

L A W - B O O K S

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A
T R E A T I S E
O F
E Q U I T Y.

Jus strictum quatenus opponitur Æquitati jus esse negamus, sed ita dici Æquivoce, ut Hominem pictum Hominem dicimus.

Grot. de Æquit.

In the SAVOY:

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A

T R E A T I S E

O F

E Q U I T Y.

B O O K I.

C A P. I.

Sect. 1. **I**T is plain that Law is a moral Science; since the End of all Law is Justice. And Justice, in the most extensive Sense of the Word, differs little from Virtue it self; for it includes within it the whole Circle of Virtues. Yet the common Distinction betwixt them is, that the same, which considered positively, and in it self, is called Virtue, when consider'd relatively, with Respect to others, has the Name of Justice. But Justice, in a proper and limited Sense, as being it self a Part of Virtue, is confined to Things simply good or evil; and consists in a Man's Taking such a Proportion of them as he ought. And this is usually divided into two Sorts; the one distributive, of Things to be divided amongst those who are united in civil Society; the other commutative, or that which governs Contracts. The Reason of this Difference is, that in the one Respect is had of the Persons, but in the other only of the Damage done. For it is the Office and Duty of a Judge to make an Equality between the

B

Parties,

Parties, that no one may be Gainer by another's Loss. But in distributive Justice the same Equality is required in both; that neither equal Persons have unequal Things, or unequal Persons Things equal. And it is this golden Rule of Equality, that God himself observes, in the Distribution of the several Parts of the World, dealing to every one according to his Deserts: As in Musick, the best Instruments are given to those who play best. And the same Order ought to be observ'd in States, if they would be truly happy, taking God and Nature for their Pattern; that they may be of a Piece and consistent with the rest of the Universe.

Sect. 2. But our present Enquiry is restrain'd to that first Sort of Justice, which governs Contracts. For as an Action or Suit, which is the Remedy the Law hath provided for the Obtaining Justice, is but a legal Demand of some Right, and all civil Rights must arise from Obligations, and these Obligations are founded on Compacts, it follows of Necessity, that the proper subject of Law is Contracts, and that Justice the chief End of Law, which teaches the Performance of them. Now Contracts are either voluntary or involuntary. The voluntary are, Buying and Selling, Letting and Hiring, Deposits, the Interest of Money and the like. The involuntary are, Theft, Murder, Rapine, and all other heinous Offences, whether secret or violent. But we shall wave the Treating of these any further here; since it is the voluntary Contracts only, that we shall have Occasion to speak of, and such especially as are most in Use amongst us. For of Torts and Crimes Chancery has no proper Jurisdiction, and we do not intend to confine our Discourse to the municipal Laws only, but to have chiefly in View that natural Justice and Equity, which ought to be the Ground-work and Foundation of all Laws, and which corrects and controls them when they do amiss.

Sect. 3. Equity therefore, as it stands for the whole of natural Justice, is more excellent than any human Institution; neither are positive Laws, even in Matters seemingly indifferent, any further binding, than they are agreeable with the Law of God and Nature. But the Precepts of the natural Law, when enforced by the Laws of Man, are so far from losing any Thing of their former Excellence, that they receive an additional Strength and Sanction. Yet as the Rules of the municipal Law are finite, and the Subject of it infinite, there will often fall out Cases, which cannot be determin'd by them; for there can be no finite Rule of an infinite Matter, perfect.

fect. So that there will be a Necessity of having Recourse to the natural Principles; that what was wanting to the finite, may be supplied out of that which is infinite. And this is what is properly called Equity in Opposition to strict Law; and seems to bear something of the same Proportion to it in the moral, as Art does to Nature in the material World. For as the universal Laws of Matter would in many Instances prove hurtful to Particulars, if Art were not to interpose and direct them a-right; so the general Precepts of the municipal Law would oftentimes not be able to attain their End, if Equity did not come in Aid of them. And thus in Chancery every particular Case stands upon its own particular Circumstances; and altho' the Common Law will not decree against the general Rule of Law, yet Chancery doth, so as the Example introduce not a general Mischief. Every Matter therefore, that happens inconsistent with the Design of the Legislator, or is contrary to natural Justice, may find Relief here. For no Man can be obliged to any Thing contrary to the Law of Nature, and indeed no Man in his Senses can be presumed willing to oblige another to it. But if the Law has determined a Matter with all its Circumstances, Equity cannot intermeddle; and for the Chancery to relieve against the express Provision of an Act of Parliament, would be the same as to repeal it. Equity therefore will not interpose in such Cases, notwithstanding Accident or unavoidable Necessity. So that Infants had been bound by the Statute of Limitations, if there had been no Exception in the Act. And altho' in Matters of apparent Equity, as Fraud, or Breach of Trust, Precedents are not necessary; yet in other Cases, it is dangerous to extend the Authority of this Court further than the Practices of former Times.

sect. 4. Now the Subject Matter both of Law and Equity is Contracts, as we before observed. And a Pact or Covenant, in the general Sense of it, comprehends all Things about which Men agree in their Transactions, Negotiations, and Intercourse with one another. Yet is it not here to be extended so largely, as to take in every Agreement of Opinion; but such only as induce an Obligation, or contain a Conveyance of some Right. Neither do we at present intend to treat of those universal Pacts, by which the Propriety and Dominion of Things was at first established; but those particular Contracts, which are limited to the Benefit of certain Persons, and presuppose Property and Price. These saith the Prætor, (as the Mouth

Mouth and Oracle of the Law, and building his Opinion on the sure Foundation of natural Justice and Equity,) if they are not gain'd by ill Practice; nor made against the Laws, I will see kept; for what can be so agreeable to human Faith, as the Observance of those Things, which they themselves have approv'd of, and made a Law amongst one another. In Contracts therefore, Respect is first to be had to the Things expressed in the Agreement, if they may possibly be obtain'd, and for Default of the Things themselves, a sufficient Equivalent is to be given.

Sect. 5. But the Law of *England* was very defective in this Point, and fell short of natural Justice, where an actual Conveyance was not obtain'd; which oftentimes, from the Distance of the Place, where a local Ceremony was required, or from other Circumstances wanting, was not immediately practicable. For executory Agreements were there look'd upon but as a personal Security, and Damages only to be recover'd for the Breach of them; most commonly either by an Action of Covenant, if there was a Deed, or by an *Assumpsit*, if without Deed. But it proving a great Hardship, in particular Cases, to be left only to the incertain Reparation by Damages, which the personal Estate may perhaps not be able to satisfy; the Court of Equity therefore, where there was a sufficient Consideration, did, in Aid of the municipal Law, compel a specifick Performance. And there are many other Cases, wherein Equity will give Relief, altho' there be a Remedy at Law, if that be insufficient; as for a Nuisance, by Injunction, or the like, yet their Decree binds the Person only, and not the Estate; because the Chancery is in this Respect no Court of Record; tho' some think this Opinion absurd, for both ought equally to be bound by the Decisions of this Court, or else there would be an Impotence in the Court, that would restrain it from doing Justice.

Sect. 6. However the common Lawyers continually poured out their Complaints against this Incroachment, as they imagined, on their own Profession; yet pretended all the while, that their only Concern was, lest this new Jurisdiction should shake the Foundation of the ancient municipal Laws of this Realm. The Law, say they, has appointed certain Ceremonies, in the Transferring of Property, for the Quiet and Repose of Society. It has also provided certain technical Words, of peculiar and determined Significations, for the Limiting the Duration of Mens Estates; and it is better to stick to the
known

known Rules of Law, than to follow the Fancies of private Men. But if the Assurance is bad, and yet there is a Remedy, to what Purpose is the Common Law? But Equity was not satisfied with this false and shallow Reasoning of the common Lawyers. For it never pretended to any arbitrary Sway over the stated Rules of Law, but only a Power of conducting and guiding them according to honesty and good Conscience. And what possible Inconvenience can there arise, where there is a good Consideration, and the Intention is clear, that Men should be compelled to perform their Engagements; and that all the Means, without which that cannot be obtain'd at Law, should be supplied by a Court of Equity?

Sect. 7. Equity therefore will supply any Defects of Circumstances in Conveyances; as of Livery, Seisin in the Passing of a Freehold, or of the Surrender of a Copyhold, or the like. Also all Misprisions in Deeds, as in the Names of the Parties, or the Sum in a Bond. And an Award or Charter-party, tho' void or defective at Law, may find Relief here. Nor shall any Fiction of the Common Law, as the Extinguishment of a Covenant by Marriage, prevent the Interposition of this Court. For Equity regards not the outward Form, but the inward Substance and Essence of the Matter; which is the Agreement of the Parties, upon a good and valuable Consideration, and where the Persons interested fully intend to contract a perfect Obligation, tho' by Mistake or Accident, they omit the set Form of Law, so that no Remedy is to be had to compel a Performance of it in Courts of civil Judicature; yet are they bound in natural Justice to stand to their Agreement.

Sect. 8. And any Covenant, tho' not specifick, but only a general personal Covenant for Indemnity, may be decreed here. For Equity prevents Mischief, and it is unreasonable a Man should have a Cloud continually hanging over him. Yet it seems, where the Incumbrance is not necessary, but contingent, you should recover no Damages at Law till a Breach, and therefore they ought not to decree it in Equity. So altho' the Chancery cannot assess Damages, yet a Covenant by the Husband, that the Jointure should be and continue of such a Value may be carried into Execution in this Court; for the Master may enquire into it, or they may send it to be tried at Law in a *Quantum damnificatus*. So a Bill for a specifick Performance of an Agreement by the Husband with a third Person, for a separate Maintenance to the Wife, is proper here, notwithstanding that Alimony belongs to the Spiritual Court.

And regularly, there are but four Cases, wherein an Agreement will not be binding in Equity. 1st, For want of Assent. 2^{dly}, For want of Testimony of the Assent. 3^{dly}, Where there is some Vice or Defect in the Subject Matter; or, 4^{thly}, The want of a sufficient Consideration.

C A P. II.

Sect. 1. **W**E are first then to examine, what Consent is required to the Making Pacts and Agreements valid. For the Rule of the civil Law is highly agreeable with natural Justice; that in the Translation of Property there must be an Union of Minds and Affections. For whether it be a Sale, or a Loan, or a free Gift, or any other Sort of Contract, unless there be a mutual Agreement, it can never have a full Effect. Now Consent is an Act of Reason, and accompanied with Deliberation, the Mind weighing as in a Ballance, the Good and Evil on either Side: So that Creatures void of Reason and Understanding are incapable of giving a serious and firm Assent. And thus Ideots, Madmen, and Infants, were restrain'd by the *Roman* Law from all Manner of Engagements and Contracts, because they were supposed to be unable to judge of their own Actions; and therefore the Charge and Care of them was committed to others. But the common Lawyers endeavour'd to set up a Maxim of their own, in Defiance of natural Justice, and the universal Practice of all the civiliz'd Nations in the World. For they said it was a known Rule in their Law, that no Man of full Age should be admitted in any Plea to stultify and disable himself; because when he recovers his Memory, he can't know what he did when he was of *non sane* Memory; and therefore they concluded that he should have no Relief for this, even in a Court of Equity; because it would be in Subversion of a Principle and Ground in Law. Yet some have thought that by the ancient Common Law he might have the Writ of *dum non fuit compos mentis*; and of Consequence might enter. And it is undoubtedly not for want of Right to the Thing, but of Capacity to do the Act, that a Madman is hinder'd to avoid his own Grant. For where the Thing does not pass by Livery of his Hand, the Conveyance is absolutely void; and therefore a Surrender by Deed of a Tenant for Life, being *non compos*, will not bar a contingent Remainder. But now only Privies in Blood (*viz.* the general or special Heir inheritable) may shew the Disability

ty of the Ancestor; and Privies in Representation, as Executors or Administrators, the Infirmities of the Testator; and neither Privies in Estate, nor Privies in Tenure. For the Difference is between a Title of Entry, as by Reason of a Condition, &c. and a Right of Entry, as in the Cases before mentioned; and the same Diversity holds in Case of Infancy and Coverture.

Sect. 2. However the Acts of a *Non Compos*, or Ideot, unless of Record, for the Inconvenience of over-turning a Record by a nude Averment, were avoidable by Law, even during his Life-time, in a *Scire facias* by the King, who is bound by his Royal Office to protect all his Subjects, their Goods and Estates; and to prevent all Incumbrances it shall have Relation to the Disability. And this they said was no Impeachment of the Rule; because the Ideot, or *Non Compos*, is no Party to it, but the whole Truth is found by the Inquest. But no Office could be found after his Death; because then the Guardianship of the King was determined. And it seems to be upon the same Ground, that Bills in Chancery have been since brought, to set aside Conveyances and Settlements by Lunatics and Ideots, tho' in other Respects reasonable, and for the Convenience of the Family; for these Bills ought properly to be brought by the Attorney General. Yet there is not a little Difference between them. For a Lunatick must be a Party, as an Infant, where a Suit is commenced on his Behalf; because he may recover his Understanding, and then he is to have his Estate in his own Disposol. And the Committee of a *Non Compos* is but a Bailly, and accountable to him or his Representatives. But of an Ideot, it is otherwise, for his Recovery is not expected by the Law; and therefore in the *Roman* Law he was look'd upon as civilly dead. And these Bills are now established in Equity, where they hold, that the Maxim of Law before mentioned is to be understood of Acts done by the Lunatick in Prejudice of others, that he should not be admitted to excuse himself on Pretence of Lunacy, but not as to Acts done by him in Prejudice of himself; for this can have no Foundation in Reason and natural Justice.

Sect. 3. As for the Question, who shall be deemed an Ideot or *Non Compos*, there is no certain Rule can be laid down: But it must be left to the Wisdom and Discretion of those, to whom the Law has entrusted the Trial of it. And altho' a Man be found an Ideot by Inquisition, he may after pray to be examined in Chancery. Yet this is not to be extended to every Person

son of a weak Understanding, unless there be some Fraud or Surprize; for Courts of Equity would have enough to do, if they were to examine into the Wisdom and Prudence of Men in disposing of their Estates. Let a Man be wise therefore, or unwise, if he be legally *Compos Mentis*, he is the Disposer of his own Property, and his Will stands instead of a Reason. And altho' Drunkenness is a Kind of Insanity for the Time, yet, as it is of his own Procuring, it shall not turn to his Avail, either to derogate from his Act, or lessen his Punishment; but it is a great Offence in itself: And this holds, as well as to his Life, his Lands, Goods, or any other Thing concerning him. However Equity, as it seems, will relieve in this Case, especially if it were caused by the Fraud or Contrivance of the other Party, and he be so excessively Drunk, that he is utterly deprived of the Use of Reason or Understanding; for it can by no Means be esteemed a serious and deliberate Consent, and without this no Contract can be binding by the Law of Nature. And so, altho' there is no direct Proof that a Man is *Non Compos* or delirious, yet if he is of a weak Understanding, and is harrassed and uneasy at the Time, or if the Deed be executed *in Extremis*, or by a Paralytick, it cannot be supposed he had a Mind *adequate* to the Business he was about, and might more easily be imposed upon; especially the Provision in the Deed being something extraordinary, or the Conveyance being made without any Consideration. And the Rule of the Common Law itself, in Case of Wills, is very favourable: Altho' it can hardly perhaps be extended to Deeds, without Circumstances of Fraud or Imposition. For a Memory, which the Law there allows to be a sound Memory, is, when the Testator hath Understanding to dispose of his Estate with Judgment and Discretion; which is to be collected from his Words, Actions and Behavior at the Time, and not from his giving a plain Answer to a common Question. And therefore a Will obtained *in Extremis*, and upon Importunity of the Testator's Wife, his Hand being guided in the Writing of his Name, may be set aside.

Sect. 4. And the Grants of Infants, and Lunatics, are parallel both in Law and Reason. For Infants are disabled, by a Maxim in Law, to contract for any Thing, but Necessaries for their Persons, suitable to their Degree and Quality. And what is necessary or not, shall be tried by the Judges, and not by a Jury. Which Maxim was grounded upon a Presumption, that Infants most commonly, before they are of the Age of

twenty-one Years, are not able to govern themselves. And therefore the Law takes upon itself the Protection of their Rights; and ordains, that they shall be favoured in all Things which are for their Benefit, and not prejudiced by any Thing to their Disadvantage. So that neither as Bailiff, nor for Goods to carry on a Trade, can an Infant be charged; because there was no Necessity that he should Trade, neither does it appear for his Advantage. And such Contracts, as may not be intended for his Benefit, are absolutely void.

Sect. 5. But an Infant may be an Executor, and of Consequence may be charged for what he does as Executor according to Law; because the Law enables him; and if he does any Thing, to which he is compellable by Law, it is good, and will bind him. And altho' a Fine or Recovery is never taken from an Infant; for it is against the Duty and Office of the Judge or Commissioners, if they know of it; yet if it be taken, and not reversed during his Minority, it is unavoidable. And there is no Way to vacate it at Law, because his Age is triable only by Inspection; and no Man would be sure of his Inheritance, if Records might be avoided by Averments. However sometimes Recoveries have been admitted upon Privy Seals, upon the Petition of Fathers upon the Marriage of their Sons; but now it is but rarely suffered, because of the Mischiefs it occasioned. But certain it is, that they may be charged for Trespasses which are *Vi & Armis*; and so it seems in Trover, because a Tort. And altho' they are not capable of doing an Injury knowingly, it is sufficient that they are the physical Cause of a Damage they had no Right to do. The Law of *England* therefore makes a Difference between Crimes and Trespasses: And in the one considers the Intent, but in the other only the Damage done. For the Obligation to Restitution arises from the Thing it self, and natural Equity; but Punishments are for the Example, and to deter others. Neither did the Court ever pretend to change the Nature of Infants Estates; or to make that absolute, which was defeasible: So that where an Estate is given to an Infant, upon a Condition, such Acts, as an Infant can perform, must be done by him, and Infancy in such Case is no Excuse.

Sect. 6. As for Feme Coverts, the Law is much the same, with Respect to their Power of contracting, as of Infants; for they have no Will but the Will of their Husbands; tho' in the *Roman* Law it was otherwise. And in this, Equity follows the Law. For the Husband's Goods are look'd upon, with re-

spect to the Wife, as if they were in Abeyance or Custody of the Law, to be charged only by Act of Law. And if she elope, she loses the Privilege of charging him even for Necessaries; as at Common Law she lost her Dower. But it is certain that a Wife may have a separate Estate from her Husband, as by Agreement before or after Marriage; or by Decree for ill Usage, or Alimony; or otherwise secured in Trustees Hands for her. And as to these she is in Nature of a Feme Sole, and may sue, or be sued, without her Husband; and they are not in the Power of her Husband, but in her own Disposol, and the Produce of them, by Writing in Nature of a Will, and are liable to her Debts. And if she has a separate Maintenance, and lives separate, and this known to Tradesmen, they cannot trust her, and recover of the Husband at Law. Yet while the Marriage continues, the living separate does not destroy the legal Rights of the Husband.

Sect. 7. Another Impediment of Assent is Ignorance and Error, either in Fact or in Law; if it be the Cause and Motive of the Agreement. And if the Mistake is discovered before any Step is taken towards Performance, it is but just that he should have Liberty to retract; at least upon satisfying the other of the Damage that he has sustained by losing the Bargain. But if the Contract is either wholly or in Part performed, and no Compensation can be given him, then is it absolutely binding, notwithstanding the Error. Yet this is not to be understood where there proves to be an Error in the Thing or Subject, for which he bargained. For then the Business is null in it self, by the general Laws of Contracting, inasmuch as in all Bargains, the Matter, about which they are concerned, and all the Qualities of it, good or bad, ought to be clearly understood; and without such a distinct Knowledge, the Parties cannot be supposed to yield a full Consent.

Sect. 8. Much more ought a Mistake to render a Pact or Agreement invalid, when accompanied with Fraud and Circumvention; if it were occasioned by one of the Parties, who by that Means drew the other into the Engagement; for then he is undoubtedly bound to make Restitution for the Injury. Yet the Rigour of the Common Law would admit no Averment by a Man against his own Deed: Except in the King's Case, who had Favour shewn him, because the Publick Interest was bound up with his. But it is a constant Rule in Equity, that where there is, either *suppressio veri*, or *suggestio falsi*, the Release or other
Deed

Deed shall be avoided. As if a Man should be informed by J. S. that J. N. wanted to be a Purchaser, and the Seller should declare, that J. N. should have a better Penny-worth, than another Person; and upon this he should article with J. S. for the Sale of it; when this Purchase was in reality for a Stranger; Equity would not carry such a Contract into Execution, tho' without Doubt he might have sold it to J. S. the next Day. And even a Misapprehension of the Party has been held sufficient for this Purpose. But it is not every Surprise, that will avoid a Deed duly made, nor is it fitting; for it would occasion great Incertainty, and it would be impossible to fix what was meant by Surprise. For a Man may be said to be surprized in every Action, which is not done with so much Discretion as it ought to be. But the Surprise here intended must be such, as is accompanied with Fraud and Circumvention; and then it must be proved; for Fraud is a Thing odious in Law, and never presumed. And if the Fraud proceed altogether from a Stranger, we are left to our Remedy against him; and it is to be looked upon, as to the Parties, as a Mistake or Error only, and to be governed by the Rules before laid down.

Sect. 9. But further, in all Contracts purely chargeable, if there appears to be an Inequality, altho' there was no Deceit on either Side, and all the Faults of the Things were exposed: Yet if the Damage be considerable, the Bargain ought to be made void. And this Estimate of the Damage is to be taken, either from the Exorbitance of the Price, or the Poverty of the Party injured; for no Man should be a Gainer by another's Loss. But a small Damage, even in the Law of Nature, is not sufficient to break off a Bargain, for the Benefit of Traffick, and the Ease of the Magistrate.

The Civil Law fixed this at Half the Value of the highest Price the Thing was really worth, to be sold at the Time of the Contract. And some have wished the Law were so in *England*. But altho' the Court of Chancery have no fixed Rule, how many Years Purchase is a reasonable Price of Lands; because the Iniquity of the Bargain does not depend upon the Price; for what may be a reasonable Price in one Case, may be unreasonable in another: Yet it is a certain Rule, that where the Bargain is plainly iniquitous, and it is against Conscience to insist upon it, as forty Years Purchase for Lands; or an extravagant Price for Stock, as was given in the *South-Sea* Year, Equity can't support it; for that would be to decree Iniquity. So a Release of an Equity of Redemption has been

set aside; the Court being satisfied upon the Proofs, that the Value of the Land was much greater, than to make a Satisfaction for the Debts for which it was given.

Sect. 10. But this Rule seems to extend chiefly to such Things, as have some stated and settled Price. For in other Cases, there is no Reason, but as a beneficial Bargain will be decreed in Equity; so if it happens to be a losing Bargain, it ought equally to be decreed. As if a Man takes a Lease of Water-works, in order to let it out in Shares, and make a Profit of it, the Assignee in Trust for those who bought Shares, shall be compelled in Equity to pay the reserved Rent, tho' it be above double the Value of what it proves to be worth; for the Contract is to be judged of as Matters stood when it took Effect. And so hazardous Bargains, to be paid double, or to have an Estate of double or treble the Value of what is at present advanced, after the Death of Tenant for Life, but if such Tenant for Life out-lives the Person, to whom the Money is lent, then the whole to be lost, are not to be set aside without Circumstances; for there may be nothing ill in those Bargains, the Price at the Time being the full Value; and what after happens (as the Death of the Party, upon whose Death the Estate was to fall, or the Money to be paid) cannot make any Difference.

Sect. 11. But an unconscionable Bargain, as a Purchase or Security got from an Heir in his Father's Life-time, are now usually avoided in Equity. For he would justly forfeit the Character of an honest Man, who should endeavour to make an Advantage of this easy Age; and enrich himself at the Cost of those, who either could not foresee, or do not rightly apprehend the Loss. And so in the *Roman* Law, the lending Money to Heirs, in their Father's Life, was prohibited expressly. And altho' the Money would have been lost, if the Heir had died before the Father: Yet it being an unrighteous Bargain in the Beginning, for it is not likely he would have made it but in Expectation of an unreasonable Advantage, it cannot be helped by Matter *ex post facto*. And no Difference, whether it was for Money lent, or Wares taken up to sell again, as improvident Heirs are used to do. But the Difference seems to be, if the Heir has no Maintenance from the Father, but was turned out upon unreasonable Displeasure; there perhaps the Bargain, if not excessively beyond the Proportion of such Assurances, shall stand; because it is not to supply the Luxury and Prodigality of the Heir, but to keep him from
starving.

starving. Yet it must be confessed, in former Times Chancery did not interpose in these Cases. But the Reason was, because there was another Court that then did; and this was the Star-Chamber, which could not only relieve the Plaintiff, but punish the Defendant. And altho' that Court was abolished, for the Abuse that was made of its Power: Yet there are many Cases in which we find the Want of such a Jurisdiction. For a Man may now practise a notorious Cheat, and pay the Fine set upon him by Law, which perhaps will be 20*l.* or some such Sum, and count all the rest as clear Gains by his Villany.

Sect. 12. Let us now examine more minutely the Force of these fraudulent and unequal Contracts. For it is certain, on the Part of him who committed the Fraud, they are irrevocable; and if he should require a Nullity of the Contract, such a Demand, which is scandalous, ought not to be granted him. Nay, if such a fraudulent Person comes as Plaintiff into a Court of Equity, to have what was really and *bonâ Fide* lent, he shall not have it; because he has committed Iniquity. But as to all others, a Conveyance obtained by Fraud, is the same in Equity as if no Conveyance had ever been made. And therefore a contingent Estate, absolutely destroyed by it, shall yet be set up in Chancery, as if it were still subsisting, and nothing had been done. And there are other Covenants which may be avoided only by one Side; as between a Minor and one of full Age. Nor is this Inequality of the Condition of the Contractors unjust; for every one ought to know the State of him with whom he treats. Yet those who are not by Nature incapable of contracting, but prohibited only by some positive Law, altho' they cannot legally be forced to stand to their Engagements, yet if they do perform them, they cannot afterwards be relieved; for there's a natural Obligation, at least so far as they are not naturally unjust. As in the *Roman* Law, if a Son, under the Power of his Father, pays what he has borrowed, to which, tho' of Age, he was not obliged. And in catching Bargains of young Heirs, in our Law, always where they are set aside for Fraud, the Plaintiff must do Equity to the Defendant, by paying him what was really lent.

Sect. 13. Also an Obligation, that was at first invalid, may afterwards recover Strength, by the Intervention of some new Cause fit to create a Right: And for this a full Agreement is sufficient, tho not expressed by any verbal Signs; since others may do as well. So at the Common Law, there was an im-

plied as well as exprefs Confirmation, as by Acceptance of Rent, or the like, which was founded on this Reason; that the Law will never intend a Wrong, if the Act, by any Construc- tion, may be made lawful: And he cannot receive the Rent, or the like, under the Contract, without a Confirmation of it. But the Acceptance of a collateral Thing, or by a Stranger to the Contract, cannot be supported by any Intendment. Nor can an implied Confirmation work stronger than if it were exprefs; as to make good a void Estate, or one not commenced, or *in Effc.* But in natural Justice and Equity, this is carried further than at Law. And therefore in Chancery, an Agreement, tho' not binding against an Infant, yet shall be decreed; the Infant having received Interest under it after he came of full Age. And so if he does not expressly signify his Desire to be relieved, when he has convenient Means, it is to be presumed that he is willing to abide by it. As where a Lease was made by an Infant, and stood unquestioned, and the Rent was received by a Person under no Disability for five Years; this Silence amounts to a Confirmation. And according to the Civil Law, the Question must not only be moved in five Years, but decided in ten.

C A P. III.

Sect. 1. **W**E are now come to our second Division, which was the Want of Testimony of the Assent. The usual Signs therefore of Consent being Words, we must enquire what Words will make a Covenant to be performed in *Specie*. And here we may observe, that altho' a Covenant is properly of a Thing future or past; for if it be of a Matter *in presenti* it vests an immediate Property, and amounts to a Gift or Grant, the Nature of which is to be executed immediately: Yet even at Law, when-ever the Intention of the Parties can be collected out of a Deed, for the doing or not doing a Thing, Covenant will lie. For a Covenant is but an obligatory Agreement of the Parties by Deed; and any Words, which shew the Intent, are sufficient for this Purpose. And therefore a Covenant will lie on a Bond, or the *Reddendum* in a Lease; for it proves an Agreement. So whatsoever Words amount to a Grant will make a Lease; for where there is Substance, the Law will apply the Words to the Intent, tho' they sound differently. And the Reason of this was, that Chattels were of little Value at the Common Law, when
personal

personal Property was but small, and Leases for above forty Years were not permitted. But for the Passing the Freehold and Inheritance there were always required apt Words, or Words tantamount. Yet; altho at the Common Law it is said, that the Law should rule the Intent, and not the Intent the Law; where there is a good Consideration, and no Doubt of the Intent, Equity will relieve against the Rigour of the Law, and make the Conveyance valid. And this is agreeable with the Rule of the Civil Law. For there no set Form of Words, or of Writing, was required in Contracts: But they were perfected by the bare Assent of the Parties. *A Fortiori*, where the Contract is good at Law, Equity will carry it into Execution. And so where there was no express Covenant, concerning the Value of the Lands to be settled, but only the Marriage Articles recited them to be 500*l. per Ann.* Yet Equity will decree the Deficiency to be made up out of other Lands.

Sect. 2. And altho' they formerly thought, that where there was a Bond given to perform any Agreement, the Obligor had his Election, either to do the Thing, or pay the Money; and that the Obligee, having chosen his Security, ought to be left to it; yet now they consider the Penalty only as a collateral Guard to the Agreement, which still remains the same, and unimpeached by the Parties providing a further Remedy at Law for the Performance, and therefore proper to be executed in this Court. So if the Obligor dies before the Day, yet the Lands must be settled according to the Agreement, and so it has been often done. For it would be hard, that the enlarging his Security at Law, should make him in a worse Condition in Equity than if he had taken none at all; nor can it ever be intended, that a Bond, added only to enforce the Performance, should weaken the Lien of the Agreement.

Sect. 3. But regularly the Law never gives any other Remedy than what the Party has provided for himself; for this would be to alter the Agreement of the Parties; tho' in some Cases it is otherwise. And the Diversities seem to be thus settled. *1st*, Where there is no Remedy at Law at all, Equity will certainly grant one. As in case of a Rent-Seek, to decree Seisin; or where the Deeds, by which it was created are lost, and so uncertain what Kind of Rent it was; for wherever there is a Right, there ought in Equity to be a Remedy for it. But if a Man comes to be remediless at Common Law, by his own Negligence, he shall not be relieved in Equity. As if a Man loses his Deed, unless he can make it appear that it was once actually in his Custody, and that he

he has been deprived of it by some Casualty or Misfortune. So if a Man destroys his Remedy to distrain; and cannot have Debt for the Arrears, it being due out of a Freehold, he shall not be relieved for them in Equity. So in Cases proper for Law, a Man must defend himself by legal Pleadings. And a Court of Equity is not to relieve either Mispleading, or where there is a Neglect and Want of a Plea, or no proper Plea put in in Time; for it was his own Fault. So Equity will not relieve for mesne Profits, unless in case of a Trust, or an Infant, where no Entry was made by the Person entitled to the mesne Profits. 2^{dly}, Where there is a Remedy at Law, Equity will not grant a further one, altho' the Remedy at Law is not sufficient: Unless there be some Fraud, or the like. And therefore in all Cases, where the Court has decreed Payment of the Rent, and thereby charged the Person, no other Remedy could be obtain'd. And the usual Relief, even where for Want of Seisin there was at Law no Remedy, is only to decree Seisin. But this is to be understood of a Remedy provided by the Party himself; as in a Grant, or Reservation of a Rent by Deed; otherwise of a Devise of a Rent, in which the Devisor is intended to have been *inops consilii*, for this is a particular Mischiefe, not against any Maxim or Rule, tho' unprovided for by the Law.

Seçt. 4. There is also an implied as well as an exprefs Assent. As where a Man who has a Title, and knows of it, stands by, and either encourages, or does not forbid the Purchase, he shall be bound, and all claiming under him by it; neither shall Infancy or Coverture be any Excuse in such Case; and this seems a just Punishment for his Concealing his Right, by which an innocent Man is drawn in to lay out his Money. And for the same Reason, such Fraud in a Mortgagee will without Doubt postpone his Mortgage. So if *A.* makes an absolute Conveyance to *B.* for 500 *l.* and *B.* executes a Defeazance upon Payment of 1500 *l.* within sixteen Years, and *B.* on his Marriage settles this as an absolute Estate on his Wife and the Issue of that Marriage, there being Proof that *A.* made the Conveyance to enable *B.* to get a Fortune, tho' another Lady, and not the Wife he really married; yet he shall be bound as *particeps criminis*, notwithstanding that the Wife's Father had Notice of the Defeazance before the Settlement made. So if *A.* agrees for the Purchase of Timber, and he and *B.* enter into a Bond that *A.* his Executors and Administrators shall not cut down Timber under such a Size; it comes out that *A.*'s

Name was only made use of for B. B. cuts down Timber under the Size; there can be no Remedy against B. upon this Bond, but it is a Fraud upon the Seller, and relievable in Equity. But this Relief is only extended to Jointures, Mortgages, and such as come in upon a Consideration, and not to a voluntary Devisee.

Sect. 5. However, where the Intent is only to give Damages, Equity will not decree a specifick Performance. As where a Settlement is made to the Husband for Life, Remainder to his intended Wife for Life, Remainder to the Heirs of the Body of the Husband on the Body of the Wife, Remainder to his own right Heirs, with a Covenant, that he would not dock the Intail, nor suffer a Recovery: Altho' this Covenant seems to be executory, and like a Covenant that a Man would not execute a Power to make Leases; yet there is a Difference where the Agreement is subsequent to the Raising the Power to extinguish it, and the Case here, where all is in the same Deed. For the Party here knew that he had a Power to bar the Intail, and therefore agrees to accept of a Covenant, by which he is to have Damages only, and not the Thing *in Specie*; for that would be to carry it beyond the Agreement.

