatute of Mortmain, 9 *Geo.* 2. *c.* 36. *ſect.* 3. "All gifts of lands, *&c.* or of any charge affecting "lands, or of any ſtock, or perſonal eſtate, to be laid out in lands, "*&c.* for charitable uſes, which ſhall be made in any other man-"ner, ſhall be void."

Mr. Attorney General *Murray*, for the plaintiffs, inſiſted, that the words, *or real ſecurity*, ſeemed to be ſet by the teſtator in contra-diſtinction to the firſt part of the will, the laying out the money in the purchaſe of land; and that his intention was to make a permanent, ſubſiſting ſecurity, for the annual maintenance of the ſchool-maſter, which may be done by inveſting it in government ſecurities, and meant ſuch a ſecurity as this in oppoſition to bonds, or any other precarious perſonal ſecurity.

He cited the cauſe of *Vaughan* verſus *Farmer* 1737, and *Gatterell* verſus *Baker* in 1747. In one caſe, there was a ſum of money given *to erect a ſchoolhouſe*; and in the other, *to erect a hoſpital*; and in both caſes your Lordſhip held it was not within the laſt ſtatute of Mortmain.

Mr. *Wilbraham*, for the defendant *Elizabeth Bowles* the executrix, and reſiduary legatee of the teſtator *William Bowles*, inſiſted that, by the words *real ſecurities*, the teſtator meant mortgages, and is ſo underſtood in common parlance; and your Lordſhip in thoſe decrees, where money is directed to be laid out in government or *real ſecurities*, takes it in this ſenſe.

He cited the caſe of *Jones* verſus *Humphreys*, determined by the late Maſter of the Rolls, where he held that the deviſe of a mortgage to a charity is void, being within the ſtatute of Mortmain, 9 *Geo.* 2.

LORD CHANCELLOR.

This act of parliament muſt receive a natural conſtruction, and ſuch a one as will moſt effectually anſwer the end of the legiſlature.

The intent of the act is not to reſtrain charity, but to prevent the heir's being diſinherited by ſurprize.

The general intention of the ſtatute is not to reſtrain charity, but to prevent the diſpoſition of real eſtate, and unwarrantably or by ſurprize diſinheriting the heir at law.

To be ſure the two parts of the bequeſt in Mr. *Bowles*'s will may fall under different conſiderations.

With regard to the two hundred pounds, there is no doubt his intention was to diſpoſe of it in the purchaſe of ground, and to build upon it a houſe for a ſchoolmaſter: if there had been any land in this pariſh appropriated to any other charity, and the ſchoolhouſe had been permitted to be built there, I do not ſee but this would have effectually anſwered the intention of the teſtator.

The act reſtrains the giving perſonal eſtate *to be laid out in land*, as much as the deviſe of land itſelf.

Such a deviſe as this is certainly contrary to that clauſe in the act of parliament, which does as well reſtrain the giving *perſonal eſtate to be laid out in land*, as the deviſe of land itſelf.

In the caſes cited by Mr. Attorney General, as it was not abſolutely neceſſary to lay out the ſums deviſed in the purchaſe of freehold lands, but might, at the diſcretion of the truſtees, be inveſted in leaſehold eſtate, renewable from time to time, it was held for that reaſon not to be within the ſtatute of Mortmain.

Therefore if the truſtees can ſhew me any charitable donation in the pariſh already, where there is ground on which the two hundred pounds may be laid out for building a ſchoolhouſe, I ſhall be of the ſame opinion in this caſe, and therefore will not diſmiſs the information as to this part, but leave it to the truſtees to lay propoſals before the court.

The meaning of words muſt be taken in the ſame ſenſe as before the act, and new ideas not ſuffered to be annexed to them, in order to evade the ſtatute.

With regard to the remaining three hundred pounds, I am of opinion it is clearly within the act of parliament; for I muſt take the meaning of words juſt in the ſame ſenſe as before the act, and muſt not ſuffer new ideas to be annexed to them in order to evade the ſtatute, which in a great meaſure would be defeating it.

