A

General Abridgment

OF

CASES

IN

EQUITY,

Argued and Adjudged in the

High Court of Chancery, &c.

WITH

A LARGE COLLECTION of CASES never before publiſhed.

To which is added,

An Alphabetical Table of the NAMES of the CASES.

By a GENTLEMAN of the *Middle Temple.*

VOL. II.

In the SAVOY:

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THE

PREFACE.

ALtho' (after many Years Application) this Work as well as the former Volume makes its Appearance in Publick *unrecommended*, and without even the Author's Name to the Title Page, yet he hopes upon Peruſal it will be found to be as uſeful as the former, and conſequently be as well received by the Publick.

Here the Reader will find a large Collection of modern Caſes, argued and adjudged in the High Court of Chancery, which are not to be met with in any Book already publiſhed; and as great Care hath been taken in collecting them, the Author hopes they will meet with Approbation.

The Author is ſenſible that ſome Faults of his own, and Errors of the Preſs, have crept into this Work, notwithſtanding the Care he has taken to prevent them.

He can aſſure the Publick that he has carefully corrected and examined each

Proof Sheet with the Originals, which is a Method few Gentlemen have taken in a Work like this, where ſurely it is moſt neceſſary; for every Man is ſenſible of the Trouble of a wrong Reference.

He hopes the candid Reader will excuſe all Faults, and ſay with the Poet,

——————*Non Ego paucis*
Offendar Maculis, quas aut Incuria fudit,
Aut humana parum cavit Natura.

Middle Temple, London,
Eaſter Term 1756.

The AUTHOR.

A

TABLE

OF THE

NAMES of the CASES.

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Y.

The *Reader* is deſired to correct the following *Errors*.

Page 80. the laſt Line but two in the Note to *c.* 8. for *to* read *for*.——*p.* 172. Note to *c.* 5. for Grant of the *Crown*, read Grant of the *Toll*.——*p.* 182. *c.* 7. for *Cary* and Rook, read *Cray* and Rook.——*p.* 203. *c.* 1. for *Battily* and Cook, read *Batteley* and Cook.——*p.* 205. for Smith and *Tanner*, read Smith and *Turner*.——*p.* 212. *c.* 1. for Hicks and *Pendarris*, read Hicks and *Pendarvis*.——*p.* 256, 257. *c.* 5. for *Looffes* and Lewen, read *Loeffes* and Lewen.——*p.* 285. *c.* 4. for Sir Edward Bettiſon and *Harrington*, read Sir Edward Bettiſon and *Farrington*,——*p.* 292. Note to *c.* 14. for *Lawther* and Fletcher, read *Lowther* and Fletcher.——*p.* 294. *c.* 22. for 528, read 258.——*p.* 296. Line ſecond, for *Bunter* and Cook, read *Bunker* and Cook.——*p.* 302. *c.* 23. for *Ibberton* and Beckwith, read *Ibbetſon* and Beckwith.——*p.* 430. *c.* 5. for Dormer and *Bertine*, read Dormer and *Bertie*.——*p.* 434. *c.* 15. for *Donner* and Bertie, read *Dormer* and Bertie.——*p.* 445. *c.* 59. for *Humpneys*, read *Humphreys*.——*p.* 500. *c.* 27. for Dawſon and *Chutir*, read Dawſon and *Chater*.——*p.* 513. *c.* 2. for Vincent and *Harmandez*, read Vincent and *Farnandez* (or *Farmandez*).——*p.* 567. *c.* 17. for *Hornſly* and *Hornſly*, read *Hornſby* and *Hornſby*.——*p.* 639, 640. *c.* 5. for *Becle* and *Becle*, read *Beale* and *Beale*.——*p.* 659. *c.* 1. for *Sarth* and Lady *Blankfrey*, read *Garth* and *Blanfrey*.——*p.* 749. *c.* 4. for *Lawſon*, read *Lawton*.

CAP.

CAP. I.

Abatement and Reviver.

(A) Abatement of the Suit & econt'.
(B) Reviving a Suit, and the Parties thereto; and who may and may not maintain a Bill of Revivor, and why.

(A) Abatement of the Suit & econt'.

1. IF two Jointenants exhibit their Bill, and one releaſes, this will not abate the Suit as to the other. So held *per* Lord Chancellor, *Trin.* 1676. *Anon.* 2 *Freem. Rep.* 6. *pl.* 5.

2. The Attorney General of the Dutchy exhibited an Information at the Relation of one Part-Owner of Coal-Mines againſt the others, the Relator (*a*) dies; by the Opinion of *Atkins* C. B. and *Ventris* J. this abates the Suit, for though Mr. Attorney be Plaintiff, yet the Relator is Party. *Trin.* 1690. in the Caſe of *The Attorney General* and *Sir Jo. Heath & al'*, *Preced. in Chan.* 13.

(*a*) *Note*; By the Spiritual Law the Death of the Party never abates any Suit. 2 *Roll. Rep.* 20.

3. A Bankrupt brings his Bill againſt *B.* his ſuppoſed Debtor, for an Account, who pleads in Abatement, that Plaintiff being found a Bankrupt, his Effects were aſſigned to Aſſignees, *&c.* and that they ought to be Parties. *A.* by (*b*) Order amends his Bill, and charges the Aſſignees in the Body thereof in a proper Manner, but prays Proceſs only againſt the Defendant *B.* who pleads the ſame Plea, which was held good; for by *Parker* C. they only are Defendants againſt whom Proceſs is prayed. *Mich.* 1719. *Fawkes* ver. *Pratt*, 1 *Will. Rep.* 593.

(*b*) On a Plea in Abatement for want of proper Parties, it is diſcretionary in the Court either to diſmiſs the Bill without Prejudice, or to give leave to amend on Payment of Coſts of the Day. *Eaſter* 1718. 1 *Will. Rep.* 428. *Staffford* and *City of London.*

4. If a Feme Sole (Defendant) marries *pendente lite*, that does not abate the Suit. Lord Chan. *King*'s Opinion, 4 *Geo.* 2. in the Caſe of *Abergavenny* and *Abergavenny*, *Viner's Abr.* Tit. *Baron and Feme*, (I. a.) *pl.* 20.——Otherwiſe of a Feme Plaintiff. *Vide Vol.* 1. *Eq. Ca. Abr. p.* 1. *pl.* 1.

5. Plaintiff gave a Feme Covert a promiſſory Note, and the Huſband dying before Anſwer to a Bill for Diſcovery of the Conſideration, the Wife adminiſtred to him; and Lord Chan. held, that as a Wife can have no ſeparate Property, but whatever ſhe gets during the Coverture veſts in the Huſband, the Property of this Note was wholly his, and that ſhe had no Intereſt in it, but as repreſenting her Huſband; and therefore that by his Death the Suit was abated. *Eaſter* 12 *Geo.* 2. *Lightbourn* and *Holyday*, *MS. Rep.*

(B) Reviving a (a) Suit, and the Parties thereto; and who may and may not maintain a Bill of Revivor, and Why.

(a) In an Injunction Cauſe where it abates by the Death of either Plaintiff or Defendant, the Rule is, that a Motion ſhall be made to revive within a ſtated Time, or elſe the Injunction be diſſolved. *Anon.* 11 *Geo.* 1. *Sel. Caſes in Chan.* 24.

1. WHERE Baron and Feme in Right of the Feme exhibit a Bill, and the Baron dies, the Feme may proceed by Bill of Revivor. *Per Amhurſt*, who ſaid it had been ſo adjudged in the Time of the late Commiſſioners. 2 *Freem. Rep.* 133.

(b) As Bills of Revivor are to revive Suits, and all Proceedings thereon abated, the Orders for the Revival muſt be ſerved on the adverſe Clerk in Court, to the End that he may take Notice that the Suit is revived, and that ſuch Revivor is right.

2. Plaintiff a Purchaſer exhibited his Bill of Revivor, and revived the Suit by Order, (b) and the Defendant joined in examining Witneſſes; but at the Hearing Lord *Bridgeman* diſmiſſed the Bill, for that *a Purchaſer could not maintain a Bill of Revivor.* (c) Hil. 22 Car. 2. 2 Freem. Rep. 132.

(c) *Note*; After this Bill was diſmiſſed, it was moved, that in an original Bill exhibited by Plaintiff, he might uſe the Depoſitions taken; but denied, becauſe there was never any Bill depending in it, for the *Bill of Revivor brought by a Purchaſer was void*, and the Depoſitions therefore taken on no Iſſue, and no Bill and Anſwer depending, and conſequently no Indictment could lie againſt the Witneſſes if perjured. *Ibid.*

(d) In an Account both Parties are Actors, and either may revive. See 1 *Will. Rep.* 743. *Mich.* 1721. *Hollingſhead*'s Caſe.—See *Select Ca. in Chan.* 54. *Thorn* and *Pitt*, *Hil.* 1725. whereby it appears that Lord Chancellor ſaid, that this was the Rule.——1 *Will. Rep.* 263. *Trin.* 1714. S. P. by *Harcourt* C. in *Done*'s Caſe.

3. Held by Lord Keeper on Debate, that where a Decree is for an Account, and after the Cauſe abates by Defendant's Death, his Repreſentative may revive as well as the Plaintiff, both being in Nature of Plaintiffs. (d) *Eaſter* 1702. *Kent* v. *Kent*, *Preced. in Chan.* 197.

(e) The Reporter ſays, He apprehended that the Practice of reviving Proceedings was only upon the Defendant's Time for anſwering being out, or upon his anſwering and not oppoſing the Revivor. *Ibid.*

4. Upon a Bill of Revivor one Defendant by Anſwer inſiſted, that Plaintiff was not intitled to revive; but this being inſiſted on by Anſwer only, and not by way of Plea or Demurrer, upon Motion Sir *Joſ. Jekyll* M. R. ordered the Proceedings to ſtand revived, having firſt conſulted the Regiſter touching the Practice. (e) However, he ſaid, the Plaintiff ought to ſhew a good Title to revive, otherwiſe at the Hearing he might happen to take nothing by the Suit. *Hil.* 1734. *Harris* and *Pollard & al'*, 3 *Will. Rep.* 348.

But this Bill muſt purſue the firſt, and in Caſe of any material Difference between them, (except what relates to the Title to revive) the Defendant may, as I apprehend, demur, and the Bill be diſmiſſed.

5. In a Bill of Revivor it may be neceſſary to inſert ſo much new Matter as is needful to ſhew how the Party becomes intitled to revive. 11 *Geo.* 2. *in Scacc'*, *Comyns's Rep.* 590.

6. The Aſſignees of a Commiſſion of Bankrupts cannot bring a Bill of Revivor, but muſt ſue by an original Bill, whch is daily Experience. *Per* Council *arg'*, and agreed to by the Court. *Ibid.*

7. Bill of Partition was brought by ſeveral Perſons; one dies, who deviſes his Part to Co-Plaintiff, and makes him Executor; he brings a Bill of Revivor, to which it was demurred: Said, that *Bills of Revivor*

vivor and *Bills in Nature* of *Bills* of *Revivor are very different:* A *Bill* of *Revivor* can only be by the *Heir*, (*a*) as to the *Realty*, and by an *Executor* or *Adminiſtrator*, as to the *Perſonalty*. On Bills of Revivor the Eſtate continues the ſame as before Abatement, but here in Caſe of a *Deviſee* who is a *Purchaſer*, the Eſtate is alter'd, and a *Purchaſer can never revive*. (*b*) Demurrer allowed, but Leave given to amend the Bill, and revive as Executor; and an original Bill in Nature of a Bill of Revivor as Deviſee was thought the moſt proper Method. *Mich.* 1725. *Huet* ver. *Lord Say and Seal, Select Caſes in Chan.* 53.

(*a*) One who *claimed only as Heir at Law by Proviſion or by Formedon* cannot revive, but muſt bring his original Bill. *May* 1721. *Oſbourne* and *Uſher.*—— *March* 13,

(*b*) *Vide pl.* 2.

1722. *Wingfield* and *Whaley*, *Viner's Abr.* Tit. *Chan.* (H. a.) *pl.* 17. and Margin.

8. *B.* had exhibited his Bill to be relieved againſt Securities entred into by him to Defendants, who anſwered; *B.* was diſcharged by the Inſolvent Act, and all his Effects transferred to the Clerk of the Peace, who aſſigned them to the Plaintiff, who thereupon brought a Bill of Revivor to revive the Proceedings in the original Suit brought by *B.* The Defendants, as to ſo much of the Bill as deſired to revive, demurred, which the Court allowed for Plaintiff; the *Aſſignee of the Clerk of the Peace could not revive*, there being no Privity between *B.* and him; and it is the conſtant Courſe that the Aſſignee or Deviſee cannot revive, but muſt proceed by original Bill, which indeed is in Nature of a Bill of Revivor. *Mich.* 11 *Geo.* 2. *Harriſon* and *Ridley & al' in Scacc'*, *Comyns's Rep.* 589.

9. *Subpœna* in Nature of a *Sci. Fa.* to revive a Decree; the Defendant doth not anſwer, but is examined upon Interrogatories to clear his Contempt. *Trin.* 1667. *Anon.* 2 *Freem. Rep.* 128. *pl.* 153.

10. Where there is only a Bill and Anſwer, and the Suit abates, the Executor muſt bring his Bill of Revivor within ſix Years, or elſe the Suit will be barred. Lord *Macleſfield*'s opinion, *Trin.* 1721. 1 *Will. Rep.* 744.

11. But a Bill of *Revivor after a Decree to account* (*c*) being in the Nature of a *Sci. Fa.* is not within or barrable by the Statute of Limitations, even though the Demand ſeemed to be a very ſtale one, and not to be countenanced. *Per King* C. *Mich.* 1727. 1 *Will. Rep.* 744, 745.

(*c*) A *Decree to account* is in Nature of a Judgment *Quod computet. Per* Lord *Macclesfield. Ibid.*

12. A Bill was diſmiſſed with Coſts, and the Perſon who was intitled to them died before they were taxed; there is no Relief to be had. *Select Caſes in Chan.* 21.

13. Bill was diſmiſſed with Coſts, which were taxed; Bill of Revivor was brought ſingly for Coſts, to which it was demurred, and Demurrer allowed. *Thorn* and *Pitt*, *Select Caſes in Chan.* 54.

14. An original Bill had been brought by an Adminiſtrator of a Judgment-Creditor; the Adminiſtrator died, and a Bill of Revivor was brought by the Adminiſtrator's Executor. This Bill was thought to be wrong, thereupon another Bill of Revivor was brought by ſame Plaintiff, (having taken out Adminiſtration *de bonis non* to the Judgment-Creditor himſelf) wherein he deſcribed himſelf as Executor to the Adminiſtrator, and alſo as Adminiſtrator *de bonis non* of the original Judgment-Creditor. To this ſecond Bill the Pendency of the former Suit was pleaded; referred to the Maſter to examine whether theſe two Bills were for one and the ſame Matter; who certified that the latter Bill related to the ſame Matter, and that both were brought by the ſame Perſon; but in the different Rights before mentioned. Moved that the firſt Bill of Revivor might be diſmiſſed with 20 *s.* Coſts,

Coſts, the Plea ſet aſide, and the Suit ſtand revived on the ſecond Bill. Lord Chancellor diſmiſſed the firſt Bill of Revivor with Coſts generally. And as to the Plea, taking Notice that where the ſame Perſon ſues in different Rights, it is the ſame as if there were different Perſons. He ſet it aſide, but without Coſts; 1ſt, Becauſe the Plaintiff gave ſome Colour for the Plea by bringing the firſt Bill of Revivor wrong: And 2dly, Becauſe in the ſecond Bill he deſcribed himſelf Executor to the Adminiſtrator, as well as Adminiſtrator *de bonis non* to the Judgment-Creditor. And obſerving that this was a plain Bill of Revivor, the Plaintiff need not take out a *Subpœna* to revive, but the Defendant muſt have an Opportunity to ſhew Cauſe, *&c.* which he has by way of Plea, (*a*) but not ſufficient; ſo directed the Suit to ſtand revived on the ſecond Bill. *Eaſter* 1740. *Huggins* and *The York-Buildings Company, MS. Rep.*

(*a*) May alſo ſhew Cauſe by way of Anſwer.

CAP. II.

Account and Diſcount.

(A) What Matters are proper for an Account; who may and may not bring a Bill for that Purpoſe, and againſt whom ſuch Bill lies.

(B) How an Accountant may diſcharge himſelf; what ſhall be a good Bar to a Demand of an Account; where a ſtated Account ſhall be concluſive, and in what Caſes it may be opened, and where Liberty ſhall be given to falſify: And here of Stoppage or ſetting off mutual Debts one againſt the other.

(A) What Matters are proper for an Account; who may and may not bring a Bill for that Purpoſe, and againſt whom ſuch Bill lies.

1. A Bill being to come to an Account for ſeveral Sums due to Defendant from Plaintiff upon ſeveral Securities, amongſt which were two Judgments, one in Battery and another for Words, ſuggeſting that moſt of the Debts were paid. Lord Chancellor ordered that they ſhould go to an Account, but that no Intereſt ſhould be allowed on the Judgments though they had been long due. *Eaſter* 1678. 2 *Freem. Rep.* 37.