Sect. 6. The Agreement ought also to be compleat and perfect; for *pacta contractuum preparatoria* are not binding, either in Law or Equity. As if upon a Treaty of Marriage, the Father and Husband go to Counsel, who hearing the Proposals on both Sides, takes down Minutes or Heads of them in Writing, and gives them to his Clerk to draw a Settlement; these preparatory Heads might have receiv'd several Alterations or Additions, or the Agreement have been entirely broken off upon further Inquiry into the Parties Circumstances; and therefore if they marry without the Consent of the Father, it is at their Peril; for there is no Case where an Agreement, tho' wrote by the Party himself, should bind, if not signed, or in Part executed by him. But if the Marriage had been had upon the Foot of this Writing, and the Father had been privy and consenting to it, he should then have been oblig'd to execute his Part. So in a Will, if the Writing be but a Draught or Preparation to a Testament, and not a Testament it self, it is without any Force, for the Testator must have *animum testandi*. But Notes taken from the Mouth of the deceased, of his last Will, or made by his Appointment, and read to him, tho' not writ in Form of Law, were a sufficient Will in Writing upon the Stat. of 32 & 34 H. 8. And in Wills, where the Devises

are several and distinct, the perfect is not to be hurt by the imperfect, altho' the Testator die before the whole is finish'd; for Perseverance, and not Mutation of Will, is to be presum'd.

Sect. 7. And where-ever there is a Demand in Law or Equity, there must be a Certainty of the Thing demanded, to be adjudged or decreed, or at least a mean to reduce it to a Certainty; for otherwise the Court will not know how to give Judgment. The Agreement must also be fix'd and settled, and not wavering and revocable, or else the Representative will not be bound by it, if not perfected before the Parties Death. But here are several Diversities to be observ'd. *1st*, Between a Covenant, or other Agreement, which is perfect and compleat, altho' it take Effect in Possession upon a future Matter precedent, and a Covenant and Agreement incompleat and imperfect, which is to be reduced to its Perfection, by future Matter *ex post facto*, for in the one Case the Interest and Estate in the Land is presently vested, but in the other not; and therefore it must be made perfect in the Life-time of the Parties, or else will not bind; for the Lien never vesting in the Ancestor or Testator, cannot descend upon the Heir or devolve to the Executor. As if Land is render'd by Fine to one and his Heirs, there the Land is bound, so that he cannot alter or defeat it: And tho' he, to whom the Render is made, dies before the Execution, yet his Heir shall have it. But if a Man devises Land to one and his Heirs, and after the Devisee dies before the Devisor, the Devise is void; for the Will was alterable at the Pleasure of the Devisor, and the Heir cannot be a Purchaser; (because by the Words, he is appointed to take by Way of Limitation. *2^{dly}*, Between a Covenant or Agreement executory, and a Grant or Bargain which must take Effect, and change the Property of the Thing granted, either presently and at once, or depending upon somewhat that shall reduce it to its full Effect; and therefore if *A.* grant all his Woods and Under-woods growing upon all his Manor, which could conveniently be spared without Prejudice to the Estate of his Manor, this Grant is void; because it is uncertain which Trees may be spared, and which not, and there is no Person appointed to determine it. But if it were a Covenant or Agreement executory, he might have taken Trees by Force of it, and have justified specially, averring, that they might be spared, and put himself upon the Jury for it.

Sect. 8. But besides the bare Words of the Agreement, the Common Law, to prevent Imposition, ordain'd certain Ceremonies

monies where an Interest was to pass; and therefore appointed Livery for Things corporeal, and a Deed for Things incorporeal. Yet in Equity, where there was a Consideration, the Want of Ceremonies was not regarded. However, in former Times, this Court was very cautious of relieving bare parol Agreements for Lands, not signed by the Parties, nor any Money paid; altho' they would sometimes give the Party Satisfaction for the Loss he had sustain'd. And now by the Statute of 29 *Car. 2. cap. 3.* If an Agreement be by Parol, and not signed by the Parties, or some Body lawfully authoriz'd by them, if such Agreement be not confess'd in the Answer, it cannot be carried into Execution. But where in his Answer, he allows the Bargain to be compleat, and does not insist on any Fraud, there can be no Danger of Perjury; because he himself has taken away the Necessity of proving it. So, if it be carried into Execution by one of the Parties, as by delivering Possession, and such Execution be accepted by the other, he that accepts it must perform his Part; for where there is a Performance, the Evidence of the Bargain does not lie merely upon the Words, but upon the Fact performed. And it is unconscionable, that the Party, that has receiv'd the Advantage, should be admitted to say, that such Contract was never made. So if the Signing by the other Party, or reducing the Agreement into Writing be prevented by Fraud; it may be good. And altho' parol Agreements are bound by the Statute, and Agreements are not to be Part Parol, and Part in Writing: Yet a Deposit, or collateral Security, for the Performance of the written Agreement, is not within the Purview of the Statute.

Sect. 9. So where, in Consideration of the Agreement, the Plaintiff had expended great Sums of Money about the Premises, and charged that Part of the Agreement was, that the Agreement should be put into Writing; there is a Difference to be taken where the Money was laid out in lasting Improvements, and where for Fancy or Humour. And its clear a Bill would hold so far as to be restored to the Consideration Money, expended in valuable Improvements; for a Lease, tho' void for Want of legal Ceremonies, yet is a sufficient Colour to possess. But the Difficulty seems to be, that the Act makes void the Estate, but does not say that the Agreement it self shall be void. So that possibly a Man may recover Damages for the Non-performance of it, and then there is no Doubt to decree it in Equity. So where the Plaintiff, pursuant to a parol Agree-
ment

ment for a building Lease, proceeded to pull down Part, and build Part, and before any Lease executed, the Owner of the Soil died; Equity will decree a Building Lease to be made according to the Agreement. But the Execution in Part, to make a parol Agreement for Land valid in Equity, must be valuable and meritorious. Nor is giving 5 s. or 10 s. Earnest, &c. sufficient: But in these Cases an Action at Law must be brought, and Damages only recovered. For when this Court does assist the Common Law, and enforce the Performance of the Agreement in *Specie*, it does it upon important Reasons, *viz.* when otherwise there would be a great Burthen and Penalty upon the Party, if having performed Part, by which he himself has a Loss, and the other a Benefit, he should not have a reciprocal Performance.

Sect. 10. There is another Branch of the Statute which restrains Marriage Agreements, not made in Writing and signed by the Party. But an Agreement by Letter takes it out of the Statute; for this is a Writing signed by him, and a Man may make a Bond in a Letter, if he puts his Hand and Seal to it. As to that Clause which relates to the Writing, Signing and Attesting of Wills, it is said, that the Signing of the Devisor or Witnesses is not necessary. And this Statute, and that of Intestates, were drawn up by J. C. Hale, and the Judge of the Prerogative Courts. And there are many Things in them that are according to the Plan of the Civil Law: And the Constructions have been accordingly. And there is the same Rule of Property in Equity, as in the Law; and the same Exposition of the Statute Law; and the rather, because it is a Statute of Frauds, which is the proper Business and Jurisdiction of a Court of Equity to suppress.

Sect. 11. And it has been said, that where there is a written Agreement, the whole Sense of the Parties is presumed to have been comprized therein, and it would be dangerous to make any Addition, in Cases where there does not appear any Fraud in leaving out any Thing. Yet if by Proof it appears that a Settlement was intended, and the Articles agree with the Intent of the Parties, but the Settlement does not, it shall go according to the Articles, altho' the Settlement was made before the Marriage, when it may be supposed to have been wav'd, as it might be before Marriage, tho' not afterwards. So where the Husband, when he proposed the Treaty of Marriage, offer'd to settle 500 l. *per Ann.* Jointure, and after the Marriage took Notice, that the Jointure settled was not so much, and

talk'd of making it up so much ; altho' there was no Covenant or Agreement prov'd, whereby he bound himself to make a Jointure of that Value ; yet the Heir shall be decreed to make it up. For a Covenant is but an Evidence of the Agreement ; and therefore, if there be any other Evidence, which proves the Agreement, it is as good.

Sect. 12. And so much for the Agreement of the Party that conveys. But an Assent, on the Part of the Person that takes, is also essential to all Conveyances and Contracts ; for where a Man is to be vested with an Interest, his Acceptance is necessary ; otherwise of a bare Authority only. Yet this is not to be compared with such collateral Acts or Circumstances, as by the positive Law are made the effectual Part of a Conveyance. *viz.* Livery of Seisin, Attornment, and sometimes Entry of the Party ; as in Case of Exchanges, or the like. For where an Act is done for a Man's Benefit, his Agreement is implied till he disagrees ; because no Man can be supposed to be unwilling to do that which is for his Advantage. And this does not hold only in Conveyances, but in the Gift of Goods or Chattels, whether in Possession or Action. But the Donees may make Refusal *in Pais* ; and hereby the Property and Interest shall be devested out of him ; for a Man can't have an Estate put into him in Spite of his Teeth. But when a Freehold is vested in him, it cannot be devested by nude Parol *in Pais* ; but remains in him always till Disagreement in a Court of Record, to the Intent that the Tenant of the *Præcipe* may be the better known : Except in some special Cases.

C A P. IV.

Sect. 11. **I**T follows in Order, that we treat of the Subject Matter of Covenants. And here it is a certain Rule, that Agreements receive all their Force from the Ability of the Parties, and can never extend further ; for of so much, and no more, have they a Liberty of disposing. If therefore they know on both Sides that the Thing is absolutely impossible, and are privy to each other's Knowledge as to this Point, the Engagement cannot be esteemed a deliberate and serious Act, or be of any Validity. But if the Undertaker only knew the Impossibility, and not the other Party, he shall pay him the Damage that he sustains by being thus impos'd upon. And so if he neglected to weigh his own Strength, so as to undertake an Impossibility, which, upon due Consideration, he might have

found to be such. And in the Civil Law, an impossible Condition avoided the Contract; for they concluded, that by the adding a Condition, which they knew to be impossible, the Parties could not intend the Agreement should be of any Force. Yet it seems, in the Law of *England*, the Rule is not the same of conditional as of other Contracts. For by that Law, an Agreement to do a Thing in it self impossible, or out of the Power of Man, is void in all Cases. And they make this Difference between an impossible and an uncertain Limitation of an Estate; that the first cannot be intended any Part of the Contract, nor to have been the Subject of Deliberation; for no Man in his Senses, deliberates about what is absolutely out of his Power: But an uncertain Limitation is void upon another Account, *viz.* because the Court can't ascertain it. But as to impossible Conditions, if they be precedent, the Interest will never vest: But if subsequent, the Deed is single; for it shall be intended that he knew he could not perform it, and so did not design to defeat the Deed.

Sect. 2. But a Man may bind himself to do any Thing, which is not in it self impossible; and it is at his Peril if he does not perform it. And the legal Distinction between a near and remote Possibility, having no Foundation in Reason, is not regarded in Equity; and therefore since the Statute of 21 *H. 8. cap. 15.* when long Leases could first be taken with Security, a Remainder of a Term for Years was admitted there, and deem'd as strong an Interest as an Estate of Freehold and Inheritance. So if *A.* covenants, &c. in case he dies without Issue, to give his Lands in *D.* to his Brother, this shall be carried into Execution, upon the falling of the Contingency, altho' the Limitation be after a Dying without Issue. So altho' a Grant of a future Possibility is not good in Law; yet a Possibility of a Trust in Equity might be assign'd. So a Covenant to settle Lands, of which he had only a Possibility of Descent, shall be carried into Execution in Equity; for the Court does not bind the Interest, but instead of Damages at Law, enforce the Performance in *Specie*. But the Law does not admit of Grants, or other Conveyances, except there be a Foundation of an Interest in the Grantor, and he has the Thing either actually or potentially. Yet of Declarations precedent it does allow, provided it be afterwards enforced by some new Act. As if a Man covenants to purchase the Manor of *D.* and levies a Fine of it before such a Day, to certain Uses express'd in the Indenture of Covenants, this Deed to lead the Uses will be sufficient

cient, tho' the Land is purchas'd after; because there is a new Act to be done, *viz.* the Fine. But if I covenant with my Son, in Consideration of natural Love, to stand seis'd to his Use of the Lands which I shall after purchase; yet the Use is void: The Reason is; because there is no new Act to perfect this Beginning, and I had nothing at the Time of the Covenant. So if I mortgage Land, and after covenant with J. S. in Consideration of Money, that after Entry for the Condition broken, I will stand seis'd to the Use of the said J. S. and I enter, and this Deed is enrolled, and all within the fix Months, yet nothing passes; because this Enrollment is no new Act, but only a perfective Ceremony of the first Deed of Bargain and Sale. And the Law is the stronger in this Case; because of the vehement Relation, which the Enrollment has to the Time of the Bargain and Sale, at which Time I had nothing but a bare Condition. So the Statutes of Wills of Land require, that the Devisor should be seis'd of the Land at the Time of making his Will. But a Man may devise Things personal which he has not; for the Legacy passes not by the Will, but by the Assent of the Executor, to whom the Will is only directory. And whatever Thing would come to my Executors, I may dispose of by my Will, as a Right of a Term, or a Thing in Action when recovered; for the Executor has his Authority only to fulfil the Will. But at Common Law, what should not be done by my Executors, but by my Heir, could not be devised, as a Possibility, &c. unless vested with an Interest. Yet it seems, since the Statute of Uses, the Devisee may take Benefit of it, by an equitable Construction.

Sect. 3. And even at Law, a Man is bound to do all that lies in his Power; so that if Part of the Agreement becomes impossible by the Act of God, that does not discharge the rest, altho' it were in the Disjunctive, and he is deprived of his Election. So if the whole were at first impossible, yet if it may become possible, before he is compellable to do it, it is not void; for the Law respecteth the Right of Possibility, and will have nothing to be void, that by Possibility may be made good. As where a Dean and Chapter, before the disabling Act, made a Lease for ninety-nine Years, and covenanted to renew, at the Expiration of the ninety-nine Years, for ninety-nine Years more; altho' the Covenant is entire, yet they ought to make such Lease as is in their Power, *viz.* for forty Years, which was allow'd them by the Statute.

Sect. 4. And it is indispensably necessary that we have both a natural and moral Power of performing what we undertake. For it would be absurd, that an Obligation, which derives its Power from the Law, should put us under a Necessity of doing somewhat which the Law prohibits. Equity therefore will not decree Tenant for Life to commit a Forfeiture. And so if 1000*l.* be bequeathed, to procure a Dukedom to the Head of the Family, a Bill will not lie for this; because it is illegal to acquire Honour for Money. So a Bill for an Allowance for Attendance at Auctions, to enhance the Price of Goods, shall be dismissed with Costs; for Equity will never give Countenance to Demands of an unfair Nature. But altho', where the Party himself comes to be reliev'd against a *turpis Contractus*; as a Bond to a common Harlot, the Court may perhaps refuse to interpose, for this Court should not be a Court to examine such Matters: Yet where the Plaintiff is only an Executor, that varies the Matter. It is true, the Common Law will not enquire into the Consideration of a Bond; for Matter *in Pais* may be avoided by Averment, but not a Deed. And there are only two Ways of Pleading to a Bond, *viz.* to the Lien, as Durefs, &c. to shew that it never did operate; or to the Condition, to shew that it is defeated by Matter of as high a Nature; but Chancery will, and set it aside if illegal.

Sect. 5. So the Law will not imbolden the doing an illegal Act, and therefore a Condition against Law makes all void. But this is to be understood of the doing some Act that is *Malum in se*, then it makes the Bond void; otherwise not, unless it be against a Statute; for a Statute is a strict Law, and the Letter is so. And where a Condition, by being against Law, shall avoid a Bond, the Condition must be against Law expressly, & *in terminis terminantibus*, and not for Matter out of the Condition, as in Bonds of Resignation, and the like, without an Averment. Yet if the Bond is general, for a Resignation, some special Reason must be shewn to require a Resignation, or the Chancery will not suffer it to be put in Suit: If it should not be so, Simony will be committed without Proof or Punishment. But regularly, wherever there may be a Way to perform the Condition, without a Breach of the Law, it is good. As a Condition to Alien in Mortmain; because there may be a Licence.

Sect. 6. And this Court will not meddle with Play Debts, or any such Things. However this is not to be understood so generally as it is spoken, but to mean, that the Court will give

no Countenance to exorbitant Gaming ; because such improvident Hazards bring on the Ruin of Families. But the Court has seldom denied to extend its Relief against the Gamester himself, in Behalf of the Person injur'd ; as where two Men play on a joint Stock, and one holds the Stakes, and sweeps up the Money, he shall answer a Moiety of that to his Companion. And altho' Equity will not usually interpose in Cases relating to the gaming Acts ; because it considers both Winner and Loser equally guilty ; and in taking upon them to game, they seem to renounce the Benefit of the Law : Yet even at Law, in an Action upon a Wager, they have given the Defendant leave to imparl from Time to Time ; tho' in Strictness it is not prohibited by the Common Law. Much more ought Equity to discourage it, because the Publick is concern'd, that Men should not mispend their Estates and Time. And in the Civil Law, they allowed the Loser to recover his Money again, even beyond the ordinary Time of Prescription.

Sect. 7. As to the Lawfulness of Usury, since Damages may be demanded for tardy Payment, why may we not bargain for something certain before-hand, upon Consideration that our Money is in another Man's Power ; when we were not oblig'd for his Benefit to venture the Loss, or to neglect the Gain that might be made of it. And therefore in the *Roman Law*, long before *Justinian's* Time, Money might be lent at 12 *l. per Cent.* which was called *Usura Centesima*, but not higher, except it was lent at great Hazards ; for the Laws there prescrib'd no Bounds, any more than in certain conditional Agreements. But in *England*, antiently the Persons of Usurers were punish'd, and the Ordinary had Cognizance of them in their Life-time, to compel them to make Restitution ; and all their Goods and Lands escheated at their Death to the King. And so odious was Usury, in the Eye of the Common Law, that a Man could not maintain an Action upon an usurious Contract. But now such Usury, as is allowed by the Statute, hath obtain'd such Strength by Usage, that it will be a great Impediment to Traffick, &c. if it should be impeached. And altho' the Statute is to be taken strictly, in order to suppress Usury, yet it must be between such Parties as make the corrupt Agreement, and not to punish others who are not privy to it. There is also a Difference between a Bargain and a Loan. For if the Principal is in Hazard, and the Bargain is plain, it is not within the Statute of Usury. But it is otherwise of a Loan ; for then it is intended that the Principal is in no Dan-

ger. However if it be found that he took 40 *l.* by a corrupt Agreement, tho' it be not within the Statute; yet Judgment shall be given against him at Common Law. And in usurious Contracts, there is no Doubt but Equity will give Relief to the Borrower, in Cases where the Law will not reach him; for it is unjust that the Lender should go away with such exorbitant Gains; and the Borrower can never be consider'd as *particeps criminis*, but rather as one deserving Compassion than Punishment; and tho' Equity will not go directly contrary to an Act of Parliament, yet it will often apply a different Remedy from what that prescribes.

Sect. 8. But there are some Sorts of Gaming and Usury not at all prohibited by Law or Equity; as in Case of Insurances and Bottomry-Bonds, which are allow'd for the Encouragement of Trade. Insuring is, where a Man for a certain Sum takes upon him the Risque that Goods are to run in Transportation from Place to Place. And a Policy of Insurance must be constru'd according to the Usage amongst Merchants, and the Voyage ought to be according to the Usage. And the King's Bench takes Notice of the Laws of Merchants, which are general, tho' not of particular Usages; for the Law Merchant is an universal Law throughout all the World. But Insurances are for the Benefit of Traders and Merchants only; and for this End were they at first introduced, that a Merchant having a Loss might not be undone, many bearing the Burthen together: Not that others unconcern'd in Trade, nor interested in the Ship, should profit by it. And the Reason why a Man having some Interest in the Ship or Cargo, may insure five Times as much, is, because a Merchant cannot tell how much, or how little, his Factor may have in Readiness to lade on Board his Ship.

Sect. 9. Bottomry, or *Fœnus nauticum*, is so call'd from the Bottom of the Ship, a Part being put for the whole; for it is indeed in the Nature of a Mortgage of the Ship; and this is allow'd almost every where, by Reason of the Hazard of the Lender, and it being found useful for Navigation and Commerce. Yet a Court of Equity will never assist a Bottomry-bond, which carries an unreasonable Interest; but will leave him to recover at Law as well as he can. On the other Side, if the Obligor goes the Voyage, he shall not be reliev'd here, upon Pretence that the Deviation was of Necessity, saving as to the Penalty. And if the Ship, tho' lost, has deviated from the Voyage mention'd in the Bond; the Obligee may recover the

the Money on the Policy of Insurance, and also put the Bottomry-Bond in Suit; for the Insurers might as well pretend to have Aid of the Bottomry-Bond, as the Obligor of the Money recover'd on the Policy.

Sect. 10. It was also a Rule in the Civil Law, that Marriage ought to be free, and the same Policy has obtain'd in Equity. And therefore in Case of a Bond in common Form for Payment of Money, but prov'd that the Agreement was, that the Obligor should marry such a Man, or should pay the Money due on the Bond: The Court will decree this Bond to be deliver'd up to be cancell'd, as being contrary to the Nature and Design of Marriage, which ought to proceed from free Choice, and not from any Compulsion. So where-ever a Mother or Father, or Guardian, insist upon a private Gain, or Security for it, and obtains it of the intended Husband, it shall be set aside; for the Power of a Parent or Guardian ought not to be made use of to such Purposes. You shall not have my Daughter unless you do so and so, is to sell Children and Matches. And these Contracts with the Father, &c. seem to be of the same Nature with Brokage-Bonds, &c. but of more mischievous Consequence, as that which would happen more frequently; and it is now a settled Rule, that if the Father on the Marriage of his Son, takes a Bond of the Son to pay him so much, &c. it is void, being done by Coertion, while he is under the Awe of his Father. Nor will the Court only decree a Marriage-brokage Bond to be deliver'd up, but a Gratuity of fifty Guineas actually paid to be refunded; for such Bond is in no Case to be countenanc'd. And a Bond to procure Marriage, tho' between Persons of equal Rank and Fortune, is void; as being of dangerous Consequence. So if *A.* being a Widow gives a Bond to *B.* of 20 *l.* if she should marry again, and *B.* gives a Bond to the Widow to pay her Executors the like Sum, if she did not marry again: And the Widow soon after marries, her Bond will be decreed to be deliver'd up. And the Difference which some take, where it is a Bond Penal, whereon the Jury can give no less than the Penalty, and the Case (of a Promise) where the Jury will, as Cause is, lessen, &c. seems not to be Law; but the Agreement void in both Cases. And so in Restraints of Trade, the Distinction is not between Bonds and Promises, as is laid down in some Books; but it is between Bonds, Covenants or Promises with Consideration and such as are without: For the first, if only with Respect to a particular Place or Person, may be just and reasonable; nor is it
against

against *Magna Charta*; for that only provides against Power and Force, that a Man be not disseised of his Liberty or Estate, but he may sell either. Whereas the other, for ought appears, may be oppressive, and is of mischievous Consequence to the Publick.

Sect. 11. And in the Civil Law, Counter-letters, and all secret Acts which make any Change in Agreements, are of no Manner of Effect, with Respect to the Interest of a third Person; for this would be an Infidelity contrary to good Manners and the Publick Interest. So private Agreements in Derogation of Marriage-Articles are all set aside in Equity. As where the Daughter promis'd to repay 10*l.* Part of the Marriage-Portion of 90*l.* this is a fraudulent and void Promise. So where *A.* having a Kindness for *B.* treated a Marriage for him with *C.* for his Niece, and a Settlement being agreed upon for 2500*l.* Portion, he obtain'd a Redemise of Part of the Estate settled for present Maintenance, and a Release of what (*A.*) had covenanted to settle after his Death; and both set aside in Equity. So where the Brother gave a Bond to make up his Sister's Portion the Sum that was insisted on, but took a Bond from her before Marriage to repay. The Husband died, the Wife surviv'd, and was reliev'd against the Bond. From which Cases it may be collected, that that which is the open and publick Treaty and Agreement upon Marriage shall not be lessen'd, or any Ways infring'd, by any private Treaty or Agreement. And that, which was once a Fraud, will always be so; and the Woman surviving the Husband will not better the Case, nor the Assignment of such a Bond to Creditors; for a Bond, assignable only in Equity, is still liable to the same Equity, as if remaining with the Obligee; and as to any Promise made afterwards to pay it, that was but *nudum pactum*, and not binding. So a Settlement made by a Woman before her Marriage, for her separate Use, without the Husband's Privity, shall not bind the Husband; being in Derogation of the Rights of Marriage. But where a Widow, before her Marriage with a second Husband, assign'd over the greatest Part of her Estate to Trustees for Children by her former Husband; it is certain a Widow might with a good Conscience, before she put herself under the Power of a second Husband, provide for the Children she had by the first.

Sect. 12. And, by the Civil Law, whatever Debtors do to defeat their Creditors is void, and there is a great Resemblance between the Civil Law in this Matter and the Statute of 13 *El.*

But in each of them there was this Exception; that it should not extend to avoid any Estate or Interest, &c. made upon a good Consideration and *bona fide*. So that both must concur; for Equity requires that the Deed that defeats another shall be made of as high a Consideration, as the Thing is that is defeated by it. And therefore if a Man steals a young Lady, who has a considerable Fortune in Trustees Hands, and the Husband gives a Judgment to make a Settlement upon her, Equity will not set this aside in Behalf of Creditors, tho' the Settlement was after Marriage, and voluntary; for the Court would not have let the Husband have had the Fortune without making a Settlement. And the Statute did not mean to alter the Nature of the Debt: So that if the Debt don't bind the Heir, but merely the personal Assets, it will not affect a Volunteer with Power of Revocation, unless reduc'd to a Judgment during the Life of the Debtor. And even a Debt that does affect the Heir will not bind a Purchaser of the Volunteer with Notice, till it is plac'd upon the Land by the Judgment; for if it were otherwise personal Security would be turn'd into real Security. And some think that fraudulent Conveyances are made so only by the several Statutes made for that Purpose. And therefore if the Debtor makes a Purchase in Trustees Names, he may declare the Trust to whom he pleases; for he might have given him the Money to have made the Purchase himself, and it is a new Pretence to say a Man made a Purchase fraudulently. But altho' regularly for Cases within the Statute, Relief must be had at Law; yet if Goods are given to defraud Creditors, in such a Case as the Gift is not avoidable by the Statutes, the Party may be reliev'd here; for this Court determin'd concerning Charities and Frauds long before any Statute made concerning the same.

Sect. 13. And these Statutes made against Frauds are for the Publick Good; and therefore to be taken by Equity, and bind the King. And the Word (declare) in the Act of 13 of *Eliz.* shews it was the Common Law before. Nor does that Act extend only to Creditors, but to all others who have any Cause of Action or Suit, or any Penalty or Forfeiture either to the King or the Subject, as for Felony, Outlawry, Recusancy, or the like. But there is a Difference between Purchasers and Creditors. For the Statute of 13 *El.* makes only fraudulent Conveyances void against Creditors; but in the Case of a Purchaser, all voluntary Conveyances are void by the express Letter of the 27th of *Eliz.* without more. And the Notice of

the Purchaser, *viz.* of the Fraud, cannot make that good which an Act of Parliament makes void, for they are always fraudulent against Purchasers. And therefore any Person coming in by a voluntary Conveyance, and pursuing a Purchaser at Law, shall be oblig'd to discover his Title in a Court of Equity; for else he might be put to encounter Evidence he never heard of. But he that would have Benefit of this Act ought to be a Purchaser *bonâ fide*, and in vulgar Intendment, *viz.* for a valuable Consideration, as a Lessee at a Rack-rent, tho' he paid no Fine, because he is bound to pay his Rent during the Term, whether the Land is worth it or not. And this Statute is very well penn'd; for the Words of the Act are general, and whoever sells it, the Purchaser shall avoid such fraudulent Estate, &c. So where a Man in a secret Manner made an Estate to the Use of his Wife for her Jointure by Fraud and Covin, to defeat a Purchaser to whom he intended to sell the Land; if the Fraud be prov'd in Evidence, or confess'd in Pleading, the Purchase shall avoid the Estate.

Sect. 14. And where upon the Statute of fraudulent Devises it has been objected, that that Statute being introductive of a new Law, the Relief upon it ought to be at Law. Yet Equity will also give Relief. As where the Heir having alien'd the real Estate, a Bond-Creditor brings a Bill against him and the Purchaser. But altho' by that Statute, a Man is prevented from defeating his Creditors by his Will: Yet any Settlement or Disposition he shall make in his Life-time of his Lands, whether voluntary or not, will be good against Bond-Creditors; for that was not provided against by the Statute, which only took Care to secure such Creditors against any Imposition which might be suppos'd in a Man's last Sickness; but if he gave away his Estate in his Life-time, this prevented the Descent of so much to the Heir, and consequently took away their Remedy against him, who was only liable in Respect of the Lands descended; and as a Bond is no Lien whatsoever in the Hands of the Obligor, much less can it be so when they are given away to a Stranger.

Sect. 15. So if a Freeman makes a Gift of any Part of his personal Estate in his Life-time, or if he turns all his Estate into a Purchase of Land, he may dispose of this as he thinks fit. So if Money be given by a Freeman to be laid out in Land, and settled, &c. or if a Freeman upon a second Marriage conveys Leases in Trust, &c. and in the Settlement there is an Agreement, that the Trustees should sell these Leases,

and invest the Money in the Purchase of Lands of Inheritance to be settled to Uses: By the Agreement, these Leases are now to be consider'd in Equity, as if a Purchase had been actually made, and the Freeman had paid the Money out of his Pocket.

Sect. 16. But the Custom of *London* must be entirely given up, if Equity would not assist to set aside Conveyances in Fraud of the Custom. And therefore where a Freeman had not altogether dismiss'd himself of the Estate in his Life-time, and the Deed being made when he was languishing, and but a little before his Death, it ought to be look'd upon as a *Donatio causa Mortis*: But will stand good as to a Moiety, which he having no Wife might dispose of. So if a Man has it in his Power, as by keeping the Deed, &c. or if he retains the Possession of the Goods, or any Part of them. Or if there be a Deed of Trust to the Use of his Will, or to pay any Sum as he should appoint, and he makes an Appointment by Deed and Will, this Will will be deem'd fraudulent and void. So if a Man possess'd of a Term for Years, voluntarily assigns it as a Provision for his Child: Yet his Wife shall have her customary Share. So a voluntary Judgment shall not prevail against Debts by simple Contract, nor against the Widow of a Freeman; but his Debts being paid, the Judgment will bind the legatory Part. And altho' the Father can't dispose of the customary Part from his Children, yet he may by his Will appoint, that if one dies before twenty-one, another shall have his Part. Yet he can't devise his Child's Part over to another, in Case that Child die in Minority. But see now the late Statute 11 *Geo. 1. cap. 18.* which has made a great Alteration in these Matters.

Sect. 17. We are likewise unable to oblige ourselves to any Performance about the Goods or Actions of other Men, not subject to our Disposal; and therefore no Man's Contract can be carried into Execution in Equity, any further than his Interest or lawful Power extends. For Equity will not decree a Man to commit a Wrong to a third Person, as to compel a Tenant for Life to make a Disseisin, or Forfeiture, of his Estate; or to bind one who claims paramount, as to decree an Agreement of one Jointenant against the Survivor; or to compel a Freeholder of a Manor to consent to an Inclosure or Stint of a Common, unless the Bill charge that he would be benefited by it. But because it would be inconvenient, that an Engagement seriously enter'd into should be of no Effect, the Law ordains, that he who undertakes for another, or makes a

Contract

Contract in his Name, should procure a Performance from him, or stand in his Stead. As if *A.* articles on the Behalf of *B.* to purchase four Houses in *Jamaica*, and, pending the Suit to compel the Seller to make a good Title, the Houses are swallow'd up by an Earthquake: Yet *A.* shall pay the Money, altho' he has not sufficient Effects of *B.*'s in his Hands.

Se t. 18. And if a third Person treats for one that is absent without his Order, but undertakes for his Consent; the absent Party does not enter into the Covenant till he ratifies it; and if he does not ratify it, the Person who undertook for his Consent, only, shall be bound. As if *A.* and *B.* Insolvents, apply to a Scrivener, who had procur'd 200 *l.* for *A.* upon their Bond to *C.* and *D.* to compromise the Debt, and the Scrivener tells them that *C.* and *D.* would stand to any Thing that he did, and accordingly compounds it with them: Yet *A.* and *B.* shall pay *C.* and *D.* their whole Money, they not being any Way privy to the Agreement, and the Scrivener shall repay them, and indemnify them according to the Agreement, tho' he acted only as an Agent. So if *A.* by Writing, agrees with *B.* and *C.* to pave the Streets in a Parish, and they in Behalf of the Parish agree to pay him for it, and this Writing is lodged in the Hands of *B.*; if *A.* paves the Streets, he must have Relief against the Undertakers, and the Undertakers must take their Remedy over against the Parish; and more especially in this Case, the written Agreement, which is his Evidence, being in the Hands of one of them. On the other Side, where a Man acts in Execution of the Authority given him by another, either expressly or impliedly; then it is by Relation the Act of that other, and he acquires no Right, nor brings any Obligation upon himself. Yet if a Verdict is obtain'd against an Agent or Trustee, Equity will not relieve against such Verdict; but will decree that he shall be re-imburs'd by his Principal, and stand in the Place of the Creditor.

Se t. 19. The Statute *de donis conditionalibus*, made 13 *Ed. 1.* in a Manner created Perpetuities; for by that Statute the Tenants in Tail could do no Act in Prejudice of the Issue, but the Will of the Donor was to be observ'd, and the same Law continued about 200 Years. But in 12 *Ed. 4.* it was resolv'd by the Judges, that by a common Recovery, the Estate-Tail should be barr'd; for the Mischiefs that were introduc'd in the Common Wealth thereby. And by 4 *H. 7. cap. 24.* a Fine had the same Force given it, as to the Issue in Tail, tho' it did not extend to him in Remainder, without he neglected to
make

make Claim within five Years after it fell into Possession. And this Court will not supersede Fines and Recoveries, as to make a Bargain and Sale of Tenant in Tail of a legal Estate good against the Heir; for he is, since the Statute, to be consider'd as a Purchaser, and is in immediately from the Donor *per formam Doni*. So that as it seems, no Act of Tenant in Tail shall be carried into Execution in a Court of Equity against the Issue any further than at Law; for this would be to repeal the Statute *de donis*. But if the Issue enters, and accepts of the Agreement, it becomes his own, and shall bind him. And any Agreement with an Equivalent will bind the Issue, as a Partition, tho' but by Parol. Nor will the Court aid the Issue in Tail against a Discontinuance, tho' by a voluntary Conveyance; so far does it favour the Owner of the Inheritance who has Power to dispose of it.