A known eſtabliſhed diſtinction in this court, between government and real ſecurities. Real is a term adopted in the law, and muſt be underſtood to mean landed ſecurities only.

I do admit, that where one purpoſe is lawful, and the other unlawful, the court have laid hold of the former to anſwer the charitable purpoſe; but here, the money is not only directed to be laid out in land, but in ſome *real ſecurity*. I can take theſe words only in the common ſenſe and acceptation; for there is a known eſtabliſhed diſtinction in this court between government and *real ſecurities*, and the latter means mortgages or other incumbrances affecting land.

The

The word *real* is a term adopted in the law, and can never be underſtood in any other ſenſe than *landed ſecurities*; as for inſtance, in the diſtinction which has been made between *real compoſition* and moduſſes, *real compoſition* does not mean any ſubſtantial, permanent ſecurity for the payment of the compoſition, but land ſubſtituted in lieu of tithes, or a rent-charge iſſuing out of land.

Real compoſition does not mean a ſecurity for the payment of the compoſition, but land ſubſtituted in lieu of tithes.

The information in this reſpect therefore muſt be diſmiſſed; but with regard to the other part, I will give the truſtees an opportunity of laying propoſals before me, of inveſting the money in ſuch a manner as will beſt anſwer the charitable purpoſe.

I declare, in the firſt place, the three hundred pounds, which by the teſtator's will is directed *to be laid out in land, or ſome real ſecurity, for the maintenance of the ſchoolmaſter*, is contrary to the ſtatute of 9 *Geo.* 2. and void: and as to ſo much, let the information be diſmiſſed.

With regard to the two hundred pounds, I declare, the ſame cannot be laid out lawfully in the purchaſe of lands, but that the ſame may be lawfully laid out in building a ſchoolhouſe upon any lands, in the village of *New-church*, which now doth or may belong to that pariſh; and the truſtees are to be at liberty to lay propoſals before the court for this purpoſe.

Anonymous. Auguſt 3, 1754. Caſe 298.

A Plea of a former ſuit and decree, in bar to the preſent bill; it appearing, that the decree was not ſigned and inrolled, Lord Chancellor would not allow it, as it is the ſtanding rule of the court, that you cannot plead in this manner before inrolment; and therefore directed it ſhould ſtand for an anſwer, with liberty to except.

A decree muſt be inrolled before you can plead it in bar to a ſecond ſuit, for the ſame matter.

Wortley verſus *Birkhead, the ſame Day. A demurrer for want of equity. The Attorney General, council for the demurrer.* Caſe 299.

AFTER a decree in the cauſe, a new original bill was brought between the ſame parties, ſtating the very ſame matter as in the former, and all the proceedings in it, and the hearing before Lord Chancellor was in *December* 1748.

After a decree in a cauſe, a new original bill cannot be brought between the ſame parties, and for the ſame matters.

The material part of the decree, as to the preſent ſuit, was a reference to the Maſter to take an account of the plaintiff's ſecurities,

mentioned in that cauſe, and of what they had received from rents and profits with common directions; and the Maſter was to inquire into the priority of the incumbrances; and the eſtate in queſtion was decreed to be ſold, and the money ariſing from the ſale to be paid to incumbrancers, according to their reſpective priority.

The preſent bill ſtates the ſeveral proceedings before the Maſter; and that the plaintiff had produced a deed of the 29th of *November* 1724, and another in *July* 1727; and then ſets forth, that there were judgments in the 5th of *William* and *Mary*, and 9th and 10th of *April* 1694, and alſo a prior mortgage, diſcovered ſince the hearing; but the Maſter not allowing the plaintiff to tack his mortgage to theſe ſecurities now diſcovered; he therefore has brought his bill, inſiſting upon his right to do it; and prays, that he may be permitted to do it accordingly.