2. Where an Executor has an expreſs Legacy, Equity looks upon him as a Truſtee, and will make him account for the Surplus though the Spiritual Court has no ſuch Power. *Mich.* 1695. *Petit* and *Smith in B. R.* 1 *Will. Rep.* 7. *Vide* Tit. *Executors and Adminiſtrators.*

3. In an Account both Parties are Actors; and therefore a *Ne exeat Regnum* lies for a Defendant in an Account againſt a Co-Defendant. *Per Harcourt* Lord Chan. 1 *Will. Rep.* 263. *Vide* Tit. *Abatement and Revivor*, (B) pl. 3.

4. *A.* pretending he had a Term of ſixteen Years to come in an Houſe, *B.* agrees with him for the Sale thereof, and pays 100 *l.* Part of the Conſideration Money down, and the Reſt was to be paid at another Day. *B.* enters, but finding that *A.* had only a Term of ſix Years in the Houſe, brings his Bill to have an Account, his Money refunded, and his Bargain ſet aſide. *B.* decreed to account for the Profits, and the Conſideration Money to be refunded, and *B.* upon his Account to have Tenant Allowances made him. *Trin.* 7 *Ann. Long* and *Fletcher*, *MS. Rep.*

5. A Maſter of a Ship goes a Trading Voyage, and dies, Succeſſor poſſeſſes his Effects, and then ſends a Letter with a Bond incloſed to the Widow to be anſwerable for 300 *l.* if the Ship arrives ſafe; the Sum the Deceaſed left being 200 *l.* which was the Rate of *Reſpondentia* Bonds. This Maſter trades and makes 300 *l. per Cent.* of the Money. Decreed *per Harcourt* L. K. That the Succeſſor was a *Truſtee*, and ſhould account with Plaintiff, the Widow of the firſt Captain, for the Profit made by the Trade, deducting reaſonable Allowance for Labour and Skill. Coſts reſerved. *Brown* and *Litton*, *Eaſt.* 10 *Ann. Lucas's Rep.* 20.

1 *Will. Rep.* 140. S. C. Defendant decreed to account, but that to recompence him for his Care in trading with this Money, the Maſter ſhould ſettle a proper Salary for the Pains and Trouble he had been at in the Management thereof. Coſts reſerved. And *per* L. K. The primary Intent of the Teſtator in carrying abroad the Money was to inveſt it in Trade, and not to return with it home again; and therefore Defendant having obſerved Teſtator's Intent, and having taken ſuch a prudent Care in the Management of it as (it might be preſumed) he would have taken of his own Money; his Lordſhip apprehended he would not have been liable to anſwer for any Loſs that might have happened; and compared it to the Caſe of two joint Traders, where if one dies, and the Survivor carries on the Trade after the Death of the Partner, the Survivor ſhall anſwer for the Gain made by this Trade. *Ibid.* 141.

6. Where an Executor *puts out* Money, though without the Indemnity of a Decree, upon a real Security, which there was no Reaſon then to ſuſpect, but afterwards ſuch Security proves bad, he is not accountable for the Loſs, any more than he would have been intitled to the Profits, had it continued good. Lord Keeper *Harcourt*'s Opinion in the above Caſe, 1 *Will. Rep.* 141.

7. If a Truſtee impower'd to put Money to Intereſt let it lie by him, he ſhall be accountable for Intereſt. Said by Lord Keeper *Harcourt*, *Eaſt.* 1711. *Lucas's Rep.* 21.

8. And the ſame Reporter, ſays Lord Keeper, ſeemed of Opinion, that if a Truſtee *trade* with Money, he ſhould be accountable not for Intereſt only, but the Profit of the Trade, and that at his Peril, becauſe he acted without the Directions of the Court. *Ibid.*

9. *T.* having *lent* D. *ſeveral Sums* of Money, *amounting to* 600 l. D. *by Indenture bargains and ſells a ſixteenth Part in a Ship, and by a Defeazance it was declared, that this Aſſignment was made to the Intent that Plaintiff out of the Earnings of the Ship ſhould pay himſelf* 600 l. *and after* ſuch Payment *ſhould account to* D. *of the Earnings*; but there was no Covenant in the Defeazance to pay the Money. Afterwards *the Ship was loſt*, and the Plaintiff brings a Bill againſt *D.*'s Executrix to have Satisfaction of this Debt. Defendant by her Anſwer denies Aſſets *præter* to ſatisfy Judgments and Debts by Specialty. Decreed that Defendant account for the Eſtate of the Teſtator, and Plaintiff to account for the ſaid Earnings, and to be *allowed what*

Sums he expended in fitting out the Ship, though ſhe happened to be caſt away in the ſecond Voyage. *Tyrrell* and *Lady Thomas*, *Mich.* 12 *Ann. Viner's Abr.* Tit. *Account* (C. a.) *pl.* 5.

10. Bill by the Heirs and Reſiduary Legatees of *A.* againſt his Widow and Executrix, to have an Account of his Eſtate. It being proved, that *A.* being very old and infirm for ſeven Years before his Death, did not receive Money himſelf, though he ſigned Receipts and executed Leaſes, *&c.* but the Money was uſually paid to Defendant. *Cowper* C. decreed Defendant to account for what Money ſhe received ſeven Years before her Huſband's Death, but that the Maſter ſhould be eaſy in taking the Account, and allow for Houſe-keeping, *&c.* without Vouchers. *Mich.* 2 *Geo.* * *Buckle* and *Milman*, *Viner's Abr.* Tit. *Baron and Feme* (E. a. 6.) *pl.* 8.

* I believe it ſhould be *Geo.* 1.

11. The Obligor on Payment of 20 *l.* to the Obligee, a weak Perſon, procured a Bond for 200 *l.* and two promiſſory Notes for 50 *l.* each to be delivered up, and the Obligee to execute a Releaſe of all Demands, upon Pretence of nearneſs of Relation, and of being poor; but neither of theſe Conſiderations were proved. *Per Cur':* The Payment of the 20 *l.* ſeems to induce a Suſpicion, (there being no Notice taken at that Time of what Sums were due either on the Bond or Notes) that that Payment was the only Conſideration of delivering up the Bond and Notes, and executing this Releaſe; and that the Obligee did not know what was due to him, being incapable of tranſacting his Affairs. Obligor decreed to account for the Bond and Notes. *Lucas*, *Executor of R. A.* and *Adams*, *Mich.* 11 *Geo.* 1. 2 *Mod. Ca. in L. and Eq.* 118.

12. In the Caſe of *Le Croy* and *Eaſtman*, *Trin.* 8 *Geo.* 1. The Queſtion was, Whether a Truſtee of *South-Sea* Stock ſhould anſwer to the Value of the Stock when ſold by him, or only be accountable for the Stock and Dividends? Reſolved *per Parker* C. that the Truſtee muſt only account for the Stock and Produce. *Lucas's Rep.* 498.

13. A Creditor cannot bring a Bill in Equity for an Account againſt one Co-Executor without the other, nor as Reſiduary Legatee. *Hil.* 10 *Geo.* 1. *Scurry & Ux'* verſus *Morſe*, 2 *Mod. Ca. in L. and Eq.* 89.

14. Where one claims an abſolute Gift of a perſonal Eſtate, and at the Hearing it plainly appears to be a Truſt, the Court will order him to account. *Ibid.* 113. *Mitford & al'* verſus *Lord Herbert & al' Mich.* 11 *Geo.* 1.

15. On a Bill brought for an Account of the Produce of 20000 *l.* *South-Sea* Stock, mortgaged by Plaintiff to Defendant, (and after Principal and Intereſt paid) to be paid the Ballance. At the Hearing an Iſſue at Law was directed; but upon (*a*) Appeal to the Lords, the Order was repealed, and an Account directed for all Monies received on the Sale of the pledged Stock, notwithſtanding the Day of Redemption was paſt, it not appearing that the Defendant had ſufficient Stock to anſwer the Plaintiff, and after Principal and Intereſt ſatisfied, the Reſidue to be paid, and the Stock not ſold to be transferred to Plaintiff. (*b*) *Harriſon* and *Hart*, *Mich.* 13 *Geo.* 1. *Comyns* 393.

(*a*) By a ſtanding Order of the Houſe of Lords, made 24 *March* 1725. Appeals are to be brought within five Years after the Decree or Order in the Courts below is ſigned and inrolled. *Forteſcue* 10.

(*b*) In this Caſe the following Caſes were cited *arg. for the Plaintiff*. *Mercer* borrowed 1100 *l.* of *Tutt*, and gave his Bond for Payment, and alſo pledged a ſecond Subſcription, N° 195. and agreed that if *Mercer* paid the Money *Tutt* ſhould reſtore the Subſcription; and if he did not, that *Tutt* might ſell. Afterwards *Tutt* ſold the Subſcription, whereupon *Mercer* exhibited his bill *in Scacc'* for an Account of the Money raiſed by the Sale. The Defendant inſiſted that he had preſerved another ſecond Subſcription, N° 194. in lieu of that; and upon Debate concerning the Subſcription pledged, Trial was directed, and Verdict for the Plaintiff; whereupon an Account was decreed between *Mercer* and *Tutt*, and afterwards affirm'd by Parliament, upon an Appeal 2 *March* 1725. So in the Caſe of *Merrick* and *Spark*, *Mich.* 1733. Stock was mortgaged by *Merrick* for 1000 *l.* the Mortgagee after this mortgaged it for 1200 *l.* whereupon *Merrick* exhibited his bill for an Account of the Overplus, and an Account was decreed. *Comyns's Rep.* 401.

16. If ſeveral Executors are ſued in Equity, and one admits Aſſets, yet an Account decreed againſt the Reſt, for that Executor might admit Aſſets, and yet have none, nor any Eſtate of his own. And it would not be reaſonable that this ſhould prevent the Creditor-Plaintiff from proſecuting the others, who may have poſſeſſed themſelves of Part of the Eſtate, and ought to be reſponſible. Said *per* Maſter of the Rolls in the Caſe of *Norton* and *Turvill*, *Trin.* 1723. 2 *Will. Rep.* 144.

17. Plaintiff who claimed under his Father's Will brought his Bill (*inter al'*) for an Account of the meſne Profits of Leaſehold Premiſſes, and had a Decree. Then the Queſtion was, from what Time the Account ſhould be taken, whether from the Time the Title accrued, or only from filing the Bill? *Per* Lord Chan. *King*: From the Time the Right accrued; and the rather, becauſe the Defendant has concealed the Title Deeds and Writings. *Bennett* and *Whitehead*, *Mich.* 1731. 2 *Will. Rep.* 644.

18. Defendant was Maſter of a Ship called the *Carteret* in the *South-Sea* Company's Service, and Owner of a fourth Part in her, and in 1733. by Deed Poll, reciting a Wreck of the Ships therein mentioned, and the Freighting of the *Carteret*, and that the King of *Spain* had by Letters Patent granted the Company Liberty to fiſh for ſuch Wrecks. In Conſideration of 700 *l.* paid by Plaintiff to the Defendant, he aſſigned over to Plaintiff 700 *l.* to be iſſuing out of the fourth Part of the *Carteret*, together with all Profits and Advantages of his ſaid fourth Part ariſing from the Freight of the Wreck of a Ship called the ——— and alſo of a Wreck of a Ship loſt on the Coaſt of *Braſil*, and of a Ship loſt on the Iſland of ——— called the ——— an *Eaſt-India* Man, after all juſt Deductions and Allowances made; the Defendant covenanted to warrant to Plaintiff his Share, and it was agreed that the ſaid 700 *l.* ſhould be liable to all Loſſes and Gains on Account of the ſaid intended Voyage. The Defendant carried ſeveral contraband Goods in his Ship, and the Plaintiff brought his Bill to have an Account of the Freightage of all the Goods he had carried in that Voyage. His Honour decreed a general Account, as well of thoſe which were contraband as the others. From this Decree the Defendant appealed, and it was inſiſted for him, that if the Ship had been forfeited for ſuch falſe Trade, yet the Plaintiff would not have been contributory to the Loſs, and therefore ought not to be a Gainer by ſuch clandeſtine Freightage. But *per King* C. it ought not to be in the Defendant's Power to expoſe the Ship to a Forfeiture, much leſs ought he to have the Advantage of ſuch unfair Dealing; and ſo affirmed the Decree. *Eaſt.* 6 *Geo.* 2. *Dr. Dover* and *Opey*, *MS. Rep.*

19. Equity will decree Money overpaid in Purſuance of an uſurious (*a*) Contract, to be accounted for notwithſtanding the Agreement of the oppreſſed Party to allow ſuch Payments, and the Securities to be delivered up. *Boſanquett* verſus *Daſhwood* at the Rolls; and afterwards affirmed by *Talbot* Lord Chan. *Mich.* 8 *Geo.* 2. *Caſes Temp. Talbot* 38.

(*a*) Max. Uſury odious in Law.

20. The Executor waſtes the Fund for *younger Children*; this is a *Devaſtavit* in him, for which he ſhall be (*b*) accountable; but the younger Children have no Remedy over out of the real Eſtate, as there was a ſufficient Perſonalty, or would have been, had it not been for the Executor's wilful Neglect. *Morgan* and *Morgan*, *before the Houſe of Lords*, 21 *April* 1736. It would be hard to make the

(*b*) Max. Equity favours younger Children.

Corruption

Vide Salk. 155.—1 *Vern.* 336.—*Prec. in Chan.* 397, 439, 585.

Corruption or Negligence of the Executor work to the Hurt of the Heir, who is an innocent Party. *Grounds and Rudiments of L. and Eq.* 68.

21. Where an Attorney's Bill has been taxed at Law, Equity will not decree an Account, which would tend to overhale the Taxation; for in Caſe the Prothonotary does not make all juſt Allowances, the Court will refer it back to be reconſidered. *Oſbaldiſton* and *Croſs & al'*, *Hil.* 11 *Geo.* 2. *in Scacc'*, *Comyns's Rep.* 612.

22. Where the Child of a Freeman of *London* is to make his Election whether he will abide by the Will or by the Cuſtom, he is not obliged to elect till after the Account taken. 3 *Will. Rep.* 124. *in a Note.*

23. Goods are aſſigned to Plaintiff for ſecuring a Debt, the Aſſignor afterwards becomes a Bankrupt, and his Aſſignees poſſeſs themſelves of the Goods. The Bill was brought againſt them for an Account: Defendants demur, for that this Matter was relievable at Law; *ſed non allocatur*; for though Plaintiff might bring an Action of Trover, yet as the Goods were aſſigned by way of Security, there is Matter of Account, and therefore Plaintiff proper in taking his Remedy in Equity. *Ryal* and *Roberts*, *Eaſt.* 1740. *Barnard. Eq. Rep.* 38.

24. In a Bill for an Account all Perſons who have poſſeſſed themſelves of the Teſtator's Eſtate ought to be made Defendants. *Hil.* 1740. *Barnard. Eq. Rep.* 332.

(B) How an Accomptant may diſcharge himſelf; What ſhall be a good Bar to a Demand of an Account; Where a ſtated (*a*) Account ſhall be concluſive, and in what Caſes it may be ſet aſide; and Where Liberty ſhall be given to falſify: And here of Stoppage or ſetting off mutual Debts one againſt the other.

(*a*) *Note*; If an Account is ſtated by the Parties, it will carry Intereſt from the Time of ſtating.—But if an Account is decreed, it will carry no Intereſt until the Maſter's Report is confirmed. Said to be the Practice of the Court, by Sir *John Trevor* Maſter of the Rolls, *Trin.* 7 *Ann. Anon. MS. Rep.*——And where two Perſons act in their own Right, and one ſtates an Account, or releaſes his Debtor; this *without Fraud* is a good Bar. *MS. Rep.*

1. IN an Account before the Maſter, the * Party may diſcharge himſelf upon his own Oath for any Sum not exceeding 40 *s.* (*b*) By Lord *Bridgeman*, and Maſter of the Rolls, 27 *October* 1672. 2 *Freem. Rep.* 136. *pl.* 168. *Anon.*

* *i. e.* the Defendant. (*b*) But the Plaintiff ſhall not be allowed any Thing on his Oath. *MS. Notes.*

2. Held unanimouſly, that where there was an Account *current* for 20 Years as Receiver of Rents, and much more in paying and receiving mutually, yet this was not barred by the Statute of Limitation; but if the Account were ſtated or ended, and then the Party forbears to proſecute for ſix Years, he is barred. And here *A.* (who was the Executor of Mrs. *Moſſe*, who was Executrix of her Huſband Mr. *Moſſe*) was decreed to account for the Profits of Lands received by Mr. *Moſſe* before his Death, in Truſt for the Plaintiff. *Eaſt.* 1680. *in Canc'*, *Aſtrey's Caſe*, 2 *Freem. Rep.* 55.