Sect. 20. As for a Trust or equitable Interest it is a Creature of their own, and to be govern'd by their Rules. For an Intail of a Trust is not within the Statute *de donis*, and therefore may be alien'd without a Recovery by any Manner of Conveyance. Yet some have thought the Method of common Recoveries a very prudent and political Institution, and fit to be follow'd in Equity, that Men may have some Restraint from overturning the Settlements of their Family.

Sect. 21. So the Head of a Corporation aggregate, as a Dean, &c. alone, cannot make a Lease or Discontinuance; for it ought to be by the entire Corporation, or else it is void, except of the Possessions, which they have sever'd from the rest of the Corporation. But an Abbot or Bishop may discontinue, for they are sole seiz'd in Fee, &c. Otherwise of a Parson, for he is not seiz'd in Fee to every Intent. And a Deed of an Abbe *ex assensu Capituli*, is good; because they are dead Persons in Law. Otherwise of a Deed of a Dean *ex assensu Capituli*; for his Chapter is Parcel of the Corporation, and seiz'd with the Dean, and shall plead and be impleaded with him. So, of a Mayor and Commonalty. But in all uncertain Bodies, as Mayor and Commonalty, &c. if the greater Part do an Act, this shall bind, altho' the rest will not agree, and the Assent may be tried by Voices or Hands; *Quia ubi major pars ibi tota*: Else they might never all agree.

Sect. 22. And a Corporation is in divers Respects as one Body, or as several Persons, and may charge and be charg'd accordingly. The Deed therefore, of a Corporation shall not bind them in their private Capacity, if it be made in the

Name of their Corporation; neither can they be charg'd in their private Capacity with Debts of the Corporation, altho' they are dissolv'd. So they shall be intended seiz'd in that Capacity by which Name they are named; and when the Mayor or other Head of the Corporation is in Prison, touching his Office for a Bond made by him and the Commonalty; this is an Imprisonment to him as Mayor. So if a Corporation be chang'd, yet they shall not be discharg'd of Covenants, Annuities, and the like, with which they were before bound. And by the same Reason they shall retain the Land and Possessions which they had before; and so Debts due to them remain. But if the Corporation be dissolv'd, the Donor shall have his Lands again.

Sect. 23. It is also against a Maxim in Law, that a Feme Covert should be bound without a Fine: So that a Fine is necessary for the Disposing of her Lands in Fee, or of Freehold. The Common Law therefore gave her a *Cui in vita* after her Husband's Death, for the Recovery of the Land alien'd by him; and to the Heir a *sur Cui in vita*. And in all Cases, where the Wife might have a *Cui in vita* at Common Law, she may enter by the Statute of 32 H. 8. cap. 28. And where the Issue cannot have a *Sur cui in vita* or Formedon, there he shall not enter within the Remedy of this Statute; as during the Life of the Husband. For the Words of the Act are, *According to their Rights and Titles therein, viz.* be it in the Life of the Husband after a Divorce *a Vinculo Matrimonii*; (for then at Common Law a *Cui ante Divortium* lay) or after his Death. And so in Equity, no Agreement of the Husband to part with the Wife's Inheritance shall bind the Wife, or be carried into Execution. But if the Wife upon private Examination consents, the Court will decree an Agreement of the Husband to convey his Wife's Land. Yet the Bill must regularly be brought against them both; for the Wife ought not by Law to convey by any Compulsion from the Husband, as it will otherwise be intended that she does. And if a Feme Covert agrees to sell her Inheritance, so as she may have Part of the Money, and the Land is accordingly sold, and her Part of the Money put into Trustees Hands: This Money is not liable to the Husband's Debts, tho' she afterwards agree that it should be so; nor shall any Promise made by the Wife for that Purpose, subsequent to the first original Agreement, be obliging on that Behalf.

Sect. 24. Neither will Equity take away the Benefit of Survivor from the Wife, of such Things as the Law has cast upon her, as Money, or the like, in Trust, altho' the Husband make her a Jointure: Unless it be full and adequate to her Fortune. So Chattels real in Possession survive to the Wife, except the Husband dispose of, or forfeit them during the Coverture; and he cannot charge or devise them, for the Title of the Wife is paramount. But a Demise of the Wife's Term, tho' but for a Fortnight, will alter the Property. So Things merely in Action survive to the Wife; unless recover'd during the Coverture, or dispos'd of by him upon a valuable Consideration. But an Award of a Sum of Money is a Sort of Judgment, and changes the Property of a Legacy in her Right. And so if the Husband recover it, as he may without joining his Wife; for where-ever the Husband is to have the Thing alone when recover'd, there he need not join his Wife. Yet of Things merely in Action belonging to the Wife, she ought to join in Suit. And a Covenant to pay it to the Husband, is but a collateral Security, and does not alter the Nature of the Debt, but it shall survive to the Wife. But it is a Rule in all Cases, that where a Man makes a Settlement equivalent to the Wife's Portion, it shall be intended that he was to have the Portion, tho' there was no Agreement for that Purpose; the Wife shall not have her Jointure and Fortune both, but the Law of this Court will presume a Promise.

Sect. 25. And it is a common Maxim, that he, who has the Precedency in Time, has the Advantage in Right. Not that Time consider'd barely in itself can make any such Difference, but because the whole Power over a Thing being secured to one Person, this bars all others from obtaining a Title to it afterwards. So in Equity, where one Party has no more Equity than the other, the Law must take place; and therefore where it is voluntary Conveyance against voluntary Conveyance you must try it at Law. And as a voluntary Conveyance cannot be revok'd without a Power of Revocation, so the Reason is the same where it is not pursued; because the Law has been liberal in expounding Powers of Revocation favourably, and where the Law expounds a Thing according to an equitable Construction, there is no Reason for Equity to extend it further. For it is a Law which a Man puts upon himself as a Guard against Surprize, and therefore ought to be perform'd in all necessary Circumstances. But if there appear other equitable Considerations, it would be convenient to give Relief,
where

where there is a Defect in the Execution of a Power, and an Intention plain to do it, as well as to supply a Defect in a Conveyance; for it is *pro tanto* Part of the old Dominion. As 1st, Where there is a Consideration either valuable or foreign, as for Payment of Debts, or Provision for Children, and no better on the other Side. 2^{dly}, Where there is any Fraud, or the Party is guilty of any Deceit or Falshood, by which the Execution is prevented; for he in the Remainder shall not take Advantage of his own Wrong. 3^{dly}, Accident or an Impossibility of Complying with the Circumstances, since it would be unconscionable in the Remainder-Man to take Advantage of these, provided he does all he can. And so in other Cases of Powers, as to make Leases, Equity will relieve the defective Execution of them, where there is any Fraud or Accident, or a valuable Consideration. But there is a great Difference between a defective Execution of a Power, and where the Power was not executed at all: Especially if the Power be general, it is not such a Lien upon the Lands as should affect a Purchaser, tho' it had been afterwards executed. Nor has the Court gone so far, as where a Man has a Power to raise, if he neglect to execute that Power; to do it for him, altho' it might be reasonable enough, and agreeable to Equity in Favour of Creditors.

Sect. 26. And it often falls out, that even not to keep one's Promise shall be just. For all must be referr'd to the fundamental Rules of Justice: As 1st, That no Man be wrong'd, and 2^{dly}, that the Publick Good be as far as possible promoted. Hence, if the Agreement is extremely unreasonable and iniquitous, Equity will not carry it into Execution. As where the Daughter and her Husband would have more than the Father indebted, and the Mother and two Daughters unprefer'd would have left. But altho' a written Agreement being unreasonable, the Court will not carry it into Execution; yet they will decree, that it be deliver'd to the Person for whose Benefit it was design'd, that he may have an Opportunity to make the most of it at a Trial at Law.

Sect. 27. Lastly, The Court will not encourage the Laches and Indolence of the Parties, but will presume, after great Length of Time, some Composition or Release to have been made: Since it would be too hard to force a Man to keep his Evidence by him for ever. And therefore a Legacy shall be presum'd to be paid after great Length of Time: As where the Testator has been dead forty Years. So when a Contract

has lain dormant many Years, there shall be no specifick Performance. But special Circumstances may alter the Case. As if there are Articles upon Marriage to purchase Lands, and to settle them within three Years, these shall not be wav'd by Length of Time, if the Covenantor has been in Trade, and could not conveniently spare Money. And altho' a sleeping Mortgage, or Bond, shall be presumed to be discharg'd, and not subsisting, if nothing appears to the contrary, as by Payment of Interest, or a Demand made, or the like: Yet a Will has been set aside after forty Years Possession under it, and even in Prejudice of a Purchaser, upon Account of the Infanity of the Devisor.

C A P. V.

Sect. 1. **L**ET us now inquire, what shall be deem'd a sufficient Consideration, to make a Pact or Covenant valid. For altho' in Donations, and such like Contracts, where there is no apparent Consideration, the bare Pleasure of doing Good to others stands in the Place of a Cause, on the Part of the Person who receives the Benefit, and gives nothing: Yet there is a Difference between a Gift perfected, and executed by Livery in the Life-time of the Parties, and a bare Promise to give, or a Gift imperfect and executory. And even since the Statute of 3 & 4 Ann. cap. 7. a Note is but Evidence of a Consideration, which it was not before, and turns the Proof on the Defendant the Drawer, that there was no Consideration. But the Acceptor and Indorser of a Bill of Exchange are bound to pay without a Consideration; because in Commerce we are govern'd by the Law of Nations, as they are in other Countries, and that Law is so for the Encouragement of Trade. And the Reason of this Caution in the Law, not to enforce a naked Agreement, was not because serious Promises do not of themselves bind in the Law of Nature; but that the Ceremony of solemn Forms might put Men upon Consideration; as also to prevent a Multiplicity of Suits. The Court therefore will pay that Faith and Deference to the Solemnity of Deeds, and to Instruments without Blemish, as to intend them at least the Acts of reasonable Men, and arising from a good Consideration, unless the contrary be prov'd: And in the Civil Law this Exception was not allow'd after two Years.

Señt. 2. But regularly, Equity is remedial only to those, who come in upon an actual Consideration. So that altho' a voluntary Conveyance, which is good in Law, is sufficient likewise in Equity: Yet a voluntary defective Conveyance, which cannot operate at Law, is not helped here in Favour of a bare Volunteer, where there is no Consideration express'd or implied. But there is no Doubt, that in the Case of a Purchaser, the Want of a Surrender of a Copyhold, or the like, shall be supplied. And so in Case of a Creditor, or Provision for Payment of Debts. And there having been Precedents already of Relief, where it is a Provision for Children, it is best to make the Rule uniform, and to stick to a Rule; and there ought not to be one Sort of Equity for an Eldest and another for a younger Son.

Señt. 3. And in Equity there must not only be a Consideration, as a Motive for Relief, but it must be a stronger Consideration than there is on the other Side; for if it was only equal, then the Ballance would incline neither Way, but Matters must be left in the same Situation, as they are in at present. And therefore where it is said, that Chancery will help a defective Assurance, if intended as a Provision for younger Children; this is always to be understood where the Heir has some Provision made for him. For the Proportion is to be left to the Prudence of the Father, and Equity will then supply the circumstantial Part in support of the Father's Providence for the Welfare of his Family, which he is by Nature bound to take Care of. But where he is destitute of all Provision, there the Reason is chang'd more strongly on the other Side, that the Court of Equity should not interpose to deprive him of the Advantage which he has at Law. And so if one devises his Copyhold, being Borough English, to his eldest Son, and devises Houses to his younger Son, and the Houses are soon after burnt, and are never enter'd upon by the younger, the Court, as this Case is circumstanc'd, will not supply the Want of a Surrender. And altho' against a Stranger, who comes in with Notice, or without a Consideration, Equity may supply the Want of a legal Conveyance; yet it never will against him, who is a Purchaser for a valuable Consideration without Notice; for when both are in equal Equity the legal Title takes Place.

Señt. 4. As to the Effect of Covenants therefore to pass with the Lands, when the Assignee is a Purchaser for a valuable Consideration without Notice, Equity will follow the Law.

As in Case of a Lease of a Fair or Wine-Licence for Years, rendering Rent, &c. a Purchaser shall not be charged with the Rent; because personal Things are not in the Law intended to reach the Assignee. So mere collateral Covenants, which do not touch or concern the Thing demis'd in any Sort, bind only the Covenantor, and his Executors or Administrators, who represent him. But Covenants that run with the Land, that is, which extend to Something *in esse*, Parcel of the Demise, and affect the Estate, lie between all those who are privy in Tenure or Contract, tho' not named, like Debt for Rent at Common Law. And the Reason is; because usually the Rent is more or less accordingly, & *qui sentit commodum sentire debet & onus*. So a collateral Covenant to be done upon the Land, as to build *de novo*, shall bind the Assignee by express Words; because he is to have the Benefit of it. And a Covenant to renew in Consideration of Improvements, a Purchaser of the Inheritance shall make good.

Sect. 5. But in Case of Covenants, that run with the Land, if the Circumstances are hard, Equity will not decree them *in Specie*, even against those who are bound by them at Law. And therefore, altho' it is the Mortgagee's own Folly to take an Assignment of the whole Term, whereby to subject himself to the Covenants in the original Lease, and not to take a derivative Lease of all the Term, but a Month, or a Week, or a Day, as he might have done: Yet where he is only a Mortgagee, who never was in Possession, the Chancery will not assist to charge him, but leave the Lessor to recover at Law, as well as he can. But if the Lessor recovers at Law against one as Assignee, the Rent reserv'd on the Lease, who had never enter'd; Equity will not deprive him of this Advantage at Law. And in some Cases, Equity will give the Lessor a Remedy where he had none at Law. As if Lessee for Years makes an Under-Lease in Trust for *J. S.* the Lessor may compel *J. S.* in Equity, to repair. But this is only where the Executors of the first Lessee are insolvent; for tho' the Privy of Estate is destroy'd in Law, yet he shall not have Recourse to this Remedy, whilst he has any left against the Executors of the first Lessee.

Sect. 6. So in Case of a Fraud, Equity will extend their Relief in Favour of the Lessor. And therefore altho' regularly this Court will only decree an Assignee of a Lease to pay the Rent become due since the Assignment, and which shall become due while he continues in Possession, but not during the

Conti.

Continuance of the Lease; for he may, if he can, get rid of the Lease by Assigning it to another: Yet there is this Difference taken, if the Assignees have continu'd long in Possession, and the Premises are worsted, and become ruinous under their Hands, or by their Means, there the Assignment to a Beggar would be consider'd to be a Fraud to get rid of the Damage, which they ought to answer. But if they assign immediately after their coming into Possession, there is no Ground to relieve; because the Assignee was not chargeable at Law, and the Lessor had his original Security against the Lessee and his Executors unimpeach'd. But where a Man makes a Lease rendring Rent, if the Lessee assigns to a Beggar or insolvent Person, in Equity the Lessee shall be bound to pay the Rent, which is a common Case; and even at Law the first Lessee by his express Contract may be charg'd in Debt for Rent after Assignment. And for the same Reason it is; that in Debt for Rent upon a Lease for Years, the Plaintiff need not set forth any Entry or Occupation, as upon a Lease at Will, it being due upon the Lease or Contract, and not by the Occupation, as in the other Case.

Sect. 7. But there is a Difference between Covenants, Advowsons, Common, and the like, annex'd to the Possession of the Land, which pass with it into whosoever Hands they come, and an Use or Warranty, or such like Things annex'd to the Estate of the Land in Privy. For to all Uses there must be Confidence in the Person, and Privy of Estate either express'd or implied; and the implied Confidence is, where a Man comes in with Notice or without a Consideration. And even a special Covenant to settle Lands, binds the Conscience only, and not the Land it self: Yet a general Covenant will bind as strongly. And if it appear judicially to the Court, that he could not properly perform or make Election; as if the Time of Settlement were past, and he aged or the like; the Court may apply the general Covenant on his particular Lands, and choose for him. So where *A.* on the Marriage of his Son covenants for himself, his Executors and Administrators (without naming his Heirs) within one Month after the Marriage to settle Lands of 150 *l. per Ann.* on the Son and the Issue of the Marriage, but dies before any Settlement made, the Son enters upon the Real Estate as Heir to his Father, and settles it for the Jointure of a second Wife who has no Notice of the Articles; the Articles shall be a Lien on the Lands whereof the Father was then seiz'd, tho' no particular Lands were mention'd in the Articles, unless he

had purchas'd and settled other Lands within the Time limited by the Articles, and which were not settled on the second Wife, who came in as a Purchaser without Notice. So if a Man covenants or enters into Bond to settle Land of such a Value, or an Annuity out of Land of such a Value, and has no Land at the Time of the Settlement, but afterwards purchases Land, that Land shall be liable, and that against a voluntary Devisee.

Sect. 8. And as a Covenant without a Consideration is null, it is the same Thing, if the Cause or Consideration happen to cease. So that in all reciprocal Contracts, there is a Warranty on both Sides in Equity, tho' not at Law. But a Difference has been taken between a Bargain for a Place, where the Party may be remov'd at Pleasure, and a Bargain of Land of a defeasible Title: Yet seeing the King has not disallow'd such Bargains, as it were to be wish'd he would, they occasioning Deceit to the King, &c. the Purchaser shall not lose his Money; and therefore what the Seller has receiv'd he shall repay. So if in a Sale of Goods, the Buyer pays Money in Part of Satisfaction, and afterwards the whole Value of the Goods is recover'd against him at Law; the Money so paid upon that Account, becomes Money receiv'd for the Use of him that paid it; and he may recover it in an Action at Law. So if *A.* sells Land to *B.* who afterwards becomes a Bankrupt, Part of the Purchase-Money not being paid, in this Case there is a natural Equity, that the Land should stand charg'd with so much of the Purchase-Money as was not paid, without any special Agreement for that Purpose. So where the Husband had bound himself to settle an Annuity upon his Wife during her Widowhood, and she had convey'd her Estate to her Husband; in both Deeds there was a Power of Revocation, and they were both in the Custody of the Wife: After the Husband's Death she conceals the Deed by which she convey'd her own Estate; and after many Years, when the Arrears of the Annuity would be worth more than her own Estate, she sets up the Bond; this shall not prevail: For the Cause of granting such Annuity was not subsisting.

Sect. 9. In the Matter of Rents, the Law of *England* is, *ex vi termini*, stricter in them than other Nations; for *redditus* and *reddere* is the same as *restituere*; and these Words, *reddendo inde* or *reservando inde*, are as much as to say, that the Lessee shall pay so much of the Issues and Profits at such Days to the Lessor. And therefore it is not due or payable before the Day, and if the Land be evicted or Lease determin'd before,

no Rent shall be paid; for there shall never be any Apportionment in Respect of Part of the Time, as upon Eviction of Part of the Land. But altho' Rent-Service was not apportionable, any more than Rent-Charge, till the Statute of *Quia Emptores terrarum*, which being made only for the Benefit of the Lord, does not extend to Rent Charge or Seck: Yet it seems at Common Law, Rent-Service might be apportion'd by the Act of God, or the Law, tho' by the Act of the Party it was otherwise. And by the same Reason in Conscience, if a Man be ignorant that he hath such a Rent out of the Land, which is *ignorantia facti*, or that the Law would extinguish his whole Rent by a Purchase of Part of the Land, which is *ignorantia juris*; even a Rent-Charge shall in such Case be apportion'd.

C A P. VI.

Sect. 1. **I**T remains in the last place, That we speak of the Execution of the Agreement. And 1st, That we inquire, what ought to be done on the Part of him who sues for a Performance. For when a Man takes upon him any Duty, not absolutely *gratis*, but upon the Prospect of the other's doing something on his Side; the Obligation to make good his Undertaking is only conditional. And therefore in the Law of Nature, it is a general Rule, That the particular Heads of a Contract are in the place of so many Conditions; and in Conditions all Things remain, before they are accomplish'd, in the same State as they were in by the Covenant. So at Common Law, in executory Contracts, *pro* makes a Condition precedent, except in some special Cases: As 1st. Where a Day is appointed for the Performance, and the Day is to happen before the Thing can be perform'd on the other Side. 2^{dly}, Where they are mutual and distinct Covenants, and not one in Consideration of the other. 3^{dly}, Where the Covenant on the Plaintiff's Part is in the Negative, which may be broken at any Time during his Life. For every Man's Bargain is to be taken as he intended, when he gives Credit, and relies upon his Remedy, it is reasonable that he should be left to it: But a Man shall not be compell'd to trust when he never intended it.

Sect. 2. He therefore, who demands the Execution of an Agreement, ought to shew, that there has been no Default in him in performing all that was to be done on his Part;

for, if either he will not, or thro' his own Negligence cannot perform the Whole on his Side, he has no Title in Equity to the Performance of the other Party, since such Performance could not be mutual. And upon this Reasoning it is, that where a Man has trifled, or shewn a Backwardness in Performing his Part of the Contract; Equity will not decree a specifick Performance in his Favour, especially if Circumstances are alter'd. So if a Man buys Land, or certain Shares of a Ship, and secures the Money, (*viz.* by giving Bond, &c.) if the Seller will not make an Assurance when reasonably demanded, he shall lose the Bargain; for the Party ought not to be perpetually bound without having a Performance. But if a third Person should take a Conveyance with Notice, and without Tender and Refusal, he would be liable. So where there was an Agreement between Lord and Tenant for inclosing a Common, that the Tenants should quit their Rights of Common, and the Lord should release them all of Quit-Rents, the Inclosure was prevented by pulling down the Fences, and the Tenants continue to use the Common; this is a Waiver of the Agreement.

Sect. 3. But if a Man has perform'd a valuable Part of the Agreement, and is in no Default for not performing the Residue, there it seems but reasonable, that he should have a specifick Execution of the other Part of the Contract, or at least that the other Side should give back what he has receiv'd, or use his best Endeavours, that he be not a Loser by him. For since he entred upon the Performance in Contemplation of the Equivalent he was to have from the Person with whom he contracted; there is no Reason why this accidental Loss should fall upon him more than upon the other.

Sect. 4. And some say, That in all Cases that lie in Compensation, Equity will relieve; for where they can make Compensation no Harm is done. So that altho' an express Time be appointed for the Performance of a Condition, the Judge may, after that Day is past, allow a reasonable Space to the Party, making Reparation for the Damage, if the Damage be not very great, nor the Substance of the Covenant destroy'd by it. As where the Condition is for the Payment of Money at a certain Time; for they may allow Interest for it from the Day it should have been paid, and the Forfeiture is a Penalty which is a Subject Matter of Relief. But where it is for the doing a collateral Act, they cannot know of what Value it is to the Party. And at Law, That which is granted or reserv'd
under

under a certain Form, is never drawn to a Valuation or Compensation; and he shall make his own Grant void, rather than the certain Form of it should be wrested to an Equivalent. For the Law allows every Man to part with his own Interest, and to qualify his own Grant, as he pleases; and therefore will not suffer any Satisfaction, or Recompence to be given in Lieu of it, if the Thing be not taken as it is granted. So in Equity, if a Creditor agrees to take a Sum of Money less than his Debt, if paid at such a Day, he cannot be reliev'd, if the Money is not paid. So where *A.* seiz'd in Fee, and having three Daughters, devises to Trustees to convey to the Eldest, if she shall pay 6000 *l.* to her two Sisters in six Months; and if not, then gives the like Pre-emption to the Second, and then to the Third: The Money must be paid punctually to the Time, and Chancery will not enlarge it.

Seet. 5. And we must agree, that Mens Deeds and Wills, by which they settle their Estates, are the Laws that private Men are allow'd to make, and they are not to be alter'd even by the King in his Courts of Law, or Conscience. So that altho', in Case of Conditions subsequent, that are to defeat an Estate, they are not favour'd in Law, and if the Condition becomes impossible by the Act of God, the Estate shall not be defeated or forfeited, and a Court of Equity may relieve to prevent the Devesting an Estate; yet it cannot relieve to give an Estate that never vested. And if the Party himself, who was Master of the Estate, and might have dispos'd of it as he pleas'd, is to be tied down to the Terms and Circumstances he had impos'd upon himself, and those that claim or derive under him: Those to whom he gives an Estate upon Terms and Conditions must stand much more oblig'd to the Performance of the Conditions and Circumstances upon which it is given; and if the Condition becomes impossible, even by the Act of God, the Estate will never arise. But Conditions to restrain Marriages annex'd to Legacies stand upon other Reasons; because Legacies being recoverable properly in the Ecclesiastical Court, where the Civil Law obtains, are here to be interpreted by the same Law, that there may be a Conformity in the Laws that govern them: And by the Civil Law, these Restraints are odious and not binding, unless there be an express Devise over, more than the Law implies.

Seet. 6. As to the Manner in which the Agreement is to be carried into Execution, it is to be observ'd, that there are some Rules peculiar to certain Kinds of Agreements relievable only

in this Court. Others belong more properly to the Municipal Law. As for the first, Contracts are divided into Gainful or Chargeable. Gainful Contracts bring some Advantage to one Party *gratis*, and therefore in these, the Magistrate is oblig'd to proceed according to the stated Forms and Rigour of Law; for else a Man's Generosity might prove too great a Burthen to him, if he should be bound to do more than he has expressly declar'd. But chargeable Contracts bind both Sides to an equal Share of the Burthen, for here we act, or give, in order to receive an Equivalent. So that they may well admit of Equity in the Interpretation: Since the Obligation being mutual, neither Party ought to be over-burthen'd. And the Court of Chancery makes the same Difference between voluntary and mutual Agreements. And therefore the Intent of Marriage-Articles appearing to be a reciprocal Contract between them for Settling each other's Claim ought not to be extended larger on one Side than on the other. But Equity will not carry a Covenant, being a free Gift, beyond the Letter.

Sect. 7. So altho' Limitations of Estates, whether it were by Way of Trust, or by Estate executed at the Common Law, are to be govern'd by the same Rule, and the Court must take the Words as they find them: Yet where Settlements are agreed upon valuable Consideration, this Court will aid in artificial Words, and make an artificial Settlement. As in the common Case of Marriage-Articles, where they are so penn'd, as that if a Settlement were made in the precise Words of them, the Husband would be Tenant in Tail: Yet this Court will order it to be settled on the Husband for Life only, and then upon the first and other Sons. For Articles are only Minutes or Heads of the Agreement of the Parties, and therefore ought to be so modell'd when they come to be carried into Execution, as to make them effectual according to the Intent. And if they come into a Court of Equity for a specifick Execution, the Court will provide, not only for the Sons of that Marriage, by proper Limitations, but likewise for the Daughters. And even altho' a Settlement were actually made in Pursuance of such Articles before Marriage, Equity will rectify it, in Favour of the Issue Female.

Sect. 8. But Equity will not interpose in Case of a bare Volunteer. And therefore in a Devise, if the Estate is executed, the Law must take place: But if executory only, the Intent and Meaning is to be pursued. As if *A.* devises Lands to Trustees to pay Debts and Legacies, and then to settle the Re-

mainder on her Son B. and the Heirs of his Body, with Remainder over, and directs, that special Care should be taken in the Settlement, that it should never be in the Power of her Son to dock the Intail; the Son shall be only Tenant for Life, but without Impeachment of Waste. And it is as strong in the Case of an executory Devise for the Benefit of the Issue; as if the like Provision had been contain'd in Marriage-Articles. But had she by her Will devis'd to her Sons an Estate-Tail, the Law must have taken place; and they have barr'd their Issue, notwithstanding any subsequent Clause or Declaration in the Will, that they should not have Power to dock the Intail; for a Devise differs from Marriage-Articles in this Respect, that the Issue under Marriage-Articles claim as Purchasers, but under a Will they are only Volunteers.

Sect. 9. And as this Court is to enforce the Execution of Agreements, and regards the Substance only and not Forms and Circumstances, it therefore looks upon Things agreed to be done as actually perform'd, as Money covenanted to be laid out in Land to be in Fact a Real Estate, which shall descend to the Heir. So where Money is agreed on Marriage to be laid out in Land, and settled to the Use of the Husband and Wife for their Lives, Remainder to their first and other Sons in Tail, Remainder to the Daughters in Tail, Remainder to the right Heirs of the Husband, provided, that if the Husband died without Issue, the Wife might make her Election, whether she would have the Land or Money; this Money is bound by the Articles, and shall not be Assets to satisfy Creditors, but the Heir shall have it, as the Land should have gone in Case the Money had been laid out according to the Articles; and here the Husband having Issue at his Death, tho' it died soon after, he could not be said to die without Issue, so no Election could arise to the Wife.

Sect. 10. But some say, that altho' Money shall in many Cases be consider'd as Land, when bound by Articles, in order to a Purchase: Yet whilst it remains still Money, and no Purchase made, the same shall be deem'd as Part of the Personal Estate of such Person who might have alien'd the Land, in Case a Purchase had been made. As if the Limitation were to be of the Lands, when purchas'd, to the Husband for Life, Remainder to his intended Wife for Life, Remainder to first and other Sons in Tail, Remainder to Daughters, Remainder to the right Heirs of the Husband; this Money tho' once bound by the Articles, yet when the Wife died without

Issue, became free again, and was under the Power and Disposal of the Husband, as the Land would likewise have been in Case a Purchase had been made pursuant to the Articles, and therefore would have been Assets to a Creditor, and must have gone to the Executor or Administrator of the Husband; and the Case is much stronger, where there is a residuary Legatee. Yet there can be no Fine levied of Money in Trustees Hands to be laid out in Lands.

Sect. 11. But 2^{dly}, We are to treat of such Rules as belong more immediately to the Municipal Law: Since where there is no particular Motive for Equity to interpose, the Court of Chancery follows the Law. And here we may observe in general, that Interpretation is a Collection of the Meaning out of Signs most probable: And these are Words, and other Conjectures. As for Words; the Rules are well express'd in the ancient Form of making Leagues, which appointed, that the Words should be expounded fairly, in the common Sense that the Words bore in that Place at that Time. And the Difference is apparent between Writs and Deeds, or Wills. For in adversary Writs, nothing shall be demanded or recover'd, but according to its proper Signification: And therefore a reputed Name will not serve. But in Deeds or Wills they shall be taken according to the common Intendment and Phrase of the Country; and so in a Verdict, or an amicable Writ; as a Fine or Recovery. But as to Names, either of the Person or Thing, in Deeds and Wills, or amicable Writs, the general Rules are these, 1st, *Quod de nomine proprie non est curandum dum in substantia non erretur*, and therefore a reputed or known Name is sufficient, and this need not be Time out of Mind, as in Prescriptions, but such convenient Time as they may be known by such Name *in Vicineto* where it is to be tried, 2^{dly}, *Quod nihil facit Error nominis cum de corpore constet*, and therefore where the Thing passes by Livery, *presentia corporis tollit errorem nominis*. 3^{dly}, If there be two of the same Name, there the Intent shall be taken. 4^{thly}, In Case of a Corporation or common Person, a Description, which is *vice nominis*, is sufficient, if the Person be so describ'd, as he may be certainly distinguish'd from other Persons. As Heirs of the Body of J. S. now living, is tantamount to Heir apparent. So, where he takes Notice in the Will, that others were his Heirs general: A Limitation to his Brother's Son by the Name of Heir Male, is a good Name of Purchase. But as all Devices to disinherit an Heir at Law are to be taken strictly, and the

the Words Heirs Males being a legal Term, where they are not accompanied with any other Words to determine the Sense otherwise, as Heir apparent, or Heir now living, &c. they cannot amount to a sufficient Description of the Person, if there be another who is Heir general. But a Remainder to the Heirs Male of the Body of *E. L.* is good, tho' *E. L.* is living at the Time when the Remainder happen'd to take Place, and the Heir apparent shall take.

Sect. 12. And not only the Place, but the Time is material; for the Contract takes Effect immediately, and therefore is to be interpreted as Matters stood at that Time. As in a Loan, the Value is to be estimated, as it was at the Time of the Contract. So in a Will, the Value of a Legacy of Sugars, payable such a Year, after the Time is elaps'd, becomes a personal Duty to be paid in Money here, of a mean Value of the Sugars there in that Year. So if a Settlement for a Jointure is made in Pursuance of Articles, and there is a Covenant in the Articles, that the Lands are of such a yearly Value; but it is omitted in the Settlement: Yet the Covenant shall be decreed *in Specie*, but the Value of the Lands are to be estimated, as they were at the Time of the Jointure settled, and not according to the present Value, Rents being now much fallen every where, unless the Covenant had been, that they should continue so. But every Man is to suffer for his own Delay or Neglect. And therefore he who does not perform his Part of the Contract, at the Time agreed on by the Parties, or appointed by Law, must stand to all the Consequences. As if *A.* is bound to transfer Stock before the 30th of *September* to *B.* and the Time is past, and the Stock much risen; he shall still be oblig'd to transfer so much Stock *in Specie*, at the Price it is now at, and account for all Dividends from the Time that it ought to have been transferr'd.

Sect. 13. It is certain therefore, that when Words may be satisfied, they shall not be restrain'd further than they are generally us'd, but they are to be understood in their proper and most known Signification. But all the Clauses of Covenants are to be interpreted one by another, in giving to each of them the Sense which results from the whole; for it is one entire Deed which ought to agree with it self, and all the Words take Effect by one Livery, and all tend to one End and Purpose. And all Deeds are but in the Nature of Contracts, and the Intention of the Parties reduc'd into Writing; and the Intention is chiefly to be regarded. In an Act of Parliament, the
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Intent

Intent appearing in the Preamble shall control the Letter of the Law ; (for the Preamble is as a Key to open the Meaning of the Act, tho' in Reality they are no Part of the Act, and introduc'd but of late Years ;) and in Case of a Deed made in Pursuance of Articles, the Articles shew the Intent of the Parties as much as a Preamble can that of an Act of Parliament.