The demurrer goes to ſuch part of the bill as ſeeks ſatisfaction for money claimed to be due, under the deeds of the 29th of *November* 1724, or under the deeds of 1727, in preference to the defendant's demands, under a deed of a prior date in 1724; and ſubmits to the court, that the plaintiff is precluded from this after the pronouncing of the decree.

Or, if he is not precluded by the decree, that this bill is improper; becauſe the plaintiff may then come under the decree, in order to have it ſettled, whether he has not a priority.

The aſſignments, which tack the plaintiff's deed to the old mortgage and judgment, bear date only in 1751 and 1754.

The priority between the plaintiff and defendants, in the former cauſe, is the material point put in queſtion there.

What is prayed by this bill is, in effect, to alter and do what is directly contrary to the former bill, but not to reverſe it.

There is no inſtance where this court has made, between the ſame parties, two oppoſite decrees, in two different cauſes; and therefore the preſent bill is totally improper.

Nor can there be any caſe cited, where this court have allowed of tacking incumbrances after a decree has been pronounced; and whether this is within or without the former decree, *quacunque via datâ*, it is improper, and the demurrer ought to be allowed.

Mr. *Yorke*, council of the ſame ſide:

This is a bill *primæ impreſſionis.*

There are only two ways of proceeding:

Either, after a decree is ſigned, and inrolled, by a bill of review; or, if not ſigned, there muſt be an application to the court to bring a ſupplemental bill, in the nature of a bill of review; and an original bill cannot be brought to affect or alter a decree, unleſs in a caſe where the decree was obtained by fraud.

The rule, with regard to tacking, is, that a third incumbrancer taking in the firſt to give him a priority to the ſecond mortgagee, muſt have no notice of the ſecond at the time of his money lent; but this has never been allowed after a decree, nor do I know it has been ſuffered even after a bill brought.

Mr. *Hoſkins*, of the ſame ſide:

The matter, which is diſcovered, is not a matter exiſting before the ſuit, but ſubſequent; and if this ſuit was ſuffered to go on, there would be two claſhing decrees with each other.

This bill admits the priority of the defendants; and therefore, if we have obtained a right by the decree, which directs our mortgage to be paid in the firſt place, this court can never, by a tranſaction between the preſent plaintiff and a ſtranger, vary the decree, as to a right actually attached to the defendant.

Such a proceeding as this would be big with abſurdities; becauſe, ſuppoſing the plaintiff ſhould have a decree, yet, if another incumbrancer hereafter diſcovers a mortgage precedent to the plaintiff's, he may, with an equal right, bring an original bill to vary the firſt decree and the ſecond, ſo that there will be no end of litigations if this was to prevail.

LORD CHANCELLOR.

If a bill of this kind was ſuffered, it would make great confuſion in the proceedings of this court, and introduce the utmoſt inconvenience.

As to the third mortagee's taking in a prior ſecurity, in order to ouſt and diſplace the ſecond mortgagee, I am clearly of opinion, that ſuch a tranſaction, after a decree to account, and before the Maſter has made his report, will not avail to the prejudice of the ſecond mortgagee: *and therefore do allow the demurrer.*

A third mortgagee cannot take in a prior ſecurity, to diſplace a ſecond mortgagee, after a decree to account, and before the Maſter has made his report.

Kemp

Caſe 300. *Kemp* verſus *Mackrell*, *Auguſt* 7, 1754.

On the circumſtances of this caſe, though the plaintiff died before the coſts were taxed, yet the defendant may revive for thoſe coſts.

A Croſsbill had been diſmiſſed with coſts, but before the coſts were taxed or aſcertained, the plaintiff died.

The queſtion was, Whether the defendant can revive, or there can be any method of proceeding in reſpect to theſe coſts.

The general rule is, that coſts *moritur cum perſonâ*, and it was ſaid there was nothing to diſtinguiſh this out of it, nor does the caſe fall within any of the exceptions to the rule.