3. To a Bill preferred generally for an Account, an Account ſtated is a good Plea; but if the Bill ſets forth that there was an Account, and a Miſtake, and ſets forth the particular Miſtake, there an Account

count ſtated is no good Plea. By *Hutchins & al'*, 2 *Freem. Rep.* 62. *Mich.* 1680. *Anon.*

4. Account ſtated is a good Plea, but if there be any Agreement to rectify Miſtakes, it ſhall not conclude, though under Hand and Seal. *Maſter of the Rolls. Ibid.* 183. *pl.* 253.

5. The Party gives in an Account of Debtor and Creditor, and ſets down ſo much received, and ſo much paid, which being taken as true, a Releaſe is given. *North* L. K. thought it reaſonable to relieve againſt ſuch a Releaſe, and let them in to diſprove the Articles of the Account. *Mich.* 35 *Car.* 2. *in Canc'*, *Anon. Skin.* 148.

In this Caſe L. K. ſaid, that a Releaſe obtained as ſoon as ever the Heir came of Age by the Guardian, ſhould never by him be thought a Trick, but that it was the proper Time; but *Finch* ſaid, it had been otherwiſe held.

6. On a Bill to have an Account of the Rents and Profits of Lands, &c. *Harcourt* C. ſaid, That when a Perſon has been *ejected at Law*, and the other Party has been *in Poſſeſſion above twenty Years*, and no Account demanded or Bill filed in that Time, the *Statute of Limitation* (*a*) will bar an Account in this Court, as well as an Action of Treſpaſs for the meſne Profits at Law; for *Jus poſſeſſionis*, is gone by the Statute, and conſequently the meſne Profits; and if once the Statute begins to attach, *Incapacity*, as *Coverture*, &c. will not aid it. This Statute does not extend to a Truſt (*b*), but in this Caſe the Defendant coming in by a Recovery at Law, and the twenty Years elapſed before the Bill filed, the Bill muſt be diſmiſſed *quoad* the Account of Rents and Profits. 13 *Ann. Nevarre* and *Rutton*, *Viner's Abr.* Tit. *Account* (D. a.) *pl.* 7.

(*a*) 21 *Jac.* I.

(*b*) See *Norton* and *Turvill* and *Blakeway* and *Earl of Stafford.*

7. A Receiver to the Guardian of an Infant, who has his Account allowed him by the Guardian, ſhall not be obliged to account over again to the Infant when of Age, for the Guardians were only and immediately reſponſible to him, and anſwerable for the Receiver their Servant. The Receiver pleaded the Accounts themſelves, and his Plea clearly held good. *Calvering's* Caſe, *Trin.* 1720. *Preced. in Chan.* 535.

8. *A.* a Clothier and *B.* a Dyer had mutual Dealings in their way of Trade, which were carried on for ſeveral Years without Payment of Money on either Side, but the Debts on one Side were *paid* * off againſt the Debts on the other. *B.* was otherwiſe indebted to *A.* and on ſtating Accounts in 300 *l.* for which he made a Mortgage, and afterwards owed *A.* 200 *l.* for which he gave Bond and Judgment: *B.* dies inteſtate, and indebted to others by Specialties, who as principal Creditors take out Adminiſtration, and finding ſeveral Sums due from *A.* ſue him at Law. On a Bill by *A. Macclesfield* C. decreed an Account, and that *A.* ſhould be allowed on Diſcount what was due to him from *B.* and his Coſts. (*c*) *Downam & al'* verſus *Matthews & al'*, *Hil.* 1721. *Preced. in Chan.* 580.

* So in the Original.

(*c*) His Lordſhip ſaid, that though generally Stoppage was no Payment, as in the Caſes under mentioned (*d*), yet in Caſes of this Nature, where it appeared that the mutual Dealings between the Inteſtate and Plaintiffs were carried on for ſeveral Years in this Manner without Payment of Money on either Side, it was a ſtrong Preſumption of an Agreement to that Purpoſe, and that otherwiſe they would not ſo long have continued their Dealings; that it was the conſtant Uſe between Merchants and Traders. That the Statute of Bankrupts directs Accounts to be taken in ſuch Manner, that if there be but the leaſt handle for directing an Account, ſo as to ſet off the other's Debts, it ought to be done; as if even in Caſe of a Bond the Intereſt had not been paid, but caſt up and allowed in Goods, this would intitle them to retain the Whole againſt each, as the Account ſhould come out. *Ibid.* 582. (*d*) For a Man cannot ſtop his *Rent* for Money owing to him, or *a Bond* towards Satisfaction of a *ſimple Contract Debt*. *Per* Lord *Macclesfield*. *Ibid.*

In this Caſe his Honour ſaid, that it was true that *Stoppage* was no Payment at Law, nor in Equity itſelf, but then *a very ſlender Agreement for diſcounting* the one Debt out of the other will make it a Payment, becauſe it prevents *Circuity of Actions and Multiplicity of Suits*, which is not favoured in *Law*, much leſs in *Equity*.

9. *A.* took a Nephew upon his Father's Death into his Houſe, and provided him with Clothes and Schooling, and afterwards took him as an Apprentice, and in his Books kept an Account of Expences of that and Board, but from the Time of the Apprenticeſhip omitted the Board, and afterwards left him 500 *l.* by Will, and made *B.* Executor. After *A.*'s Death *B.* ſupplied the Nephew with Wines, who likewiſe received Monies due to *B.* and ſo became indebted to *B.* conſiderably. The Nephew ſued *B.* in the Spiritual Court for the 500 *l.* Upon a Bill brought by *B.* firſt againſt the Nephew, and afterwards againſt the Aſſignees of a Commiſſion of Bankruptcy againſt the Nephew, and Croſs Bill by them againſt *B.* his Honour decreed an Account, and Plaintiff *B.* to pay only the Surplus, after having deducted what is due to the Nephew, as well to himſelf as to the Teſtator, but no Coſts on either Side. *Eaſter* 1723. *Jeffs* and *Wood*, 2 *Will. Rep.* 128.

In mutual Dealings between Tradeſmen, it is reaſonable to ſuppoſe they intend one Debt ſhould be ſet againſt the other, and the Balance only to be paid, as it is *per* Statute of Bankrupts; and therefore the leaſt Evidence of ſuch an Intent is ſufficient. Here is ſufficient Proof of ſuch Intent between the Parties, and tho' Equity will be tender of relieving after a

10. Plaintiffs and *Fry* the Inteſtate were Tradeſmen, and had mutual Dealings together. *Plaintiffs were indebted to the Inteſtate* 30 l. *for Paper, and the Inteſtate was indebted to them* 100 l. *for Sugars.* Inteſtate died Inſolvent, not leaving Aſſets to pay his Debts. Defendant takes out Adminiſtration as principal Creditor, and brings an Action againſt *Lane*, one of the Plaintiffs and Partners, for Goods ſold to him by the Inteſtate, and gets a *Verdict and Judgment thereupon.* Plaintiffs bring their Bill, " Suggeſting that the Inteſtate was indebted " to them as Partners in a far greater Sum for Goods ſold and de- " livered than they were indebted to him, and pray an Account; " and that deducting the Debt due by them to the Inteſtate, they " may have Satisfaction for the Balance of the Account *out of Aſſets.*" *Macclesfield* C. decreed that the Defendant acknowledge Satisfaction upon the Judgment, and that an Account be taken between the Parties, and the Balance due to Plaintiffs to be paid in a Courſe of Adminiſtration, but *without Coſts, becauſe Defendant is an Adminiſtrator, Mich.* 10 * *in Canc'*, *Hawkins & al'* and *Freeman, Viner's Abr.* Tit. *Diſcount*, (A) *pl.* 26. —— Mr. *Viner* in a Note at the Bottom of this Caſe ſays, " This was an Appeal from the *Rolls*, where the Bill was " diſmiſſed, that Decree now reverſed, and decreed *ut ſupra.*

Verdict at Law, yet in the preſent Caſe the Verdict is not material; for it appears in the Cauſe that the Sugars were Part of the joint Stock, and *per contra* the Paper was delivered to the Uſe of the joint Trade, and not bought by *Lane* for his ſeparate Uſe; and though *Lane* was the acting Partner, and agreed for the Paper, yet it was bought and employed in the joint Trade, and tho' the Verdict was given againſt him ſingly, yet he is but in Nature of a Truſtee for the other Partners; and the Caſe is the ſame in Equity as if all the Partners had actually bought the Paper, ſince it was bought for their Uſe and on their Account. *Per Macclesfield* C. *Ibid.*——The Caſe of *Downham* and *Matthews in Canc'*, *Hil.* 8 *Geo.* 1. was cited for the Plaintiffs as a Caſe in Point.

* The Original does not ſay in what King's Reign, but I take it that it ſhould be *Mich.* 10 *Geo.* 1. *ſed Q.*

11. Stated Accounts by Men of perfect Ages and Underſtandings, after great Length of Time not to be ſet aſide againſt an Executor; for *King* Lord Chancellor ſaid, to have a Bill now brought againſt the Executor would be very hard; that the Court had gone great Lengths in relieving againſt the Statute of Limitations, and run into all the Inconveniences deſigned to be avoided; and ſaid, it is much better for the Publick that one ſhould ſuffer than all the World be in Uncertainty; People ſhould come in a reaſonable Time. He did not ſay Accounts were concluſive, but it would be very hard to put a *Man's Executor, who knew nothing of the Matter, to anſwer. Weſtern Executor of Weſtern* verſus *Cartwright Executor of Cartwright, Trin.* 1725. *Select Ca. in Chan.* 34.

12. After laying out 200000 *l.* of the publick Money for building *Blenheim* Houſe for the Duke of *Marlborough*, he fell into Diſgrace, and the ſame was afterwards carried on at his own Expence; at that Time 45000 *l.* was due to the Overſeers and Workmen, and Meſſieurs *A. B.* and *C.* who were employed by the Crown, ſettled their Accounts, and paid them 16000 *l.* the Sum remaining in their Hands of the publick Money; ſo 29000 *l.* remained due to the Workmen, for which they had a Decree againſt the Duke *in Scacc'*, which was affirmed in the Houſe of Lords. Afterwards the Duke apprehending that the *Account ſettled with the Crown ought not to conclude him*, moves to bring his Bill for an Account of what Money the Defendants had received for their Work, and to know what was due to them in order to be paid; which was granted. The Overſeer by Anſwer inſiſted he was to account only with the Crown, and having ſo done, he ought not to account again; and all the Defendants ſaid, they took the Duke Pay-Maſter, *&c.* It appeared that in the Warrant to the Overſeers to proceed in the Work, that they ſhould be accountable to none but the Duke. Though it was argued for the Workmen, that it would be hard for them to come to a new Account, and to produce Vouchers after ſuch a Length of Time, and that ſeveral of the preſent Defendants were Widows, Children, and other Repreſentatives of Workmen deceaſed, and therefore almoſt impoſſible for them to produce Vouchers for Work done by thoſe whom they repreſent after ſo long Acquieſcence under a ſtated Account, by relying whereupon they might be negligent of ſuch Vouchers, and might probably have loſt great Part of them. Yet decreed that the Officers and Workmen ſhould account, and that the ſtated Account ſhould not ſtand in the way. *Marlborough Ducheſs* and *Sir John Vanbrugh or Vanbrook & al'*, *Trin.* 9 *Geo.* 1. 2 *Mod. Ca. L. and Eq.* 23.

13. Account directed after thirty-three Years Acquieſcence. *Feb.* 17, 1724. *Lord Kingſland* and *Lady Tyrconnel*, *Viner's Abr.* Tit. *Account*, (D. a.) *pl.* 10. *But in Regard to the Reaſons the Court went upon the Book is ſilent.*

14. A Bill was for an Account by *A.* a Merchant againſt *B.* a Merchant who was his Partner. Defendant pleads, that the Dealings concerning which Plaintiff prays an Account were tranſacted above twenty Years before the Bill brought; and pleads ſuch Acquieſcence without Suit, and alſo the Statute of Limitations in Bar of the Account. *Per Cur':* Forbearance of Suit for twenty Years will in Equity be a good Bar though between Merchant and Merchant. *Hil.* 12 *Geo.* 1. *in Scacc'*, *Bridges* and *Mitchell*, *Gilb. Eq. Rep.* 224.

15. Not neceſſary for the Defendant in ſuch a Bill to aver in his Anſwer, that he did not promiſe within ſix Years to account, *&c.* unleſs particularly charged in the Bill; as was reſolved in *Bodvil* and *the Biſhop of Meath in Scacc'*, ſaid *per Cur' in the above Caſe. Ibid.* 225.

N. B. Though the Statute of Limitations has been always conſtrued to except Accounts open between Merchant and Merchant, yet that is to be underſtood with this Diſtinction, that if open Accounts be by ſubſequent Acts continued, they are not barred by the Intervention of ſuch Length of Time from the original Tranſaction; but if ſuch an Account is by the Plaintiff deſerted, then in ſuch Caſe it is barred. ' *Per Cur'*, *ibid.*

16. In a Decree of Foreclоſure againſt an Infant, though he hath ſix Years after he comes to Age to ſhew Cauſe againſt the Decree, yet he cannot ravel into the Account. This Point clearly laid down by *Talbot* C. as agreeable to the conſtant Practice. *Mallack* v. *Galton*, *Hil.* 1734. 3 *Will. Rep.* 352.

In the Caſe of *Lyne* and *Willis*, heard at the Rolls 13 *May* 1730. this Point was admitted by the Counſel on both Sides, and by the Court, to be the ſettled Practice.

17. Juſt

17. Juſt and fair Accounts, which appear ſo in themſelves, ſettled with an Infant after he comes of Age, and after Length of Time and the Death of both Parties, ſhall not be opened. *Hil.* 1740. *Vernon* and *Vandrey*, *Barnard. Eq. Rep.* 283, 305.

18. But where an Account is ſettled, which in the very Nature thereof is fit to be opened, as where Intereſt is carried into Principal, and other Impoſitions appear by the *Items*, in ſuch Caſe notwithſtanding Length of Time and the Party's Death, Equity will intirely ſet aſide the Account; but with an Exception as to thoſe *Items* that contain groſs Sums advanced upon Securities, and Goods bought, but even as to them Liberty will be given to falſify. *Ibid.* 305, 306.

19. *A.* by Bill prays *Relief* and a *Diſcovery* againſt *B.* and proceeds at Law upon the ſame Account. *B.* prays that *A.* may make his Election which Court to proceed in. *A.* elects to proceed at Law, but has Leave to proceed here alſo with Regard to ſo much of his Bill as ſought *a Diſcovery*. *A.* amended his Bill on Payment of Coſts, by ſtriking out that Part which tended to pray *Relief*: Thereupon the Bill was diſmiſſed of Courſe, becauſe that it prayed only a Diſcovery, and *B.*'s Coſts taxed to 38 *l.* *A.* gets Judgment at Law for 440 *l.* for which *B.* was taken in Execution, but at the ſame Time *B.* takes out an Attachment againſt *A.* for ſaid 38 *l.* Coſts. *A.* petitions that he might deduct the 38 *l.* out of the 440 *l.* Lord Chan. ſaid, the Petition ſeemed to him to be very reaſonable, and that he would grant it if the Precedents would juſtify it, which he doubted, becauſe the Bill of Diſcovery was diſmiſſed; therefore he made no Order, but directed it to ſtand over that Plaintiff might ſearch for Precedents. *Hil.* 1740. *Geeriſh* and *Donaccon*, *Barnard. Rep. in Chan.* 428.

20. Where there are only Miſtakes in an Account, Equity (whilſt both Parties are living) will only give Liberty to ſurcharge and falſify; but where there are Impoſitions, will ſet aſide the Account intirely. ———And though a Charity is not barred in Equity by the Statute of Limitations, yet that ſeems to be a good Rule how far back to carry the Account. *MS. Notes.*

CAP.

CAP. III.

Affidavits.

(A) Where an Affidavit is neceſſary, & econt'.
(B) Of an evaſive Affidavit; —— where Affidavits are allowed to be read on a Motion to diſſolve an Injunction; — and concerning Affidavits ordered to be ſworn on both Sides by a limited Time.

(A) Where an Affidavit is neceſſary, & econt'.

1. THE following Rule was laid down *per* Lord Chan. in *Trinity* Term 1681. in an *Anon.* Caſe. That if a Man prefer a Bill for a Thing of which the *Court hath Juriſdiction*, there the Plaintiff *need not make an Affidavit that he hath not the Writings*; but if it be to intitle the Court to a Juriſdiction, there he muſt. As if a Man bring a Bill to be ſatisfied a Debt upon a Bond, and pretends the Bond is loſt, he muſt make Affidavit of it; for if the Bond be not loſt, the Court hath no Juriſdiction; but in the Caſe before the Court the Bill was for a *Diſcovery of Writings* (*a*), and that his Lordſhip ſaid the Court had a Juriſdiction of, and there needed no Affidavit that Plaintiff had them not. 2 *Freem. Rep.* 71. *pl.* 83.