Sect. 14. And it is a general Rule, that several Deeds made at one Time, are to be taken as one Assurance; yet every one hath its distinct Operation to carry on the main Design. And therefore where a Man covenanted by Marriage-Articles to pay the Legacies charg'd upon his Wife's Estate, and gave a Statute, and also a Mortgage of his own Estate, to secure the same, and by an Indorsement upon the Mortgage, the same was to be void, unless the Wife's Estate was settled upon him for Life, &c. according to the Marriage-Articles: This Indorsement, tho' upon the Mortgage only, is sufficient to discharge the Statute and Articles. Besides they being all executed at one and the same Time, the same Witnesses, and Part of the same Agreement, are all to be look'd upon as but one Conveyance. So where a Father put his Son Apprentice, and gave a Bond for his Fidelity, and at the same Time took a Covenant from his Master, that he should at least once a Month see his Apprentice make up his Cash; this Bond and Covenant ought to be taken as one Agreement, and therefore the Father shall be answerable for no more than the Master could prove the Apprentice imbezzel'd in the first Month when the Imbezzlement began.

Sect. 15. But that which helps us most in the Finding out the true Meaning, is the Reason or Cause which mov'd the Will. And this is of the greatest Force, when it evidently appears, that some one Reason was the only Motive that the Parties went upon; which is no less frequent in Laws than in Facts. And here that common Saying takes Place, *That the Reason ceasing, the Law itself ceases.* So a Present made in Prospect of Marriage may be revok'd, and demanded back, if the Marriage does not take Effect, especially, if it sticks on that Side to whom the Present was made. And with this agrees the Practice of the Court of Chancery, where if a Term be rais'd for a particular Purpose in Pursuance of Marriage-Articles, when that Purpose is answer'd, it shall fall again into the Inheritance, and shall not be Assets to pay any Debts, but what

affect the Inheritance; as Bond-Debts, and Debts of a superior Nature, and not simple Contracts.

Sect. 16. And the Matter which he is about, is always suppos'd to be in the Mind of the Speaker: Altho' his Words seem to be of a larger Extent. As general Words in a Release of all Demands, or the like, shall be restrain'd by the particular Occasion, and shall be intended only of all Demands concerning the Thing releas'd. So the Limitation of the Trust of a Term, which was the Husband's, upon his Marriage with *A.* to himself for Life, Remainder as to a Moiety to *A.* for Life, for her Jointure, Remainder to the Heirs of the Body of *A.* by him begotten, Remainder as to the other Moiety to the Children of the Body of *A.* must be intended the Children of that Marriage, and not as a Provision for any Child of her's by any other Husband. So the Condition of a Recognizance shall be qualified in Equity, according to the Intent and Equity of the Case for which it was given.

Sect. 17. And from the Regard that the Law it self gives to the Intention of the Parties, it is that where there is a Fine by Way of Render, there shall be no Dower, and so a Rent or Recognizance shall not be extinguish'd, by levying a Fine to the Party. And altho' a Fine and Non-claim is a good Bar to an Equity of Redemption, or to a Bill of Review; yet it would be otherwise where levied upon the Making of the Mortgage only to strengthen the Security. But there are some Cases where Equity will carry the Conveyance further than he intended it upon apparent Equity: As if a Tenant in Tail confesses a Judgment, &c. and suffer a Recovery to any collateral Purpose, that Recovery shall enure to make good all his precedent Acts and Incumbrances.

Sect. 18. And where Words, if taken literally, are likely to bear none, or at least an absurd Signification, to avoid such an Inconvenience, we may deviate from the receiv'd Sense of them; for the Agreement of the Parties is the only Thing which the Law regards in Contracts. And it is a known Rule, that a Man's Act shall not be void, if it may be good to any Intent: For every Deed is made for some Purpose. So that for the Necessity, *ne res pereat*, where there is no other Way of satisfying the Will and Intent, the Words may be taken in the most extensive and improper Sense. As a Rent or Reversion of Tithes, will pass by a Devise of all his Lands. So a Trust to raise out of the Profits implies a Sale, especially if

if it cannot be rais'd conveniently within the Time limited. Otherwise if it be of the annual Profits.

Sect. 19. *Lastly,* There is a Difference between Testaments and Deeds. For in Testaments it is only one Person who speaks, and his Will ought to serve as a Law, of which every Part shall stand together, if it may; and therefore if a Man in the first Part of his Will devise his Land to J. S. and in the latter Part to J. N. they shall have a joint Estate: Or if in the latter Part, he had devis'd a Rent of it to J. N. this should have been constru'd first a Devise of the Rent to J. N. and afterwards of the Land to J. S. charg'd with the Rent. For a Will is for the Benefit of the Testator, and at most implies only a Consideration of Love and Affection, and therefore shall not be taken strongest against the Testator, or most beneficial for the Devisee, but equally. But a Deed imports a valuable Consideration, and is for the Advantage of the Grantee alone: And therefore if there be any Doubt in the Sense, the Words are to be taken most forcibly against the Grantor, that he may not by the obscure Wording find Means to evade it. And the Grantor cannot by any Act of his derogate from his Grant, or contradict in the latter Part what he has pass'd by the Premises, for his Act shall be constru'd most forcibly against himself. And the latter Part may qualify and explain the Premises, or enlarge them; for no Word shall be rejected that may properly stand; but not abridge, or contradict, or control them; for this would be repugnant. But this is meant only of divided Clauses: For of one Clause carried on with a Connection till the Whole is finish'd, the Law is otherwise. And indeed in one Sentence it is in vain to imagine one Part before another, since the Mind of the Author comprehends them at once.

Sect. 20. And so much for the Discovery of the Meaning where the Consent is declar'd by express Signs. Yet sometimes it is sufficiently gather'd from the Nature and Circumstances of the Business it self. What we most commonly meet with of this Kind is, that when some principal and leading Contract has been enter'd upon by express Agreement, some other tacit Pact is included in it, or flows from it, as we cannot but apprehend upon considering the Nature of the Affair. It is upon this the Principle of Law is founded, that when ever the Law, or the Party, giveth any Thing, it giveth implicitly whatever is necessary for the Taking and Enjoying of the same. But Things appendant, appurtenant, or regardant, do

not pass without the Words *cum pertinentiis*; because they are not express'd nor implied by Law in the Grant. And there is no Sort of Covenant in which it is not understood, that the one Party is bound to deal honestly and fairly by the other, and to do whatever Equity may demand. As if the Price be omitted, it is to be estimated at the common Rates. So the Time of Payment or Delivery being added only in Favour of him who is oblig'd, he is bound to do it, or pay, immediately, if it requires a necessary delay. So if the Place be omitted, it shall be deliver'd at the Place, where it happens to be at the Time. In the same Manner most Covenants leave some slight Exceptions and Conditions to be understood. But in all these it is strictly requir'd, that not so much as one probable Conjecture appear to the contrary, *Tale oportet sit quod pro naturâ actus credi debeat exceptum*. For otherwise it would be easy to thrust a troublesome Obligation upon a Man against his Will. And were too great a Licence given to these secret and implied Reserves, there is scarce any Covenant which might not be either annull'd or evaded by them.

B O O K II.

C A P. I.

Sect. 1. **W**E will now proceed to some of the particular Kinds of Agreements, which occur most usually in Chancery. And 1st, Of a *Depositum* or Trust, to which this Court owes its Original, and which, if well consider'd, will still be found to make the principal Business here. For who ever has the Possession of Goods or Lands, either hath the absolute Property or Estate in them, by a sufficient Title; or, so far as this is wanting, is consider'd as a Trustee for the true Owner. And no Man can be depriv'd of his Estate and Property, but with his Consent, or by Order of Law; as by some Contract or Conveyance, or by a Forfeiture for some Crime, or Want of Claim in due Time, or for some other Default or Negligence in him. And therefore if a Man pays Money upon a Mistake, it not being intended as a Gift, the Receiver shall take it only in Trust for him that paid it. And he may recover it back again even at Law. But if the Payment were upon an illegal Contract, the Law will not en-

courage ſuch Engagements ſo far, as to help him again to his Money; tho' if it were unlawful only on the Part of the Receiver, it might be otherwiſe. And the ſame Rules may be applied to all other Engagements.

Señt. 2. Now an Uſe is a Truſt, or Confidence, which is not iſſuing out of the Land, but as a Thing collateral, annexed in Privity to the Eſtate, and to the Perſon concerning the Land, *viz.* that *Ceſtuy que Uſe* ſhould take the Profits, and that the Terre-Tenant ſhould make Eſtates according to his Direction, and plead ſuch Pleas as he ſhould ſupply him with at the Coſts and Expence of the *Ceſtuy que Uſe*. So that the *Ceſtuy que Uſe* had neither *Jus in re* nor *ad rem*, *i. e.* neither a Right in Poſſeſſion, nor in Action; but only a Confidence and Truſt which the Common Law, tho' it took Notice of, would not protect, nor give him any Remedy for it; but his Remedy was only by *Subpoena* in Chancery. And if the Feoffees would not perform the Order of Chancery, then their Perſons were to be imprifon'd for the Breach of the Confidence, till they did perform it. For Chancery will not ſuffer a Right in Conſcience to be without a Remedy; and the firſt Feoffment ſhall not come in Examination, but only whether in Conſcience the Intent ought not to be perform'd.

Señt. 3. But theſe Uſes proving a great Grievance to the Kingdom, and therefore eſteem'd odious in the Law, they being founded uſually in Fraud, to evade the Statutes of Mortmain, or to prevent Forfeitures, or the Wardſhip of the Heir, or juſt Debts, and the like; for they were accounted in Law neither Chattel, nor Hereditament, and were no Aſſets to the Executor or Heir, neither could they be forfeited; the Statute of 27 *H. 8. cap. 10.* to prevent theſe Inconveniencies, hath ſince executed the Poſſeſſion to the Uſe, ſo that ſuch Uſes have now the ſame Qualities, as Eſtates at Common Law, and a Rent may be reſerv'd out of them. And there ſhall be a Tenancy by the Curteſy of ſuch an Eſtate veſted, and it ſhall be Aſſets; for the Uſe and Poſſeſſion paſs by Virtue of the Statute both together in one Inſtant, *tanquam uno flatu*. And a Bargain and Sale of an Eſtate for Years is capable of Release by this Statute, and ſo is the conſtant Practice: Which Method of Conveyance, was firſt devis'd by Sir Francis Moor. Yet actual Poſſeſſion is not in the *Ceſtuy que Uſe* by this Statute; neither upon ſuch a Seifin can he maintain an Ejeñtment, for it is impoſſible an Act of Parliament ſhould give any more than a civil Seifin. And Mr. Noy was of

Opinion, that this Conveyance by Lease and Release could never be maintain'd, without the actual Entry of the Lessee, as the ancient Course was: And in the Case of a Common Law Lease, this may perhaps be true, for the Estates are not divided till then, and so no Privity.

Sect. 4. Yet, notwithstanding this Statute, there are three Ways of creating an Use or a Trust, which still remains a Creature of the Court of Equity, and subject only to their Control and Direction. *1st*, Where a Man seiz'd in Fee, raises a Term for Years, and limits it in Trust for *A.* &c. for this the Statute cannot execute, the Termor not being seiz'd. And the Law is the same of Annuities, and personal Chattels; for the Statute intended to remit the Common Law, and Chattels might ever pass by Testament or Parol only. And the Word (Person) excludes all dead Uses, which are not to Bodies living and natural. *2^{dly}*, Where Lands are limited to the Use of *A.* in Trust to permit *B.* to receive the Rents and Profits; for the Statute can only execute the first Use. And the Common Law rejected the second Use as void, but Chancery consider'd the Intent of the Conveyance. *3^{dly}*, Where Lands are limited to Trustees to receive, and pay over the Rents and Profits to such and such Persons: For here the Lands must remain in them to answer these Purposes. Otherwise they would be the Trustees, contrary to the express Words of the Will or other Conveyance.

Sect. 5. And the Statute did no more, in executing the Possession to the Use in the same Plight as he had the Use, than Equity would have done before. So that Uses are rais'd by the same Conveyances and Agreements, as before the Statute. And as at Common Law, they being a Creature of Equity, that is, only an equitable Right or Conscience, and no Possession, are guided entirely by the Rules of Equity, and not subject to the Rules of Common Law, tho' in a Deed. For the Operation of the Statute is, by bringing the Possession to the Use, and not the Use to the Possession. So that altho' after they are executed by the Statute, Uses seem not to differ from the Possession: Yet before they are govern'd by Equity, and the not Regarding this, but striving to construe them by the strict Rules of Common Law, was the Cause of many erroneous Opinions, both before and after the Statute.

C A P. II.

Sect. 1. **N**OW an Use at Common Law might be created two Ways. *1st*, By the Intent of the Parties upon Transmutation of the Possession. Or *2^{dly}*, By an Agreement made upon an effectual Consideration, without Transmutation of Possession. The Intent, upon Transmutation of the Possession, might be declar'd by Writing, or by Parol. For the Use was there according to the Intent, and no Matter how that Intent was manifested. Since an Use is but a Trust, which is not like Land, for Land cannot pass without Livery; but an Use one may give or devise at his Pleasure by nude Parol, for a Devise is as a Gift. And so the Practice was before the Statute of Wills, to put their Lands in Use, that they might pass without Livery. And the Limitation of the Uses was to be by him who had the Estate in the Land according to his Intent. For if no Intent was express'd, nor Consideration effectual implied, the Use arose to the same Person who gave the Estate, according to such Interest as he convey'd. And the Use ensu'd the Ownership of the Land, without having Regard to Estoppells, which are adverse to Truth and Equity. For the Conveyance standing indifferent, the Chancery thought it best to put the Proof upon him, who took the Possession; and if he fail'd, would have compell'd a Re-conveyance. But where there was an express Consideration, an Use limited contrary to it was void. As if upon a Sale or Lease with Rent reserv'd, the Use were limited to the Vendor or Lessor. Otherwise of a Consideration implied: As in a Devise to an Use, the Use may be executed, if the Intent of the Devisor appear to be so. Yet a Devise imports a Consideration in it self, and therefore cannot be averr'd to be to the Use of another than of the Devisee, or for a Jointure, unless it be express'd in the Will.

Sect. 2. An Agreement to raise an Equity to have the Land ought to have an effectual Consideration; as Money, Pains, and Travel, Marriage, or natural Affection. For an Use will not arise either by Deed, or Deed inroll'd, without an actual Consideration: Altho' a Deed, for the Solemnity, imports a Consideration in Law. And there are two Sorts of good Consideration; a Consideration of Nature and Blood, and a valuable Consideration. But there is this Difference between them, that Money
may

may be given by one, in Consideration of all the Estates; for it being given for them, they are made Parties to the Consideration: But natural Affection will not raise an Use to a Stranger to the Consideration. And this is the Reason, that a general Power in such Case to limit Uses to any Body is void. So that a Limitation afterwards, tho' to his Daughter, is not good: For a good Execution will not profit, where the Constitution is defective. And in a Covenant to stand seiz'd, where the Consideration is general, and the Person uncertain, no Averment can be taken: But when the Person is certain, such an Averment may be taken as stands with the Deed. And so where the Consideration is particular and certain, as of brotherly Love or Advancement of his Blood; there the Person by Matter *ex post facto*, may be made certain. And altho' there be a Consideration express'd, yet any other may be taken, as stands with it, and is not repugnant. But it matters not whether the Consideration be past, present, or future: Only a Consideration executory will not raise an Use, till it be executed. Neither in a valuable Consideration is the *Quantum* regarded in Law. Nor any Averment allow'd to the Heirs, that the Consideration express'd was false, or not paid; for he is estopp'd by the Deed. And upon these Considerations, if any Agreement be made by the Owner of the Land, this Agreement makes a sufficient Equity, for those to have the Land to whom it is appointed by the Agreement. For if an Equivalent be given, tho' the Contract be not executed with all the Formalities of Law: Yet in Equity the Use of the Lands ought to be in the Purchaser. And so if a Man parts with any Lands in Advancement of his Issue, and to provide for the Contingencies, and necessary Settlements of his Family, it is fit the Chancery should make such Conveyance good, tho' they want the Ceremonies of Law, so as they may best comply with the Peace of Families; for their Establishment is Part of the Nature and End of Government. But if I bargain and sell Land to my Son, no Use arises unless there be a Consideration of Money; for selling, *ex vi termini*, supposes my transferring a Right of something for Money the common Medium of Commerce. And if there be no such Consideration, it may be an Exchange, a Covenant to stand seiz'd, a Grant, &c. but it can be no Sale.

Seet. 3. And it was much controverted at first, whether a Deed were necessary to the Raising of an Use? In a Bargain and

and Sale, it was agreed on all Sides, not to have been requir'd at Common Law; by Reason of the Consideration given for the Land; and that was the Cause why the Fee-simple would pass there, without the Word Heirs. And it was said that a Man's Blood, and the Building up a Family, is of more Value to him than his Money. And where throughout the whole Body of the Law shall it be seen, that to any Thing which may pass by Contract, there needs any other Thing than the Words, which make the Contract, as Writing, or the like, testifying it? And that the Law was so, appears by the Statute of 27 H. 8. which was made to alter it as to the Freehold in Bargains and Sales; but by an Exception at the End of the Statute, *London* is as it was at Common Law. And Uses in such Cases, in Respect of Marriage, which is always a Thing publick and notorious, were for the Solemnity left at Common Law: And not restrain'd, as the Bargain and Sale, which by common Presumption may be made more secretly and easily. Yet notwithstanding these Reasons, this Point hath been since clearly determin'd otherwise; for the Mischief that would follow, if an Use should arise without a settled Resolution, manifested by a Deed.

Sect. 4. And now by Stat. 29 Car. 2. altho' a Lease for three Years, &c. may be made by Parol: Yet when it is made in Writing, the Trust of that Lease cannot be declar'd by Parol. But a Confession of a Trust in an Answer for the Wife and Children, tho' no Proof of it, will be good in Equity. So if the Son prevails upon the Mother, to get the Father to make a new Will, and make him Executor in her Stead, promising himself to be a Trustee for the Mother; this will be decreed a Trust for the Wife, on the Point of Fraud, notwithstanding the Statute of Frauds and Perjuries.

Sect. 5. Also the Declaration of Uses ought to have a clear and apparent Intent, and not to be upon general Words, or Words spoken *in futuro*, (for these are executory, and found only in Covenant) but spoken advisedly, and *in presenti*, which is an immediate Gift. The Words must likewise be declaratory, and not obligatory; for then they have another Effect. 2^{dly}, The Declaration must be certain; for else there would be no Certainty of Inheritances. And this Certainty ought to be principally in three Things, *viz.* in Persons to whom, in Lands, &c. of which, and in Estates by which Uses shall be transfer'd and declar'd. And if Certainty is wanting in any of these, the Declaration is not sufficient.

3^{dly}, The Declaration must be precedent or present, and perfect and compleat, and not as a Communication in Reference to Matter to be put into Writing after. Yet a Deed subsequent may declare the Uses of a Recovery, &c. precedent; because in Judgment of Law, it purports against the Maker and his Heirs, viz. by Estoppel, since nothing appears to the contrary, that there was a certain and compleat Declaration of the Uses of the Time of the Recovery, &c.

Sect. 6. And where the Uses of a Recovery are declar'd by Deed precedent, no new or other Uses can be averr'd by Parol; for nothing vests till the Recovery be had, and then the Parol Declaration shall not control the Deed precedent, but all Parties are estopp'd to aver the contrary. And in Case of a Deed precedent, if the Party set up other Uses, he must confess and avoid; for *unumquodq; dissolvitur eo ligamine quo & ligatum est*. 2^{dly}, But if there be two Deeds, the last shall stand, and not both; for it would be contrary to the Intent of the Parties to make an Hotchpot and Commixtion of them, which by their Creation were distinct, and several, in Time, Persons, and Estates. 3^{dly}, This is intended where the Fine or Recovery is pursuant; for if they vary, there is Room and Occasion given to inquire and receive Information, that the old Agreement was relinquish'd. And by the same Reason, that the Use of a Fine may be declar'd by Parol upon an original Agreement, it may also, where the original Agreement is relinquish'd. Yet without such Averment the Fine shall be intended to the Use of the said Agreement, notwithstanding the Variance. 4^{thly}, But where they are by Deed subsequent, new, or other Uses may be averr'd, without shewing the Deed, tho' there be no Variance: Because there was an intermediate Time, when there might be such Agreement made. And the Uses arise by the Recovery according to that Agreement, and cannot be divested by any Declaration by Indenture subsequent; and if a Deed subsequent be set up, the other may traverse those Uses.

C A P. III.

Sect. 1. **B**UT altho' Uses are no more than an equitable Right to the Land, and to be determin'd only in a Court of Equity: Yet Equity often follows the Law, and especially in voluntary Conveyances, or where there is no particular

cular Reason to favour one Side rather than the other. There is a known and establish'd Difference therefore between the Limitation and Creation of Uses. For in their Creation the Intent of the Parties is chiefly to be regarded: And if the Intent is manifest, tho' void, yet the Conveyance shall never take Effect any other Way. As if Uses are limited upon the Estate intended to be transferr'd, or there be any other Circumstance in the Deed that shews he design'd to pass it at Common Law; because the Intent is the great Director of Uses, and no Construction can be made against the Intent apparent. Yet the precise technical Words of Bargain and Sale, or Covenant to stand seiz'd, are not requir'd to raise an Use: But any Words sufficient to shew the Intent, or that are tantamount with good Consideration, will do. And the Judges have more Regard for the Substance, than the Shadow and Form, and will make a Man's Intent good in passing his Estate, if by any lawful Means it may take Effect.

Sect. 2. But as Forms and technical Words in Conveyances are appointed by Law for the general Peace and Quiet, the Words of Limitation of Estates must be the same by Way of Use, as in a Feoffment, and so in all common Assurances, and thus Uses differ from a Devise. For there, any Words which shew the Intent are sufficient, if it could be made good by any Conveyance in his Life-time; because the Law intends the Devisor to be *inops consilii*, Wills being usually made *in extremis*. So that any Words which shew the Intent, that the Devisee should have the Land for ever, will make a Fee-simple without the Word Heirs, as *in perpetuum*, or paying where the Payment is of a Sum in Gross, and he may not be able to pay it out of the Profits. So where he has Power to give a Fee, he is constru'd to have one, unless he has an express Estate divided from the Power. And in general, where-ever Lands are devis'd for a special Purpose, or for Payment of Debts, or the like, without any Words of Limitation; he shall have an Estate to answer that Purpose, by Implication of Law. So where A. having only a Remainder in Fee after an Estate-Tail to B. devises all the House call'd the *Bell Tavern*, to C. without saying for what Estate, the Fee passes, otherwise C. should have nothing. And altho' in a Deed, an Implication is never admitted, neither shall there ever be cross Remainders upon Construction of it: Yet in a Will it is otherwise. But there must be an express Intent to be collected out of the Words, or a necessary Implication, or else the

Heir

Heir at Law shall not be disinherited ; for his Title is clear, and not to be doubted of.

Sect. 3. So if the Intent of the Testator may be collected out of his Will, that he design'd an Estate-Tail, tho' the Word (Body), which properly creates an Estate-Tail, is left out, yet it is an Estate-Tail. As if Lands are devis'd to one, and if he dies before Issue, or not leaving Issue, or not having a Son, all these Limitations create an Estate-Tail. And the Meaning of the Testator is to be spelt out by little Hints, and no Word to be rejected which may possibly be made to stand. And therefore a Devise to a Man and the Heir of his Body, tho' in the singular Number, or to the Issue of his Body, is an Estate-Tail, if he had none at the Time that might take jointly with him, according to the Rule of Law, the Gift being immediate. For Heir is *nomen operativum & collectivum*, and chiefly in a Will, shall be taken in its full Extent, and then it reaches the most remote Heir.

Sect. 4. And whensoever the Ancestor takes an Estate for Life, and after a Limitation is made to his right Heirs, the right Heirs shall not be Purchasers. And no Difference where the Law creates the Estate for Life, and when the Party, or where there is an intervening Estate, especially if not of Freehold. And as Ancestor and Heir are cor-relative as to Inheritance, so are Testator and Executor as to Chattels ; and therefore a Remainder of a Term to the Executor vests in the Testator. Nor will the Intention, tho' in express Words, control the Operation of Law upon the Words express'd. As where the Ancestor has an Estate for Life given to him expressly, a Limitation after to his Heirs, or to the Heirs Male of his Body, puts the Estate of Inheritance in himself: Otherwise, perhaps of Heir Male only in the singular Number, especially if there be Words of Limitation after it. And tho' there be a Difference in Words, when the Land of Freehold is devis'd to one for Life, the Remainder to his Heirs, mediately or immediately ; and where a Term is so devis'd, the Difference is in Words only, for the Testator's Meaning is the same. And new Estates, Jointures, and Settlements are of long Terms, and a Similitude is between them, &c.

Sect. 5. There ought also to be one universal Rule of Property in the Realm, the same in Chancery as at Common Law. And therefore the Rules to prevent Perpetuities are the Policy of the Kingdom, and must take Place in a Court of Equity, as well as in any other Court ; and it is an undeniable

Reason against any Settlement. So that there can be no such Thing as a perpetual Limitation of a Freehold. And if there be a Devise over to a Charity, in Case he go about to alien, it will not avail or make the Condition good: However, there ought to be a strict Settlement made, and the Intent follow'd as far as the Rules of Law will permit. Nor can a Devise direct an Inheritance to descend against the Rules of Law, as to the Heirs Male in Fee; for what could not be made valid by any Act executed in his Life-time, cannot be good in a Devise. And therefore a Term limited to a Man and his Heirs, shall go to the Executors. So a Will in *Dutch* or *Latin* must be so fram'd, as to pass an Estate according to the Rules of our Law; for a Will or other Act of the Party cannot rule the Law, but the Law rules them.

Seet. 6. But so long as it may be made consistent with the Rules of Law; the Devise shall not be impeach'd. And therefore, altho' a Freehold cannot be granted *in futuro*, by a Conveyance in his Life-time: Yet where a Man in his Will gives a future Estate to arise upon a Contingency, and does not part with the Fee at present, but retains it, this is not against Law. For by the Common Law, one might devise that his Executor should sell his Land, and in such Case the Vendee is in by the Will, and the Fee descends to the Heir in the mean Time; and of the same Nature with these are springing Uses. But as for springing Uses, like executory Devises, they are either present or future. If present; the Party must be *in esse* & *capax* at the Time; for it shall take Effect according to the Intent or not at all. As a Feoffment to the Right Heirs of *B.* is not good as to a springing Use; because it is by Way of present Limitation, & *non est Hæres Viventis*: Otherwise if it were future, as to the right Heirs of *B.* after his Death, & *sic nota diversitatem inter verba de presenti, & verba de futuro.* 2dly, If future, they must arise within a reasonable Time; as a Feoffment to the Use of *A.* after the Death of *B.* without Issue, within twenty or thirty Years, or the Compass of a Life or Lives, is good, as a springing Use, and the whole Estate remains in the Feoffor in the mean Time; for let there be ever so many, it is but one Life, and must have an End. But a springing executory Use, after a Dying without Issue, the Law will not expect. Nor can it be limited after a Fee; for after such a Disposal, nothing remains in the Owner to limit. But there may be two concurrent Contingencies, and not expectant one after the other; as where the

Devisor parts with the whole Fee-simple, but upon some Contingency qualifies that Disposition, and limits another Fee, which is altogether new in Law. And the *ultimum quod fit* of a Fee upon a Fee in the Limitation of an Use, is not yet plainly determin'd. It may be extended further than a Life or Lives, as to a Year after, and the true Rule is to stop when it proves inconvenient. Nor is there any Danger of a Perpetuity from these Uses, as from executory Devises; for all Uses as well *in esse*, as otherwise, may be destroy'd by the Alteration of the Estate to one against whom the Remedy fails in Equity, there being no Confidence express'd or implied. But every executory Devise is a Perpetuity, as far as it goes, that is an Estate unalienable, tho' all Mankind join in a Conveyance. And it is to be remember'd, that as an executory Devise is never after a Freehold, but it is constru'd a contingent Remainder; because it is admitted only for the Necessity, and to support the Intent, as after a Term for Years, or the like, upon which a contingent Remainder cannot depend by Reason of the Abeyance of the Freehold: So there is the same Difference between a future Use and a contingent Remainder, by Way of Use.

C A P. IV.

Sect. 1. **B**UT further, Where the Intent of the Parties does not specially appear, it is intended to agree with the Rules of Law. And therefore the Chancellor, in Case of an Use, often adjudg'd by Imitation of the Rules of Law, and according to the Nature and Quality of the Land; as in Case *de possessione fratris*, Borough English, Gavelkind, Lands on the Mother's Side, &c. for Chancery will consult with the Rules of Law, where the Intention of the Parties does not specially appear. So the Widow of the *Cestuy que Trust* of a Copyhold Estate, ought to have her Free Bench or Widow's Estate, as well as if the Husband had had the legal Estate in him: And there it may be said, that *Æquitas sequitur legem*. So a Tenant by the Curtesy, shall be decreed of a Trust as well as of a legal Estate. But Dower is not allow'd out of a Trust Estate, nor was it anciently of an Use, and most Estates being then in Use, was the first Occasion and Original of Jointures: Tho' no Manner of Reason can be given for it, if it were *Res integra*, but the Authorities are clearly so, and it would overturn many Settlements to make an Alteration in it.

Sect. 2. Upon the same Kind of Reasoning it is, that a Trust of a Term must go as the Term at Law would have done by the like Limitations, and if it be given to two jointly, as Survivorship would have taken Place at Law, it must do the same in Equity: Yet the Advantage of Survivorship is against Equity; but the Judges will have it so even in a Devise to Executors. And the Distinction seems to be, where two become Joint-tenants, or jointly interested in a Thing by Way of Gift, or the like, there the same shall be subject to all the Consequence of Law; for in Favour of Volunteers, there is no Reason for Equity to interpose. But as to a joint Undertaking in the Way of Trade, or the like, it is otherwise; and the Custom of Merchants is extended to all Traders to exclude Survivorship.

Sect. 3. Yet Terms are admitted to attend the Inheritance to protect it for Purchasers; and this came up in Queen *Elizabeth's* Reign, since the Way of limiting Terms in Mortgage came in Use. These Trusts of Terms attending on the Inheritance, tho' entail'd, were not within the Statute *de donis*, and might be alien'd by the Parties; but of Terms in Gross not, and therefore the Judges would not admit of their being entail'd. And a Term attendant becomes in Gross, when it fails of a Freehold and Inheritance to support it, and is divided from the Inheritance by different Limitations, or the like. The Trusts of a Term in Gross therefore can be limited no otherwise in Equity, than the Estate of a Term in Gross can be limited in Law; for they are not for setting up a Rule of Property in Chancery, other than that which is the Rule of Property at Law. So that the Rules are the same in Equity in Cases of Trusts of Terms, as in Devises at Common Law.

Sect. 4. But a Difference between a Chattel and Inheritance, is a Difference only in Words, and not in Reason of the Nature of the Thing. For the Owner of a Lease has as absolute a Power over his Lease, as the Owner of an Inheritance over his Estate; and where no Perpetuity is introduc'd, nor any Inconvenience does appear, there no Rule of Law is broken. A Term may therefore be limited to twenty successively for Life, if all in Being together, because they must all wear out in a little Time. And so it is a good Limitation, where the Contingency is circumscrib'd within the Space of twenty-one Years, or the Compass of a Life, and one Step further, *viz.* to the first Son, tho' not *in esse*, at the Time. And so just and reasonable is this Allowance to make Provision for Families,

lies, that where the common Lawyers have complain'd, that this Court did encroach upon them, it may on the contrary be retorted, that they ought rather to confess themselves beholden to this Court for their Rules in Equity.

Sect. 5. And it is no strange Notion at Law, that long Terms for Years should attend and wait on an Inheritance, in which Case they are to be govern'd and directed by the Intention of the Parties, that created them. And when they have done their Office, Duty, and Trust, and have born the Burthen, I mean have rais'd the Portions, which was the original Cause of their Creation, then ought they in Equity and Conscience to cease, and return back to the Channel, from whence they were extracted. For it is a Reason in Law, that *cessante causâ cessat effectus*. And there is no original Consideration to give them a longer Being: So that such a Term ought not to be made Use of to any other Purpose, especially to deprive a Dowress of her Dower. But these Terms have been always look'd upon as a good Security to a Purchaser against Dower, tho' the Purchase was with Notice; and frequently to avoid Charges, they never insist on a Fine or Recovery.

Sect. 6. But it is said, that if the Term be not expressly declar'd in the Assignment to be attendant on the Inheritance, but is so only by Construction in Equity, it shall in Equity be Assets for the Payment of Debts, but the Heir shall have the Surplus. And so the Difference that had been formerly taken in this Case between legal and equitable Assets, has been exploded. Yet the Law seems now otherwise. For a Term in the Owner, is Assets at Law, but a Term in Trust is not to be made Assets in Equity, and it would be dangerous to Purchasers to make it so. Neither shall the Custom of *London* prevent the Attendance of a Lease on the Inheritance, tho' there was no Declaration of Trust, that it should be attendant. So if a Feme Covert hath such a Term, it shall not survive to the Husband. Indeed if a Man purchases an Inheritance in the Name of Trustees, and takes a mortgaged Term carv'd out of such Inheritance in his own Name, in Order to protect the Inheritance, such Term will be liable to the Payment of his Debts; because it still remains as a Chattel in him. But if they are both in the Name of other Persons, there is no Difference in Reason, whether he had the Term or Inheritance first in him: But the Heirs are to have the Lease to attend the Inheritance.

C A P. V.

Sect. 1. **B**UT we must examine more particularly to whom the Use shall be by Operation of Law, where there is either no Declaration, or but in Part only, and here it is a general Rule, that the Trust results to the Party, from whom the Consideration moves. As *1st*, In Case of a Purchase; where a Man buys Land in another's Name, and pays the Money, it will be in Trust for him that pays the Money. So if *A.* agrees for a Lease for ninety-nine Years, and *B.* advances the Money, and the Lease is taken in the Name of *A.* this is a resulting Trust, and out of the Statute of Frauds, *A.* having by Letter acknowledged the Trust. So where one of the three, that held a Lease under the Dean and Chapter, surrenders the old Lease, and takes a new one to himself, this shall be a Trust for all. But altho' in the Purchase-Deed, the Consideration-Money is mention'd to be paid by the Purchaser, and there is no express Declaration of a Trust; yet it appearing upon the Face of the Deeds to be a Trust for an Infant-Heir in Pursuance of Marriage-Articles, and the Purchaser at the Courts he held, declar'd it was his Son's Estate, it shall be decreed a Trust for him, tho' to the Disappointment of the Purchaser's Will, and of his Creditors. For tho' Creditors are Favourites, yet we must not pay them out of other Mens Estates; nor, as Justice *Twydden* said, steal Leather to make poor Men's Shoes.