LORD CHANCELLOR.

Upon the general rule as laid down, there can be no revivor; otherwiſe, if the coſts had been taxed.

The right to coſts is the ſame before taxation as after.

I always held this to be a hard rule, and a very nice diſtinction, the right to coſts, is the ſame before taxation as after, only the *quantum* has not been aſcertained.

This, I think, is one of the caſes where the court ought to diſpenſe with the ſtrict rule.

Where there is a particular fund to anſwer the coſts, the court will direct them to be paid out of that fund.

The cauſe was heard on the original and croſs bill at the ſame time, and the decree in the original bill gave the defendant his coſts out of the ſurplus.

A croſs bill is a defence, and ſo connected with the original; they are always conſidered but as one cauſe.

The croſs bill is a defence, and always conſidered ſo, and therefore but one cauſe; the court having given the defendant his coſts in the original bill, can any thing be more natural than to deduct the coſts he was to pay on account of the croſs bill, out of what he is to receive on account of coſts upon the original bill?

I am of opinion the taxing of the coſts in the croſs bill ought to have been ſtayed till the Maſter had taken the account in the original, and it was ſeen what was due to the defendant in that cauſe, and that both are ſo connected together, they can be conſidered but as one only, and therefore the exception to the Maſter's report, for not allowing the defendant in the croſs bill to revive for the coſts againſt the plaintiff, who is dead, ought to be allowed.

In the matter of Thomas Hogan a lunatick, Auguſt 9, 1754. Caſe 301.

THE petitioner had taken all the affidavits before himſelf notwithſtanding he had been Solicitor throughout in the cauſe.

Affidavits taken before a perſon who was a ſolicitor in the cauſe, cannot be read.

LORD CHANCELLOR.

If I had known this at the time, I would not have ſuffered the affidavits to have been read.

At common law it is always objected to, and diſcountenanced, and equally ſo in equity, from the inconvenience that would ariſe if ſuch a practice was ſuffered; for this, and other reaſons, the petition was diſmiſſed with coſts to come out of the pocket of the ſolicitor, who thus very improperly took the affidavits.

The petition diſmiſſed, and the coſts directed to come out of the ſolicitor's pocket who took the affidavits.

Ex parte Birchell, November 1, 1754. Caſe 302.

AN application on the behalf of *Sarah* and *Mary Birchell*, infants, that a guardian may be appointed, *Sarah* being 19, and *Mary* 12 years of age.

A guardian may be appointed, though no cauſe is depending.

And at the ſame time Mr. *Croucher* applied for leave to marry *Sarah*, the relations aſſenting.

LORD CHANCELLOR.

The firſt part of the petition is neceſſary, as one of the infants is ſo young.

But there is no ſort of occaſion for the latter, and goes upon a miſtake and miſapprehenſion of the marriage bill.

If perſons would attend to the *Rubrick*, which is now of 150 years ſtanding, they have a very eaſy method to purſue by publiſhing the banns in the church, and if there is no lawful impediment, nothing can prevent the marriage.

When I conſider the *Rubrick*, and the act of uniformity, which takes in the very text of the *Rubrick*, I am aſtoniſhed how licences ever got footing in this kingdom; and, for my own part, I could wiſh, that all marriages were by publication of banns only.

Lord *Hardwicke* expreſſed his wiſhes that all marriages were by publication of banns only.

I have lately had a young gentleman and lady out of *Glouceſterſhire*, whoſe fortune was only 800*l.* to petition me for leave to marry, which was putting themſelves to a very needleſs charge, and therefore I mention this, to prevent, for the future, the trouble and expence to parties in ſuch applications.

The uncle, Mr. *Robert Birchell*, appearing in court, who is likewiſe the only acting executor under the will of the father, in which all his perſonal eſtate is divided in equal ſhares between the two daughters and his wife, agreeing to accept of the guardianſhip at the deſire of the infants his nieces, he was appointed accordingly, though no cauſe was depending.