(*a*) *Prec. in Chan.* 536. *Trin.* 1720. in an *Anon.* Caſe, the Bill was for Diſcovery of Writings, and the Defendant demurred, becauſe the Plaintiff had not annexed the uſual Affidavit that *he* had none of them in his Cuſtody; but the Demurrer was over-ruled; and Lord Chan. ſaid, that if on ſuch a Bill as this was it ſhould be allowed, it would overthrow half the Bills in this Court. —— 2 *Will. Rep.* 541. *Trin.* 1729. the S. P. was ruled on Demurrer after Debate, and on looking into the Caſes; for *per King* C. if a Bill be brought only for Diſcovery and delivering up of a Deed, and which *Bill prays no other Relief*, there it is not neceſſary to annex ſuch an Affidavit, *for it cannot be intended that a Man will bring a Bill only for diſcovering or delivering up of that Deed which he himſelf is poſſeſſed of.* *Ibid.* —— But where the Bill is for a Diſcovery of a particular Bond ſuggeſted to be loſt, or for Diſcovery of a particular Deed, for want of which the Plaintiff could not recover his Debt at Law, or the Poſſeſſion in Ejectment; in theſe Caſes it is fit he ſhould make Oath that he himſelf has not the Bond or Deed, becauſe if he had, his Remedy is proper and open at Law; and then he is not to put another to the unneceſſary Expence of an Anſwer to deny his having of it; *per* Lord Chan. in an *Anon.* Caſe, *Trin.* 1720. *Prec. in Chan.* 536. ——— So if a Bill be for Relief *generally* upon any Deed or Bond, as to recover the Money upon the Bond, or the Profits of the Land under the Deed; in this or the like Caſe there muſt be an Affidavit annexed to the Bill, that the Deed is not in the Plaintiff's Cuſtody, *becauſe ſuch a Bill does by Conſequence ſeek to transfer the Juriſdiction from the Common Law to the Court of Equity.* *Per King* C. *Trin.* 1729. 2 *Will. Rep.* 541. —— And the Reporter ſays, that the very next Day in the Caſe of *Saunders* and *Stephens*, on Demurrer to a Bill for want of an Affidavit annexed, that the Deed was not in the Plaintiff's Cuſtody, his Lordſhip gave the ſame Rule. *Ibid.* 542.

2. A Peereſs ordered to produce Deeds confeſſed in her Anſwer on Honour only, and not on Oath. *Eaſter* 1699. *Duke Hamilton & Ux'* and *Lady Gerrard*, *Prec. in Chan.* 92.

And ſo it was ordered in the Caſe of *Powell, late Maſter of the Rolls*, and *the Counteſs of Dorſet.* *Ibid.*

3. Ruled on Demurrer by the Maſter of the Rolls, and afterwards by *Cowper* C. on a Rehearing, that a Bill to perpetuate Teſtimony lies before Trial, on *Affidavit that the Plaintiff's Witneſſes are infirm*, &c. but not without ſuch *Affidavit*. *Hil.* 1709. *Philips* and *Carew*, 1 *Will. Rep.* 117.

4. Though a Peer of the Realm is allowed to put in his Anſwer upon Honour, yet as to all Affidavits, or where he is examined as a Witneſs, he muſt be upon his Oath. Ruled *per Harcourt* Lord Keep. *Trin.* 1711. *Sir Thomas Meers* and *Lord Stourton & econt'*, 1 *Will. Rep.* 146.

5. Where a Maſter reports any Thing as admitted by either of the Parties, which Report is afterwards excepted to, the Report muſt *primâ facie* be taken to be true, and requires an *Affidavit* to falſify it. *Per* Lord *Parker*, the Seal before *Eaſter* Term 1720. *Allen* and *Pendlebury*, 3 *Will. Rep.* 142. (*in a Note*).

(B) Of an evaſive Affidavit;——where Affidavits are allowed to be read on a Motion to diſſolve an Injunction;—— and concerning Affidavits ordered to be ſworn on both Sides by a limited Time.

1. DEfendants made *Affidavits that they had no Books, Evidences,* &c. *to their Knowledge concerning the Matters in Queſtion, but what were produced before the Maſter, and annexed to a Schedule.* This Affidavit is evaſive, and they were put to *ſwear that they had no Books or Evidences concerning the Matters in Queſtion but what they had already produced. June* 10, 1713. *Mayor*, &c. *of Hartford* and *the Poor of Hartford*, *Viner's Abr.* Tit. *Chancery*, (S. a.) *pl.* 10.

2. Affidavits were allowed to be read for the Patentee of a new Invention, on a Motion to diſſolve an Injunction on coming in of the Defendant's Anſwer, *on account of the great Prejudice that would ariſe to the Patentee were the Injunction to be diſſolved. Eaſter* 1734. *Gibbs* and *Cole*, *Talbot Lord Chan.* 3 *Will. Rep.* 255.

3. Where the Court orders that the Affidavits on both Sides ſhall be ſworn within a limited Time, and ſome of the Affidavits on one Side are not ſworn within the Time mentioned in the Order, the Court will not enlarge the Order, for the neglecting Party is precluded, according to the eſtabliſhed Rule of the Court. *Per* Lord Chan. *Hil.* 1740. *Burton* and *Maloon*, *Barnard. Rep. in Chan.* 401, 402.

CAP.

CAP. IV.

Agreements, Articles and Covenants.

(A) Articles and Covenants which ought to be perfoꝛmed in Specie, & econt'.

(B) What Acts ſhall be taken to be done in Purſuance of, and ſhall go either in Satisfaction of the Whole oꝛ Part of an Agreement.

(C) Where a Covenant is a ſpecifick Lien on the Lands, and where on the Perſonal Eſtate, & econt'.

(D) Where Equity will decree Lands to be ſettled in ſtrict Settlement, and why.

(E) Of Variance between Articles and Settlement.

(F) Where Money agreed to be laid out in Land ſhall be paid to the Heir.

(G) Parol Agreements, oꝛ ſuch as are within the Statute of Frauds and Perjuries, & econt'.

(H) Voluntary Agreements, concerning them.

(I) Agreements by whom to be perfoꝛmed; and where the Perſon oꝛ Eſtate will be made liable to a Covenant oꝛ Agreement.

(K) Concerning unreaſonable Agreements; and in what Caſes Equity will give Relief on Covenants and Agreements, & econt'.

(A) Agreements and Covenants which ought to be perfoꝛmed in (a) Specie, & econt'.

(a) Where Equity executes an Agreement *in Specie*, it muſt be ſuch an Agreement as is fairly made without any Fraud or Circumvention. 2 *Freem. Rep.* 217. For the *Rule* is that *Agreements and Contracts muſt be on good Conſiderations or mutual Recompence. Grounds and Rudiments of Law and Equity, p.* 18.

1. WHERE no Action at Law will lie to recover Damages, there Equity will not execute the Agreement in *Specie*, for Equity will never make that a good Agreement which is not ſo by Law (b). *Mich.* 1697. *Anon.* 2 *Freem. Rep.* 217. Where Damages are to be recovered at Law for the Breach of a Covenant,

Equity will compel a ſpecifick Execution of ſuch Act, for the not doing of which the Law gives Damages; and that for this Reaſon, as an adequate Compenſation is to be made on the Covenant, the *Quantum* of the Damages may be very uncertain; and therefore to prevent that Uncertainty, Equity will enforce a ſpecifick Execution of the Thing, for it is a certain *clear Rule of Equity*, that *a ſpecifick Performance ſhall never be compelled, for the not doing of which the Law would not give Damages. Per* Lord *Raymond, Nov.* 16, 1726. in the Caſe of *Dr. Betteſworth* and *Dean and Chapter of St. Paul's, Sel. Ca. in Chan.* 68. And *per* Lord Chan. the Reaſon why ſpecifick Performances are in Equity, is, becauſe the Lien is ſubſiſting at Law, and the Law can only give Damages, which may not be adequate. *Ibid.* (b) *Sed vide* the Caſe of *Cannel* and *Buckle*, P. Ca. and the Notes there.

2. If

2. If a Marriage Agreement be ſo ill worded that an Action will not lie at Law for the Breach of it, yet Equity will decree a Performance according to the Intent. *Hil.* 1700. 2 *Freem. Rep.* 246. But where one Party has trifled, or ſhewn a backwardneſs in performing his Part of the Agreement, Equity will not decree a ſpecifick Performance in his Favour, eſpecially if Circumſtances are altered. *Jan.* 26, 1702. (*a*) *Hayes* and *Caryll*, *Viner's Abr.* Tit. *Contract and Agreement*, (M) *Ca.* 18.

(*a*) *Grounds and Rudiments of Law and Equity, P.* 18. *Ca.* 6. S. C. *in totidem verbis* ſays this Determination was made *in Dom' Proc'.*

3. If a Man (being in Company) makes Offers of a Bargain, and then writes them down, and ſigns them, and the other Party takes them up, and prefers his Bill; this ſhall be a good Bargain, and the Party ſhall be compelled to a ſpecifick Performance of it. Said by Lord K. in the Caſe of *Coleman* and *Upcot*, *Hil.* 5 *Ann. Viner's Abr.* Tit. *Contract and Agreement*, (I) *Ca.* 17.

4. *A.* ſeiſed of Lands in Fee demiſed them to *B.* upon a building Leaſe, *B.* paying 5 *l. per Ann.* and alſo 12 *s.* yearly for every Foot ſquare that he ſhould build above the Height of ten Feet, which *B.* covenanted to pay. The Reverſion of thoſe Lands came to *C.* This Leaſe being mortgaged, was afterwards aſſigned by *B.* to *D.* who builded above the Height; and upon a Demand refuſed to pay the increaſed Rent. The Reverſioner brought an Action of Covenant, and recovered; then *D.* brings his Bill to have a Mitigation of the increaſed Rent, alledging that he had done little or no Damage to *C.* and that he was ignorant of any ſuch Covenant. The firſt Allegation appeared to be true, but the other falſe. Lord Chan. decreed *D.* to pay the increaſed Rent from the Time he exceeded Height, until the Abatement of ſo much as he hath tranſgreſſed; but no broken Quarters to be paid for: And if he had paid Rent to *C.* without deducting the Taxes, they to be allowed him before the Maſter. *Eaſt.* 7 *Ann. Turner* v. *Metcalfe*, *MS. Rep.*

Gilb. Eq. Rep. 6. *Trin.* 7 *Ann. Vane* and *his Father Lord Barnard*, S. C. and P. ſays, Lord Chan. obſerved that the Covenant in the Deed of Settlement was not to be that the Eſtate *is free from Incumbrances*, but that the Truſtees ſhould enjoy free from Incumbrances; which ſo long as they do the Covenant is not broke. The Reporter *p.* 8. ſays, it appeared that in the Articles Notice was

5. *A.* for the Advancement of Plaintiff a younger Son in Marriage, enters into Articles with *B.* the Lady's Father: *B.* covenants to ſettle Lands free from Incumbrances, according to the uſual Limitations in Marriage Settlements; and in Conſideration thereof *A.* covenants to ſettle Lands by Name of the Value of 2500 *l. per Ann.* (but with a Life or two upon them) upon Truſtees to like Uſes, but with theſe Words: That in ſuch Settlement there ſhould be Covenants that he is *ſeiſed in Fee, has good Right to convey*, and that the *Truſtees ſhall enjoy free from Incumbrances.* Theſe Lands were charged by *A.*'s own Marriage Settlement with 6500 *l.* to be paid to ſuch Daughter or Daughters as ſhould be living at *A.*'s Deceaſe, and not provided for. On a Bill to have a ſpecifick Performance of theſe Articles, by *A.*'s paying off or giving collateral Security againſt this contingent Portion of 6500 *l.* He having then one Daughter about ſixteen Years old, Lord Chan. held, that here was not any Covenant that the Lands were free from Incumbrances, but only a Covenant that *A.* would in the Settlement (which was after to be executed) covenant for that Purpoſe, ſo that the Parties ſeemed to be ſatisfied with a bare Covenant only, and the Articles were only a Covenant to covenant. That inſerting that Covenant in the Deed of Settlement

taken of *A.*'s Lady's Jointure in theſe very Lands, which neceſſarily leads to the Deed whereby that Jointure is made, and in that Deed there was this Portion charged upon the Lands, and whatever is contained in a Deed to which any other neceſſarily leads you, you are preſumed to know; which was allowed. *Per* Lord Chan. without a Word more, *quod mirum.*

ment was a ſpecifick Performance of thoſe Articles, and was all that *A.* agreed to do, or that the Plaintiff by his Bill deſired to have done. His Lordſhip ſaid, that Notice or no Notice of this Incumbrance was very material; for firſt, if between the Executing the Articles and the Sealing the Deed of Settlement the Party had no Notice of this Incumbrance, then this Incumbrance ſhall be diſcharged even before executing the Deed of Settlement, not only upon Account of the Fraud in concealing ſuch Incumbrance, but alſo becauſe it would be needleſs to enter into a Covenant already known to be broke; but ſecondly, againſt all other Incumbrances diſcovered after the Execution of the Deed of Settlement there is the Party's Covenant only. But where Notice is given of an Incumbrance before executing the Articles, it is a ſtronger Caſe than the laſt, for you conſent to accept the Party's Covenant againſt an Incumbrance you were aware of, and when you have choſen your Method of Security yourſelf, Equity will give no other, nor make the Party do a further Act than by the Articles he has agreed to do; and the rather in this Caſe, for that the Portion is not a certain Incumbrance but a contingent one; and therefore it is reaſonable to ſuppoſe that *A.* would not be compelled to charge his remaining Eſtate at all Hazards to ſecure againſt an Incumbrance that was but contingent, to the Prejudice of his eldeſt Son, eſpecially when he had provided for the younger Son ſo plentifully. Decreed that *A.* ſhould execute a Deed of Settlement with Covenants according to the Articles, but becauſe the Eſtate was ſubject to a preſent Charge, *viz.* to the Payment of a yearly Sum for the Daughter's Maintenance from her Birth, therefore that *A.* ſhould pay and diſcharge all Arrears of that and the growing Annuity as it ſhall ariſe, taking Acquittances from his Daughter, and leaving them with the Plaintiff for his Security. *Trin. 7 Ann. Anon. MS. Rep.*

It ſeems the Portion being *contingent* and *not certain*, was the Reaſon of the firſt Part of the Decree, becauſe it is plain by the latter Part of the Decree, where the Incumbrance was certain, (*viz.* the Payment of a yearly Sum) *A.* was decreed immediately to diſcharge it, though by the Articles he did but *covenant* to *covenant*; and there is no other Difference between theſe two Matters. *Gilb. Eq. Rep.* 7.

6. *A.* being Curate of *Newcaſtle*, covenanted with *B.* to build an Houſe upon the Glebe Land; *B.* brings his Bill for a ſpecifick Performance of this Agreement; and it was inſiſted for Defendant, that this Covenant is ſo looſe and incertain, that *B.* cannot have a ſpecifick Performance of it: Incertain both in Reſpect to Time and Value; for it is neither mentioned when the Houſe is to be built, nor what ſort of a Houſe it ſhall be; and ſo founds only in Damages. But *per* Lord Chan. who can the Damages go to? Surely to Plaintiff, to whom the Covenant was made. His Lordſhip ſaid, the Covenant was deſigned for the Benefit of the Church; and therefore if poſſibly it can be ſpecifically performed, it ought. *Ergo* decreed a convenient Houſe to be built; and for that Purpoſe each Side to chooſe two Commiſſioners, neighbouring Gentlemen; and if they cannot agree, then to reſort to the Ordinary of the Dioceſe to ſettle the Matter between them. *Trin. 7 Ann. Allen* v. *Harding, MS. Rep.*

7. Bill to compel the Defendant and his Wife to join in a Fine to the Plaintiff, purſuant to his Covenant in a Conveyance. The Defendant and his Wife, and *H.* their Son and Heir, ſet forth in their Anſwer, that Defendant *H.* is Tenant for Life, Remainder to his Wife for Life, Remainder to the Heirs of the Huſband begotten on the

Mr. *Viner* in a Note ſays, that the Huſband and Wife were Parties to the Deed, but the Huſband only ſealed it, tho' the Covenant was, that the Huſband and Wife ſhould levy a Fine, and a Fine *Sur Conuſans de Droit, &c.* was levied by the Huſband alone. *Ibid.*

the Body of the Wife, Remainder to the Huſband's Heirs; and inſiſt that nothing paſſed by the Conveyance but an Eſtate for Life of the Huſband, and that the Wife did not ſeal the Deed. Decreed that the Huſband the Defendant ſhould procure his Wife to join with him in a Fine to the Plaintiff according to his Covenant, ſince he has taken upon him to do it, and the Plaintiff hath paid the full Value of the Eſtate. By *Cowper* C. *Mich.* 1 *Geo.* 1. *Barrington* and *Horn & al'*, *Viner's Abr.* Tit. *Contract and Agreement*, (O) *Ca.* 35.

Vide P. Ca. and the Notes there.

Prec. in Chan. 534. *Trin.* 1720. S. C. cited by the Name of *Scould* and *Butter*, as a Caſe of the precedent Term, ſays, the Maſter of the Rolls decreed for the Plaintiff, but that on Appeal to the Lord Chan. the Decree was reverſed, and the Party decreed only to pay the Difference; and that to do otherwiſe might be the greateſt Hardſhip and Injuſtice in the World, as the ſudden Riſe of Stocks happened.