Sect. 2. And if a Father purchase Lands, &c. in the Name of a Son unadvanc'd, it is an Advancement for him, not a Trust; for the Father is bound by the Law of Nature to provide for his Children, and Chancery will compell him, if they are destitute, and not able to maintain themselves. But if the Trust is declar'd before, or at the Time of the Purchase; or the Father has already provided for him; or the whole Estate is not given him, but Part of it to another; or if he were of full Age, and the Father acts as Proprietor, or does any Thing, which implies him to be Owner of the Land; this shall over-rule the Presumption of Law, in Favour of him. As to the Grandfather, there is a Difference in the Case, where the Father is dead, and where he is still living; for when the Father is dead, the Grandchildren are in the immediate Care of the Grandfather. And therefore if he takes Bonds in their Names, or makes Leases to them, they shall not be adjudg'd

as Trusts, but as a Provision for the Grandchild, unless it be otherwise declar'd at the same Time. But this is to be understood only of legitimate Children; for of a Bastard or reputed Child, the Law takes no Notice.

Sect. 3. So the Wife cannot be a Trustee for the Husband; but if the Husband purchase in her Name, it shall be presum'd to be an Advancement, and Provision for her. And the Law is the same, where the Purchase is to himself, his Wife and Daughter, and their Heirs; or of Money lent, on Mortgages and Bonds in their Names. Yet in Case of Creditors it may be fraudulent as to them, unless the Purchase is made in Pursuance of Articles before the Marriage, or as a Settlement upon the Wife upon her Marriage. And by the same Reasoning it is, that where a Wife is made Executrix, it is to be presum'd, that she is not so appointed, to have barely an Office of Trouble, but of Benefit to take the Surplus, altho' she has a special Legacy given her; and this is not a Devise, but in Nature of an Exception. But otherwise of a Stranger made Executor, who has a particular Legacy; there it implies a Trust of the Surplus. Yet the Executor hath the entire Right both in Law and Equity, unless by some such Circumstances it appears, that the Testator intended the contrary; for it cannot be intended, that a Man makes a Will with an Intent to die Intestate; and parol Proof ought to be receiv'd in Favour of an Executor's Title, consistent with the Will.

Sect. 4. The second Sort of resulting Uses are upon Conveyances. For every Man that hath Lands, hath thereby two Things in him; the one the Possession of the Land, which in the Law of *England* is call'd, the Freehold; and the other, the Authority to take the Profits of the Land, which is the Use. And therefore, where there is a Feoffment to particular Uses, the Residue of the Use shall be to the Feoffor; for the Raising those particular Estates, appears a sufficient Consideration for making the Conveyance. And there is no great Difference between a Feoffment to Uses, and a Covenant to stand seiz'd; for so much as he does not dispose of, remains in him as the ancient Use in both Cases, altho' in the one, there is a Transmutation of the Possession, and in the other not. So that there seems no resulting Use or Occasion for a Priority in an Instant, (*viz.* That it should first vest, and then return.) But there is a Difference, where he who has the Use limits it to *A.* for Life, Remainder to the Heirs of the Body of *B.* here no Estate can arise to *B.* because nothing mov'd from him: Other-

wife if the Limitation is to the Heirs of his own Body, there *ut Res magis valeat*, he shall have it for his Life. And altho' an Estate cannot arise by Implication in a Deed, even by Way of Use, and a Man cannot convey to himself; yet a Man may qualify an Estate that is in him, as in Case of a Devise, for the Benefit of the Issue in Tail, or him in Remainder. But if a Man covenant to stand seiz'd to such Uses, as that he should leave a descendible Estate in himself; as to the Use of his Son from and after his Marriage, or to the Use of 7. S. after forty Years; these are not to be resembled to the Cases, where the precedent Estate cannot continue longer than his Life, and this without any Wrong done to any Rule of Law, may be turn'd to an Use for Life, and therefore such Construction shall be.

Sect. 5. And the Words of the Stat. 29 Car. 2. cap. 3. *and to no other Uses*, shall be constru'd to no other express Uses; but shall not prevent Uses by Implication, which arise of Necessity, because the Uses must be in some Body. But an Use reserv'd by Implication of Law, shall not be implied against the express Intent of the Conveyance; for the Statute of Frauds, which saves resulting Trusts, extends only to such as were resulting Trusts before the Statute, and a bare Declaration by Parol before the Act, would prevent any resulting Trust; as if an express Estate be limited to the Covenantor. *A Fortiori* where the Estates take Effect by Transmutation of Possession, and a particular Estate is limited to the Party, as for ninety-nine Years, Remainder to Trustees for twenty-five Years, Remainder to himself in Tail Male, &c. this is void, for want of a Freehold to support it.

C A P. VI.

Sect. 1. **W**E will now see, where the Use may be extinguish'd, or not. For to every Execution of an Use by Force of this Statute, four Things are requisite. 1st, A Person seiz'd. 2^{dly}, A Person *Cestuy que Use*. 3^{dly}, An Use *in esse*, viz. in Possession, Reversion, or Remainder. 4^{thly}, The Estate out of which the Use arises ought to vest in *Cestuy que Use*. And all these four must concur at one and the same Point of Time. So that every Use *in esse*, viz. in Possession, Reversion or Remainder, where the other Circumstances are not wanting, is executed by the Statute immediately: But no future or contingent Use, till they come *in esse*.
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2dly, All Uses, whether contingent or others, not executed by the Statute, remain in the mean Time at Common Law. So that if the Root is defeated, out of which they ought to spring, the Uses are utterly destroy'd; that is, if the Feoffees and their Heirs do not continue their Seisin, or some other by their Assignment, against whom there may be a Remedy in Equity. As where the Party is in, in the *Per*, and with Notice, or without a Consideration, for then the Law implies Notice. But a Lease for Years shall only bind the future Use, and not destroy it for the Freehold; because the Seisin remains. 3dly. It was formerly held, that the Feoffees after the Statute had a Possibility to serve the future Use, when it came *in esse*, and that they should be reputed the Donors of all the contingent Estates, when they vested, and if the Possession was disturb'd, the Feoffees should have Power to re-enter to revive the future Uses according to their Trust; but if they bar themselves of their Entry, then this Case being not remedied by the Statute, remains at Common Law. But this Opinion has been since contradicted, and it is now held, that to the Raising of the future Uses after the Statute, the Regress of the Feoffees is not requisite, and that they have no Power to bar these future Uses; for the Statute has taken and transferr'd all the Estate out of them, and they are as meer Instruments. So that contingent Uses do now, like other contingent Remainders, depend upon the particular Estate. For to reduce the Estates convey'd by Way of Use to the Common Law, which all Sides agree was the chief End of the Statute of Uses, nothing ought to be left in the Feoffees, no need of any *Scintilla Juris*, or Power of Re-entry for the Benefit of the contingent Uses, nor Power in the Feoffees to destroy them, but they are meer Conduit Pipes. And the other Conceit was grounded as it seems upon a Zeal against Perpetuities and contingent Remainders, there being at that Time, no receiv'd Opinion, that the Destruction of a particular Estate would destroy a contingent Remainder, till afterwards in *Archer's Case* it was so adjudg'd.

Seet. 2. And it seems to be the Rule of this Court, That where a Man is a Purchaser without Notice, he shall not be annoy'd in Equity; not only where he has a prior legal Estate, but where he has a better Title or Right to call for the legal Estate than the other. But by taking a Conveyance with Notice of the Trust, he himself becomes the Trustee, and must not, to get a Plank to save himself, be guilty of a Breach of Trust, notwithstanding

notwithstanding any Consideration paid. Yet where the Trust is general, as to pay Debts, tho' he has Notice of them, the Purchaser seems not oblig'd to see the Money applied: Otherwise if the Debts be particular, as for Payment of Debts in a Schedule. So altho' the Law hath intrusted the Executor with the Personal Estate to pay Debts, and unless he has an absolute Power, he has none at all: Yet if a Term is devis'd to Executors to raise 2000*l.* for the Portion of his Daughter; and the Executors mortgage this Term, the Portion shall be preferr'd.

Sect. 3. It is Notice of the Use therefore, that is all the Effect of the Matter; for then he is *Particeps criminis*, & *dolus* & *fraus nemini patrocinantur*, since in Conscience he purchas'd my Land, or my Goods. For the Common Law, whenever it found a Consideration, discharg'd the Covin; but Chancery looks further to the corrupt Conscience of the Party, that will traffick for what in Equity he knows to belong to another. And in all Cases, where the Purchaser cannot make out a Title, but by a Deed which leads him to another Fact, the Purchaser shall not be a Purchaser without Notice of that Fact, but shall be presum'd cognizant thereof; for it was *crassa negligentia*, that he sought not after it, and this is in Law a Notice. So where in a Jointure, there was a Covenant against Incumbrances, except Leases, or Copies determinable on three Lives; the Exception of Leases *ut supra*, gave Notice of former Leases, and therefore he must take Notice of the Covenants contain'd in them. So there was sufficient Notice in Law, or an implied Notice where the Mortgage was excepted in the Defendant's Conveyance, and therefore they could not be ignorant of the Mortgage, and ought to have seen it, and that would have led them to the other Deeds, in which pursued from one to the other, the whole Case must have been discover'd to them. And Notice of the Marriage has been constru'd as Notice of the Jointure, because the Wife being under the Power of her Husband could not give proper Notice, so as to prevent the Alienation of her Interest. So if a Man purchases under a Will, by which the Trust is created, he must at his Peril take Notice of the Operation and Construction of the Law upon it. And tho' this be call'd a notional Notice, yet it is such a Notice, as has always been allow'd to be good. For every Man is presum'd to be conusant of the Law of the Realm, and he shall not take Advantage of his own Ignorance, but *caveat Emptor*.

Sect. 4. And Notice of the Plaintiff's Title to the Agent or Purchaser for another, as likewise Notice to the Counsel or Attorney, that peruses the Title, is Notice to the Party himself, because a presumptive Notice to the Party. So where all the Securities were transacted by the same Scrivener, Notice to him, is Notice to them all, and consequently they that lend last, must come last; for he was in Nature of an Agent to them all. So where *A.* having Notice of an Incumbrance, purchases in the Name of *B.* and then agrees, that *B.* shall be the Purchaser, and he does accordingly pay the Purchase-Money without Notice of the Incumbrance; tho' *B.* did not employ *A.* nor knew any Thing of the Purchase, till after it was made, yet *B.* approving of it afterwards, made *A.* his Agent *ab initio*, and therefore shall be affected with the Notice of *A.* But tho' Notice to a Man's Counsel, is constru'd as a Notice to himself: Yet where the Counsel comes to have Notice of the Title in another Affair, which it may be he has forgot, when his Client comes to advise with him in a Case with other Circumstances; that shall not be such a Notice as to bind the Party.

Sect. 5. Lastly, A Trust is reviv'd by a Re-purchase of the Trustee, altho' a Fine pass'd; for it being but a Conveyance, it did not extinguish or separate the Trust, but transferr'd both together, and in the Gift of the Land, he gives all Interests and Demands by Reason of the Land. And so where a Man wrongfully possesses himself of my Goods, and sells them in a Market Overt: If he afterwards buys these Goods again, I may seize them in his Custody.

Sect. 6. As to the Revocation of Uses, it is a general Rule, that Things may be avoided and determin'd by the same Ceremonies and Acts, by which they were rais'd. That which passes by Livery, ought to be avoided by Entry; that which passes by Grant, by Claim; that which passes by Way of Charge, determines in like Manner by Way of Discharge. And so at Common Law, an Use which was rais'd by a Declaration or Limitation, might cease by Words of Declaration or Limitation. But an Use executed by the Statute differs not from a legal Estate, and cannot be wav'd or determin'd without Entry. Yet for the Necessity, where the Party himself is Tenant for Life, (as in the usual Powers of Revocation) by the Revocation the Estate ceases without Entry or Claim; because he cannot enter upon himself, and an express Act of Revocation is as strong as any Claim can be. And therefore, that which in a Conveyance at Common Law is call'd a

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Condition, by Way of Use is call'd a Limitation or a conditional Limitation; because it has the Effect of a Limitation to determine an Estate of Freehold without Entry. And by the same Conveyance, as the ancient Uses are revok'd, by the same Conveyance other Uses may be limited or rais'd; for since the ancient Uses cease *ipso facto* by the Revocation without Claim, or other Act, the Law will adjudge a Priority of Operation in the Deed, tho' it be seal'd and deliver'd and takes Effect altogether. And therefore it shall be first in Construction of Law, a Revocation and Ceasing of the ancient Uses, and then a Limitation or Raising of new; for the Law will marshal several Acts done at the same Time, that all may stand. But unless he reserves a Power expressly to limit new Uses, he can only revoke.

Sect. 7. These Powers of Revocation were only allowable in Conveyances by Way of Use; for in a legal Conveyance, such a Power would have been repugnant. And they are a Law, which a Man puts upon himself by Virtue of the Power which every one has of disposing of his own, as he pleases, and therefore they ought to be perform'd in all the incidental Circumstances requir'd by the Proviso, *viz.* As to Subscription, Witnesses, or the like; for these Ceremonies were appointed by him to prevent Fraud and Surprize. And there can be no Revocation in Equity, where it is not a good Revocation at Law, unless there be a clear Intention of the Party to revoke, which he was prevented carrying into Execution pursuant to the Power, by Fraud or Accident. But there is a Difference betwixt a Power reserv'd to a Stranger, and to the Owner himself. For a Power to alter or charge the Estate of another, shall be constru'd strictly, and shall never be extended beyond the Letter and Intention of the Parties; because it is to affect the Estate of a third Person. But a Power over a Man's own Estate is Parcel of the old Dominion reserv'd to him, and for the Benefit of the Party himself, and voluntary, and therefore shall be expounded favourably, many Estates depending upon such Powers. Also a Power reserv'd to himself, who has a present Estate, or shall have by the Ceasing of the Uses, favours of an Interest, and may be extinguish'd by a Feoffment of the Land, or Release to him that has the Freehold; for he who raises and limits the Use, shall be suppos'd the Donor; but to a Stranger is merely collateral.

Sect. 8. In Case of Merger of Terms, the Diversity formerly taken, was this, If a Man has the same Interest, and absolute

lute Dominion and Property in the whole Inheritance, as he has in the Term, or Power for raising Money out of the Inheritance, there it must merge; for a Man cannot have a Power to raise Money merely for my Benefit, out of that which is mine. But if there be any Difference in the two Interests, or any other Person intermediate, then there can be no Merger; for if there be any Merger in the first Case, it will change the Intent of the Conveyance; and in the other Case, there being an intermediate Estate, there is no Merger at Law, no more is there in a Court of Equity in the Case of a Trust. But it has been since held, that where the Inheritance descended to the Daughter, as Heir, who was also entitled to the Trust of the Term for her Portion, so that she had the same Dominion over both, yet there could be no Merger of the Term; for that was lodg'd in Trustees, and so not merg'd at Law, nor consequently in Equity. For where an Infant has two Rights in her, this Court, which is to take Care of Infants, will always preserve that Right, which is most beneficial for the Infant. And in this Case, it was for the Interest and Advantage of the Infant, that the Portion should be look'd upon as a continuing and subsisting Charge, and not sink into the Inheritance; because it might have been a Means to have preferr'd her in Marriage during her Infancy, before she was capable of making a Settlement of her Real Estate, and likewise when of the Age of seventeen, she was capable of disposing by Will of her Personal Estate, either for Payment of Debts, or in Legacies amongst her Relations.

C A P. VII.

Sect. 1. **I**T follows, That we treat of the Office and Duty of the Trustee, and how far his Power extends. And here regularly, no Act of the Trustee shall prejudice the *Cestuy que Trust*; but the Trustee must especially in Equity make good the Trust. And the Law seems to be the same of the Act of God; for if the Trustee of a Legacy dies before the Legacy is paid, this shall not prejudice the Legatee. So if a Trustee of Land die without Heir, tho' the Lord by Escheat will have the Land at Law: Yet it shall be subject to the Trust in Equity. So if *A.* puts out 100*l.* at Interest, in the Name of *B.* who after becomes a *Felo de se*; *A.* may be reliev'd against the King upon this Trust in Equity, upon the

Statute of 33 H. 8. cap. 39. Yet if an Equity of Redemption is convey'd to *A.* in Trust for Payment of Debts, and the Surplus to *B.* and *A.* agrees with the Mortgagee to turn Interest into Principal; this Agreement of the Trustee shall bind *B.* tho' he was no Party to it. And so an Infant shall be bound in such Case by the Act of his Trustee or Guardian, for we must distinguish betwixt importunate Gain; as if the Account were stated every six Months, on Purpose to load it: And where the Interest is run up to a bulky Sum; for here Interest ought to be allow'd for Delay and Forbearance, as well as in any other Case whatsoever.

Sect. 2. But it seems a certain Rule, that what a Trustee, or any other is compellable to do by Suit, he may do without Suit; as to join with *Cestuy que Trust* Intail in a Feoffment; for they are Trustees merely to preserve his Estate. So there being a Remainder over in Trust to raise Portions for Daughters, if there were no Issue, and there being a Daughter, upon giving Security for the Daughter's Portion, the Trustees shall be compell'd to join in the Recovery. So Trustees in a Marriage-Settlement for preserving contingent Remainders, (there being no Issue,) may be decreed to join in a Sale, the Settlement being only of an Equity of Redemption, and the Wife consenting to the Sale. But the Husband and Wife being married twelve Years, and having no Issue, the Court will not force the Trustees to join in a Sale, tho' for Payment of their Debts; for that People have been married near twenty Years without Issue, and after have had Children. And if Trustees appointed to preserve contingent Remainders, join in a Conveyance to destroy the Remainders before a Son is born, this is a plain Breach of Trust, and whoever claims under this Conveyance having Notice of the Trust, or by a voluntary Settlement, shall be liable to make good the Estates.

Sect. 3. As to the Allowances to be made to the Trustee, regularly he is to have nothing for his own Labour and Pains, tho' some have thought this a great Hardship. But if a Trustee sued concerning the Trust in Chancery, obtain a Dismission, and have Costs paid him, as in Course, but the Costs allow'd him and tax'd are short of his real Costs; and after a Bill is brought by *Cestuy que Trust* to have an Account of his Disbursements, he shall be allow'd his true and necessary Costs in the former Suit, and not be concluded, &c. And the Law is the same of a Mortgagee; for since the Keep-

ing only is given *gratis*, it is plain, that all the Expences laid out upon the Charge ought to be repaid: And altho' where a Mortgagee or Trustee manage the Estate themselves, there is no Allowance to be made them for their Care and Pains: Yet if they employ a skilful Bailiff, and give him 20*l.* *per Annum*, that must be allow'd, for a Man is not bound to be his own Bailiff.

Sect. 4. Nor will the Court ever charge a Trustee with imaginary Values, but he shall be charg'd as a Bailiff only. And altho' very supine Negligence might indeed in some Cases charge a Trustee with more than he had receiv'd: Yet the Proof must then be very strong. So a Trustee for a Charity is no otherwise, or further chargeable, than another Trustee is, *viz.* for so much as he receives. So a Mortgagee shall account for what he actually did make, or might have done, had it not been for his wilful Default. And if a Trustee is robb'd of the Money he receiv'd, he shall be allow'd it on Account, the Robbery being prov'd, altho' the Sum is only prov'd by his own Oath, for he was to keep it but as his own. So in Case of a Factor; for he cannot possibly have other Proof. And so it seems of an Executor. Nor is this without a good Foundation in Reason; for the Contract is not for the Trustees, but the Party's own Advantage, and it was his Fault to choose such a one. And the Interruption of Acts of Friendship do not oblige to Restitution. But otherwise of a Carrier, for he hath his Hire, and thereby implicitly undertakes the safe Delivery of the Goods committed to him.

Sect. 5. But where they are more than one, there is a Difference between Trustees and Executors. For Trustees have all equal Power, Interest, and Authority, and cannot act separately, as Executors may, but must join, both in Conveyances and Receipts; for one cannot sell without the other, or desire to receive more of the Consideration-Money, or to be more a Trustee than his Partner. And therefore it is against natural Justice to charge them for each other's Receipts, unless in Case of Necessity, where they so join in Receipt, as not to be distinguished, what has been receiv'd by one, and what by the other, there from their own Neglect or Default, both shall be charg'd with the Whole. As if a Man should blend his Money with mine; by rendring my Property uncertain, he loses his own. But Executors have each an absolute Power over
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the Whole, and therefore if they join they trust one another, & *sic* Diversity. Yet a Difference has been taken in the Case of Executors, as to Creditors, and as to Legatees.

Sect. 6. And in an Action of Account, there must be either a Privity in Deed by the Consent of the Party, (as where he is his Bailiff or Receiver, for against a wrong Doer an Account will not lie,) or a Privity in Law *ex provisione Legis*, as against a Guardian. And at Law, if the Defendant is charg'd as Bailiff of Goods *ad Merchandizand'*, he shall answer for the Increase, and be punish'd for the Negligence, and have his Expences and Factorage allow'd him. But if he is charg'd as Receiver *ad computandum*, he shall answer only for the Money, or Thing deliver'd, except in Case of joint Merchants in Favour of Trade. So in Chancery, an Executor or Trustee not being bound to lend, &c. if he do lend it is at his Peril; and if it be by that Means lost, he shall answer the same out of his own Estate; and therefore as he shall bear the Loss, he shall have the Gain. But if the Trustee or Executor were an insolvent Person at the Time of Placing out the Trust-Money in the Funds, or on other Security, whereby he gains considerably; there the *Cestuy que Trust* shall have the whole Benefit gain'd thereby, as he only could have born the Loss, *aliter econtra*. And this is a fix'd Rule of the Court, and they will not change it, even where the Executor calls in the Money on good Security. So where a Factor, who is in Nature only of a Trustee for his Principal in Equity, tho' he has the Right at Law, upon his Account, demanded according to Custom Allowance for so much paid for Customs to the King in *India*, which it was insisted he had never paid, the Factor shall have the Benefit of the Customs; for it was a Duty to be paid, and the Employer could make no Title to it against him that was in Possession, and he that has Possession, has Right against all but him that has the very Right. Otherwise of Customs stolen from our own King; for that could not be call'd a Custom, being grounded upon Fraud, and therefore the Court will order, that Defendant should answer, whether he paid the Custom or not.

Sect. 7. And if a Trustee or Executor compound Debts or Mortgages, or buy them in for less than is due upon them, he shall not take the Benefit of it himself, but other Creditors and Legatees shall have the Advantage of it, and for want of them, the Benefit shall go to the Party, who is entitled to the Surplus. So of an Heir, unless he bought it to protect

protect an Incumbrance to which he was entitled, or there be some special Circumstances in the Case. But if one acts for himself, and being not in the Circumstances of a Trustee or Executor, buy in a Mortgage for less than is due, or for less than it is worth, he shall be allow'd all that is due upon the Mortgage; for he stands in the Place of him that assign'd, *viz.* the Mortgagee, who might have given it to him *gratis*, and what is due must be the Measure of our Allowance, and not what he gave, for that might have been more than it is worth, as well as less, and since he runs the Hazard, if a Loss happens, he ought to have the Benefit, in Case it turns to Advantage. Yet the true Reason seems to be this, that in the first Case, he that takes upon him a Trust, takes it for the Benefit of the Person for whom he is trusted, and not to take any Advantage to himself. But in the latter, as far as he did not purchase, it was a free Gift, and one Man shall not profit himself of the Contract of another. But where there are subsequent Incumbrances or Creditors in the Case, there a Man that buys in a prior Incumbrance, shall be allow'd only what he really paid, tho' there was in Truth a greater Sum due. For *Nemo ex alterius detrimento fieri debet locupletior*, and therefore the Taking away one Man's accidental Gain to make up another's Loss, is making them both equal. But the Owner or his Representatives are no Losers, when they pay the whole Money due.

C A P. VIII.

Sect. 1. **W**E will now shew, how the Trust shall be executed. And there may be many Reasons, why a Court of Equity would not decree a Conveyance at all, (*viz.* of the legal Estate by the Trustees) sometimes for a Politick Reason: As if it were to enable a Nobleman to suffer a Recovery, and leave the Honor bare without Estate, or if the Party were a notorious Spendthrift, or when the Estate-Tail was only by Implication. And so before the Act tortious and troublesome Uses could not have been executed; for this Court, which has the Jurisdiction of Trusts, will see that they do no Mischief.

Sect. 2. And it is agreed on all Hands to be a declar'd Rule in this Court, That if Money be devis'd to be laid out in the Purchase of Lands to be settled on one and his Heirs, that the Person himself, for whose Benefit the Purchase was to be made,
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may come into this Court, and pray to have the Money it self, and that no Purchase may be made, because none have an Interest in it but himself. But if he dies before the Purchase made, or Payment of the Money, so that the Question comes between his Heirs and Executors, which of them shall have the Money; the Heir shall be preferr'd, and it shall for his Benefit be consider'd in a Court of Equity, as if the Purchase had been actually made in the Life-time of his Ancestor for two Reasons. 1st, Because the Heir is to be favour'd in all Cases, rather than the Executors, who by the Old Law were to have nothing to their own Use. 2^{dly}, If the Executors should have it, it would be against the Words of the Will, which gave it to the Heirs. So if Trustees in a Will have Power to sell the whole Estate for Payment of his Debts; and that the Residue should go to A. and B. his Wife, as they by any Deed, &c. should appoint. A. dies, and B. devises it to C. It must be consider'd in Equity, as if actually sold, and go accordingly, in which Case the Money would have gone to the Husband, and so must the Land too, else it would be in the Power of Trustees to make it Land or Money, and so to give it to whom they should think fit.

Sect. 3. But it is now constantly held in Chancery, that if Lands are vested in Trustees, to the Use of one and the Heirs of his Body, with Remainder over, that the Trustees are not to convey a Fee but an Estate-Tail, tho' he will have Power to bar the Entail when the Conveyance is made to him, and it would avoid Circuity. So if a Sum of Money be appointed to be laid out in a Purchase, and the Lands to be settled in Tail, the Purchase and Settlement shall be made accordingly, and not the Money paid the Party; for the Remainder-Man has a Chance for the Estate, in Case the Tenant in Tail in Possession die without Issue before any Recovery suffer'd, which he may omit thro' Ignorance or Forgetfulness, or he may be prevented by Death, before he has completed it.

Sect. 4. And in the Performance of a Trust, the Chancery has a Power to alter the Disposition of the Party upon emergent Accidents, which he did not foresee; and which if he had foreseen, he would in all Probability have settled his Estate otherwise. As where *Cestuy que Use* will'd, that his Feoffees should convey to his Daughters, and died, and after his Death a Son is born, the Feoffees shall convey to him; because the *Cestuy que Use* never intended to disinherit his Heir at Law. Nor is this Court bound to decree ac-

according to the ordinary Rules of Law, in Construction of Wills, where the Question in a Devise arises upon the Performance of a Trust; as where *A.* having two Daughters, and no Son, makes a Feoffment to the Use of his Will, and devises his Lands to *J.S.* upon Trust and Confidence *inter alia*, for the Raising the Sums of Money following, *viz.* if he has but one Daughter, then 12000*l.* to her Fortune, if two or more 20000*l.* amongst them, equally to be divided, the same to be due and payable at their several Ages of twenty-one Years or Marriage, which shall first happen, with a Provision for Maintenance in the mean Time, *A.* left three Daughters, and one died under Age, &c. here being an apparent Intention, that these two Daughters should have 10000*l.* a-piece, this Court will comply with it, notwithstanding any Accident that might happen to the contrary.

Sect. 5. So where an Executrix has a general Power or Trust to distribute a Sum of Money amongst Children at Discretion; an unreasonable and indiscreet Disposition may be controll'd in a Court of Equity. But otherwise where the Power is special and particular; as that the Wife might dispose to one or more; for this is *casus provifus*, and it is expressly provided, she might give all to one. Yet it is now held discretionary in the Court to relieve here or not, since such Clauses are for the most part to preserve Obedience only. So the Power given by Will to dispose of a Personal Estate by an Executrix being general, to distribute to the Use of her self, her Brothers and Sisters, according to their Need and Necessity, as in her Discretion she should think fit; the Heir shall have a double Share, being most in Need of it. And if one devise to two of his Sisters 400*l.* a-piece, and to his third Sister, what his Executors should think fit; the third Sister shall have 400*l.* also, and be made equal to her two other Sisters, if the Estate will hold out. So where the Testator desires him to give 100*l.* to *A.* if his Executor thought fit; this seems to be a Trust in their Hands, tho' no Circumstances of Hardship in the Case.

Sect. 6. As for the general Rule, that Portions may be rais'd by the Sale of reversionary Terms in the Life of the Tenant for Life, it cannot be got over: Tho' on the other Side, there are Cases where it has been refus'd. But this must depend upon the Circumstances of the Deed, and the Intent of the Parties. And 1st, If a Portion is directed to be paid at eighteen, or Day of Marriage, and the Term is absolutely

folutely veſted; there the Daughter ſhall not expect during the Life of the Father; but it may be ſold in the Father's Life-time, altho' a Term in Remainder and not in Poſſeſſion. 2^{dly}, If the Truſt of the Term had been upon a Condition precedent, as to commence if the Father die without Iſſue Male by his Wife, in Truſt to raiſe Portions for Daughters; there, if the Wife be dead without Iſſue Male, leaving a Daughter, tho' the Father is living, the Term has been decreed to be ſold. For in Equity, the Father is taken to be dead without Iſſue, when the Wife is dead, by whom he was to have Iſſue; all that is contingent there, has happen'd by the Death of the Wife without Iſſue Male; and the Huſband muſt alſo one Time or other die, as all Men muſt, and whenever he dies, he muſt die without Iſſue Male by that Marriage, his Wife being dead before. So that this is in Truth a Remainder, and depends no longer upon a Contingency; and this Court, as in ſome Caſes they do prolong the Time, ſo here they have ſhorten'd it. And thus far the Court has gone for Convenience, that young Women may have their Portions, when they moſt want them: Or elſe the Father might live ſo long, that the Portion might be of little Service. 3^{dly}, But if the Agreement is, that the Portion ſhould be paid after his Death, it is hard to make it payable in his Life-time. For it would be to no Purpoſe for any one to make Deeds, if the Argument of Convenience or Inconvenience ſhould prevail to over-rule them, and the Caſes on this Head have gone too far already, and mangled all Eſtates, and therefore they will never decree Portions to be rais'd in the Father's Life-time, where it can poſſibly bear any other Conſtruction.

Seçt. 7. And there is no Difference where the Portion is ſecured by a Settlement, or Will, if ſecured out of a Real Eſtate, and the Party dies before it is payable; in either Caſe it ſinks in the Lands. But the Difference is, between a Perſonal Legacy, which in ſuch Caſe being *debitum in præſenti* tho' *ſolvendum in futuro*, and govern'd merely by the Eccleſiaſtical Law which is ſo, ſhall go to the Executor or Adminiſtrator, and a Sum of Money appointed to be rais'd, out of the Rents and Profits of Lands, and deſign'd for a particular Purpoſe; as a Portion for a Daughter, payable expreſſly at twenty-one, or Marriage, for which there was no Occaſion, ſhe dying under Age and unmarried.

P A R T II.

C A P. I.

Señt. 1. **T**HE Preservation of every private Man's Goods in particular, is the Preservation of the Common Wealth in general. And therefore in every good Government, the Magistrates ought to have a special Care and Regard of the Estates of Orphans, Madmen and Prodigals. So anciently in this Realm, there were several Things that belong'd to the King as *Pater Patriæ*, and fell under the Care and Direction of this Court; as Charities, Infants, Ideots, Lunaticks, &c. afterwards such of them as were of Profit and Advantage to the King, were remov'd to the Court of Wards, but by the Statute, upon the Dissolution of that Court, came back again to the Chancery. And altho' it was formerly doubted, if the Court could by Bill take Notice of the Statute of 43 *Eliz. cap. 4.* for Charitable Uses, so as to grant a Relief according to that Statute upon a Bill, but that the Course prescrib'd by that Statute by a Commission of Charitable Uses must be observ'd in Cases relievable by that Statute: Yet now it is agreed, that the Chancery may relieve upon an Original Bill in these Cases. But a School for the Inhabitants of *A.* not being a Free School, is not a Charity within the Statute of *Eliz.* and consequently the Inhabitants have not a Right to sue in the Attorney General's Name.

Señt. 2. And Tenant in Tail may dispose of a Charity out of his Land, without Fine or Recovery, and even by Will, by Virtue of the Construction, which has been made on the 43 *Eliz.* the Statute of Charitable Uses supplying all Defects of Assurance, either in the Giver or Receiver, where the Donor is of Capacity to dispose, and hath such an Estate, as is any Way disposible by him, whether by Fine or Recovery; for the Intent of the Statute of Charitable Uses was to make the Disposition of the Party as free and easy as his Mind, and not to oblige him to the Observance of any Form or Ceremony. But if a Man dispose of a Charity by Will, and such Will wants the necessary Circumstances requir'd by the Statute of Frauds and Perjuries, it shall not operate as an Appointment; for the Statute of 43 *Eliz.* is now repeal'd *pro*

tanto, and tho' there were three subscribing Witnesses to the Codicil, yet that would not support the Will. But as to such of the Lands as were Copyhold, it was agreed, they were well appointed, they passing by Surrender, and not by the Will. So a Devise in Mortmain is good as an Appointment to a Charity within the 43 *Eliz.* But see now the late Statute 10 *Geo.* 2.

Sect. 3. But whenever any Thing is given to Charity, and no Charity appointed, or if the Charity which is appointed, be superstitious, there the King shall appoint. And altho' a Devise cannot be averr'd to be to a superstitious Use, by Reason of the Statute of Frauds, yet the King is not bound by that Statute. So of an uncertain as well as void Use; for the Use is void, and not the Charity, yet in the Case of a superstitious Use, the Appointment shall be to a charitable Use *ejusdem Generis*; for the Appointment of that good Use to which it shall be applied, is a judicial Act, and ought to be according to the Rules of the Court. And altho' the Charity cannot take Place according to the Letter, yet it ought to be perform'd *cy pres*, and the Substance pursu'd. But where the Appointment is good, it shall not be in the Power of the Heir by his Consent to alter the Disposition of his Ancestor; for they shall be held to the Letter of the Charity. Much less of the Devisee as the Parishioners.