And *Lord Chancellor* ſaid, after the order is drawn up, and he is properly guardian, it will be in his diſcretion to approve or not of the match propoſed, but would give no directions himſelf on this part of the petition.

Caſe 303. *Ex parte Catcot, November* 1, 1754.

The adminiſtrator of a bankrupt intitled to the bankrupt's allowance, where he has divided 10*s.* in the pound. * *Vide Ex parte Trop*, 1 *T. Atk.* 208.

THE petitioner, who was adminiſtrator of *Tyrrel*, a bankrupt, applies to the court for the bankrupt's allowance, he having made a neat dividend of 10*s.* in the pound.

Lord Chancellor ordered that the aſſignee, out of effects in his hands, ſhould pay the allowance to the petitioner, at the rate of 5 *per cent.* on the money got in, not exceeding the ſum of 200*l.**

Caſe 304. *Maitland* verſus *Wilſon, December* 17, 1754.

LORD CHANCELLOR.

Where a plea is to the relief only, and is directed to ſtand for an anſwer; the words *with liberty to except* muſt be added, to prevent the eſtabliſhing it as a good anſwer.

A Bill was brought to impeach the defendant's purchaſe of an eſtate that belonged to Mr. *Haſlewood* of *Worceſterſhire*, for fraud and impoſition, and inſiſting it ſhould be conſidered only as a mortgage, the defendant not having paid near the value.

The defendant pleaded the purchaſe deed, the ſeveral ſums which were the conſideration, and, amongſt the reſt, a ſum of 4958*l.* odd money, really paid.

But then it was pleaded in ſuch a manner, that it ſeems rather a recital of the purchaſe deed; whereas it ought to have been pleaded diſtinct and ſeparate from the recital, and ſhould have been averred by the plea, *that the ſaid ſum mentioned as the conſideration in the deed, was really and* bonâ fide *paid.*

This being a plea to the relief, and not to the diſcovery, if I was to direct it ſhould ſtand for an anſwer, without the words, with liberty to except, it would be eſtabliſhing it as a good anſwer, and therefore, to prevent this, it is neceſſary theſe words ſhould be added.

Radford verſus *Wilſon*, *the ſame day.* Caſe 305.

LORD CHANCELLOR.

IN the preſent caſe there is a plea put in of a purchaſe for a valuable conſideration without notice, cloathed with a poſſeſſion of 40 years, (for the eſtate was bought in 1714), and all the equity ſet up by the plaintiff, the iſſue in tail, is, that there was notice of the will under which the eſtate-tail was created, and that there ought to have been a recovery ſuffered in the Lord's court by the tenant in tail, the anceſtor of the plaintiff, at the time the eſtate in queſtion was purchaſed by the perſon under whom the defendant claims, and that a bare ſurrender only is no bar.

Where the bill charges particular and ſpecial inſtances of notice of the plaintiff's title on the defendant, his denial of notice generally is not ſufficient.

It has never been laid down, that a common recovery is neceſſary to bar an eſtate-tail in copyholds, and therefore I am of opinion, that an equitable eſtate-tail in a copyhold will be barred by a ſurrender in the Lord's court.

Some judges who have ſat here have been of opinion, that an equitable eſtate-tail at common law might be barred, even by a deed of bargain and ſale inrolled; but it has been held otherwiſe ſince, and now a recovery is neceſſary.

Here the inſtances of notice charged in the plaintiff's bill are particular and ſpecial, to which the defendant has given no anſwer, and therefore the plea muſt be over-ruled, for a general denial of notice is not ſufficient, it muſt be denied as ſpecially, and particularly as it is charged.

Hawley verſus *Taylor*, *the ſame day.* Caſe 306.

THE bill ſtates a right in the plaintiff to a quart in every four buſhels of corn, brought to the market at *Brentford*, for toll, by virtue of a grant from King *James* the firſt, and that, in conſideration of this, his anceſtor built the market-place, and he is himſelf at a great expence in repairing it.