8. The Defendant, in Conſideration of two Guineas paid by Note *under Hand* agrees to transfer 1000 *l. South-Sea* Stock at a fixt Price at the End of three Weeks. Plaintiff on the Day demanded the Stock, and offered to pay the Price, but the Defendant inſiſted he would only pay the Difference. On a Bill for a ſpecifick Performance of this Agreement, the Maſter of the Rolls decreed, that the Defendant transfer the Stock, account for the Dividends, and pay Coſts; and the Plaintiff to pay the Defendant Intereſt for the Money from the Time that it ought to have been paid according to the Contract. But *Parker* C. reverſed this Decree, delivering his Opinion with great Clearneſs, that a *Court of Equity ought not to execute any of theſe Agreements* (*a*), but to leave them to Law, where the Party is to recover Damages, and with the Money (recovered in Damages) may buy the Quantity of Stock agreed to be transferred to him, for there can be no Difference between one Man's Stock and another's. *Mich.* 1719. *Cud* and *Rutter*, 1 *Will. Rep.* 570.

(*a*) Vide *Parol Agreements*, *p.* *c.*

Though it is a common Equity to decree ſpecifick Performances of Agreements, yet where they are extremely unreaſonable and iniquitous, the Court will not decree them, as in a Caſe

9. A Court of Equity is not bound to decree a ſpecifick Execution of Articles, where they appear to be *unreaſonable*, or *founded on a* (*a*) *Fraud*, or where it would be *unjuſt* or *unconſcionable* to aſſiſt them, but will leave the Party to his legal Remedy for Recovery of what Damages he can for Non-performance of ſuch Contracts. *Per* Lord Chan. who in the principal Caſe diſmiſſed the Bill brought for a ſpecifick Performance of Articles, they appearing to him to be *unreaſonable* and *ſhameful*, although there was *no direct Fraud proved. Mich.* 1720. *Young* and *Clerk*, *Prec. in Chan.* 538, 540.

ſince the Year 1720. where a Bill was brought in the Exchequer for a ſpecifick Performance of Articles for a Purchaſe made in that Year, whereby it was agreed that forty Years Purchaſe ſhould be paid for the Lands. There was a Decree in the Exchequer for a ſpecifick Performance, but it was reverſed in the Houſe of Peers; and though the Doubtfulneſs of Equity may be here objected, ſince no Rule is ſettled how many Years Purchaſe is a reaſonable Price for Lands, yet it may be anſwered, that no certain Rule can be drawn from the Price of Lands, whether the Articles for a Purchaſe ſhall be performed or not, becauſe the Iniquity of the Bargain does not depend always upon the Price; for what may be a reaſonable Price in one Caſe may not be ſo in another. But it is a certain Rule, that where the Bargain is plainly iniquitous, and it is againſt Conſcience to inſiſt upon it, (as in the Caſe of forty Years Purchaſe) Equity cannot ſupport it; for that would be to decree Iniquity. *Fran. Max. in Eq. p.* 6. *in a Note.*

(*a*) For *æquum & bonum eſt lex legum*; and the Office of Equity is to ſuppreſs *Fraud.*

S. C. cited *arg'*, *Lucas's Rep.* 504. in the Caſe of *Lewis* and *Lord Lechmere*,

10. So if *A.* articles to grant and convey to *B.* an Eſtate of 180 *l. per ann.* for which *B.* was to give thirty-five Years Purchaſe, and *B.* pays 50 *l.* in Part, but diſcovering that 30 *l. per ann.* of the Lands

were

ſaid, that the Vendor offered to procure an Infranchiſement of the Copyhold, or make any Compenſation in the Price, and yet the Court diſmiſſed the Bill, the *Price* being *unreaſonable. Ibid.*——Caſes of this Nature are proper for a Jury at Law to conſider of, where they may mitigate or moderate the Damages according to what the Circumſtances ſhall appear to be; but a Court of Equity can take no Advantage of ſuch Circumſtances, but muſt either decree an Execution of the Agreement, or diſmiſs the Bill; and therefore the Party ought to be left to make the moſt he can of ſuch *harſh* and *unequitable* Contracts at Law. Said *per* Lord Chan. in the ſame Caſe, *Prec. in Chan.* 575, 576. and his Lordſhip cited the Caſe of *Young* and *Clerk*, (above) wherein the Overvalue of the Land was the Reaſon the Court would not decree an Execution of the Leaſes, and for the ſame Reaſon ought not for the Overvalue of the Money in the principal Caſe. *Ibid.* 576.

were Copyhold, he refuſed to go on. On a bill brought by *A.* Lord *Macclesfield* would not decree a ſpecifick Execution of theſe Articles, it being *unequitable*, but ordered the 50 *l.* to be paid back, but without Coſts. *Trin.* 1721. *Sir Harry Hick* and *Phillips*, *Prec. in Chan.* 575.

11. *A.* agrees with Builders, before the Act made for building *Blenheim* Houſe at the Expence of the Crown; and recites, that he made ſuch Agreements at the Inſtance and Deſire of the Duke of *Marlbrough*. The Duke is bound by ſuch Agreement, and as well liable to pay for the Work done after the Statute as before. *May* 8, 1721. *Ducheſs of Marlbrough* and *Strong*, *Viner's Abr.* Tit. *Contract and Agreement*, (L) *Ca.* 36.

12. Where a Contract has lain dormant for many Years, there ſhall be no ſpecifick Performance. Decreed *March* 3, 1722. *Wingfield* and *Whaley*, *Viner's Abr.* Tit. *Contract and Agreement*, (L) *Ca.* 38.

13. Upon mutual Articles there ought to be mutual Remedies, and therefore the *Vendor may come into Equity for a ſpecifick Performance as well as the Vendee. Trin.* 8 *Geo.* 1. *Lucas's Rep.* 506.

14. On an Appeal to the Houſe of Lords the Caſe was, That the Reſpondent being ſeiſed in Fee of certain Lands, did by Articles dated 20 *July* 1720. ſell the ſame to Defendant, and did thereby agree that he would, on or before the 29th of *September* following, at the Coſts of the Appellant, make to him a good Eſtate in Fee-ſimple of and in the ſame Lands, to the Satisfaction of the Appellant and his Counſel; and the Appellant did thereby agree that on the Execution of ſuch Conveyance he would pay the Reſpondent 800 *l.* being *forty Years Purchaſe*. A Bill was brought in the Exchequer by the Reſpondent for a ſpecifick Performance of this Agreement, which was decreed accordingly, it being proved in the Cauſe, that the Reſpondent had left his Deeds with the Appellant, and that there was no juſt Objection to his Title: This was admitted in the Exchequer, and therefore Proofs were not read there, nor even marked as read. Two Points were argued before the Houſe of Lords: Firſt, Whether an exorbitant Bargain for forty Years Purchaſe ſhould be carried into Execution, or whether they ſhould be left to recover their Damages at Law; and this was a very doubtful Point among the Lords; and on hearing both Sides was left doubtful. But the Lords all agreed in the ſecond Point, *viz.* That ſince the Title was not made out by 29 *September*, as the Reſpondent undertook by his Covenant, there was no Occaſion to determine the other great Point; for the Reſpondent not having proved that he had made out the Title by the Time covenanted, could not be intitled himſelf to the Purchaſe Money; and the *Proofs for this could not be read, becauſe they were not read in the Exchequer, and the Appellant's Admittance of the Matter was not entred. Mich.* 8 *Geo.* 1. *Keen* and *Stuckley in Dom' Proc', MS. Rep.*

Gilb. Eq. Rep. 155. S. C. and Decree.

This was one Point in the Caſe of *Lewis* and *Lord Lechmere*, *P. Ca.* but was not determined in that Caſe.

Note this.

15. The Father agreed to give his Daughter 3000 *l.* as a Marriage Portion with the Plaintiff, who in Conſideration thereof was to ſettle Lands in Jointure, *&c.* and the Father having deviſed 2000 *l.* to her, died before the Marriage. On a Bill exhibited againſt his Executors to have the other 1000 *l.* paid according to the Agreement, it was decreed

The Court was of Opinion that Plaintiff might have ſome colourable Pretence to this 1000 *l.* if before his Marriage with the Daughter he had not known that her Father had deviſed 2000 *l.* to her, and no more; but having married the Daughter, and accepted that Legacy, he ſhall recover no more. Beſides, if this 1000 *l.* *had been recoverable, it muſt be in Right of the Huſband alone*, for his Wife hath no Manner of Right thereto, therefore if he die before it is recovered, his Executors or Adminiſtrators, and not the Wife, will be intitled to it; ſo that he ought rather to have exhibited his Bill for the Whole 3000 *l.* than for 1000 *l.* Reſidue thereof, becauſe the 2000 *l.* he received by Virtue of the Will can be no Part of the 3000 *l.* upon the Marriage Agreement.

ment. *Ibid.* 3, 4. 2 *Will. Rep.* 65. *Ayliffe* and *Tracy* S. C. ſtates it thus: *A.* courted *B.*'s Daughter, *B.* conſents to the Marriage, and writes to his Daughter, intimating that he had met *A.* and had agreed to give him as a Portion 3000 *l.* which *A.* (he ſaid) ſeemed fully to aſſent to, and ſubſcribed his Name to the Letter. *B.* dies before the Wedding-Day, having made his Will *long before this Treaty of Marriage*, and given his Daughter only 2000 *l.* The Daughter did not ſhew this Letter to *A.* whom ſhe afterwards married, and the 2000 *l.* Legacy was paid to *A.* but he did not, neither was he required to make any Settlement on his Wife, but was a Merchant and Freeman of *London*. Lord Chan. ſaid, This being no more than a Communication, has no Ingredient of Equity; the Huſband made no Settlement; he did not know of this Letter, and therefore cannot be ſuppoſed to have married in Confidence of the Letter. Then he accepted of the 2000 *l.* Legacy as the Portion, and at that Time demanded no more, and the other Daughters had but 1500 *l.* Portion. Bill diſmiſſed.

creed that the Huſband ſhould not have it, *becauſe he knew that the* 2000 l. *was deviſed to her, and having accepted that Legacy in Marriage, he ſhall have no more.* Bill diſmiſſed with Coſts. *Eaſt.* 8 *Geo.* 1. *Ailoffe* and *Tracy*, 2 *Mod. Ca. in Law and Eq.* 3.

S. C. cited in *Lucas's Rep.* 503. in the Caſe of *Lewis* and *Lord Lechmere*, *Eaſt.* 8 *Geo.* 1. and ſays, that it being acknowledged that this Manor was of little or no Value, it is evident that the other Circumſtance in the Caſe, *viz.* the *unreaſonable Price*, was that which really inclined the Court to lay hold upon a Point too inconſiderable otherwiſe to have been taken Notice of.

16. Bill for a ſpecifick Performance of Articles for the Purchaſe of Lands. The Caſe was, The Plaintiff agreed to ſell the Manor and Lands in *H.* in *Kent* to the Defendant by a Particular, wherein the Manor and Royalties are mentioned, but no Value ſet upon them therein. It happened that the Plaintiff had no Title to the Manor, but had been in Poſſeſſion of the Royalties for ſeveral Years. The Defendant objected againſt going on with the Purchaſe, that this was a Contract at a *South-Sea* Price, *viz.* forty-ſix Years Purchaſe: And ſecondly, That though no Value was ſet upon the Manor and Royalties by the Particular, yet they are valuable in themſelves, and was a great Inducement to him to purchaſe the Eſtate; and therefore ſince the Plaintiff cannot ſtrictly perform his Part of the Agreement by conveying the Manor, he ought not to have the Aid of a Court of Equity to compel the Defendant to pay the Money, ſince he cannot have the full Benefit of the Agreement; and for this laſt Reaſon the Bill was diſmiſſed, but without Coſts, if the Plaintiff would deliver up the Articles. *Per Macclesfield* C. *Hil.* 8 *Geo.* 1. *Sir Geo. Hanger* and *Eyles*, *Viner's Abr.* Tit. *Vendor and Vendee*, (A) *Ca.* 1.

Ibid. The Reporter ſays, though this was *that* upon which his Lordſhip was pleaſed to found his Decree, yet there were ſeveral other Things in the Cauſe.

17. This was a Bill brought by the Plaintiff for a ſpecifick Performance of Articles dated 30 *Auguſt* 1720. whereby the Defendant had covenanted to purchaſe ſuch an Eſtate at *forty Years Purchaſe*; provided the Plaintiff did by 10*th of* November *following lay ſuch a Title before Defendant's Counſel as they ſhould approve of* (*a*). The Bill was diſmiſſed with Coſts, becauſe the Plaintiff had not laid his Title before the Vendee's Counſel within the Time limited by the Articles, which *Time* his Lordſhip ſaid *was very material*, the Price of *South-Sea* Stock, *from whence the Money for the Purchaſe was to be raiſed, being upon the ſaid* 10*th of* November 260 l. *per Cent.* and at the Time of *the Hearing the Cauſe but* 92 l. *per Cent.* *Parker* C. *Trin.* 8 *Geo.* 1. *Lewis* and *Lord Lechmere*, *Lucas's Rep.* 503.

(*a*) Covenant to make ſuch *a Title as Vendee's Counſel ſhall approve of*, means no more than that the Plaintiff ſhould make out a good Title, and fit to be approved of; for if the Counſel diſapprove of a good and clear Title, (ſuch a Title as a Court of Law or Equity would take to be a good Title) yet the Vendee will be bound by his Bargain. *Lucas's Rep.* 505.

18. Mr. *Trevor* incouraged the Plaintiff (then under Age and an Apprentice) to court his Daughter without the Privity of Lady *Hobſon* the Plaintiff's Mother; and *Trevor* before the Marriage gave a Bond to the Plaintiff, dated 8 *November* 1716. in the Penalty of 5000 *l.* and in the Condition the intended Marriage betwixt Plaintiff and *Trevor*'s Daughter was recited, and that Defendant *Trevor* had agreed in Conſideration thereof to ſettle and aſſure one third Part of all ſuch real Eſtate as ſhould deſcend to him upon the Death of his Father, to the Uſe of the Plaintiff for Life, Remainder to the Daughter for her Life, Remainder to the Heirs of her Body by the Plaintiff, Remainder to his own right Heirs. The Condition of the Obligation was, that if the Marriage ſhould take Effect, and *Trevor* ſhould within three Months after his Father's Death make ſuch a Settlement, then the Bond to be void. The Marriage took Effect, and ſoon after the Father dies inteſtate, whereby a great real Eſtate came to Defendant. On a Bill brought by Plaintiff and his Wife for a ſpecifick Performance of this Agreement, *Macclesfield* C. decreed the Agreement to be executed in Specie, ſaving that a third Part of the real Eſtate, which came to the Defendant from his Father, muſt be ſettled upon Plaintiff and his Wife for their Lives, Remainder to their firſt, *&c.* Sons in Tail Male, *Remainder to their Daughters in Tail General*, Remainder to Defendant *Trevor* in Fee; Defendant to account for the meſne Profits from the end of three Months after his Father's Death, and to be examined upon Interrogatories touching his Father's real Eſtate, and to produce all Books, *&c.* upon Oath, and pay Coſts. *Mich.* 1723. *Hobſon* and *Trevor*, 2 *Will. Rep.* 191.

Ibid. 192. This is an Agreement upon a valuable Conſideration, that of the Marriage of a Child, and therefore fit to be executed in Equity. It ſeems the more reaſonable, in regard it extends to no more than a third Part of the real Eſtate that was to come to the Defendant from his Father; and this was very hazardous, for if the Defendant had died in the Life-time of his Father, or if there had been a Will, the Defendant, who was ſo well known to be under the Diſpleaſure of his Father, had but an indifferent Proſpect, ſo that it might be reaſonably thought that the Plaintiff at that Time had the worſt of the Bargain. The Plaintiff being an Infant could make no Settlement, and might depend upon his Succeſs in Trade, as he was left a Portion of upwards of 1000 *l.* It is no Argument to ſay that Defendant ought only to pay the Penalty of 5000 *l.* becauſe the *Agreement is recited in the Bond*; and ſuch an Agreement is the ſtronger for the Penalty, for had the Penalty been beyond the Value of a third Part of the real Eſtate, Defendant would not have been bound to pay it; ſo now the Penalty being beneath the Value of a third Part of the real Eſtate, Plaintiff is not bound to accept it; beſides, it is to be a Settlement for the Benefit of the Iſſue of the Marriage, and the Payment of the 5000 *l.* to the Huſband would not provide for ſuch Iſſue, *Per* Lord Chan.——*Lucas's Rep.* 507. S. C. ſays, Lord Chan. decreed the Land to be ſettled purſuant to the Condition of the Bond. Says his Lordſhip declared, that if the Agreement had been *to have made the Settlement, or forfeited the Penalty*, it would have been a Debt due to the Huſband, and not in the Power of the Court to have taken Care of the Wife and Children, by ordering the 5000 *l.* to be ſettled. *Ibid.* 511. The Reporter ſays 2. of this, in coming in Lieu of the Settlement.