Sect. 4. And where, in the Constitutions for founding an Hospital, it was ordain'd, that no Lease should be made for above twenty-one Years, and the Rent not to be rais'd, nor above three Years Rent taken for a Fine, tho' the Tenant of the Hospital Lands is intitled to a beneficial Lease upon Renewal, the Constitution being just and charitable, for the Encouragement of the Tenant: Yet this Constitution is not to be follow'd according to the Letter, but in the Reason of it, as Fines alter, and the Price of Provisions increase, so the Rent ought to be rais'd in Proportion. So if the Hospital makes a Lease for twenty-one Years, with a Covenant by Renewal to make it up sixty Years, and by Deed of Covenants the Lessee covenants to pay all additional Rents: This Covenant is not binding in Equity, as being equally prejudicial to the Hospital, as a Lease for sixty Years. And the Corporation are but Trustees for the Charity, and might improve for the Benefit of the Charity, but could not do any Thing to the Prejudice of the Charity in Breach of the Founder's Rules. But the additional Rent and Arrears shall be paid during the Term of twenty-one

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Years; for tho' it was an Indenture of mutual Covenants on the Lessor's Part to renew, and on the Lessee's Part to pay the additional Rent, those Covenants appear'd in the Deed to have been made on distinct Considerations, *viz.* the Covenant for Increase of Rent, because the Price of Provisions was rais'd, and the Covenants for Renewal, because the Lessee undertook to lay out 100*l.* in Buildings.

Sect. 5. And if *A.* seiz'd of a Manor, of the yearly Value of 240*l.* devises several Legacies, and particularly to his Heir at Law 40*s.* and then adds; That being determin'd to settle for the future, after the Death of me and my Wife, the Manor of *F.* with all Lands, Woods and Appurtenances to Charitable Uses, I devise to *M. N. &c.* upon Trust, that they shall pay yearly, and for ever, several particular Sums to Charitable Uses, amounting in the Whole to 120*l. per Annum*, and gives the Trustees something for their Pains; there being an Overplus, it shall go in Augmentation of the Charities, it appearing to be the Testator's Intent to settle the whole Manor, and that the Heir should have no more than the 40*s.* So where the Reversion in Fee of divers Lands lett on Leases on which in all 70*l. per Annum* was reserv'd, was granted by King *H. 8.* to the Corporation of *Coventry*, 400*l.* of the Purchase-Money was paid by the Corporation, and 1000*l.* by Sir *T. W.* but in the Grant, the Corporation was said to be the Purchasers, and it was by the Deed declar'd that the whole 70*l. per Ann.* should be applied to several Charities therein mention'd, the Leases expiring, the Value of the Lands were greatly increas'd, but the Surplus had been all along receiv'd by the Corporation of *C.* the Lands themselves not being given to the Charities, but particular Rents out of the Lands; and it was strongly insisted, that the Articles mentioning the Corporation to be Purchasers, there could be no Averment receiv'd to the contrary, and altho' a Charity is not bar'd by Length of Time, or any Statute of Limitations, yet it is an Evidence, that the Surplus belong'd to *C.* because they have enjoy'd it ever since the Purchase, but the Defendants were order'd to account for the improv'd Value of the Land, and the Charities to be augmented in Proportion.

C A P. II.

Sect. 1. * **T**HE King is also an universal Guardian to Infants; and ought in the Court of Chancery to take Care of their Fortunes. As 1st, If they marry during their Minority, to procure a Settlement; for tho' by the Ecclesiastical Law, a Woman is of Age to marry; yet by the Temporal Law, she cannot dispose of her Fortune, and therefore the Court will make such a Disposition of the Fortune of the Ward, as may be most beneficial for her. But if she was of full Age at the Time of her Marriage, then she was out of the Care of the Court; and the Court cannot at all interpose, tho' she be under Age, as some say. But where the Husband is Plaintiff here in Chancery to have the Trustees transfer their Estate, or for any other Favour of the Court; then indeed when they had such a Hand upon him, they may make him do such Things as shall be reasonable, otherwise there is no Colour in it. 2^{dly}, This Court, upon Application made to it by Guardians, has settled the Maintenance of Infants. And a Court of Equity may, by the Approbation of an Infant's Relations, allot the Infant Maintenance out of a Trust-Estate, tho' there be no Provision in the Trust for that Purpose: And this is founded on natural Equity. But Chancery never allows the Principal to be lessen'd in Maintenance of an Infant. 3^{dly}, If a Man intrudes upon an Infant, he shall receive the Profits but as Guardian, and the Infant shall have an Account against him in Chancery as Guardian. For in the Consideration of this Court, he shall be look'd upon as Trustee for the Infant. And if a Man, during a Person's Infancy, receives the Profits of an Infant's Estate, and continues to do so for several Years after the Infant comes of Age, before any Entry is made on him; yet he shall account for the Profits throughout, and not during the Infancy only. And so it seems
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* There are in Law several Kinds of Guardians.

As 1st, *Jure Naturæ*, the Father of his Heir apparent till twenty-one; and this was inseparable from his Person.

2^{dly}, In Socage, *Jure Gentium*, the next of Kin to whom the Lands could not descend; and this was only of Things, that lie in Tenure till fourteen: Of others he might choose a Guardian, if he was of Years to make a Choice.

3^{dly}, By the Statute of 12 Car. 2. cap. 24. form'd by Sir Matthew Hale; and this is in Office and Interest much the same with a Guardian in Socage. But it extends not to his Lands by Descent only, as that did, but to all his Estate whatever, and may be till twenty-one, or any less Time.

4^{thly}, By Custom, as in London, and other Boroughs.

5^{thly}, The Spiritual Court, of Personal Estate only.

6^{thly}, The King, for Allegiance and Protection are reciprocal.

at Law, he should be charg'd in an Action of Account, as
Tutor Alienus.

Se&ct. 2. Guardians are appointed by Writ for Infants, and one or more Guardians jointly, and the Court of Chancery may assign one of the Six Clerks to be Guardian to an Infant. But a Guardian cannot be otherwise appointed than by bringing the Infant into Court, or his praying a Commission to have a Guardian assign'd him. And where there is a Guardianship by the Common Law, this Court will intermeddle and order: But if there be a Guardian by Act of Parliament, it cannot remove him or her. Yet in this, and all the other like Cases, they shall give Security not to marry the Child, *infra annos nobiles*, or consent, or be aiding to the Marriage of such Child, *post annos nobiles*, during Minority, without acquainting this Court therewith. But the Chancery cannot restrain the Infant from Marriage *ad annos nobiles*. But if a Person appointed Guardian pursuant to the Statute, (*viz.* 12 Car. 2. cap. 14.) dies, or refuses to take upon himself the Guardianship, the Lord Chancellor may appoint a Guardian. As to the Custody of Lunatics, it is no Question of Right, but of Prudence, and where no Right there is no Wrong. It shall never in this or in any other Case be committed to any that will make Gain of it, or who is concern'd to outlive the Lunatick, as being nearest of Blood, and entitled to the Administration; and the Allowance must be liberal and honourable.

Se&ct. 3. A Tutor or Guardian was look'd upon in the Civil Law, to be in the place of a Father to the Minor, who by Reason of the Infirmary of his Age, was deem'd unable to take Care of himself, and the Particulars of his Charge was, *1st*, Of his Person and Education, and to lay out all reasonable Expences for him in Proportion to the Value of his Estate, since it was not his Estate alone, but his Morals, that he was appointed to look after. But in the second Place he was to take Care of his Patrimony, and to be as provident of his Affairs, as a prudent Master of a Family is of his own, and the Power of the Tutor was limited to what might be profitable to the Minor, for so far they thought his Authority establish'd by Justice it self. And so it seems formerly in the Law of *England*, he that was constituted Tutor or Guardian, ought to see, that the Heir be well brought up, and that his Estate be safely kept; for he can do nothing but for the Profit and Benefit of the Infant, nor intermeddle with any Thing but of what he may render an Account. And he was bound to

put in Security before his Admission, and to make Oath to administer the Affairs of the Minor to his Profit and Benefit, to exhibit a true and faithful Inventory of all the Goods, and to render an exact and true Account of his Office, whensoever it was requir'd by the Judge, which is the same Oath, that was administer'd to all Executors and Administrators. But this Law is not now observ'd here, as it was in *Rome*, to the great Detriment of many Minors. But both in Chancery and in the Civil Law, an Infant might call his Guardian to an Account, even during his Minority, if there fell out any Thing that made it necessary.

B O O K III.

C A P. I.

Sect. 1. **I**T follows in the next Place, that we treat of Mortgages and Pledges. This Kind of Agreement was useless in a State of Nature; because it was lawful for the Debtor in that State, to seize on any Part of the Creditor's Goods or Estate, without any special Contract. For right Reason, and the Nature of Society prohibits not all Force, but that which is repugnant to Society; that is, which depriveth another of his Right. For the End of Society is, that by mutual Aid, every one may enjoy his own. And as naturally every Man may vindicate his own Right, so to profit another, in what he can justly, is not only lawful but also commendable. But Civil Society being ordain'd for the Maintenance of Tranquility, there arises presently to the Commonwealth, a certain greater Right over us, so far as is necessary to that End; and therefore so far it may and will prohibit that promiscuous Right of resisting. Nor were there any Mortgages of Lands with us, while the feudal Tenures were on Foot; because such Conveyances were look'd upon as a Sort of Fraud on the Constitution. But when a Licence of Alienation was given about the Time of *H. 3.* and it became a Maxim in Law, that the Purity of a Fee-simple imported a Power of disposing of it, as the Owner pleas'd: There were two Ways of pledging Lands introduc'd, which *Littleton* distinguishes by the Names of *Vadium vivum*, and *Vadium mortuum*. The first is, where a Man borrows a Sum of Money

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of another, and makes an Estate of Lands to him, until he hath receiv'd the same out of the Issues and Profits: So that neither the Money nor the Land dies, or is lost. The other, where a Feoffment is made upon Condition, that if the Feoffor pay to the Feoffee such a Sum by such a Day, that then the Feoffor may enter, &c. in this Case, if he does not pay, then the Land is taken from him for ever, and if he does, then the Pledge is dead as to the Tenant, &c.

Sect. 2. These Sorts of Conveyances, being usually made in Fee-simple, were expos'd to many Inconveniences. For the Estate becoming absolute at Law, on Default of Payment, was subject to the Dower of the Wife of the Feoffee, and all other his real Charges and Incumbrances; and therefore to prevent this, the ancient Course in Mortgages was to join another with the Mortgagee in the Conveyance. But the Court of Chancery, tho' at first they made a Scruple of breaking in upon the Rules of Law, have now set this Matter right, and since the Lands were originally only a Security for the Money, therefore the Payment of the Money doth in Consideration of Equity put the Feoffor in his first Estate, as well after as before the Condition broken.

Sect. 3. And altho' with Respect to the Surplus of the Estate over and above the Mortgage-Money, the Mortgagee is usually look'd upon in Equity, as a Trustee for the Mortgagor: Yet there is a Difference betwixt a Trust and a Power of Redemption. For a Trust is created by the Contract of the Party, and he may direct it as he pleases, and may provide for the Execution of it, and therefore they only are bound by it, who come in in Privy of Estate, or with Notice, or without a Consideration. As a Tenant in Dower is bound by it, because she is in the *Per*: But not a Tenancy by the Curtesy who is in the *Post*. Nor shall any other, who comes in in the *Post*, be liable to it, without express Mention made by the Party. But a Power of Redemption is an equitable Right inherent in the Land, and binds all Persons in the *Post*, or otherwise; because it is an ancient Right, which the Party is intitled to in Equity. And altho' by the Escheat, the Tenure is extinguish'd, that will be nothing to the Purpose, because the Party may be recompenc'd by the Court for that, by a Decree for Rent, or Part of the Land it self, or some other Satisfaction. And it is of such Consideration in the Eye of the Law, that the Law takes Notice of an Equity of Redemption, and makes it assignable, or devisable.

Sect. 4. And Equity is Part of the Law of *England*, so that it cannot any Manner of Way be provided by Agreement, in Case of a Mortgage, that the Court of Chancery should not give Relief. For such an Agreement would be contrary to natural Justice in the Creation of it, and prove a general Mischief; because every Lender would by this Method make himself Chancellor in his own Case, and prevent the Judgment of this Court. Neither shall a Man have Interest for his Money, and a collateral Advantage besides for the Loan of it, or clog the Redemption with any By-agreement, since this would be to let in all Manner of Extortion and Usury. But there is a Difference between Mortgages of Exchequer-Annuities and Common Stock, the Value of which depends upon Imagination, rather than a Real Value: For Annuities are a certain Security, and carry a constant Interest, and therefore are to be consider'd, as Mortgages of Lands, and cannot be sold after Forfeiture without Foreclosure. Yet Annuities mortgaged are now held irredeemable after Forfeiture, unless there be an express Agreement, that the Mortgagee may sell after Forfeiture.

Sect. 5. And notwithstanding, that in a common Mortgage, such Covenants ought not to be regarded, for the general Inconvenience that would follow; yet this Reasoning cannot extend, where it is made with an Intention to settle his Estate, besides the Consideration of the Money paid. As where the Conveyance is in Consideration of 1000*l.* paid to him by a Person that married his Kinswoman, upon Condition, that if he did not repay the Money with Interest during his Life, his Heirs, &c. should then have no Power to redeem; this Court can neither shorten, nor enlarge the Time that is given by express Covenant and Agreement of the Parties. So where there is a Clause or Provision to re-purchase in a Conveyance, the Time limited ought precisely to be observ'd. But then this must be in Case the Court are fully satisfied, that it was not originally a Mortgage, but an absolute Purchase: Or else a Redemption may be decreed at any Time within twenty Years after the Time of Re-purchasing is out.

Sect. 6. And in Equity there is no Time limited for the Redemption of a Mortgage, and the common Doctrine in the Court of Chancery is, that Mortgages were not within the Statute of Limitations; however that Statute may be mention'd sometimes as a proper Direction to go by; for the Courts of Equity are tender of settling any set Time, because there can be no Question in whom the Property of the
Pawn

Pawn is, when I possess it as another's, and Prescription was introduc'd only to put an End to Suits, and settle Property, which would otherwise be uncertain. Besides, a Man can never be injur'd, if he receives Principal, Interest, and Costs: But the Proprietor of the Land is injur'd, if he parts with his Possession under the true Value. Yet where a Man comes in at an old Hand, the Possessor shall account no further than for the Profits made in his own Time, and upon extraordinary Circumstances, it may be reasonable to debar him altogether of the Power of Redemption, and so this Court sometimes hath allow'd Length of Time to be pleaded in Bar, when the mortgaged Estate hath descended as a Fee, without Entry or Claim from the Mortgagor, and where the Possessor would be entangled in a long Account.

Sect. 7. And it seems, now the Court will not relieve Mortgages after twenty Years, for the Statute of 21 *Jac. cap. 16.* did adjudge it reasonable to limit the Time of one's Entry to that Number of Years, unless there are such particular Circumstances as may vary the ordinary Case, as Infants, Feme Coverts, &c. which are provided for by the Statute it self. And altho' these Matters in Equity are to be govern'd by the Course of the Court: Yet it is best to square the Rules of Equity, as near the Rules of Reason and Law as may be. So if there were Infants: Yet the Time having begun upon the Ancestor, it shall run even upon Infants, as it is at Law, in the Case of a Fine. But where a Bill has been brought, and an Account within twenty Years, a Redemption may be decreed upon the Foot of that Account. So if the Mortgagor agreed the Mortgagee should enter, and hold till he was satisfied; this is in the Nature of a *Welch* Mortgage, and in such Case the Length of Time is no Objection.

Sect. 8. And this Court cannot shorten the Time of Redemption which the Parties have agreed upon, but when that is past, the Practice is to foreclose. Yet at the Common Law, in the Case of Infants, the Parol was to demur, and the Infant is not bound to answer till full Age, and the Register, Parliament and Common Law give no Execution against an Infant Heir, tho' the Debt were clear and indisputable as by a Judgment or Statute: But the contrary is done in Chancery. However in Equity, the Interest of Infants is so far regarded and taken Care of, that no Decree shall be made against an Infant without having a Day given him to shew Cause after he comes of Age. And there being an Infant

in the Case, we cannot foreclose him without a Day to shew Cause after he comes of Age. But the proper Way in such a Case, is to decree the Lands to be sold to pay the Debts, and that will bind the Infant. So if Lands are devis'd to be sold for Payment of Debts, the Lands may be decreed to be sold, without giving the Heir, who is an Infant, a Day to shew Cause, when he comes of Age; for nothing descends to him. But if he is decreed to join in the Sale, he must have a Day after he comes of Age. But altho' if an Infant answer by Guardian, upon which a Decree is made, without any Day given him to shew Cause, it shall not be read or admitted as Evidence against him, when he comes of Age; yet an Infant shall be bound by an Offer made by him in his Answer, if the other Side are thereby delay'd, and he do not immediately after his Coming of Age apply to the Court, in Order to retract his Offer, and amend his Answer. And where an Infant is Plaintiff, he cannot amend his Bill in any Point where it has been dismiss'd upon the Merits. So if a Man by Fraud or Forgery gets into Possession of an Estate, and soon after dies, leaving his Heir an Infant, it would be hard his Infancy should protect him from pleading or answering; for neither Law nor Reason can entitle him to possess an Estate got by the Fraud of the Father. And some say, there is scarce any Case, where an Infant hath Time to shew Cause against a Decree, but where it is necessary for him to join in a Conveyance, as in Case of Foreclosure or the like.

Sect. 9. By the Civil Law, the Mortgage is properly a Security only for the Debt it self, for which it was given, and the Consequences of it, as the principal Sum, and Interest, and the Costs and Damages laid out in preserving it. But he that will have Equity to help, where the Law cannot, shall do Equity to the Party, against whom he seeks to be reliev'd. And upon this Rule a Mortgage given as a Counter-Security to a joint Obligee shall stand as a Security for a second joint Bond, enter'd into by the same Persons afterwards, without any Agreement for that Purpose; and the Heir shall not redeem without saving harmless against both. So if the Mortgagor borrows more Money of the Mortgagee, and gives Bond for it, the Heir of the Mortgagor shall not redeem without also paying the Debt by Bond, if that the Mortgagor bound himself and his Heirs in the Bond; for it is a known Rule in Equity, that where there is an Estate subsisting at Law, Equity will not destroy

it, unless the Party redeeming will satisfy all equitable Demands out of the Estate. And the Law is the same of an Executor, in Case of a Mortgage of a Lease for Years, tho' no special Agreement, that the Bond-Debt should stand secur'd by the Mortgage. So of the Mortgagor himself, he must pay all that was due on Note, or simple Contracts, or Bonds. But this last Point has been denied by some, and a Diversity taken between the Mortgagor himself and his Heir; for the Land in the Hands of the Heir is chargeable with the Bond-Debt even at Law. And since the Statute against fraudulent Devises, the Devisee of the Equity of Redemption is in the same Case with the Heir; because the Statute makes such Devise void, as against Creditors; but before that Statute, such Devisee would not be liable to the Bond-Debt.

Sect. 10. As for Pawns, they differ in this Respect from Mortgages, as appears by the following Case. A pawn'd some Jewels to K. who sign'd a Writing, that they were to be redeem'd in twelve Months, otherwise they were to be as bought and sold: K. within a short Time after, delivers over the Jewels, together with some Plate of his own to M. as a Pledge for 200 *l.* and K. afterwards borrow'd 30 *l.* and 50 *l.* of M. on promissory Notes to be repaid on Demand: Altho' M. was a Bookseller, and did not deal in Plate or Jewels, and so had not gain'd any Property, as having bought in a Market Overt, yet it is natural to think, altho' he took Notes for the 30 *l.* and 50 *l.* that the Pawn was not to be parted with, until that Money, as well as what was before lent, was paid. And it is to be look'd upon as an Account current between K. and M. and therefore he might retain what he had in his Hands, until the Ballance was paid: But the Goods of K. which were pawn'd are to be first applied, as far as the Value thereof would extend, and if there be Creditors of a higher Nature, this shall not give him any Preference.

Sect. 11. But in this both Pawns and Mortgages agree, that the Act, for which the Defendant is to pray Equity against the Plaintiff, must be done to the Plaintiff himself, or to his Representative. For if the Mortgagor mortgage the Equity of Redemption, and the second Mortgagee brings a Bill to redeem, he shall not be oblig'd to pay the Bond-Debt, since the Money was not lent to him. So the Assignee of the Equity of Redemption shall not be affected by a Judgment after confess'd by the Mortgagor, tho' the Judgment-

Creditor purchase in the Mortgage; but shall redeem upon Payment of the first Mortgage-Money only. So if Tenant for Life, Remainder to his Son in Tail, mortgage the Lands, and the Son after borrow Money of the Mortgagee, and give the Lands as a Security: Yet he may redeem without paying his Father's Mortgage, for the Son is a Stranger to the Father, and all one as Stranger.

Sect. 12. But further the Mortgagee is to be consider'd, as a Creditor beyond the Security he has taken. As where *A.* lent a Sum of Money on the Mortgage of some Houses, and had a Bond for Payment of the Money, as usual in such Cases; afterwards he lent a Sum of 2000*l.* on the Equity of Redemption, and had a Bond for that likewise; and then the Mortgagor becomes a Bankrupt, and by some Accident, the Value of the Houses sunk so much, that they were not sufficient to raise the Mortgage-Money first lent; on a Bill brought to have them sold, and that as to so much as they fell short to answer the first Mortgage-Money, the Mortgagee might come in upon his Bond, as a Creditor, it must be so decreed and as to the 2000*l.* lent upon the Equity, which was worth nothing, it must stand singly upon the Bond. So where a Man borrows Money on the Mortgage of a Ship, and covenants to repay the Insurance-Money, but there was no Covenant for Re-payment of the principal Money it self; the Mortgagee treated with a Person concerning the Insurance, but could not agree for the Rate, and thereupon the Ship went out, and was lost in the Voyage; since, if he had taken no Security at all for his Money, he had then without Question been a Creditor by simple Contract, surely the Taking Security ought not to put him in a worse Condition, especially now the Security being lost. And in Case of Pawns even at the Common Law, if the Pawn is lost without the Default of the Pawnee, he may have an Action for his Money against the Pawnor.

Sect. 13. Yet notwithstanding that by the Common Law, the Mortgagee of Lands has an absolute Interest, and by the Covenant for quiet Enjoyment, &c. till Default of Payment, the Mortgagor is but Tenant at Will to the Mortgagee; in natural Justice and Equity, the principal Right of the Mortgagee is to the Mortgage-Money, and his Right to the Land is only as a collateral Security for the Payment of it. And therefore all Mortgages are to be look'd upon as Part of the Personal Estate: Unless the Mortgagee in his Life-time,

or

or by his last Will do otherwise declare or dispose of the same. And in Regard the Money came first out of the Personal Estate, the Law always gives the Money to the Executor, where no Person is nam'd: And where the Election to pay, either to the Heir or Executor, is gone and forfeited in Law, it is all one in Equity, as if neither Heir or Executor were named, and therefore to have a certain Rule in these Cases, Equity ought to follow the Law and give it to the Executor. And the Right to a Sum of Money, which is a Personal Duty, ought always to be certain, and not variable upon Circumstances; so that whether there are Assets or not, or there wanted the Circumstances of a personal Covenant to pay the Money, is not material. So altho' the Mortgagee be foreclos'd, or it be of so ancient a Date, as in the ordinary Course of the Court not redeemable: Yet in Case the Mortgagee be not actually in Possession, it shall be look'd upon in his Hands to be Personal Estate. But if the Land be worth more than the Money, the Heir may well say, I will pay you the Money, and take the Benefit of the Foreclosure to my self.

C A P. II.

Sect. 1. **A**ND altho' the Money shall not be paid to the Heir or Assignee of the Land, without naming him in the Condition: Yet the Money may be paid by them in Preservation of their Inheritance, & *qui sentit onus sentire debet & commodum*. And it is Equity that should make Satisfaction, which receiv'd the Benefit. As where the Heir is indebted by Mortgage made by his Father, or by Bond, or by other Means, as Heir to his Ancestor, the Personal Estate in the Hands of the Executor shall be compell'd to pay that Debt in Ease of the Heir; and especially in Case there be sufficient to pay the Debt by the Mortgage, &c. and the Legacy out of the Personal Estate; for when both can be satisfied, both shall be satisfied. The Reason is, because the Personal Estate is the Fund for the Payment of all Debts, and the Mortgage-Money is a Debt, whether there be a Covenant for Payment in the Mortgage-Deed, or not; tho' some have been of a contrary Opinion, where there is no Covenant express or implied. But the Personal Estate of the Father is not liable to the Grandfather's Debts, and therefore it shall not go in Exoneration of the Grandfather's Mortgage of the Lands descended to the
Grandson,

Grandson, unless the Father had been Executor to the Grandfather, and had converted the Assets to his own Use.

Sect. 2. So the Wife being a Jointress, and having granted a Term for Years only out of her Estate for Life, by Fine, with her Husband for a Mortgage, there rests a Reversion in her, which naturally attracts the Equity of Redemption, altho' the Equity of Redemption was limited to the Husband and his Heirs by the Deed of Redemption; for that she was no Party to it. And the Husband having covenanted to pay this Money, if there be Assets sufficient, it shall be decreed clear to the Wife; for the Husband having had the Money, is in Equity the Debtor, and the Land is to be consider'd but as an additional Security. And so it is if there were no express Covenant. But all other Debts shall be first paid.

Sect. 3. And as the Heir in many Cases has the Assistance and Favour of the Court, as to make the Personal Estate first liable to Debts, and to be applied in Ease and Exoneration of the Real Estate: So even an *Heres factus* has had that Relief here. The Reason is, because the *Heres factus* comes instead of the *Heres natus* by the Will, and it is presum'd to be the Intention of the Testator, that he should have all the Privileges of the *Heres natus*. And some say, that not only he who is *Heres factus* shall pray in Aid of the Personal Estate to discharge the Real, but even an ordinary Devisee shall have that Benefit. But the Law seems otherwise. For if a Man mortgages his Land, and then devises it to *J. S.* or to *A.* for Life, the Remainder in Fee to *B.* there the Charge doth pass with such Estate, for there appears no Intent of the Testator. So where the Equity of Redemption is purchas'd, the Purchaser shall have no Aid of the Personal Estate of the Mortgagor, for he has made it his own Debt. Nor shall the Heir himself after the Sale; for the Equity that the Heir has, is, that the Lands may descend clear to the Family.

Sect. 4. But regularly the Personal Estate must aid the Heir, and an implied Intent must not, without clear Expression, alter the equitable general Law. As if a Man devises Lands for Payment of Debts and Legacies, and devises the Personal Estate shall go in Discharge of the Real; because the Remainder of the Lands, after the Debts and Legacies paid, descends to Heir as Heir, and he is not thereby disinherited. And altho' there is an express Devise to the Executor, yet that is only after Debts and Legacies paid, and being no more than the Law

gave him, is a void Devise. *A Fortiori* if the Devise to the Executor be in the same Clause in which she was named Executrix; for it not being said, free and exempt from Payment of Debts, she must therefore take it as Executrix. Otherwise if a Man devise Lands for Payment of Debts and Legacies, and the Overplus to the Heir, or to the Heir and a Stranger, as they call it in Chancery out and out. For there is a Difference between charging an Estate with Payment of Debts, and devising an Estate to be sold out and out to pay Debts: Since in this Case the Intent appears to be, that he should take the Overplus, as a Money-Legacy only, and that the Land should not descend to him as Heir at all.

Sect. 5. And if there be no Assets to answer the Intent of the Testator on his Legacies, the Heir shall have no Assistance of the Personal Estate; for this would be to overthrow his express Intent by an implied one, that the Land was to descend free to the Heir, and to take away from a Man the Disposal of his own Property. So if the Personal Estate were devis'd to a Stranger, and not to the Executor; for such Devise must then be taken as a Legacy. So if the Devise were of a specifick Legacy, or any certain Sum to the Executor; for the same Reason. So if he devise all his Goods, Chattels, and Household-stuff in such an House to another, and then goes on in these Words, *All the Rest and Residue of my Personal Estate I give and devise to my Wife, whom I make sole Executrix*: For tho' the Words, *Rest and Residue of his Personal Estate*, are generally understood, after Debts, Legacies, and Funerals: Yet here they are relative to the last Antecedent, and pass to his Wife, as a specifick Devise of what he had not before particularly devis'd. Much more if there be an express Clause to exempt the Personal Estate from Payment of Debts, the Will of the Testator shall be observ'd. And the Heir can have no Equity in Case of other Creditors to defeat them of their Debts, for this even an express Devise to him of the Personal Estate could not have done.

Sect. 6. On the other Side it is but reasonable, that as the Heir is to have Equity, he should do it. And therefore altho' regularly, where the Parties are in equal Degree, the Executor or Administrator may prefer which of them he thinks fit: Yet Equality is Equity, and the Court, where they have any Foundation to go upon, usually marshals the Assets, so as all Parties may have Satisfaction, for *Nemo ex alterius detrimento fieri debet*

debet locupletior. So if there be a Debt owing to the King, the King's Debt shall be satisfied out of the Real Estate, that the other Creditors may be let in to have a Satisfaction of their Debts out of the Personal Assets.

Sect. 7. But Equity is remedial only for those who come in upon a good Consideration. So that in Case of Legacies there is a Difference. For if the Legacy be in Satisfaction of a Debt, or as a Provision for younger Children or Grandchildren, then Equity will marshal the Assets, as for a simple Contract Creditor. And the Statute for settling Intestates Estates has made a Will for those that die Intestate and therefore the younger Children of one dying Intestate, shall have the same Advantage, as if their Shares had been respectively devis'd to them. But otherwise it is, if the Legatees were Volunteers or collateral Relations; for whom the Testator was not oblig'd by the Law of Nature to provide; or were provided for in the Life of the Testator. And since the Heir is not disinherited by the Will, the Value of what descends to him must be look'd upon as much a design'd Provision for him, as an express Devise is for the younger Children, and therefore he must abate in Proportion out of his Provision, in the same Manner, as each of the younger Children are to abate out of their respective Provisions, where there is not sufficient to answer them all, so that the Heir must have as much as all the Legatees taken together. But if there be a bountiful Provision for the Heir; as where there is as much left in Reserve for him, as is taken out for a Provision for all the younger Children Legatees; in such Case the Legatees shall have their whole Legacies.

C A P.th III.

Señt. 1. **I**N *equali Jure melior est Conditió Possidentis.* Where Equity is equal, the Law shall prevail, and he that hath only a Title in Equity, shall not prevail against Law and Equity. As a Purchaser or Mortgagee coming in upon a valuable Consideration without Notice, and purchasing in a precedent Incumbrance, it shall protect his Estate against any Person, that hath a Mortgage subsequent to the first and before the last Mortgage, tho' he purchas'd in the Incumbrance, after he had Notice of the second Mortgage; for he has both Law and Equity for him. It is true there have been strong Arguments us'd against the Unreasonableness of this Practice, and there might likewise be strong Reasons brought for the Maintaining of it, and so it was at first a Case very disputable; but being long since settled, the Court will not now suffer that Point to be stirr'd; but it may be, they will where they find a Man designing a Fraud, and who thinks to make a Trade of Cozening by the Rules of the Court. So tho' it were purchas'd *pendente lite* between them, for a Discovery and Re-conveyance, the first Mortgage being satisfied. But otherwise if after a Decree made. So tho' nothing be due upon it; he himself has no Estate at all in him; or it be obtain'd by undue Means, as without any Consideration; or by Fraud: For the Practice is not material, to secure a just Debt. So if the Purchase were of a precedent Statute by the last Mortgagee, he shall not be brought to any Account upon this in Equity by the second Mortgagee, any otherwise than he may do at Common Law upon a *Scire fac' ad computand'*, viz. not according to the true Value, but upon the extended Value for the whole Debt and Damages. And this, altho' the extended Value was but a third Part of the true Value. Same Law of a Purchaser, and there is no Difference, whether it was bought in before the Purchase or after. So that by Protecting is meant, making all the Advantages of it, that the Law admits of.

Señt. 2. So where the second Mortgagee agreed with the Executor of the Conuzee, to put the Statute in Execution at his Costs, and to pay him the Debt due on the Statute, after such Time as the Statute should be extended, and an Assignment made thereof; for a Thing agreed to be done, is look'd upon in Equity as really done, and he shall not only defend himself,

as to the Land, that is in his Mortgage; but for so much as is contain'd in the Statute. But if a Man is seiz'd of sixty Acres, and mortgages twenty to A. and then mortgages the Whole to C. who purchases in the first Mortgage, that shall not protect more than the twenty Acres; but it shall protect these twenty Acres, so as B. shall never recover that, until he pay C. all the Money upon the first and last Mortgage.

Sect. 3. And it is now an establish'd Doctrine, that a Purchaser *bonâ fide*, and without Notice of any Defect in his Title at the Time of his Purchase, may lawfully buy in any Statute, Mortgage, or any other Incumbrance, and if he can defend himself by those at Law, his Adversary shall have no Help in Equity to set those Incumbrances aside; for Equity will not disarm a Purchaser. And Precedents of this Kind are very ancient and numerous, where the Court has refus'd to give any Assistance against the Purchaser, either to the Heir or to the Widow, the Fatherless, or to the Creditors; or to one Purchaser against another. And this Rule in Chancery is in Vindication of the Common Law, where the Maxims which refer to Descents, Discontinuances, Non-Claims, and Collateral Warranties, are only the wise Acts and Inventions of the Law, to protect and quiet the Possession, and strengthen the Right of the Purchasers.

B O O K IV.

P A R T I.

C A P. I.