A general demurrer allowed to this bill; the facts as ſtated by the plaintiff himſelf being clearly a queſtion at law.

And

And further ſtates, that the defendant, in order to incroach upon this right, and prevent the corn being pitched in the market as the grant directs, in combination with ſeveral farmers in the neighbourhood, has contrived that ſamples of corn ſhould be brought to his houſe, and hung up there, where the perſons who have occaſion to buy, may come and deal by ſample for what corn they want, and inſiſts that this is an incroachment upon his right, and defrauding him of the toll, and therefore has brought his bill for a diſcovery of theſe matters.

The defendant demurred to the bill, for that it was a mere queſtion at law, and the matters of fact ſet forth by the complainant himſelf are inſufficient for him to proceed upon, or to oblige the defendant to anſwer.

LORD CHANCELLOR.

This is a caſe *ſtricti juris*, and if the plaintiff is Lord of the market, under a grant from the crown, he may bring an action at law.

Either the corn lodged at the defendant's is liable to toll, or not liable, which may be determined upon an action.

If the defendant ſtops the corn from being brought to market, it is a foreſtalling, and an indictment may be preferred againſt him upon that account.

So, that upon the circumſtances of this caſe, there is no ſort of equity which will intitle this court to interpoſe, and conſequently the demurrer muſt be allowed.

Caſe 307. *Ex parte Mathews a Bankrupt, December* 20, 1754.

A perſon under a commiſſion of bankruptcy may prove a debt in the right of his wife, and yet bring an action in his own right for a debt due to himſelf from the bankrupt.

MR. *Gary* proved a debt under the commiſſion in the right of his wife, amounting to 5000*l.* being her fortune under a marriage ſettlement, and has alſo brought an action at law in his own right, for a debt due to him for goods ſold and delivered.

The debt proved under the commiſſion being ſo large, prevents the petitioner from having his certificate.

LORD CHANCELLOR.

The court undoubtedly will never ſuffer a creditor, to ſplit a demand, and prove part under the commiſſion, and proſecute, at the ſame time, a bankrupt for the remainder at law.

But

But this caſe is quite different; for here are two remedies and different rights, and, I ſhould apprehend, he might even have done it, if the debts had been both in his own right.

The preſent is the ſtrongeſt inſtance that can happen, the debt of 5000*l.* being ſecured to the wife by a judgment before marriage, and will ſurvive to her, if the huſband ſhould die before her.

Suppoſe one debt had been due to Mr. *Gary* by bond, and another upon an account current, and he had brought a bill here for the account, and an action at law upon the bond; theſe are two diſtinct things, and therefore the court will let him go on, both in law and equity.

A creditor by bond, and upon an account current, may bring a bill here for the latter, and an action upon the former.

If, indeed, he was to bring a bill in equity for an account current, and an action at law for a particular *item* in that account, the court would in that caſe oblige the plaintiff to make an election.

In caſes of bankruptcy the court may determine in a ſummary way, and exerciſe a diſcretionary power; but notwithſtanding this, they govern themſelves by way of analogy to the uſual and ordinary proceedings in the court of chancery: and as the ſame rule would hold in the point of election, if Mr. *Gary* was carrying on a ſuit by bill here for one demand, and by action at law for the other, I* am of opinion, in this caſe likewiſe, he ought not to be reſtrained from his double remedy, and therefore the petition muſt be diſmiſſed.

Baldwin verſus *Mackown*, *January* 18, 1754.

Caſe 308.

A Supplemental bill brought againſt a defendant, who was no party to the original bill, to anſwer the matters charged in the original bill.

The defendant demurred; and for cauſe of demurrer ſhewed, that he was no party to the original bill, nor was any new matter pretended in the ſupplemental bill to be ariſen ſince the filing of the original bill.

The demurrer allowed by *Lord Chancellor*.

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FINIS.