19. *A.* and *B.* by Articles agree that all Legacies and Sums of Money which ſhould be given to either of them by the Will of *T.* whoſe Couſins and *preſumptive Heirs* they had married, ſhould be equally divided betwixt them, and that all Benefit or Advantage accruing to either of them by the ſaid Will ſhould be alſo divided, and (*a*) *that the ſame ſhould be divided between them, their reſpective Executors and Adminiſtrators.* Afterwards *T.* leaves *B.* a great real and perſonal Eſtate, and *A.* but a ſmall real Eſtate; *A.* brings a Bill againſt *B.*'s Executors for an Account of the real and perſonal Eſtate which came to *B.* by *T.*'s Will. But upon Conſideration of the Articles, and foraſmuch as *A.* did not offer by his Bill to divide that ſmall real Eſtate given to him and his Heirs by the Will of *T. Macclesfield* Lord Chan. took it, that theſe Articles did not extend to any Part of the real Eſtate deviſed by the Teſtator; and therefore decreed only the perſonal Eſtate given by *T.*'s Will to either of them the ſaid *A.* and *B.* to be equally divided. Hereupon it being ſaid that *B.* had died inſolvent, and though it ſhould be admitted that theſe Articles would let in the Plaintiff as a Creditor by Specialty, yet there would not be enough to pay him; his Lordſhip ordered, that if (as it was ſuggeſted)

(*a*) This was one Reaſon for the Decree; the other was that *A.* did not offer to divide, *&c. Ibid.*

geſted) any of the Mortgages of *T.* were yet ſtanding out, and the Property thereof unaltered, and in Caſe it ſhould appear that *B.* had received more than his Moiety of *T.*'s perſonal Eſtate, then the Plaintiff ſhould be let in to receive out of *T.*'s perſonal Eſtate, or the ſubſiſting Mortgages, ſo much as to make up his Receipts equal with thoſe of *B.* before *B.*'s Repreſentatives ſhould be admitted to receive any Thing further. *Trin.* 1723. *Beckley* and *Newland*, 2 *Will. Rep.* 182, 187.

Ibid. 517. His Lordſhip ſaid it was plain, from the Nature of this Tranſaction, that it was the fixt Intention of the Uncle that one way or other his Nephew ſhould have the Lands. In order thereunto he attempted more than once to ſurrender it to the Uſe of his Will, reſolving to deviſe it to his Nephew; but not being able to ſurrender, he then had recourſe to this Bond, as the next Method to ſecure it to him; ſo that this Bond is not to be conſidered as ſomething given in Lieu of the Land, but as another Medium of ſecuring the Land to him; and on the Part of the Mother it amounts plainly to an Agreement that the Son ſhould have the Land; the Conſequence of which will very plainly be, that the Mother muſt be conſidered as a Truſtee for her Son; and then his Lordſhip ſaid, he would have no Regard at all to the Niceties of Law, of the Bonds being extinguiſhed and gone, either by the Obligor's being Adminiſtratrix to the Obligee, or for want of a Requeſt. That the Authorities are many in this Court, That Bonds have been conſidered as Evidences of Agreements, and Obligors held to a ſpecifick Performance, and not allowed to forfeit the Penalty. *Ibid.* 517, 518.—*Vide* the following Caſe S. P.

20. *A.* being ſeiſed of a Copyhold Eſtate, and intending that not his Siſter, (who was his Heir at Law) but *B.* her Son, ſhould have the Land, attempts to ſurrender it to the Uſe of his Will, with a Reſolution to deviſe it to *B.* but a Surrender not being practicable by Reaſon of ſome Accidents, (*ſet forth in the Evidence*) he prevails with his Siſter to give a Bond to him, that ſhe would at any Time upon the Payment of 200 *l.* and upon the Requeſt of *B.* her Son, ſurrender the Eſtate to him. Then *A.* dies, *B.* enters and receives the Rents and Profits of the Eſtate, but no Surrender was ever made purſuant to the Condition of the Bond, nor was the Mother requeſted ſo to do. *B.* dies inteſtate, leaving only two Siſters. The Mother adminiſters, and having procured herſelf to be admitted Tenant of the Copyhold, enters and deviſes the ſame to one of her Daughters, and dies. The other Daughter and Siſter of *B.* brings her Bill againſt the Deviſee her Siſter, praying to have a Decree for a Surrender and proper Conveyance of a Moiety of the Land which ſhe would have been intitled to had her Mother ſurrendred to *B.* as ſhe ought to have done, purſuant to the Condition of the Bond. *Parker* C. decreed that the Mother ſhould be conſidered as a Truſtee for *B.* her Son, and that a Surrender and Conveyance ſhould be made accordingly upon Payment of the 200 *l.* by Plaintiff, with Intereſt, from the Death of *A.* the Uncle; *B.* the Brother having during his Life, by the Mother's Conſent, received and enjoyed the Profits of the Lands. *Mich.* 10 *Geo.* 1. *Parks* and *Wilſon*, *Lucas's Rep.* 515.

21. So where *A.* the Plaintiff's Uncle was ſeiſed of a Copyhold Eſtate, and having no Iſſue intended to leave it to his Nephew *T. A.* the Plaintiff's Brother; but being taken ill had no Time to ſurrender it to the Uſe of his Will, and for want thereof the Eſtate would deſcend to his Siſter, who was his Heir at Law and Mother of the Plaintiff; and to prevent which *A.* procured his Siſter to enter into a Bond of 2000 *l.* to *T. A.* her Son, conditioned that at any Time upon his Requeſt ſhe would convey the Lands to him and his Heirs. *T. A.* accordingly entered after his Uncle's Death, (but without any Conveyance from his Mother) and died without Iſſue; but leaving two Siſters, one of them entered, and ſurrendered to the Uſe of her Will, and deviſed this Eſtate to her Grandaughter, and died. On a Bill exhibited by the ſurviving Siſter againſt her Niece to have a Moiety of the Eſtate in Coparcenary with her, as Heir to her Brother *T. A.* Lord Chan. decreed that the Mother was Truſtee for the Son, and that Defendant ſhould ſurrender to the Uſe of the Plaintiff, and both of them to be admitted as Coparceners. *Mich.* 10 *Geo.* 1. *Aliſon*'s Caſe, 2 *Mod. Ca. in Law and Eq.* 62.

22. The Plaintiff's Houſe being ſo near the Church that the five o'Clock Bell rung in the Morning diſturbed him, he came to an Agreement in Writing with the Churchwardens and Inhabitants at a Veſtry, that he (the Plaintiff) would erect a Cupola and Clock at the Church, and in Conſideration thereof the five o'Clock Bell ſhould not be rung in the Morning during the Life of the Plaintiff. Two Years after a new Order of Veſtry was obtained for the Ringing again of this Bell, upon which Plaintiff brought his Bill to injoin the Ringing of it at five o' Clock. This is a good Agreement, and binding in Equity, and an Injunction to ſtay the Ringing of this Bell at five o' Clock during the Plaintiff's Life, was decreed by Lords Commiſſioners *Gilbert* and *Raymond*. *Hil.* 1724. *Dr. Martin & Ux'* and *Nutkin & al'*, 2 *Will. Rep.* 266.

Here was a meritorious Conſideration executed on the Plaintiff's Side, and the Churchwardens are a Corporation, and may ſell the Bells or ſilence them, and make a reaſonable Agreement, beneficial to the Pariſh, and thereby bind the Pariſhioners and their Succeſſors, as alſo the ſucceeding Wardens. The Ringing of the five o'Clock Bell does not ſeem to be of any Service to the Pariſh, though of very ill Conſequence to the Plaintiff; and ample Recompence hath been made to the Pariſh by Plaintiff. Said *per* Lords Commiſſioners. *Ibid.* 268.—It appeared that the Majority of the better Part of the Pariſh continued willing to abide by this Agreement, and proteſted againſt the new Order of Veſtry. *Ibid.*

23. Plaintiff ſold Defendant a Copyhold Eſtate of the yearly Value of 16 *l.* (on which was Timber of 150 *l.* Value) for 630 *l.* and covenanted to ſurrender on or before *Michaelmas* then next. Defendant paid 10*s.* Earneſt, entred on the Premiſſes, cut down Timber, ſtocked the Land, and acted as Owner. On a Bill for a ſpecifick Performance of Covenants, Plaintiff proved he gave Notice in Writing that he would ſurrender next Court-Day, and attended accordingly. On Defendant's Part there were ſeveral Proofs that he was diſordered in his Senſes; and though there be Proof of the Timber's Value, yet as no Cuſtom is alledged of the Tenant's having Power to cut it down, it muſt be according to the Common Law, by which the Tenant has no Power over it, and therefore a plain Impoſition. *King* Chan. was of Opinion, that it was a great Overvalue, and that his cutting down of Timber was a convincing Proof of his Folly, being a direct Forfeiture; but ſaid, as it is, it is a Matter merely at Law; the Covenant is to ſurrender at or before *Michaelmas*, and Plaintiff was ready at the next Court, which does not appear to have been before *Michaelmas*; if Surrender had been, Action would have lain at Law. Bill diſmiſſed. *December* 6, 1724. *Edwards* and *Heather*, *Select Caſes in Chan.* 3.

24. Feme Covert gives a Bond to her intended Huſband, (in which the intended Marriage was recited) that in Caſe of their Marriage ſhe would convey all her Lands (about 10 *l. per* Year) to him in Fee; they marry, and the Wife made her Will, reciting the ſaid Bond, and deviſed all her Lands to her Huſband in Fee, and died. The Iſſue of the Marriage died without Iſſue, and the Huſband enjoys the Land

The Impropriety of the Security, *viz.* a Bond from a Woman to a Man whom ſhe intends to marry, or the inaccurate Manner of Wording ſuch Bond, is not material, for it is ſufficient that the *Bond is a written Evidence of the Agreement of the Parties*, that the Feme *in Conſideration of Marriage* agrees the Man ſhall have the Land as her Portion; and this Agreement being upon *a valuable Conſideration*, ſhall be executed in Equity. It is unreaſonable that the Intermarriage, upon which alone the Bond is to take Effect, ſhould itſelf be a Deſtruction of the Bond. In Equity the Huſband may ſue the Wife, or the Wife the Huſband; and the Huſband might ſue the Wife upon this Agreement in the principal Caſe.—Neither is it a *true Rule*, that where *an Action cannot be brought at Law on an Agreement for Damages, there a Suit will not lie in Equity for a ſpecifick Performance*, as is plain from this Caſe: Suppoſe a *Feme Infant* ſeiſed in Fee, on a Marriage with the Conſent of her Guardian, ſhould covenant in Conſideration of a Settlement to convey her Inheritance to her Huſband; if this was done in *Conſideration of a competent Settlement*, Equity would execute the Agreement, though *no Action would lie at Law to recover Damages*. Said *per* Lord Chan. *Ibid.* 244.—*Vide* 3 *Will. Rep.* 272. S. Opinion cited.—*Note*; By this Opinion of Lord *Macclesfield*, the Rule that *where no Action lies at Law to recover Debt or Damages, there no Suit in Equity lies to compel a ſpecifick Performance*, (which is given in Lieu of Damages) is denied to be Law. *Quod nota.*—*Vide P.* 15. *C.* 1. and the Notes there.

Land during his Life, and dies. The Bond is a good Evidence of the Agreement in Equity, and the Heir of the Huſband ſhall compel a ſpecifick Performance againſt the Heir of the Wife: But in regard this Bond was a very ſtale one, (being given in 1678.) and the Huſband had for ſo long a Time omitted to ſue upon it in Equity, the Court ordered a Trial at Law to ſee whether this Bond was executed or not, and all other Matters to be reſpited till after the Trial. *Macclesfield* Lord Chan. *Mich.* 1724. *Cannel* and *Buckle*, 2 *Will. Rep.* 243.

2 *Mod. Ca. in Law and Eq.* 106. S. C. decreed *accord*.

25. The Bill was exhibited by the Daughters and Heirs of *Oliver Neeve* by a *former Venter* againſt the Heir at Law of *Francis Neeve*, to have a ſpecifick Performance of a Covenant to ſurrender Copyhold Lands entered into by *Francis* on the Marriage of *Oliver* with his ſecond Wife Mr. *Sheffield*'s Daughter, and to perform which Covenant *Francis* had bound himſelf and his Heirs. It appeared that in Conſideration of the ſaid Marriage, *Oliver*, *Francis* and *Sheffield* agreed to ſettle their ſeveral Eſtates to the Uſes following, *viz. Oliver*'s Eſtate was to be ſettled to the Uſe of himſelf and his intended Wife for Life, Remainder to the firſt Son, *&c.* of that Marriage, with ſeveral Remainders over, Remainder to the right Heirs of the ſaid *Oliver* for ever: And *Sheffield* agreed to ſettle his Eſtate to the Uſe of himſelf for Life, and after his Deceaſe to the Uſe of *Oliver* and his intended Wife for their Lives, Remainder to the Sons of that Marriage in Tail Male; and *Francis Neeve* agreed to ſettle his Eſtate to the Uſe of himſelf and his Wife for Life, with like Remainders to the Sons of *Oliver* in Tail Male. Accordingly the Eſtate of *Oliver* and *Sheffield* were ſettled to the Uſes aforeſaid, but *Francis*, in order to keep his Eſtate in his Name and Blood, and in Conſideration of ſaid Marriage, and of natural Love to *Oliver*, and of 5 *s.* to him paid by *Oliver*, covenanted for himſelf and his Heirs to ſtand ſeiſed of the Lands, *&c.* to the Uſe of himſelf for Life, Remainder to his Wife for Life, Remainder to *Oliver* and his Wife for Life, Remainder to the firſt, *&c.* Son of the ſaid *Oliver* in Tail Male, Remainder to the right Heirs of *Oliver* for ever; and for the ſame Conſiderations he covenanted for himſelf and his Heirs to ſurrender his Copyhold Lands to the ſame Uſes; before *Michaelmas* following *Francis* and his Wife are both dead. It was inſiſted, that though the Settlement made by *Francis* was in Conſideration of this Marriage, and to keep the Eſtate in his Name and Blood; and ſo far *Francis* would have been obliged to perform this Covenant, and ſo would his Heir at Law; yet ſince Plaintiffs are the Daughters of *Oliver* by a *former Venter*, they are not likely to continue the Eſtate of *Francis* in his Name, neither are they within any of the Conſiderations of this Settlement; therefore in reſpect of them this Covenant ſtands merely on the Foot of a voluntary Conveyance. But the Court was of Opinion, that there were ſeveral Conſiderations in theſe Settlements ſufficient to raiſe and ſupport the Uſes: And firſt, it is probable that *Oliver* would not have ſettled his own Eſtate in that Manner which he had done, but in reſpect of the Eſtate now in Queſtion; for by that Settlement there is no Proviſion made for younger Children, ſo that if there ſhould happen to be a Son of this Marriage, the reſt of the Children would have nothing out of their Father's Eſtate (*a*) but what he could provide for them in his Life-

(*a*) In this Caſe the Court ſaid, that ſometimes it is very prejudicial to a Family where the Father hath a great Eſtate, and no Power to charge it with Portions for younger Children; as for Inſtance, where the Teſtator deviſed an Eſtate of 400*l. per Ann.* to the Deviſee for Life, Remainder over, but without any Power of making a Jointure to a Wife; afterwards the Deviſee

Life-time. Decreed that the Defendant, the Heir at Law to *Francis Neeve*, ſhould ſurrender this Copyhold to the Uſe of the Plaintiffs and their Heirs, and at their Expence. *Mich.* 11 *Geo.* 1. *Neeve* and *Keck*, *MS. Rep.*

Deviſee ſettled all his own Eſtate in Jointure on the Woman he intended to marry, and with whom he did marry, and then he died without Iſſue; ſo that the Eſtate which he took by the Will went over to him in Remainder, and the paternal Eſtate was all in Jointure to his Widow, and his next Relations had nothing to ſupport them. But in the principal Caſe *Oliver Neeve*, who married *Sheffield*'s Daughter, was made richer, and that might be a Conſideration for ſettling his Eſtate as he did, and the Widow of *Francis* enjoyed this Copyhold during her Life, by Virtue of this Covenant by which her Huſband had bound his Eſtate. Therefore decreed as above. *Per Cur'*. 2 *Mod. Caſes in Law and Eq.* 109.

26. Father and Son on the Son's Marriage article to ſettle Lands on Huſband for Life, Remainder to the Wife for Life, Remainder to the Iſſue Male of the Marriage, Remainder to the Nephew in Fee on the Death of the Son without ſuch Iſſue; the Nephew may compel a ſpecifick Performance of the Articles. Determined firſt by Lord *Macclesfield*, *Mich.* 1724. and affirmed on a Rehearing by Lord *King* in *December* 1725. *Oſgood* and *Strode & al'*, 2 *Will. Rep.* 245, 257. *No Coſts given. Ibid.* 257.