Sect. 1. **I**T is not pretended, that Wills are of Ecclesiastical Conuzance *suâ naturâ*, but only such as were made for pious Uses; and in *England* it plainly appears, that the Probate of Testaments was originally in the County-Court. But the Conqueror made a Law, that no Matters of Ecclesiastical Conuzance should be transacted in the County-Court. And altho' it is not discover'd, how the Bishop and Earl divided their Causes and Jurisdiction after the said Law: Yet that of Wills, it seems, went wholly to the Bishop and Clergy, and the *Saxon* Custom being chang'd, the *Norman* was introduc'd. Nor was the very Name of the Ecclesiastical Court, or Court Christian heard of before this Division. But it is clear, that in *H. II.*'s Time, the Jurisdiction of Personal Legacies was in the secular Courts, and in *Glanv. lib. 7. cap. 6 & 7.* there is the Form of the Writ for a Personal Legacy. Yet that the Spiritual Court did from the Beginning of *H. 3.* exercise a Jurisdiction for Recovery of Legacies, is infallibly prov'd from *Bracton*, and the Cases of that Time. And tho' in Legacies, as in Tithes, the Jurisdiction, that gave the Recovery of them, was sometimes in one, and sometimes in the other Court, before it was restrain'd to the Spiritual only: Yet it seems beyond Exception, that the Spiritual Jurisdiction over Legacies, was long before in Practice. The Beginning of this Practice is as difficult to find, as that of Probates: But it is thought by some to have come from the Canon in the Decretals, *Extr. de Test. c. 6.*

Sect. 2. But it is without Question, that the Suit for a Personal Legacy may be brought in Chancery; and if the Matter has proceeded to a Sentence in the Ecclesiastical Court, it is proper to come here for the Executors Indemnity. And here Legatees are to give Security to refund, but not there; and

this Court will see the Money put out for Children. And so a Bill for Distribution of an Intestate's Personal Estate is very proper in this Court; for the Spiritual Court in that Case has but a lame Jurisdiction, and there are no negative Words in the Act of Parliament.

Sect. 3. But a Will prov'd in the Spiritual Court, is not to be controverted here for Fraud, altho' he shall have no Aid of this Court. Yet some think the Judgments of the Ecclesiastical Court ought to be as subject to the Equity of this Court, as Judgments in the Courts of Common Law. And altho' at Law one Executor is not liable to the *Devastavit* of another, yet in the Ecclesiastical Courts, and by their Law, if an Executor prove the Will, they will charge him, tho' he intermeddle no further, to pay the Legacies. And the Plaintiff is without Relief by Appeal from the Sentence; because the Judges Delegate must judge according to that Law, and therefore this Court should relieve him. And without Question there may be Fraud in obtaining a Will, which is relievable in Equity, and of which no Advantage can be taken at Law. As if a Man agrees to give the Testator 2000*l.* in Bank-Bills, if he will devise his Estate to him; and upon the Delivery of these Bills, he makes his Will, and leaves his Estate to him accordingly, and the Bills after prove to be forg'd or counterfeit. But it has been settled, that a Will of a Real Estate cannot be set aside in a Court of Equity for Fraud or Imposition, but must be first tried at Law, on *deviseavit vel non*, being Matter proper for a Jury to inquire into.

Sect. 4. In Regard therefore, that Cases of Wills are for the most part tried in the Ecclesiastical Courts, and by the Rules of the Civil and Pontifical Law, the King's Judges must in such Cases judge after the Law of the Church, that there may be a Conformity of Laws. And thus in Personal Chattels, the Civil and Canon Law is to be consider'd. And there the Rule is, where Personal Chattels are devis'd for a limited Time, it shall be intended the Use of them only, and not a Devise of the Things themselves; and so a Remainder over of them is good. And altho' in some Cases a Man is said to die without Issue, whenever there is a Failure of Issue, as to the Limitation over of Lands of Inheritance: Yet in Case of a Personal Legacy, or Chattel Real, it is not intended to arise upon any remoter Contingency, than that of dying without Issue living at his Death. So where there was a Devise of all
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the Personal Estate to *A.* who was a Feme Covert, but the Testator declar'd, that it was his Mind, that the Interest and Produce thereof should be for her Use separate from her Husband, and after her Decease, the Interest and Produce thereof to her Children till twenty-one, and then the Principal to them, but for Want of such Issue, then he gave all his Estate to the Children of *J. S.* and made the said *A.* Executrix, and residuary Legatee, she being only intitled to the Interest and Produce for her Life, the Personal Estate was not vested in her, and the Limitation over upon the Contingency of *A.* dying without Issue, is a good Limitation, and as for the Words *Residuary Legatee*, it only means for the Purpose in the Will.

Sect. 5. And the Canonists, whom our Resolutions have follow'd, have expounded these Wills, as the Civilians did the *Testamenta militaria*, viz. according to the Intent. And therefore, altho' a Legacy is to be taken as a Gift, yet a Man shall be intended to be just before he is kind. So that a Bequest of the same Sum by the Debtor to the Creditor, shall be applied in Satisfaction of the Debt. For by the Law of Nature, when two Duties happen to interfere at the same Point of Time, that which is the most honest and best is to be preferr'd. And so it shall be in Construction; for the Intendment of Law is agreeable to Nature, and on the better Side. Yet where there are Assets, and he intended both, it may be as good Equity to construe him both just and kind, and the Construction of making a Gift a Satisfaction has in many Cases been carried too far. And this Presumption of the Canon Law was founded upon the Similitude of the Legacy with the Debt, which yet might be controll'd by opposite Presumption: Much more then ought Proofs to do it, which may be stronger than any Presumption. So if a Legacy be less than the Debt, it was never held to go in Satisfaction. So if the Legacy were upon Condition, or upon a Contingency; for the Will is intended for his Benefit, and therefore it could not be suppos'd, that the Testator would give him an uncertain Recompence in Satisfaction of a certain Demand. So if the Thing were of a different Nature, as Land, it should not go in Satisfaction of Money, tho' there was a Defect of Assets. So if the Debt was contracted after the Legacy given, he could not have it in Contemplation to satisfy a Debt not then in Being. Cases of this Nature therefore depend upon Circumstances, and where a Legacy has been decreed to go in Satisfaction of a

Debt,

Debt, it must be grounded upon some Evidence, or at least a strong Presumption, that the Testator did so intend it; for a Court of Equity ought not to hinder a Man from disposing of his own, as he pleases. And therefore the Intention of the Party is to be the Rule; for where he says he gives a Legacy, we cannot contradict him, and say he pays a Debt.

Sect. 6. But as the whole Force of the Bequest often rests upon some particular Words, it will be necessary to consider, what Interpretation they bear in the Canon and Civil Law: At least such as are made Use of frequently in Testaments, as Goods, Chattels, Moveables, Ready Money, Debts, Household-stuff, and the like. Now by Goods, the Civil Law doth oftentimes understand, not only those Things whereof a Man is Owner, or justly possess'd: But also such as belong to him, whether corporeal or incorporeal, for the which he may have a lawful Action, as Debts. And so with us the Words, Goods and Chattels in a Devise, will pass a Right to set aside a Release obtain'd by Fraud. *2dly*, Sometimes it is understood of a Man's whole Estate, both actively and passively, which devolves upon him, who in that Law is call'd *Heres* or Heir. *3dly*, By the Word *Goods*, the same Law doth understand no more, but only a Man's clear Goods, his Debts deducted. And in the Common Law, the Word *Goods* extends, neither to Things in Action, nor Chattels, nor Freehold.

Sect. 7. Chattels is a Word more obvious in the Laws of this Realm, than in the Civil Law, and takes in all his Goods; except such as are of the Nature of Freehold or Parcel thereof. And these Chattels are divided into Real or Immoveable, and Personal or Moveable. Among the latter, Money is accounted, tho' some have held that ready Money is neither Goods nor Chattels; because it is of no Worth in it self, but is made so only by the Consent of Men, as necessary for Common Life. But according to others, a Devise of all his Chattels, passes the whole Estate of the Testator, both actively and passively, as in Case of a Devise of all his Goods; for it is as extensive and more.

Sect. 8. *Mobilia*, is strictly such Goods as are passively moveable, or removeable: And *Moventia*, such as actively and by their own Accord do move themselves, as live Goods. Yet regularly Moveables are indifferently understood of both, and will pass them in a Devise: As also industrial Fruits, *viz.* such as are sown by Men's Industry, in Order to be reap'd with In-

crease ere long, for these are moveable *Habitu*, or in the Intention and Purpose of the Sower. And these Emblements are to be put in the Inventory ; for the Rule of *Accessorium sequitur Principale*, is true in Fruits natural, but not in Fruits industrial. Immoveable Goods or Chattels Real, are those which do not immediately belong to the Person, but to some other Thing by Way of Dependancy ; as Trees growing, or a Term for Years. Yet it will not extend to the industrial Fruits ; for they are reckon'd among the moveable : But it takes in all Leases, and all the natural Fruits ; as also whatever is appurtenant to, or Parcel of the Thing demis'd, which, if it were out of Lease, should belong to the Heir, and not to the Executor

Sect. 9. Ready Money is justly reputed among the moveable Goods of the deceas'd ; for no Goods are more moveable, and it is therefore term'd current. But altho' this is regularly true, yet it fails in particular Cases. As 1st, Of the Money that arises from Lands devis'd to be sold, *vide* 21 H. 8. cap. 5. 2^{dly}, Of Money laid up for Payment of Lands purchas'd ; for it is not likely, that he intended to pass that Money in Prejudice of the Heir, according to that Rule of Law, that nothing doth pass by general Words, where it is likely the Giver would not grant them by Special. Also in Favour of the Heir, many Things, which of their own Nature are moveable, by Construction or Fiction of Law are nevertheless accounted immoveable, as Hawks and Hounds, and Deer in the Park, &c.

Sect. 10. Debts are neither moveable nor immoveable Goods, nor will they pass as such. But if the Testator did bequeath all his Goods moveable and immoveable whatsoever ; these universal Signs stretch the Word, to which they are join'd, to the Comprehension of whatsoever is signified by them, not only properly, but also improperly, or else they would be idle and superfluous, which Superfluity is to be avoided, especially in a Testament, wherein commonly less is written than spoken, and less spoken than was meant, partly thro' want of Skill, and partly thro' Want of Time. And altho' no Man is presum'd to think that which he doth not speak : Yet by the common Use of Speech within this Realm, Debts are understood to be comprehended under that general Legacy of all Goods moveable and immoveable.

Señt. 11. Household-stuff is *Instrumentum patrisfamilias domesticum & quotidianum*. But this wants some further Explanation. In the first place then, there is no Doubt, but these Particulars are to be reckon'd as Part and Parcel of Household-stuff, *viz.* Tables, Stools, Chairs, Carpets, Hangings, Beds, Bedding, Basons with Ewers, Candlesticks, all Sorts of Vessels, serving for Meat and Drink, being of Earth, Wood, Glass, Brass, or Pewter, Pots, Pans, Spits, and such like. *2dly*, Without all Difficulty, Apparel, Books, Weapons, Tools for Artificers, Cattle, Victuals, Corn in the Barn, or Granary, Wains, Carts, Plough-gear, Vessels affix'd to the Freehold, are no Part of Household-stuff. And in ancient Times, nothing which was made of Silver or Gold, was accounted Household-stuff; because of the Severity and Frugality of old Times, when Vessels of Gold and Silver were very rare. But upon the Change of Manners *ex Ebore, testitudine atque argento, jam ex auro etiam atque gemmis supellestili utimur*. And thus also these Vessels of Silver, Gold, and precious Stones, as Bason and Ewer, Bowls, Cups, Candlesticks, &c. pass as Part of Household-stuff or Furniture. Yet not indistinctly or absolutely, but with this Limitation, so that it be agreeable to the Testator's Meaning, otherwise not; that is, if the Testator, in his Life-time, did use to reckon them amongst his Household-stuff. But if the Testator did esteem them as Ornaments, rather than Utensils, and did use them for Pomp or Delicacy, rather than for daily or ordinary Service of his House, in this Case, they do not pass under the Bequest of Household-stuff. Or if the Testator did use to number Things of another Kind amongst his Household-stuff, which without Doubt are not so to be esteem'd; as his Apparel, and such like; then, altho' he did intend, that his Apparel or those Things should pass under the Name of Household-stuff, yet the Legatory cannot recover them. So Furniture in a large House takes in Plate; but not where he distinguishes the Chapel Plate from the Furniture.

Señt. 12. And altho' there be no Defect in the Testator's Meaning, yet because the same is no Way express'd by Words, which by their own Nature, or by Common Use of Speech might testify this Meaning of the Testator, therefore is the Legacy void, as if it had not been written or spoken: Unless it were the express Will of the Testator, that the Legacy should stand good notwithstanding his Misnaming thereof.

Non

Non enim ex opinione singulorum, sed ex communi usu. verba exaudi debent. But it is to be observ'd, that Error in the Name, Quantity, or Quality of the Thing bequeath'd, doth not hurt the Legacy, when the Body or Substance is certain; and so of Error in the Name, or Quality of the Person. But Error in the Body or Substance of the Thing bequeath'd doth destroy the Legacy, as well as in the Person of the Executor or Legatory. And so Error in the Form of the Disposition maketh it to be of no Force, as if a Condition is omitted by Mistake, the Legacy is void.

Sect. 13. And a Will speaks not until the Death of the Party, for till then he is Master of his own Will: But the Construction is to be made, as Matters stood at the Time of making the Will. As where *A.* devis'd the Surplus of his Estate to his Brothers *B.* *C.* and *D.* and the Children of his Brother *E.* and of his Sister *F.* equally to be divided; and if any of my Brothers die before the Estate is got in and divided, his or their Share to go to his or their Children; *B.* died before the Estate was got in and divided, and before the Testator, yet still he died before the Estate was got in and divided: But then it is objected that his Share is to go to his Children, when he had no Share ever vested in him, but that is to be understood the Share intended him. So a Devise of 300 *l.* to three at twenty-one, and if any die, to go to the Survivors, one died in the Life of the Testator; this is a Devise over as an executory Devise. But where the Devise was of a Debt to two, and if either died, to the Survivor, and one died before the Debt got in: Altho' he surviv'd the Testator, yet as he died before the Debt was got in, he was not entitled to the Share of the Debt.

Sect. 14. And if the Gift be general, it shall be expounded generally, for the Court will not restrain the Testator's Bounty. As where one gave Legacies of 15 *l.* a-piece, to each of his Relations of his Father and Mother's Side: The Court would not restrain the Devise to the Relations, within the Statute of Distributions. So where a Will was made in these Words, *Item,* I give to such of my Servants, as shall be living with me at the Time of my Death, one Year's Wages: Altho' Stewards of Courts, and such who are oblig'd to spend their whole Time with their Master, but may also serve any other Master, are not Servants within the Intention of the Will; yet the Court will not narrow it to such Servants only, as liv'd in the Testator's House, or had Diet from him.

C A P. II.

Sect. 1. **L**ET us now see how a Legacy, which was at first good, 'may afterwards be destroy'd or lost; and this is, *1st*, By Ademption or Translation. *2^{dly}*, Where it is lapsed. *3^{dly}*, The Testator's Estate falling short. Ademption is the Taking away of a Legacy before bequeath'd. Translation is a Bestowing the Legacy bequeath'd upon some other Person. So that Ademption may be without Translation; but Translation of a Legacy cannot be without Ademption. This Ademption of Legacies is two-fold, express'd and implied. The express'd is, when the Testator doth by Words take away the Legacy before given. An implied Ademption is, when the Testator doth by Deed without Words, take away the Legacy. But Ademption of Legacies is no more to be presum'd, than the Revocation of the Testament, unless it be prov'd, notwithstanding the Length of Time, or Alteration of Circumstances; for a Revocation by Implication must be a necessary Implication, and wholly inconsistent. And where it is said, that as the latter Testament doth destroy the former, so the latter Part of the Testament doth overthrow the former Part: That is true, when it is evident that the Testator did mean it should be so. But if it be doubtful, we ought to labour diligently to save the Testament from Contradiction. If therefore the same Thing be devis'd to two, and one dies, the other shall have the Whole; or if both survive the Testator, it shall be divided betwixt them, or they shall take it jointly. But it is sufficient in last Wills for the Revoking of a Legacy, that the Testator's Meaning do appear by an Act otherwise insufficient. As if the Gift or Alienation, not being of Necessity, but voluntary, be void in Law. Yet the second Will must be a good Will in all Circumstances to revoke a former; it being intended to operate as a Will, and not otherwise as an Instrument of Revocation.

Sect. 2. In a Devise of Debts, the true Distinction seems to be between a Legacy, *in numeratis*, and a specifick Legacy. For in the first Case, the Legacy will remain, tho' it is devis'd out of Debts paid in to the Testator: But a specifick Legacy may be lost by being alter'd. And there is no Foundation for the Difference taken in the Books, between a voluntary and com-

pulsory Payment, for the latter might be with an Intent to secure the Legacy on all Events.

Sect. 3. And regularly if the Legatory die before the Legacy be due, the Legacy is extinguish'd: Yet it is otherwise, when they take as Nominees only, and it is but the Execution of a Trust. So when the Legacy is not conditional, but modal, as 20 *l.* devis'd to a Boy to bind him Apprentice, and he dies before he is bound, his Executor or Administrator shall have it; because the same is actually devis'd to him, and the Act of God shall not take it out of him. So if it were devis'd to be paid him within six Months after he shall have serv'd his Apprenticeship; the Serving the Apprenticeship is not a Condition annex'd to the Legacy, but only an Appointment when it should be paid. And tho' a Will is no Deed; because a Seal is not necessary to it; yet it has the Force and Effect of a Deed. And therefore if a Person says in his Will, I forgive such a Debt, or my Executor shall not demand it; this is a Discharge of the Debt, tho' the Debtor dies in the Life of the Testator. But if a Debt is mention'd to be devis'd to the Debtor, without Words of Release or Discharge of the Debt, if the Debtor died before the Testator, that will be a laps'd Legacy, and the Debt will subsist. And if the first Clause in the Will imports a Devise only, and the latter Clause amounts to a Release and Discharge of the Debt; the latter Clause shall be coupled with the former, as to be ancillary and dependant upon it, *viz.* if the Legacy took Effect, then the Executor to release, &c.

Sect. 4. But a Legacy is an immediate Duty, tho' payable *in futuro*, and is an Interest vested, which shall go to the Executor or Administrator. So of a Share of an Intestate's Estate, or a Sum of Money devis'd out of Lands; for it is look'd upon as a Legacy, and depends merely on the Will, and is govern'd by the Ecclesiastical Law, which is so. Otherwise, where it depends upon a Deed; for a Trust is guided by the Intent. And if a Settlement is made, and Lands charg'd with such a Sum of Money, as a Will should declare; there the Will would be but declarative and not operative. And this the true Difference, and not that which is laid down in some Books, that where the Time is annex'd to the Legacy it self, and not to the Payment of it, if the Legatee dies before the Payment, it is a laps'd Legacy: Otherwise if the Time be annex'd

nex'd only to the Payment of it. So a Contingency, as after the Death of the first Devisee without Issue living at his Death, vests immediately tho' not assignable over; for this is a near and common Possibility. And where Words refer to that which must needs happen, there shall be no Contingency.

Sect. 5. Lastly, If a Man devises specifick Legacies and pecuniary Legacies, and the Estate falls short to answer the pecuniary Legacies, they shall abate in Proportion; but nothing shall be abated from the specifick Legacies. And where one devises to his Wife all his Personal Estate at *W.* this is a specifick Legacy, and is as if he had enumerated all the Particulars there. So a specifick Legatee is not to abate in Proportion with other Legatees, where there is a Deficiency to pay Debts: Yet in any Case, he cannot have more than the Testator devis'd to him, altho' the Testator had not Power over it. So when the Testator doth bequeath any Thing in Satisfaction or Recompence of some Injury by him done; this Legacy is not to abate any more than a specifick Legacy. But if a Man devises specifick and pecuniary Legacies, and afterwards says, that such pecuniary Legacies should come out of all his Personal Estate, or Words tantamount; or if there is no other Personal Estate than the specifick Legacies; they must be intended to be subject to the pecuniary Legacies, otherwise he must mock the Legatees. So a Legacy devis'd to be paid in the first place, shall abate, if the Legacies fall short. So a Devise of 100 *l. per Ann.* to be set out by his Executor, is not a specifick Legacy, but *Quantitatis*.

P A R T II.

C A P. I.

Sect. 1. **B**UT we cannot omit making some Mention of Executors and Administrators, at least with Respect to their Office and Duty. Executors and Administrators differ in little else than in the Manner of their Constitution, their Offices being almost exactly the same. And this consists chiefly in three Things. *1st*, The Proving the Will. *2^{dly}*, The Payment of Debts. And *3^{dly}*, The Making an Account. As to the first; The Ecclesiastical Court is the proper Place to try Wills and prove them, and the Chancellor will not try them here. But altho' the Probate of a Testament of Personals belongs only to the Spiritual Court: Yet of Lands or such Things as favour of the Realty, it is otherwise; however by Agreement they may be prov'd there. And in Boroughs, a Devise of Lands by Custom is reputed as a Devise of Chattels, and so prov'd before the Ordinary, and after before the Mayor in the Hustings. So the Prerogative Court of *Canterbury* is not to prove a Will concerning the Guardianship of a Child, which is a Thing conusable here, and to be adjudg'd, whether it be devis'd pursuant to the Statute. But they may prove a Will which contains Goods and Lands, tho' formerly a Prohibition us'd to go *quoad* the Lands, for the Spiritual Court could not prove the Will in Part; for the Will was the whole Will and not a Part.

Sect. 2. But as to Executors, Probate is not the Matter, for he is Executor notwithstanding in our Law, and may do all Acts, except bringing Actions; because else, he cannot appear to the Court judicially to be the Executor. Yet if he shews it to the Court, when he declares, it is sufficient, tho' it was prov'd after the Action brought. And if one Executor proves the Will, it suffices for all. Neither is the Refusal before the Ordinary any Estoppel to administer afterwards when they please in our Law: And we have no Regard in this Point to the Ecclesiastical Law, where a Renunciation is peremptory.

And if an Executor dies, the Executor of the Executor shall be charg'd; for he is Executor of Course, if the Will be prov'd, because there needs no new Probate. But no one can prove the Will, but he who is named Executor in the Will, and therefore he must take Administration with the Will annex'd, if the Executor died before Probate; for Administration is an Act *in Pais*, of which the Spiritual Court cannot take judicial Notice.

Sect. 3. And if a Man makes his Will, which is prov'd, the Ordinary cannot change it, nor make another Executor or Administrator; because this was the Testator's Act, and he hath his Authority immediately from the Testator, and is like the *Heres* in the Civil Law, only he is to take nothing to his own Use. Nor hath the Ordinary any Power to grant Administration, but when the Person deceas'd did die Intestate, or that the Executors, either will not or cannot perform the Office. For the Executor is constituted by the Testator himself, and by him thought fit, and the Ordinary cannot adjudge him not to be so upon a Disability by the Canon Law, as where he became a Bankrupt; for that is not receiv'd here, but as far as admitted from Time immemorial. Otherwise of a natural Disability, as *Non compos*, &c. And if an Executor takes Administration, and be once sworn, tho' he will not after administer, the Ordinary cannot make any other: But it shall be accounted the Testator's Folly to make such an one Executor as will not administer. And after an Executor has once administer'd, he cannot refuse; or else an Executor might convert the Goods to his own Use, and then refuse, so that a Man should never recover against him, which would be against Reason: Wherefore the Ordinary ought in such Case to compel him to prove the Testament upon Pain of Excommunication, &c.

Sect. 4. For the Ordinary may make Process against Executors to prove their Testament, and if they do not come, they shall be excommunicated; and if they come and refuse, the Ordinary ought in all that he can to perform the Will of the deceas'd. And if any Legacy be left him, he shall not reap the Benefit of it, if being duly admonish'd, he refuse the Burthen. But the Executors may pray Time to advise, and the Ordinary is to grant in the mean Time Letters *ad colligend'*. So the Ordinary may grant Administration in the mean Time, till the Executors prove the Will; as during Ab-

fence beyond Sea, Minority, or *pendente lite*, and a *Caveat* is only *Consilium*, but not *Præceptum*. And an Administrator *durante minori etate*, may do all Things that an Executor may, and he has more than the Custody, for he has the Property. Yet his Release is not good, but for such Things as he ought to release, and he is only a Curator in the Civil Law, which is in the Nature of a Bailiff in our Law, who hath no Power over the Estate, but only to sell *bona peritura*: And the Court *ex Officio* ought to take Notice of the Ecclesiastical Law, when it is by that Law determin'd.

Sect. 5. But when one dies Intestate, the Ordinary has Power to grant the Administration to whom he pleases. And therefore the Ordinary may well make another, if the Committee will not administer at all, or but in Part; for he cannot compel one to administer, and then is the Power of the first determin'd, as a Man may revoke his Letter of Attorney. For as a former Will may be revok'd by a latter one, by the Law of the Church, *a fortiori*, so may Letters of Administration. And a Power or Authority is revocable, as an Administration; because he has nothing to his own Use: Otherwise of an Interest certain. But mine Acts executed shall stand, *viz.* if the Administration, was once lawfully granted, tho' not perhaps, where it was never good. Yet even in the first Case, they may be avoided against Creditors for Covin, by the Statute of 13 *Eliz.* And if an Administrator dies, his Executors cannot meddle with his Goods, but the Ordinary may make a new Letter to whom he will, &c. And upon Letters of Administration shewn, we must judge according to their Law; for it shall be intended, that they would not grant it against Law. But altho' by the Civil Law, the Administrator was accountable as Servant to the Ordinary, and might be discharg'd by him, and a Repeal might have been of the Letters of Administration at the Ordinary's Pleasure: Yet since the Statute 21 *H. 8. cap. 5.* the Administration being duly committed by the Ordinary, cannot now be repeal'd without Cause, but a Prohibition lies. So where at Common Law, the Ordinary was not compellable to grant Administration at all, and also might grant it to whom they pleas'd; now they are compellable to grant it to the next of Kin. Nor is Administration now esteem'd like a Letter of Attorney, but is rather an Office, and Administrators are enabled to bring Actions in their own Name, and come in the Place of Executors,

as a new Creature made by the Statute, and therefore this Office survives.

Sect. 6. And the Civil Law with Respect to Successions, was anciently very various and perplex'd, till by *The Novel Constitutions* 118. c. 1. it was settled and made plain; from whence the Plan of the Statute of Distributions was taken and penn'd by a Civilian, and except in some few particular Instances mention'd in the Statute, is to be govern'd and constru'd by the Rules of the Civil Law, and not from the Canon Law. For the Canon Law prohibiting Marriage between Relations, till after the fourth Degree, that they might exclude as many as possible from the Liberty of Marriage within those Degrees without a Dispensation, reckon all in the direct ascending or descending Lines, and those in the collateral Line corresponding with them, to be but one Degree. And it is said, the Ecclesiastical Court very anciently made Distribution of Intestates Estates, long before the Act of Parliament, *viz.* of 22 Car. 2. nor were they prohibited till the Reign of King James 1. And the Prohibition was grounded on the Statute of 21 H. 8. which directs the Ordinary to grant Administration to the next of Kin; for when that was done, they had executed their Authority. But where the Words in the Act of Parliament are, *to distribute according to the Laws for that Purpose, and Rules in the Act aforementioned*; the Word *Laws* must relate and be intended of Ecclesiastical Laws, and the Usage in the Spiritual Court before that Time practis'd. And there is no Doubt now, that the Half-Blood shall have Administration; even an Alien of the Half-Blood is capable. As to the Words in the Act, provided that no Representation be admitted amongst Collaterals after Brothers and Sisters Children, these are to be understood of the Brothers and Sisters of the Intestate. For the Intestate is the Subject of the Act, it is his Estate, his Wife, his Children: And by the same Reason his Brother's Children, he being plainly the Cor-relative to all. But the Statute being made upon a Presumption, that the Intestate intended to prefer the next of Kin, when there is a residuary Legatee, that Presumption is taken away: And therefore he shall have the Administration, whether Assets or not.

C A P. II.

Sect. 1. **B**UT Executors shall have only such Chattels as the Testator had to his own Use. And regularly Estates of Inheritance, or of Freehold descendible, shall go to the Heir, and the Statute of 29 *Car. 2. cap. 3.* makes the Estate *pur autre vie* Assets, only to pay Creditors, for it is still a Freehold and not distributable. Yet whatever comes to the Executors Hands, or they are entrusted with as Executors, shall be Assets at Law. And legal Assets, altho' you cannot come at them without the Assistance of Equity, shall be applied in a Course of Administration: Otherwise where you raise Assets, where there were none at Law. Yet even there, real Securities shall be first satisfied, and then the Debts by Bond and Simple Contract, to be paid in Average; for any other Method would become impracticable. And the Rule is, where there are legal, and also equitable Assets, the Creditors, who will take their Satisfaction out of the legal Assets, shall have no Benefit of the equitable Assets, till the other Creditors, who can only be paid out of those Assets, have receiv'd out of them an equal Proportion of their respective Debts. And where-ever the Testator's Intent appears, the Lands shall be liable without express Words to the Payment of his Debts: So far are Creditors favour'd, and if the Profits will not raise the Sum in a convenient Time, they may sell.

Sect. 2. The Course and Order of Payment of Debts by an Executor at Law, is 1st, Debts to the King upon Record. 2^{dly}, Judgments obtain'd in a Course of Justice in adversary Suits against the Testator, altho' by mere Confession and without Defence in any Court of Record, and of two Judgments, he who first sues Execution must be preferr'd; but before, it is at the Election of the Executor to pay which he will first, only a Judgment in a Foreign Country, as *France*, is to be consider'd but as a Simple Contract. And a Decree in this Court is equal to a Judgment at Law. But if the Decree pass'd by Default, he may contest the Reality of the Debt, as at Law in an Escape, the Gaoler shall have the Prisoner's Equity. 3^{dly}, Statutes or Recognizances, and of these whoever first getteth hold of the Goods in Execution shall be preferr'd: But before, the Executor may give Precedence to which he will. But neither of these before they are broken do

take place of Specialties. 4thly, Specialties by Bond or Bill, and of such Specialties that is to be preferr'd, whose Time of Payment is already come, especially if it be demanded. But in equal Degree, he may pay himself first, and any Stranger notwithstanding a verbal Demand, if no Suit be commenc'd, and if several Suits are commenc'd, he who first hath Judgment must be first satisfied. But between a Debt by Obligation, and a Debt for Rent, or Damages upon a Covenant broken, there seems to be no Difference; that is a Rent behind at the Time of the Testator's Death. And if the Testator died a few Days before the Rent became due, it would not make it the Executor's Debt, for the Rent issues from the Profits. But if the Lessor distrain for the Rent Arrear, the Executor cannot plead fully administer'd, as if Debt had been brought. Nor can the Distress be taken after in Execution upon a Judgment or Statute of the Testator's, altho' replevied; because it is but in the Case of a Prisoner bail'd, who is still in some Sort in Custody of the Law. Also the Land is chargeable with the Distress from the very Making of the Lease, and the Rent is a Debt of a real Nature, and so superior to personal Debts. And they were found levant and couchant upon the Lands; so that if they had been an Under-Tenant's or Stranger's Cattle, they might have been distrain'd. Lastly, Assumptions or Promises before Legacies, or the reasonable Part of the Wife or Children, to which by Custom in some Counties they are entitled; for it concerns the Soul of the Testator to have all Duties and Debts to others, *as alienum*, satisfied before voluntary Gifts or Bequests. And Legacies are Gratuities and no Duties, and therefore an Action will not lie at Common Law for the Recovery of a Legacy. But Legacies shall be paid notwithstanding any Covenant not actually broken; for a Covenant is no Duty till it is broken, and it shall be presum'd it will not. Now what is said of the right Method or Order of Payment of Debts, discovereth how and by what Means an Executor may waste them, and so much he hath still in Right according to the Rule *pro possessore habetur qui Dolo vel Injuria desit possidere*, and therefore he has still the same Advantage of preferring which Creditor he will, in equal Degree, as aforesaid. But if there be no particular Motives from the Nature of the Debts or Legacies, or the Circumstances of the Parties, *in Foro Conscientiæ* he ought to pay every one in Proportion, and let the Loss be equal. And so was the Civil Law, and the ancient Law of this Realm, *excepto Domini*

Regis privilegio fiat ubique Defalcatio, and by the Law of God they shall be bound to do what is most profitable for the Soul of the Testator.

Sect. 3. But the Executor may retard one Action, and confess Judgment to another subsequent Action, and in some Cases is oblig'd to confess Judgment for his own Defence, and plead such Judgment to other Actions then depending: Otherwise if several Actions should come to be tried at the same Time he might be doubly charg'd, and oblig'd to answer the Value of the Assets twice over. But a voluntary Payment made after an Original filed; or Bill exhibited, shall not be allow'd. Yet even in the Case of a voluntary Payment, if the Suit at Law be not by Original, but for the Purpose upon a *Latitat* out of the King's Bench, there a voluntary Payment shall stand good, tho' after the Action brought; for the *Latitat* supposing a Trespass gives no Notice of a Debt, and so of a *Subpoena* out of the Exchequer. *Lastly*, The Bringing of a Bill in Equity is not stronger, nor can bind the Assets more than the Bringing of an Original at Law, and therefore a Judgment confess'd by the Executor to a Bond-Creditor after the Bill brought in this Court by the Plaintiff, who was also a Bond-Creditor, shall be allow'd upon Account. But a Judgment confess'd by an Executor pending a Bill here, shall not be allow'd upon an Account of Assets.

Sect. 4. And it is the Duty of an Executor to pay the Testator's Debts, therefore if he pays them with his own Money, &c. the Testator becomes indebted to him in the like Sum. For it is but reasonable, when a Man pays Money lawfully, that he should be paid again, and because the same Hand is to pay and receive, so that he cannot have an Action against himself for the Debt, therefore he may retain so much of Testator's Goods, and pay himself. So if he redeems a Pledge of the Testator's for the full Value, the Property is immediately chang'd by the Redemption, and it is not Assets in his Hands; for this seems a Sort of Selling it to himself. But otherwise, if for less than the Value; the Surplus is Assets in his Hands. So if a specifick Legacy, as three Gowns, &c. is devis'd, and the Legatee takes Money in Satisfaction of them; this amounts first to a Consent of the Executor to the Legacy, and then it is at the same Instant a Sale by the Legatee to the Executor for the Money.

C A P. III.

Sect. 1. **B**UT all equal Laws of every well govern'd Common Wealth, have favour'd the Execution of Testaments and last Wills of Men deceas'd, and have taken special Care that they should not be frustrated. And surely if it be agreeable to Reason, that Stewards, Receivers, Bailiffs, Guardians, Factors, and such as have to deal for other Persons, should be accountable of their several Offices, with greater Reason may it be maintain'd, that an Executor ought to be subject to account. For they for the most part have to deal for such as are living, who may have an Eye to what they do: But an Executor is intrusted for a dead Person, who is totally ignorant of it, if his Executor deal unjustly. Besides from the Care and Caution that is taken, as well by the Civil as the Ecclesiastical Law, in making Inventories, we may learn the Necessity of Making of an Account; for if Executors were not accountable, the Use of Inventories were to little Purpose. The End for which this Account is requir'd, is that the Will may be fully accomplish'd, and therefore all that have Interest, are to be cited to be present at the Making of it, as the Creditors and Legatees, otherwise the Account shall not be prejudicial to them.