This cannot be called a voluntary Settlement, becauſe the Father, who joined in the Settlement, had an *equitable Intereſt in Part of the Lands*, and it may well be preſumed that he would not have joined unleſs a Remainder had been limited over to the Son of his ſecond Son, which was the very Reaſon given by the Lord *Macclesfield* in pronouncing the Decree. *Ibid.* 256. But if the Son had had the ſole Intereſt in the Lands, the Limitation to the Nephew would have been voluntary. *Ibid.* 256. —— *Lucas's Rep.* 533. S. C. ſtates it thus: By Marriage Articles it was covenanted, that Land ſhould be ſettled upon Huſband and Wife for their Lives, then to the Iſſue of that Marriage in Tail, Remainder to the *fourth Son of the Huſband's Father*. This fourth Son died, leaving a Daughter married to Plaintiff, who brings his Bill, the *Eſtate-tail being ſpent, and no Settlement made*, to have the Articles performed ſpecifically in Oppoſition to Defendant, the Huſband's Heir at Law, and to whom as ſuch the Eſtate would deſcend in Caſe of no Settlement. And it appearing that the *Huſband's Father had a Power of charging the Eſtate with the Payment of* 1300*l. which it was not probable he would have departed from but in Caſe of his Son's (the Huſband) giving his Conſent to that Part of the Settlement under which Plaintiff claimed* (*b*). *Macclesfield* C. decreed a Settlement to be made upon the Plaintiff purſuant to the Articles. — But his Lordſhip ſaid, that if there had been nothing more in the Caſe than the Conſideration of the Marriage and the Marriage Portion, the Plaintiff would have been conſidered as a Volunteer: But here the Eſtate was neither all in the Father nor all in the Son, ſo that neither could, without the Aſſiſtance and Help of the other, have made this Settlement; and as it was natural for the Father to provide for all his Children, therefore Plaintiff, the Remainder-man, cannot be conſidered as a Volunteer. *Ibid.* 535. (*b*) Mr. *Lucas* ſays, upon this Reaſon, without determining the Point that related to Volunteers, his Lordſhip grounded his Decree. *Ibid.*

27. The Bill was to have an Execution of Articles for the Sale of ſome Copyhold Lands to the Plaintiff on Payment of 538*l.* to Defendant *R.* a Guinea being paid in Part, and to compel the Lord of the Manor to admit Plaintiff in Fee according to the Agreement; which was decreed by Lord Chancellor accordingly. But there being no Tender of a Surrender to the Lord, and conſequently no Refuſal, he was to have his Coſts. *Hil.* 12 *Geo.* 1. *Sayle* and *Reeves and others*, *Gilb. Eq. Rep.* 188.

Ibid. 189. Lord Chan. obſerved, that this ſeemed to be a Bill to know the Opinion of the Court whether the Plaintiff had bought a good Title. But ſaid, that that did not belong to the Court; nor would his Lordſhip give any Opinion as to the Title, but decreed in general a ſpecifick Performance of the Articles, *&c.*

28. Bill for the Execution of Articles for the Sale of Lands againſt the Executors and Deviſees of Land for Life, and the Infant Heir of the Vendor. Decreed that the Articles be carried into Execution, and the Plaintiff *Sikes*, upon paying the Purchaſe Money to the Executors, to be let into Poſſeſſion at *Lady-day* next, and the Executors and Deviſees to make a Conveyance in Fee to Plaintiff at his Coſts, and Plaintiff to hold the Premiſſes againſt the Infant Heir, who when of full Age was to convey to Plaintiff and his Heirs, unleſs within ſix Months after he comes of Age he ſhews Cauſe to the contrary. *King* C. *Hil.* 12 *Geo.* 1. *Sikes* and *Liſter & al'*, *Viner's Abr.* Tit. *Contract and Agreement*, (M) *Ca.* 28.

29. Sir *Cleeve Moore* having married the Daughter of Mr. *Edmonds*, after ſome Years Cohabitation Lady *Moore* eloped, and lived in a ſcandalous Manner with ſeveral Perſons, as appeared by Proof: This Marriage proving ſo unfortunate, Mr. *Edmonds* by Will in 1696. deviſed (*inter al'*) 6000 *l.* to three Truſtees, in Truſt that they, or the Survivor of them, or the Executors, *&c.* ſhould pay both Principal and the Intereſt thereof to ſuch Perſon or Perſons as the Lady *Moore* ſhould by Deed in Writing, ſubſcribed by two or more Witneſſes, appoint: And ſaid *Cleeve*, or any other after-taken Huſband, not to intermeddle therewith, nor the ſame to be ſubject to the Debts of Sir *Cleeve*, or ſuch after-taken Huſband. After this Lady *Moore* continued to live in the ſcandalous Manner ſhe had done, and Sir *Cleeve* on the 10th of *Auguſt* 1716. met with her in a Coach, and took Poſſeſſion of her, and the next Day an Agreement was executed by Sir *Cleeve* and his Lady, and atteſted by four Witneſſes; the Subſtance of which Articles were, that in Conſideration Sir *Cleeve* would permit her to live ſeparate from him, ſhe would ſettle upon him for his Life 200 *l. per Ann.* and alſo pay him the Sum of 1000 *l.* out of her ſeparate Eſtate, the firſt Quarterly Payment to commence three Months after the Date of the ſaid Articles. They met afterwards at the *Middle Temple-Hall* on the 10th of *November* following, the Day the firſt Payment became due, and on the 24th of the ſame Month the ſaid Agreement was ratified by Indorſement on the Articles, and ſubſcribed and witneſſed as before. The Morning of the Meeting in the *Temple-Hall* Lady *Moore* made her Will, and deviſed ſeveral ſpecifick Legacies to Mr. *Ellis*, whom ſhe alſo made her Executor and Reſiduary Legatee. There having been a Bill brought before by Lady *Moore* againſt Sir *Cleeve* to ſet aſide the Articles, or that he ſhould make his Election to take 200 *l.* according to the Articles, and a Croſs Bill by Sir *Cleeve* againſt Lady *Moore* and her Truſtees to carry thoſe Articles into Execution; which Cauſes were heard, and the Court then equally divided, and ſo it went to the Chancellor of the Exchequer, who referred it to the Judges; but before it was heard again Lady *Moore* died, and now upon the Revival of all the Proceedings in both Cauſes againſt Mr. *Ellis* as Executor of Lady *Moore*, by the Opinion of the Court, theſe Articles were deemed a good Execution under the Will of Mr. *Edmonds*, and that Sir *Cleeve* could not be excluded by the negative Words. And ſecondly, That though the Truſtees were not Parties to the ſaid Articles, yet in Equity it is good to bind her, it not being a direct Transferring of an Intereſt, but an Appointment, purſuant to a Power; but a Point ariſing whether theſe Articles were obtained by a Dureſs, that was ſent to be tried by an Iſſue. *Note*; Mr. *Ellis* was a Witneſs to the Force and Dureſs in the former Cauſes; but it was now objected, that he being become the Party intereſted by the Act of Lady *Moore* herſelf, ſworn now to ſupport a preſent Intereſt; and beſides his Examination in the former Cauſe after the 10th of *November* 1716. the Day the Lady *Moore* made the Will, whereby he was made Executor and Reſiduary Legatee; and for theſe Reaſons, though he might have been a good Witneſs in the former Cauſes, his Depoſition was now rejected. *Hil.* 12 *Geo.* 1. *Sir C. Moore* and *Freeman & al' in Scacc', MS. Rep.*

30. In the 10th Year of Queen *Elizabeth* the Dean and Chapter of *St. Paul's* made a Leaſe to the Maſter and Fellows of *Trinity-Hall* in *Cambridge* of the Land on which *Doctors Commons* is now built, for ninety-nine Years. In the Leaſe there was a Covenant for Renewal for ninety-nine Years, on Surrender of the old Leaſe and Pay-

ment of 20 *s.* in which future Leaſe there was to be the like Covenant of Renewal on Surrender *toties quoties*. Afterwards the *Stat.* of 13 & 14 *Eliz.* was made, by which Eccleſiaſtical Bodies are reſtrained from making Leaſes in Corporation or Market-Towns for *above forty Years*. The Leaſe being near expiring, a Bill was brought to compel a Surrender up of the old Leaſe, and to have a new Leaſe for *forty Years*, with the ſame Covenants as in the former Leaſe. *Price* Juſt. was of Opinion, no Leaſe ſhould be made. The Maſter of the Rolls, that a Leaſe for *forty Years* ſhould be made. *Raymond* C. J. was of Opinion, that Equity could not interpoſe, for that ſince the ſaid Statute no *Action at Law would lie for the Breach of the Covenant*, (for by the Statute it is now not a legal Covenant) and for that very *Reaſon cannot recover in Equity*; the Covenant to oblige them to make a Leaſe for ninety-nine Years is gone, and *Damages* cannot be *recovered* for *Part* of a *Covenant*. Lord Chan. held, no Propoſition to be more clear than that if a Man had *covenanted to do an Act, which by an Act of Parliament made afterwards he would be diſabled from doing, that works a Releaſe*; but were there any Doubt, the *Proviſo* makes it very plain; can it be ſaid it would be a Breach of Covenant not to do a Thing which an Act of Parliament ſays when done ſhall be void? The Reaſon why *ſpecifick Performances are in this Court is, becauſe the Lien is ſubſiſting at Law, and the Law can only give Damages, which may not be adequate*, but here the Lien is gone; this cannot be ſaid to be a Purchaſe, for *a Purchaſe is where it is mutual*; this is only to renew if Leſſee pleaſes, and is merely a perſonal Covenant. Action at Law cannot be for a Leaſe for forty Years, for the Breach muſt be aſſigned according to the Covenant, and to bring it for forty Years would be to make this a new Covenant. His Lordſhip ſaid, he *could not oblige them to make a Leaſe for forty Years*. Bill diſmiſſed. *November* 16, 1726. *Dr. Beteſworth* and *Dean and Chapter of St. Paul's, Sel. Caſes in Chan.* 66. But this Decree was reverſed by the Lords, 2 *May* 1728.—— *Ibid.* 69.

Sed vide *the following Rule in the Margin.*

Grounds and Rudiments of Law and Eq. 254. S. C. in *Dom' Proc'* ſtates it as a Caſe upon the Statute of 13 *Eliz. c.* 10. that Colleges, Deans and Chapters, &c. ſhall not leaſe for more than twenty-one Years, or three Lives; and *Stat.* 14 *Eliz. c.* 11. that in Cities, &c. they may leaſe for *forty Years*, but no longer, ſays in this Caſe the Covenant was to renew for ninety-nine; and the Houſe of Lords decreed the Dean and Chapter to renew for (*a*) *twenty Years*, and to leaſe accordingly, with all other Covenants, *except that to renew*, and that at the covenanted Fine and Rent. For *where an equal Agreement cannot by Reaſon of any ſubſequent Act of Parliament, or the like, be performed in the Whole; yet the ſame ſhall be executed in ſuch Part as is lawful.* Ibid. 76.

(*a*) *Q.* If it ſhould not be *forty Years.*

31. A Feme ſeiſed of a Copyhold Eſtate on the Marriage of her Daughter to *J. S.* ſurrenders it to the Uſe of *J. S.* and his intended Wife and the Heirs of their Bodies, Remainder to *J. S. in Fee*. The Marriage takes Effect; the Huſband ſigns a Writing, whereby he owns that the Limitation of the Remainder in Fee to himſelf was a Miſtake, and that it was intended to be ſettled as follows: And accordingly he covenanted that he would ſtand ſeiſed of the Premiſſes, in Truſt for himſelf and his Wife for their Lives, Remainder in Truſt to the Heirs of their two Bodies, Remainder in Truſt for the Wife and her Heirs; and alſo covenanted to convey the Premiſſes to theſe Uſes. This is not a mere voluntary Agreement, and Equity will compel a Performance of it; and decreed accordingly by *King* C. on Time taken to conſider of it. *Trin.* 1728. *Randal* and *Randal*, 2 *Will. Rep.* 464.

32. Marriage Articles recite, that Lands covenanted to be ſettled were 500 *l. per Ann.* but there was no expreſs Covenant that they were

were ſo; yet decreed that the Deficiencies ſhould be made up out of other Lands. 14 *March* 1728. *Gleg* and *Gleg*, *Viner's Abr.* Tit. *Contract and Agreement*, (E) *Ca.* 21.

A perſonal Eſtate cannot be intailed; *ergo* this Deviſe over is void. *Vide* the Caſe of *Seale* and *Seale*, *p.* *c.* alſo Vol. 1. *Eq. Ca. Abr.* 4th Edit. *p.* 207. *c.* 9. and my marginal Note there.

33. *A.* having deviſed the Reſidue of his perſonal Eſtate, being about 10000 *l.* to *B.* his Brother, and in Caſe he died without Heirs Male of his Body, then to his two Brothers *G.* and *C.* to be equally divided between them: Then *B.* intermarries with Defendant, and by Articles made before Marriage, it was agreed that the Defendant ſhould convey her Eſtate of Inheritance in *S.* to the Uſe of *B.* for Life, Remainder to herſelf for Life, Remainder to the firſt, *&c.* Son in Tail Male, Remainder to their Daughters in Tail General, Remainder to *B.* in Fee: In Conſideration whereof, and of the Marriage, as alſo of 1500 *l.* in Money, *B.* covenanted to purchaſe and ſettle Lands of 350 *l. per Ann.* on himſelf and Wife for their Lives, Remainder to their firſt, *&c.* Son in Tail Male, Remainder to the Heirs Male of *B.* Remainder to his Brother *G.* for Life, Remainder to his firſt, *&c.* Son in Tail Male, Remainder in like Manner to his Brother *C.* Remainder to himſelf in Fee; to which Articles *B.*'s Father was a Party, but neither gave nor covenanted to ſettle any Thing upon the Marriage. *B.* omitted to ſettle Lands to ſuch Uſes, and having deviſed all his real Eſtate to his Widow and Executrix, chargeable with Portions for his Daughters, died without Iſſue Male. On a Bill brought by his two Brothers *G.* and *C.* for a ſpecifick Performance of theſe Articles, Defendant, the Widow and Executrix, (ſhe having admitted Aſſets) was decreed by Lord Chan. *King* to purchaſe and make a Settlement of Lands of 350 *l.* purſuant to the Articles. As to Coſts, it ſeems this was ſo doubtful a Caſe that they were not ſo much as aſked for the Plaintiffs. *Eaſter* 1731. *Vernon* and *Vernon*, 2 *Will. Rep.* 594. Decree affirmed in *Dom' Proc'* in *March* 1731-2. *Ibid.* 601.

His Lordſhip obſerved, that to put the Plaintiffs to ſue the Covenant in the Name of the Truſtees in the Articles for the Recovery of Damages would not be an adequate Remedy; the Party who would be intitled to the greateſt Share of the Damages would (in Caſe any ſuch were living) be the Plaintiff *G.*'s Son, as having the firſt Eſtate-tail; but there being as yet no ſuch Son, his Lordſhip did not ſee how he would have any Part of the Damages given in the Action of Covenant, were it to be brought; alſo Plaintiff *C.*'s eldeſt Son may die without Iſſue, and then the ſecond Son may be intitled to the firſt Eſtate of Inheritance in the Premiſſes to be purchaſed, who yet cannot come in for any Part of the Damages recovered in the Covenant. But by this Decree each Party intitled, or to be intitled, will have Right and Juſtice done him, if not before barred by a legal Conveyance, *viz.* by a common Recovery. That *B.* might be induced to come into this Covenant in order to make ſome Recompence for what was intended the Plaintiffs by the *void Deviſe over to them* of his Brother *A.*'s perſonal Eſtate, in Caſe he (*B.*) ſhould die without Iſſue Male, which has happened; or for the Support of his Name might have entred into this Covenant; and no Creditor can be hurt by a ſpecifick Performance of this Agreement. *Ibid.* 599. ——— *Note*; It appeared that the Executrix had by Letters after her Huſband's Death promiſed to perform his Marriage Articles in purchaſing and ſettling Lands accordingly. But his Lordſhip ſaid, that theſe Letters ought not to bind her, if not bound before by the Articles. *Ibid.* The Caſe of *Oſgood* and *Strode* was cited *pro Quer'*.

34. Tenant in Tail entred into Articles concerning his Lands for Payment of Debts, but died without doing any Act to deſtroy the Eſtate-tail; this Agreement not to be executed againſt Heir in Tail. *Herbert* and *Fream*, *Mich.* 5 *Geo.* 2. *in Scacc'*, *MS. Rep.*

Ibid. 190. It is ſaid by way of Note, that "Theſe Decrees may not have been uſual, becauſe Awards are commonly to *pay Money*; in which Caſes a Bill in Equity to compel a Performance is improper; but where the Award is to do any Thing in *Specie*, as to convey an Eſtate, *&c.* in ſuch Caſe, if the Defendant has accepted the Money awarded him in Satisfaction of the Conveyance, it is highly reaſonable that he ſhould make the Conveyance; the rather, for that if the Plaintiff had ſued the Bond at Law, the Defendant would have been relieved by Bill in Equity againſt the Penalty of the Bond, upon a *Quantum damnificatus*; ſo that ſuch a Decree as in the principal Caſe, prevents a Suit in Equity."