Sect. 2. And if we respect what is to be perform'd by the Executor, who maketh the Account, he is not only to declare what Goods and Chattels belong to the Testator, he hath receiv'd, and what Debts and Legacies he hath paid for the Testator, and to make due Proof of every Payment, that is to say of lesser Sums by his Oath, and of greater Sums by other Proofs, such as the Ordinary shall allow of; but also if any Thing do remain of the said Goods and Chattels, the Funerals together with the Debts and Legacies being satisfied and discharg'd, the same ought to be employ'd and dispos'd of *in pios Usus*. Neither ought the Executor by the Ecclesiastical Law to apply any Part thereof to his own private Use more than is given him by the Testator, or which the Ordinary shall allow him for his Labour, or for the like Consideration, *viz.* honest, moderate, and not sumptuous Expences, according to the Condition of the Person. And for Strictness no Funeral Charges are allow'd against a Creditor, except for the Coffin, Ringing the Bell, Parson, Clerk, and Bearers Fees, but not
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for Pall or Ornaments. But by the Common Law, altho' an Executor was compellable to account before the Ordinary, and so was an Administrator: Yet the Ordinary was to take the Account as given in, and could not oblige them to prove the *Items* of it, nor swear the Truth of them. So it was if a Creditor sued in the Ecclesiastical Court; for he had a proper Remedy at Common Law. But otherwise, if a Legatee had sued for an Account, or the next of Kin who is a Legatee by the Statute of 22 Car. 2. of Distribution, for the Legatee had no other Remedy. Yet in such Case, if the Executor would pay him, he could not sue further, for he had Right done him, and the Executor was not liable, but of Necessity that Right might be done.

Sect. 3. An Executor *de son tort* is, where a Stranger assumes the Office of an Executor, by Performing some Acts which are proper to an Executor, as by paying himself or other Creditors with the Goods of the deceas'd, or by taking them into his Possession; for he must not be his own Carver, because of the great Inconvenience and Confusion that would ensue, if every Creditor should strive to satisfy himself first. And he cannot take Advantage of his own Wrong, as to retain for his Debt: But all lawful Acts that a wrong Doer does are good. Yet regularly it cannot be said Administration, unless he does what an Administrator ought to do; as by employing them for the Testator's Use, for the Good of his Soul. And where there is another Executor of Right, who proves the Will, they will not make him Executor of his own Wrong by Construction of Law. But if he claims in such Case to be Executor, there, because of such express Administring as Executor, he may be charg'd as Executor of his own Wrong, tho' there be another Executor of Right: And so if he intermeddled before Probate. In Case of Intestacy, there is this Diversity taken, if *H.* gets Goods of an Intestate into his Hands after Administration is actually granted, it does not make him Executor of his Wrong. But if he gets the Goods into his Hands before, tho' Administration be granted afterwards, yet he remains chargeable, as a wrongful Executor: Unless he delivers the Goods over to the Administrator before the Action brought, and then he may plead *plene Administravit*, and if he takes upon him to act as Executor, he is chargeable at all Events.

 B O O K V.

C A P. I.

Sect. 1. SINCE a Man is bound in Equity, not only to perform his Engagements, but also to repair all the Damages that accrue naturally from the Breach of them: We ought not to omit treating of these, and especially of Interest, which is the most frequent of all, it being the common Measure, where the Contract is for Money, tho' in its own Nature more uncertain than any other. But it is now fix'd to a certain Portion of the Sum lent. For to cut off the infinite Variety of Liquidations, and Law-Suits, which might be occasioned by the Non-payment of Money, it was absolutely necessary to settle by a Law an uniform Reparation for all the Sorts of Damages arising thence. But there was besides a natural Reason which made this Regulation as equitable as it was useful to the Publick. For the Damages which proceed from other Causes do all spring from some Engagement which points out the Nature of the Loss if he fails to perform it, and determines precisely the Quality of the Reparation to be made. But in the Case of those who owe Money, it is otherwise. And Debtors being all oblig'd to one and the same Thing, the respective Damages which the Creditors may suffer are Accidents they could not foresee, nor are oblig'd to answer; so that they are all bound only to the same Reparation of Damages, and this could not be made more just or more certain, than by fixing it at the Value of the common Profits, that may be made of Money by a lawful Commerce. As for Damages in general, the Measure of them is to be taken from the Quality of the Action, the Cause, and the Event. For where there is any Fraud or knavish Dealing, the Sentence ought to have the utmost Extent that the Rigour of the Law can give it; because the Knavery implies a Will and Intention to do all the Hurt that was possible. But where there was nothing unfair, we ought to distinguish the Events ensuing from the Fact, which are to be imputed to him as Author of it, and such as flow

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from other Causes; for the general Rule is, that no Man is to be answerable for Accidents, except there be some Fault on their Part.

Sect. 2. Now while the *Roman* Commonwealth stood, no Interest could be demanded for the Debtor's Delay of Payment, unless some Advance was agreed upon by Contract. But some Lawyers having introduc'd a Custom chiefly in Matters of Companies, the Emperors enlarg'd it to all Contracts *bonæ fidei*, without Exception, as also to Legacies and Trusts. Yet in Contracts of rigorous Right, there must always be an Agreement in Form, or nothing is due, tho' a Process be enter'd. And thus it is plain, that Interest was not esteem'd by them as any natural Produce, but given only in certain Cases to recompence the Delay of Payment: Yet it seems *vicem fructuum sustinere*, and is allow'd in Chancery, not only upon a Note payable upon Demand, but even for Demands due by Covenant, notwithstanding the Objection that they were not liquidated, and found only in Damages. However a Difference has been taken in Case of Goods sold and deliver'd between bare Notes and penal Securities; because in the former, the Parties have not extended the Bargain beyond the bare Sum in the Note. But in the latter, altho' there was a Profit in the Sale, yet the Court will not dispossess him of the Security without a common Amends, *i. e.* the Common Interest for the Time of his Forbearance; for the Penalty is presum'd, without any Agreement for that Purpose, to be inserted for that End. But where excessive Rates are allow'd for the Work, in Respect of slow Payments, there shall be no Interest allow'd; for Interest is only allow'd to supply the Want of prompt Payment. And when-ever the Debt is carried beyond the Penalty of the Security, it is always for a Defendant, upon the Maxim, That he who will have Equity must do it; as where the Party has been delay'd by Injunction of this Court, or the like. But never for a Plaintiff any further than he could charge him at Law; because he has chosen his own Security, and therefore must abide by it. Besides, a Man can have no more than his Debt, and the Penalty is the utmost of the Debt. Nor will Equity ever carry Interest beyond the Penalty, where there has been no Demand of several Years. But where a Bond is only a collateral Security, Interest may be carried beyond the Penalty. And so where Advantage is made of the Money, Interest shall be carried beyond the Principal.

Sect. 3. As to the Time when the Interest shall commence, it seems regularly to begin from the Delay of Payment. In the Civil Law, if that which is due proceeds from a Cause, which in its own Nature produces no Revenue, the Interest of it will be due only after the Debt has been demanded in a Court of Justice. But those who retain Money in their Hands, and convert it to their own Use, without the Consent of the Owners, are bound to pay Interest, altho' it be not demanded, as a Punishment for their Knavish Dealing. And in our Law, if the Legatee be of full Age, he shall have Interest only from the Time of his Demand after the Year; for no Time of Payment being appointed, it is not payable but upon Demand. But in the Case of an Infant it is otherwise; because no Laches can be imputed to him: And the Law dispenses with the Demand in his Favour, because of the Impotence and Weakness of his Age. But where a certain Legacy is left payable at a certain Day, it must be paid with Interest from the Day; because it is the Will of the Testator that the Executor should then tender it. Yet some think even in that Case, a Legacy ought to carry Interest but from the Time of a Demand made, tho' it is otherwise of a Debt. But a present Legacy charg'd upon a Reversion, expectant upon an Estate for Life shall carry Interest from the Death of the Testator. And a Demand would be fruitless, the Legacy not being in the Hands of the Executor, but only charg'd on the Reversion. But Interest may sometimes commence even before the Time of Payment. As if a Father limits or devises Portions to his Daughters, or younger Children, to be paid or payable at their respective Ages of twenty-one Years, or any other certain Time, without making any other Provision for their Maintenance in the mean Time, and dies; in this Case they shall have Interest for their Portions from his Death, till paid; because the Father, if he had liv'd, was oblig'd by the Laws of God and Nature to have provided for them. Otherwise in Case of such a Provision by a Stranger, who was under no such Obligation; because it was a mere Bounty in him, and therefore shall be carried no further than he has appointed it.

Sect. 4. And it has generally been laid down as a Rule, both in the Civil Law and in Chancery, that Interest should not be allow'd upon Interest. But this has some Exceptions. And 1st, A Mortgagee of Mortgage forfeited shall have Interest
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for his Interest. At least as to so much Interest as was reserved in the Body of the Mortgage-Deed, that shall be reckon'd Principal; for it being ascertain'd by the Deed, an Action of Debt will lie for it, and therefore it is but reasonable, that there should be Damages given for the Non-payment of that Money. And altho' it is objected, that if this were to be establish'd for a Rule, every Scrivener would reserve all his Interest half-yearly, from Time to Time, as long as the Money should be continued out upon the Security, which would make all Mortgagees pay Interest upon Interest: Yet it is certain, there is a clear Distinction between Debt and Damages, and it does not appear that any Inconvenience will arise from this Doctrine, it will only serve to quicken Men to pay their just Debts. But where there was a Deed to let the Mortgagee into Possession and enlarge the Time of Redemption, in which Deed was mention'd what was due for Principal and Interest; the Interest then due shall not carry Interest, there being no express Agreement that such Interest should carry Interest, and the whole Sum due being mention'd for another Purpose. 2^{dly}, It is without all Question, that this Rule does not extend to a third Person who pays Interest for a Debtor to his Creditor; for the same with Respect to him is a principal Sum lent. And therefore it has always been the Rule in Chancery, that the Mortgagee assigning, the Assignee should have Interest for the Interest then due, and so all Money really paid by the Assignee that was due to the Mortgagee, shall be Principal to the Assignee. But the Account between the Mortgagee and Assignee, is not to conclude the Mortgagor, but the Master is to see what was really due at the Time of Assignment, and whether he actually paid the Money; for, if the Assignment was colourable, it would be otherwise. And therefore some have thought that Interest should not be made Principal in such Case, unless the Mortgagor had join'd in the Assignment. 3^{dly}, A stated Account ought to carry Interest, especially in Cases of Mortgages, and more strongly when settled by a Master of the Court pursuant to Order, and so Interest shall be decreed for the yearly Ballance of a renewing Account.

Sec. 5. But it is said, that Damages are in the Power of the Court. And therefore they usually order them as they see convenient. As if Lands are limited upon Failure of Issue Male, to the Daughters of the Marriage and their Heirs, until
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the next Remainder-man should pay them 3000*l.* there being four Daughters only, who entred, the Rents in this Case shall not be applied, first to pay the Interest and then to sink the Principal, as in Case of a common Mortgage, but with this Variation, that the Principal shall not be sunk till a third Part is rais'd above the Interest, and so again, when another third Part is rais'd. So an Account ought to be taken with an annual Rest, each Year's Account to carry Interest, in Cases where it is of a Trustee, who has paid off Incumbrances with his own Money, Arrears of Annuities, and old Mortgages. On the other Side, where the Case is very hard, as the principal Sums paid for Maintenance of younger Children to the Grandmother, being allow'd in the House of Lords towards the sinking of her Jointure; the Court here would not let them be applied at the Time when they were paid, but in one entire Sum at the End of the Account, and so struck off all the Interest for above sixteen Years, which came to more than the Principal. So where by Marriage-Articles, the Ladies Father was to pay several Sums at several Times for discharging the Husband's Incumbrances, he advances Money to the Son-in-law, and maintains the Wife and Child for two Years; such Money allow'd for Maintenance shall be added to the Foot of the Account, and not carry Interest.

Seçt. 6. As to the Measure of the Computation of the Interest, it is to be observ'd. 1st, That Contracts are to be adjudg'd according to the Law of the Place, where such Contracts are made, and therefore in all Cases, Interest must be paid according to the Law of the Country where the Debt was contracted, and not according to that where the Debt is sued for. So where one living in *England* devises a Rent-charge out of his Estate in *Ireland*, it shall be reckon'd according to the *English* Value, the Will being made here. So *Turkish* and *India* Interest is allow'd upon Contracts made there, tho' both Parties have been long in *England*. Yet it is but reasonable, where the Money is to be paid here, that the Party should have an Allowance for the Return of it. 2^{dly}, The Statute in 1660 respects only subsequent Contracts. So that if a Mortgagor before the Statute continues paying Interest above 6*l. per Cent.* no *Indebitatus Assumpsit* will lie at Law for the Overplus. Nor is there any just Grounds to decree it in Equity, it being voluntarily paid, and the Contract not being

chang'd or varied. But if the Mortgagee enters, he shall be allow'd Interest but after the reduc'd Rate of 6 *l. per Cent.* And so it is agreed, that the Statute of 12 *Annæ, cap. 16.* which reduces the Interest of Money to 5 *l. per Cent.* has no Retrospect, but Interest shall be paid, as it was at the Time of the Contract.

B O O K VI.

C A P. I.

Seçt. 1. **B**UT as it is not sufficient to have a Right in Equity, unless we can make this appear by some outward Proof to the Court, in Order to obtain Relief: We must of Necessity treat also of the Qualification of Witnesses, and the Nature of Evidence, least our Discourse should seem maim'd and imperfect. But we do not here intend to speak of these in general, but so far as they are us'd in this Court. Now in determining the Qualifications of Witnesses, Equity follows the Law; and it seems the Chancellor cannot do otherwise. And therefore if a Man be render'd infamous in Law; as by an infamous Judgment, or has not Discretion and Understanding, &c. his Testimony is not to be admitted. And the Cases where the Party is concern'd in Interest, tho' never so small, have usually prevail'd, unless in special Instances. As 1st, For the Necessity, where no other Evidence could possibly be had; as where a Man tears a Note, or a Goldsmith's Apprentice over-pays a Bill of Exchange. 2^{dly}, *In Odium Spoliatoris*, the Oath of a Party injur'd shall be a good Charge on him who did the Wrong. 3^{dly}, After great Length of Time; as in an Account of twenty Years standing, he may prove by Oath what he cannot prove otherwise. 4^{thly}, Of small Sums in an Account; as under 40 *s.* he shall be discharged by his Oath, but he shall not charge another so. And this Rule extends no further than for the Sum of 100 *l.* and he must mention to whom paid, for what, and when; for in an Account he must prove the Particulars. 5^{thly}, Where he has releas'd his Interest, tho' the Release was seal'd in Court while the Cause was trying. 6^{thly}, *Particeps criminis* is admitted

to prove Matters of Fraud, especially where what he proves is to his own Prejudice. *7thly*, If one be made a Defendant by Covin to take away his Testimony, and it appears upon the Evidence, the Judges may and ought to allow him to be a Witness. And this cannot be a general Rule, but every Case stands on its own Circumstances, that is, whether their Interest is so great as it may be presum'd to make them partial, or not; and therefore Alms-People and Servants are good Witnesses. So it is usual for a Legatee of a small Legacy, as 5 s. to a private Person, or 5 l. to a Nobleman, to be admitted a Witness for the Will.

Seçt. 2. As to the Evidence, the usual Course in Chancery is by Depositions, for no Witnesses *vivâ Voce* are allow'd at the Hearing, except by special Order. And there being the same Question in both Causes, and Defendants Defence being the same, the Depositions in a former Cause shall be read against him. But Depositions in another Cause, in which the Matters in Question were not in Issue, shall not be read. So Depositions taken in a Suit betwixt other Persons, are not to be given in Evidence; for he had no Opportunity to cross examine them. So Depositions taken in a Cause; where the Plaintiff's Father was a Party to the Suit, being in all Matters the same, his Father being only Tenant for Life, those Depositions could not be read against him; for the Advantage ought in all Cases to be reciprocal. And where a Cause is dismiss'd, the Matter of it not being proper for Equity to decree, yet the Fact in this Cause prov'd may be used as Evidence between the same Parties, whenever it shall come in Question again. But when a Cause is dismiss'd, not upon this Ground, but for Irregularity, so that in Truth there was never regularly any such Cause in the Court, and consequently no Proofs, those Proofs cannot be used: For Proofs cannot be exemplified without Bill and Answer, nor can they be read at Law, unless the Bill upon which they were taken can be read. *Lastly*, No Depositions ought to be allow'd which were not taken in a Court of Record. And they are like Examination of Witnesses: So that altho' the Defendant may read what Part he will, yet the other Side may read the Whole afterwards.

Seçt. 3. And altho' all Exhibits prov'd by the Depositions may be read at the Hearing; yet they must be shewn forth in Court if the Party will have any Benefit of them. And
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Parties and Privies ought to shew the original Deed; for every Deed ought to prove itself, and be prov'd by others; but Strangers to the Deed, and who do nothing in Right of the Grantee, as Bailiff or Servant, may plead the Patent or Deed without shewing it. So a Will which is the Plaintiff's Title must be shewn to the Court itself, and not a Copy only; otherwise, where it is by Way of Circumstance. But where a Deed or other Evidence is suppress'd, the Court will always intend a Title against him that suppress'd it. But a Copy of a Deed, suppos'd to be suppress'd, is not allow'd unless examined, nor even upon Affidavit that Plaintiff had got it, but he shall be left to recover it at Law. So altho' a Recital of a Lease in a Deed of Release is good Evidence of such Lease against the Releasor and those that claim under him: Yet as to others, it is not without proving there was such a Deed, and that it was lost or destroy'd. And in Case of an Inrolment for safe Custody, the Deed may be said to be recorded, and a Copy of it is no Evidence. Nor is the Inrolment itself without particular Circumstances to support it; as proving that the original Deed was in the Defendant's Custody or Power, or accidentally lost, &c. But where a Bargain and Sale is inroll'd pursuant to the Statute, the Inrolment is a Record: So that a Copy of it may be read in Evidence. For no Rasure or Interlining shall be intended in a Record for the Height and Solemnity of it; but the sure Way is to exemplify it under the great Seal, or at least under the Seal of the Court.

C A P. II.

Sect. 1. **R**ECORDS, when perfect, for avoiding Infiniteness, which the Law abhors, estop all Parties and Privies from contradicting any Thing apparent in the Record. And a Record cannot be confess'd and avoided; as to say, that he was not a Person able, &c. for then every Record might be so avoided by a nude Averment. But to take an Averment which stands with the Record, and which does not contradict any Thing apparent in the Record to the Judges by Construction of Law upon the Words, the Law well admits and allows of. So a Deed indented is the Deed of both Parties, tho' they were the Words of but one, for both seal it, and of Consequence are estopp'd by it, *viz.* in all the material and essential

essential Parts, without which it would not be good. Otherwise of a Patent, or Deed Poll; because the Estoppel there is not mutual, as it ought to be. But to a Deed they may plead *Non est factum*, & *pari Ratione* may confess and avoid it, as by Coverture or the like. And altho' a Deed is *prima facie* an Estoppel: Yet they may plead or aver any Matter of Fact which stands with the Words of the Deed. But no Averment can be taken against the Judgment of Law which appears to the Judges upon View of the Deed; for Matter of Fact is to be tried by the Jury, but Matter of Law by the Judges only.

Sect. 2. But in Case of Estoppels, Verdict against the Truth, or the Law being founded upon an untrue Presumption, Chancery will relieve. And altho' such Assurances, as are used for the Common Repose of Men's Estates, Equity will not draw in Question (For a Fine with Proclamations ought after five Years to be a Bar in Conscience, as it is in Law; so shall it be of a Common Recovery for docking the Entail) Yet if a Fine is unfairly obtain'd, Equity will order a Reconveyance, and the Court where it is acknowledg'd will vacate it for Error, or Irregularity. Neither is a Judgment at Law to be pleaded in Bar to a Suit in Equity, notwithstanding the Statute of 4 H. 4. cap. 22. because that Statute meant only to restrain such Jurisdiction, as did take upon it to reverse the Judgment, as Error and Attaint doth, which the Chancery never pretended to, but leaves the Judgment in Peace, and only meddles with the corrupt Conscience of the Party. And altho' it is said, that the Common Law used some Power to restrain such Examinations directly before any Statute made: Yet these seem rather to examine the Manner than the very Matter and Substance of the Thing adjudg'd.

Sect. 3. So in natural Justice, Deeds and Writings are consider'd only as Memorials of the Contract, not as a substantial Part of them; and therefore any other Proof is as well, and the Estoppel will not in Equity be regarded against the Truth. As if a Covenant be general, that he was lawfully seiz'd, and there is Proof, that it was declar'd upon Sealing, that he should undertake for his own Act only, he shall be reliev'd. So if in the Purchase of a Manor, a Copyhold being a little before escheated, was not intended to pass in Demesne, and was left out of the Particular: Yet the Conveyance was sufficient to pass it at Law, the Vendor shall be reliev'd in Equity. So where a Lease for Years was made in Trustees, precedent to the

Wife's Settlement, only to protect the Wife's Estate against the Violence of the Times, and not to exclude the Husband, but the Sequestrators; upon Proof of this by one single Witness of an undoubted Reputation; the Nature of the Case requiring Secrecy, Chancery will relieve against the Trust express'd in the Deed. And in Case of a Surrender made by a Steward of a Copyhold, if there be any Mistake there, that is only Matter of Fact, and the Courts at Law will in that Case admit an Averment, that there was a Mistake, &c. either as to the Lands or Uses.

Sect. 4. As for a Testament prov'd *sub sigillo Episcopi* it is no Estoppel. Yet the last Will of a Man is look'd upon as the last serious Act of his Life, as to the Disposition of his Estate, and must be admitted sufficient to repeal all former Wills, and much more to control all parol Declarations. It is to be consider'd therefore, as it stands upon the Will alone, and would have been so, even before the Making of the Statute of Frauds and Perjuries. For by the Statute of Wills, by which Men are enabled to make Wills, and devise their Lands, it must be a Will in Writing, and should Parol Proof be admitted, it would introduce a mighty Incertainty and an infinite Inconvenience.

Sect. 5. But this Rule has receiv'd a Distinction, which has greatly prevail'd, *viz.* between Evidence offer'd to a Court, and Evidence offer'd to a Jury. For in the last Case, no parol Evidence is to be admitted, lest the Jury might be inveigled by it; but in the first, it can do no Hurt, being to inform the Conscience of the Court, who cannot be bias'd or prejudiced by it. And therefore, tho' such an Averment could not be admitted, where it was to make the Party a Title; yet where it was only to rebut an Equity, it might. As where *A.* charg'd his Real Estate with Payment of his Legacies and Debts, and devis'd his Estate so charg'd, to the Defendant his Nephew, and made the Plaintiff his Wife Executrix. Proofs may be admitted that it was *A.*'s Intention, that she should have the Personal Estate clear of the Debts. And if it were taken from her by the Creditors, she should come in as a Creditor on the Real Estate. So where a Money-Legacy given to an Executor shall exclude him from the Surplus, the Presumption being that the Testator did not intend him all and some: Yet such Presumption may be ousted or taken away by a Proof of the Testator's Intention, that his Execu-
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tor should have the Surplus, or that his next of Kin should not have it, especially if a specifick Legacy were given to the next of Kin, for one may aver the Trust of a Personal Estate. So the Construction of making a Gift a Satisfaction, has in many Cases been carried too far; it is therefore reasonable in such Cases to admit of parol Proof as to the Testator's Intention. However the later Resolutions have been very cautious of admitting parol Evidences, because they encourage Suits and Litigations and introduce the very Mischiefs that the Statute intended to prevent.

Sect. 6. But altho' no Proof ought to be receiv'd to supply the Words of a Will, since the Will that must pass the Land must be in Writing, and must be determin'd only by what is contain'd in the written Will: Yet there can be no Hurt in admitting collateral Proof to make certain the Person or the Thing described. As where *A.* devis'd to *B.* Lands of 60 *l.* *per Annum*, paying 100 *l.* which he by Bond ow'd *J. N.* It happen'd that the 100 *l.* by Bond was not due to *J. N.* but to *S. H.* but the Person who drew the Will having sworn, that the Testator intended the Debt to *S. H.* the Devisee of the Lands, shall be liable. So to ascertain the Thing, notwithstanding the Statute of Frauds; for it neither adds to nor alters the Will, but only explains which of the Meanings shall be taken. Yet some have doubted, whether they could read Witnesses on a Will of Lands by the Statute, tho' it were only in Preservation of the Devise. But to be sure, if the Devise would admit of any Sense, they could not be read.

Sect. 7. And it is a settled Rule in the Court of Chancery, that altho' they will read parol Proof to fortify any natural Construction that arises from the Words of the Will: Yet they will never read any parol Proof to make any Alteration in the Will, or Addition to it. And if the Bequest cannot be made out but by the parol Disposition of the Witnesses, there being only initial Letters for the Names of the Legatees, as it is not substantive in Writing, it is not a written but nuncupative Will, and therefore without the Circumstances required by the Statute is void.

C A P. III.

Sect. 1. **I**N the Law of Nature, when Deeds and undeniable Instruments cannot be produc'd, they must then give Judgment according to the Testimony of Witnesses, or with Consent of the other Party give him his Oath. I say with the Consent of the other Party, for else in the Liberty of Nature, no Man is oblig'd to put the Issue of his Cause upon another Man's Conscience. And in the Civil Law, the Judge *ex Officio*, if he saw Occasion, might put the Defendant to his Oath, or the Party interested might demand it. And this was decisive between the Parties and their Representatives, but did not hurt a third Person. So in Chancery, tho' Witnesses are examin'd, yet you may afterwards examine the Defendant. And a Bill lies there for the Discovery of an Estate by one who had a Title to it; as by the Patentee of the Goods of a Felon, or of one outlaw'd, for Outlawry is in Nature of a Gift or Judgment to the King. So where *A.* obtain'd Judgment against *B.* and the Defendant to defraud him of the Benefit of it, assign'd his Estate to Trustees for himself. *A.* may have a Discovery, tho' it is objected, that this is in the Nature of a foreign Attachment, and that there could not be a Discovery of a Man's Personal Estate in his Life-time. But if the Plaintiff in such Case has not taken out Execution, it will not be allow'd. And it seems agreed, it would not lie against the Debtor himself, nor to have a general Discovery from a third Person, but only for particular Things. So where a Fire happens in a Man's House, and burns his Neighbours likewise, altho' he is liable to Damages at Law, yet the Plaintiff in such Case shall not be assisted in Equity; for tho' the Law gives an Action, yet it does not arise out of any Contract or Undertaking of the Party. But the Case is not parallel, where a Lighter is overset by Negligence of the Lighterman, or a Ship takes Fire by the Negligence of the Master or Ship's Crew, these come within the Reason of any common Carrier, and therefore he shall have a Discovery to enable him to bring his Action. Yet a Plaintiff is not admitted to a Discovery without verifying his Title at Law. So that if there be a full Answer given to the Thing in Demand, till that be tried, the Defendants are not bound to discover. As in a Bill for Tithes, if they plead the Statute of 13 *Eliz.*

cap. 20. against Non-residence in Bar: Or in Case of Tithes of Conies by Custom, if they deny the Custom. And the rather, because the Demand was against Common Right, and if it should be otherwise, the Defendant by a feign'd Suggestion might be forc'd to discover any Thing. But if in that Case, the Matter be found against the Defendant, he shall after be examin'd upon Interrogatories. But where there is no such great Inconvenience, as upon a Bill against an Executor to discover Assets, he must answer, tho' he denies the Debt, because it concerns the Act of another.

Sect. 2. As to the Difference of the Persons, for whom and against whom a Discovery will be admitted, it is to be observ'd, That Persons who claim Lands by a Will, or any other voluntary Disposition, having the Law on their Side, are entitled as against an Heir at Law to a Discovery in Equity of Deeds relating to the Estate, and to have them deliver'd up; otherwise the Heir might defend himself at Law by setting up prior Incumbrances, and by that Means prevent the Trying the Validity of the Will. So where a Will concerning a Personal Estate is prov'd in the Spiritual Court, another having a former Will in his Favour may bring his Bill to discover by what Means the latter Will was obtain'd, and to have an Account of the Personal Estate, and whether the Testator was not incapable and impos'd on, tho' objected that it belong'd to the Spiritual Court only to prove the Validity of the Will, and the former Will was not prov'd in the Spiritual Court, as the Will in his Favour was. But if a Bill is brought by a remote Heir for a Discovery of a Title, and Evidence, and to have Terms remov'd, and the Title at Law clear'd, this is one of the hard Cases at Law, where Equity will not assist; for as Equity will not relieve the Children, should the remote Heir recover, so neither will it assist the remote Heir.

Sect. 3. And Purchasers shall not discover to impeach or weaken their Title; for by this Method all Purchases might be blown up. As whether in a Mortgage made by *A.* to *B.* which had been assign'd to the Defendant, there was not some Trust declar'd for the Benefit of the Plaintiff, tho' Plaintiff charg'd in his Bill, that such a Lease in Defendant's Custody mention'd it; for this is but a side Wind to make a Purchaser expose his Title, and the Court will not do it, unless the Plaintiff makes some Proof towards falsifying his Answer to induce them to it. So an Assignee of a Lease shall not be

forc'd to discover whether the Lease was expired. So there is no Reason to compel one whose Lands lie contiguous to mine, to discover the Boundaries in his Deeds; for that would be to help a Man to Evidence to evict another of his Possession. And they will never help the Issue against a Purchaser. But where it is a Bounty, as a voluntary Devise to the Wife for Life, in such Case the Heir having a good Title, *viz.* as Heir in Tail to his Great Grandfather, or the like, shall be aided.

Sect. 4. But with Respect to the Personal Estate there is a Difference between Contracts that are negotiable, and such as are not, or where they are not negotiated in a mercantile Way, where the Note passes as ready Money. As if it were assign'd as a collateral Security for a Debt already contracted; for there, if the Note was fraudulently obtain'd, or by Gaming, he has no Remedy against the Drawer. But if he actually negotiates it for Value, the Indorsee shall in all Events, have his Money of the Drawer, tho' he has paid it before, or it was obtain'd by Fraud; because the Indorsee has a legal Right to the Note, and a legal Remedy at Law, which the Court of Equity ought not to take away from him, and it would be to the Ruin of all Commerce, if the original Cause, and Consideration of such Note should be inquir'd into. But the Assignee of a Chose in Action has no Remedy at Law, or Right to sue in his own Name, and has only an equitable Remedy. And this fails, when the Bond or Covenant is obtain'd by Fraud, or the Obligor has a legal Discharge, as a Release upon Payment of the Money. So if the Bond were assign'd for Value before Payment, there an equitable Interest passes, and in such Case if the Obligor pays the Money to the Obligee, and cannot plead such Payment at Law, a Court of Equity will not interpose to assist him. But if he can, Equity will not interpose to assist the Assignee.

Sect. 5. In the Civil Law the Oath was only to be tendred in Civil Matters, when the Facts and Circumstances may render the Use of an Oath just and decent, and not in criminal Matters, any more than in the Law of *England*. And it is a standing Rule in Equity, that no one is bound to betray himself. For it is the Business of Courts of Equity to relieve against, not to assist Forfeitures, and by Law no one is bound to discover any Matters which tend to subject himself to Penalties or Forfeitures, As a penal Clause in an Act of Parliament

liament, 'or in a Deed, tho' said it was not a Penalty, but Part of the Contract. But otherwise, if he covenants not to plead or demur to any Bill, which should be brought against him in Equity, or the Plaintiff waves the Penalty. And such Pleas ought to have the greatest Strictness and Exactness as tend to the Support of wrong Doing. And in some Cases, even for a Trespas, a Bill is proper enough in this Court, viz. where by the secret Contrivance of it, it cannot easily be prov'd. As if a Man in his own Ground digs a Way under Ground to my Mineral, and the like. So in Case of a Bill by the *East-India* Company for a Discovery, and to prevent an Interloper's Trading to the *East-Indies*, there is a great Difficulty as to the Proof, the Matter for the greatest Part having been transacted in the *East-Indies*, and therefore the Plaintiffs setting forth, that they were willing to wave the Forfeiture, shall have a Discovery. So where the Charge is not by Way of Trespas, but under Colour of Title, as that Defendant by Colour of Sequestration by the Committee, had seiz'd several Tithes, &c. due to Plaintiff, the Plaintiff may pray a Discovery of the Particulars so taken, and their Value. So where a Man by Colour of a Title enters into an House, &c. and possesses himself of the Goods, &c. for it may be impossible for the Plaintiff to discover the Particulars without such Bill. So where a Will is prov'd, and the precedent Administration revok'd, such Bill is usually necessary for the Discovery of the Goods: And yet in Strictness of Law there was a Trespas.

Sect. 6. And when this Court can determine the Matter, it shall not be an Hand-maid to other Courts, nor beget a Suit to be ended elsewhere. And therefore where a Trial at Law was press'd for, whether there was a new Publication or not; it was said, the Cause must properly end here, and where the Court has a Jurisdiction as to the End, it must have likewise as to the Means. And if the Court is fully satisfied, as to the Evidence, they will not send it to a Trial at Law at all.

Sect. 7. For an Issue at Law is a feign'd Issue in an Action upon the Case directed by the Chancery for the better Informing and Guiding the Conscience of the Court. And therefore no Issue ought to be directed to try a Matter fully prov'd in the Cause. So where the Proof of Deeds is very plain, it would be dangerous to direct an Issue to try the Reality of them.

them. Neither is it proper to direct an Issue, whether there be a Trust or not, especially where a Trust appears by Implication from the Nature of the Case. And regularly an Issue ought not to be directed to try a Title not alledg'd in the Plaintiff's Bill. Yet if upon the Hearing a Matter not in Issue does appear to the Court which goes to the very Right, the Court will sometimes order an Issue at Law to try it, and decree thereupon. And Issues are frequently directed where Matters of Law are mix'd with Matters of Fact; because the Judges can explain to the Jury what the Law would be, if they should find the Facts.

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F I N I S.