35. A Bill in Equity lies to compel a ſpecifick Performance of an Award to convey an Eſtate, where the Party ſubmitting has *received the Money*, in Conſideration whereof he is to convey the Eſtate ſued for; and

and the Court will give Coſts, it being a Defence againſt Conſcience for Defendant to take the Money awarded, and yet refuſe to perform his Part of the Award. *Trin.* 1733. *Hall* and *Hardy*, 3 *Will. Rep.* 187.

36. Where the Huſband for a valuable Conſideration covenants that his Wife ſhall join with him in a Fine, Equity will enforce a Performance of ſuch Covenant. Said *per Jekyll*, Maſter of the Rolls, in the Caſe of *Hall* and *Hardy*, *Trin.* 1733. who alſo ſaid, that there were a hundred Precedents in Point. 3 *Will. Rep.* 189.

Ibid. The Editor by way of Note ſays, "Becauſe in all theſe Caſes it is to be pre-

"ſumed that the Huſband, where he covenants that his Wife ſhall levy a Fine, has firſt gained her Conſent for "that Purpoſe. So ſaid *per* the Maſter of the Rolls in the Caſe of *Winter* and *D'evreux*, *Trin.* 1723. and "that the Intereſt in ſuch Covenant has been taken to be an Inheritance deſcending to the Heir of the Cove-"nantee. But after all, if it can be made appear to have been impoſſible for the Huſband to procure the Con-"currence of his Wife, (as ſuppoſe there are Differences between them) ſurely the Court would not decree an "Impoſſibility, eſpecially where the Huſband offers to return all the Money with Intereſt and Coſts, and to "anſwer all the Damages." *Vide* the Caſe of *Barrington* and *Horn*, *p.* *ca.*

37. Plaintiff and Defendant being ſeiſed of Lands, did in Conſideration of Marriage by Articles mutually agree to ſettle their reſpective Eſtates upon each other for Life, Remainder to the firſt, *&c.* Son of the Marriage in Tail Male, *&c.* and that the Defendant ſhould have Power to ſell ſome Timber that was then growing on Plaintiff's Eſtate to diſcharge an Incumbrance which lay on his own. A Marriage enſuing, Defendant entred into the Plaintiff's Land, cuts down 7000 *l.* worth of Timber; but after ſeven Years Cohabitation, ſome Differences ariſing between them they parted, and this Bill was brought by the Plaintiff's next Friend to have a Settlement made upon her of the Defendant's Lands, and an Injunction to ſtay further Waſte. The Defendant by his Anſwer inſiſted on Plaintiff's *Miſbehaviour, and that ſhe refuſed to cohabit with him, but did not charge her with any Act of Adultery.* By the Depoſition of one *Crowle* it appeared, that the Plaintiff was taken in the very Act of Adultery with one of the Defendant's Servants, and alſo that *Crowle* was directed by the Defendant to acquaint the Plaintiff, that if ſhe ſuſpected his (the Defendant's) Familiarity with any other Woman, and would return to him, he would deſiſt. Maſter of the Rolls: The Objections againſt the Plaintiff are two; (1) That ſhe does not offer by her Bill to ſettle her Eſtate on the Defendant, without which ſhe cannot intitle herſelf to a Settlement of his. (2) Having broken the Marriage Contract by her Adultery, ſhe has thereby rendered herſelf unworthy the Aſſiſtance of this Court. As to the firſt Objection, the Relief prayed by the Plaintiff's Bill is a full Anſwer to it; for if ſhe will have a Settlement of his Lands, ſhe muſt make a Settlement of hers. And as to the ſecond Objection, Whether as the Plaintiff hath miſbehaved herſelf, ſhe ought to have a Settlement out of her Huſband's Eſtate. In Anſwer to this his Honour obſerved, that the Charge in the Defendant's Anſwer was not directly of Adultery, but *only of her miſbehaviour and withdrawing herſelf from her Huſband*; whereas ſuppoſing Adultery to be a Bar of Dower, it muſt be certainly alledged; and though the Evidence has proved her guilty of the Crime, yet that is *not the Point in Iſſue:* Beſides, the Articles are in Part executed by the Defendant's cutting down the Timber, and therefore let the Plaintiff's Behaviour be what it will, ſhe is intitled to Relief. But ſuppoſing the Fact of Adultery had been poſitively charged, and the Defendant had not done any Thing in Performance of the Articles,

3 *Will. Rep.* 269. S. C. *Eaſter* 1734. Decree affirmed by Lord *Talbot* on an Appeal, and the Defendant to account for the Timber which he had cut on the Wife's Eſtate, contrary to the Articles. The Coſts to go out of the Eſtate. His Lordſhip obſerved, that the Accuſation againſt the Wife was only general and uncertain, amounting to little elſe than that ſhe had *withdrawn herſelf from her Huſband, lived ſeparately from him, and very much miſbehaved herſelf*; nothing of which implies that ſhe had been guilty of Adultery; as to the Recrimination appearing in the Proofs, he ſaid, this did not ſeem to affect the Caſe, but that with Regard to the Evidence of the Crime of Adultery in the Wife, there ſeemed

to be ſufficient to convince any third Perſon that ſhe was not innocent; but that *not being put in Iſſue*, his Lordſhip ſaid, he could not judge of it. *Ibid.* 276, 277.

ticles, ſo that Things could be put in *ſtatu quo*, yet the Plaintiff ought to be relieved; (1) Becauſe the Defendant is an unfit Perſon to accuſe the Plaintiff of Adultery. (2) Though he were capable of accuſing, yet this Court cannot admit of ſuch an Allegation without a Sentence firſt obtained in the Spiritual Court, *propter Adulterium*. As to the firſt Point, the Meſſage the Defendant ſent by *Crowle* ſpeaks him an Adulterer; and if he had ſued in the Spiritual Court, ſhe might have alledged his Miſbehaviour by way of Recrimination, and that would have been a good Bar to the Suit; *ergo à fortiori* his Faults may be objected to him by way of Anſwer to an Accuſation that is made againſt her in Bar of a Civil Right. This Court cannot receive ſuch an Allegation but after a Sentence in the Spiritual Court; for though Adultery is ſaid in all private Acts to diſſolve the Bond of Matrimony, and in Conſequence of ſuch an Effect the (*a*) Laws of *Scotland* allow the injured Perſon to marry again, yet this muſt be intended after the Adultery is pronounced to be ſo by Sentence, and not upon the bare Act, which only gives Cauſe for the Judge to make ſuch Diſſolution. By *Weſtm.* 2. *cap.* 34. Elopement and Adultery is made a Bar of Dower; and in 1 *Roll. Abr.* 680. *pl.* 13. a Divorce for Adultery, though it diſſolves not the Bond of Marriage according to our Eccleſiaſtical Law, is ſaid to be a good Bar of Dower; but it was never pretended that Adultery would bar a Woman of Dower without a Decree for a Divorce; for if it ſhould, let the Huſband be never ſo wicked, as our *Law knows nothing of the Doctrine of Recrimination*, the Wife muſt loſe the Opportunity of oppoſing his Crime to hers; and therefore in the preſent Caſe we cannot admit ſuch an Objection againſt the Plaintiff's Petition for Relief without depriving her of a Defence, which the (*b*) Common Law allows her. Beſides, Courts of Equity require Anſwers upon Oath, and the Huſband cannot be obliged to diſcover whether he hath injured his Wife's Bed, becauſe ſuch a Diſcovery would expoſe him to Puniſhment in another Place, ſo that ſuch a Fact is not according to the Uſage of Courts of Equity properly inquirable here; whereas in the Spiritual Court, a bare Affirmation or Denial ſuffices, and the Party not bound to accuſe himſelf, which he would be obliged to do if this Court ſhould take Notice of ſuch an Allegation, unleſs founded on a Sentence made by one who has a full Juriſdiction of the Matter, and can do compleat Juſtice on all Sides: And for theſe Reaſons his Honour decreed, that on the Plaintiff's ſettling her Eſtate on the Defendant according to the Articles, ſhe ſhould have her Settlement out of his. *Hil.* 6 *Geo.* 2. *Sidney* and *Sidney*, *MS. Rep.*

(*a*) In his Argument he obſerved, that the *Scotch* Law was more reaſonable than ours, for here neither Party can marry again, but there the injured Perſon may; and that a voluntary Separation, as in the preſent Caſe, is not comparable to a Divorce in its Effects; for if Baron and Feme are divorced *à Menſa & Thoro*, the Children born after ſhall be Baſtards, (for the Court will intend Obedience has been paid to the Sentence) unleſs Cohabitation is proved; but thoſe born after a voluntary Separation are legitimate, for Cohabitation ſhall be preſumed. *Salk.* 123. Secus *where the Jury find the Huſband has had no Acceſs to the Wife*; according to the Determination in the Caſe of *Pendrel* and *Pendrel*, heard before the Lord *Talbot*, *Feb.* 5, 1733. where the Huſband and Wife by Conſent lived ſeparately, and a Child being born, an Iſſue was directed to try whether the Child was a Baſtard, and he was found a Baſtard; wherefore this Point is now ſettled for Law. 3 *Will. Rep.* 276.

(*b*) Meaning the Eccleſiaſtical Law, which is eſteemed Part of the Common Law. *MS. Notes.*

His Lordſhip obſerved, that this was a mutual Agreement between the Parties, and that there were no Children of Tenant in Tail *in eſſe*; that though Tenant in Tail died before any Thing was done in Purſuance of the Articles, yet every Thing may be done now as well as it might in his Life-time. *Ibid.* 273. The Reporter ſays by way of Note, That his Lordſhip ſeemed to lay a good deal of Streſs on Tenant in Tail's dying without Iſſue. *Ibid.* 274.

38. *A.* deviſed 8000 *l.* to be laid out in Land, and ſettled to the Uſe of *B.* in Tail, Remainder to *C.* in Fee; *B.* and *C.* agreed by Articles to divide the Money, *B.* died without Iſſue before a Diviſion of the Money; a ſpecifick Execution of the Articles was decreed at the Rolls in Favour of *B.*'s Executor, and afterwards affirmed by Lord *Talbot*, *Eaſter* 1733. *Carter* and *Carter*, *Ca. in Eq. Temp. Talbot* 271.

39. A Bill in Equity lies not to compel the Performance of an Agreement to pay Money in Conſideration of having ſtifled a Proſecution for Felony; *ſecus* if to ſtop a Proſecution for a Fraud; for when the Indictment is for a Fraud, and the Party wronged comes to an Agreement to be ſatisfied for ſuch Injury, (as in Conſcience he ought to be) this is lawful, Matters of *Fraud being cognizable and relievable as well in* (*a*) *Equity* as at Law. *Eaſter* 1734. *Johnſon* and *Ogilby & al'*, 3 *Will. Rep.* 277, 279.

(*a*) Rule, *In Caſes of Fraud the Court of Equity has a concurrent Juriſdiction with the Common Law*, Matters of *Fraud* being the great Subject of Relief in Equity. *Per* Maſter of the Rolls, *Trin.* 1723. 2 *Will. Rep.* 156. *Vide Ibid.* 220.

40. A Bill brought to compel a ſpecifick Performance of an Agreement entred into by an Attorney for and on Behalf of his Client, promiſing to pay the Plaintiff 500 *l.* was diſmiſſed by *Talbot* C. with Coſts, the Attorney having entred into ſuch Agreement by the Conſent of his Client. *Eaſter* 1734. *Johnſon* and *Ogilby*, 3 *Will. Rep.* 277. And his Lordſhip compared this Caſe to that of *Brokers* or *Factors* acting for their Principals, who his Lordſhip ſaid were never held to be liable in their own Capacities. *Ibid.* 279.

But if the Attorney had had no Authority from his Client, then it would have been a *Fraud* in him to have made this Engagement, and he would himſelf have been liable. Said *per* Lord Chancellor. *Ibid.* 279.

41. A Truſt-Eſtate was decreed to be ſold for the Payment of Debts and Legacies, and to be ſold to the beſt Purchaſer; *A.* articles to buy the Eſtate of the Truſtees, and brings a Bill to compel them to perform the Contract. The Truſtees by their Anſwer diſcloſe this Matter, and ſubmit to the Court, being willing, if indemnified, to convey purſuant to the Contract. Bill diſmiſſed by Lord *Talbot*; for the Court will make no new Decree, but will leave the former Decree to be purſued. *Trin.* 1734. *Anneſley* and *Aſhurſt*, 3 *Will. Rep.* 282.

42. *A.* in Conſideration of 6000 *l.* Portion with *M.* by Marriage Articles covenanted with Truſtees to lay out that Sum, and alſo 24000 *l.* of his own Money in the Purchaſe of Lands in Fee, to be ſettled (*inter al'*) on himſelf and his intended Wife for Life, Remainder to the firſt, *&c.* Son of the Marriage in Tail, Remainder to *A.* in Fee; and alſo covenanted that until the 30000 *l.* ſhould be laid out in Lands, there ſhould be paid 5 *l. per Cent.* Intereſt for the ſame unto the Perſon intitled to the Rents of the Lands when purchaſed. After the Marriage *A.* purchaſed ſeveral Eſtates in Fee-ſimple in Poſſeſſion, but never ſettled any, and died Inteſtate and without Iſſue, leaving about 1800 *l. per Ann.* real Eſtate to deſcend upon Plaintiff, his Nephew and Heir at Law, who brought his Bill againſt *A.*'s Widow and Executrix for an Account of *A.*'s perſonal Eſtate, and to have this Covenant carried into Execution, (his Remainder by the Death of *A.* without Iſſue now taking Effect) as alſo to have ſome particular Purchaſes compleated which were left incompleat by *A.*'s

3 *Will. Rep.* 211. *Mich.* 1733. S. C. and Decree *per* the Maſter of the Rolls, ſays, it appearing that the 30000 *l.* now ordered to be inveſted in a Purchaſe, and ſettled according to the Articles, and for which 5 *l. per Cent.* Intereſt was to be paid till ſuch Purchaſe had been placed out in the Government Funds, which yielded but 4 *l. per Cent.* his Honour reduced the Intereſt to 4 *l. per Cent.* in Regard the Adminiſtratrix had made no more of it.—Says, on Appeal to Lord *Talbot*, (*Eaſter* 1735.) after long Debate, his Honour's Decree was ſo far affirmed as that the 30000 *l.* (*a*) *articled to be laid out in Land*, was by his Lordſhip held to be *as Land*, who moreover agreed that no Difference had ever been made between the Caſes where the Money was depoſited in the Hands of a third Perſon to be laid out, and where it was veſting in the Hands of the Covenantor. But with Reſpect to the Freehold Lands purchaſed in Fee-ſimple in Poſſeſſion after the Covenant, though but with Part of the 30000 *l.* and left to deſcend, theſe his Lordſhip ordered to go as Satisfaction *pro tanto*, for that it could not be intended *A.* was obliged to lay out all the Money together, but if it was inveſted at ſeveral Times, it would ſatisfy the Covenant. *Ibid.* 227, 228.

(*a*) Rule; *Money articled to be laid out in Land is to be looked upon as Land.*

Death.

Death. Sir *Joſeph Jekyll* decreed, (*Mich.* 1733.) That the Heir was intitled to have a ſpecifick Performance of this Covenant, and that the ſeveral Eſtates which deſcended upon him *were not a Satisfaction for this Covenant, or any Part of it.* And on an Appeal to Lord *Talbot* the Decree was varied only as to the Fee-ſimple Lands in Poſſeſſion *purchaſed ſince the Covenant*, which his Lordſhip held ought to go in (*a*) Satisfaction of the Covenant. *Eaſt.* 1735. *Lechmere* and *Lady Lechmere, Ca. in Eq. Temp. Talbot* 80.

(*a*) The Reaſon given by his Honour why the Fee-ſimple Lands purchaſed after the Articles, and which were permitted to deſcend, ſhould *not be deemed a Satisfaction* of the Covenant was, becauſe they were under the Value of what *A.* was bound to ſettle. 2 *Will. Rep.* 214.

43. Lord *Bathurſt* being ſeiſed in Fee (in Right of his Wife) of certain Lands in *Eſſex*, he and his Lady by Indenture dated 17 *May* 1711. demiſed the ſame to *George Gill*, his Executors, Adminiſtrators and Aſſignees, for *twenty-one Years*, at the Rent of 8 *l.* 15 *s. per Ann.* and Lord *Bathurſt* did thereby for himſelf, his Heirs, Executors and Adminiſtrators, and for his Lady and her Heirs, covenant with *Gill*, his Executors, *&c.* that *Gill*, his Executors, *&c.* paying the Rent, *&c.* ſhould peaceably hold the Premiſſes during the ſaid Term; and that if *Gill* and *E.* his Wife, or either of them, ſhould happen to be living at the End of the ſaid Term, and ſhould deſire a new Leaſe of the Premiſſes for *a further Term of Years*, to commence at the Expiration of the above Term, that then Lord *Bathurſt* and his Lady, or the Survivor of them, his or her Heirs or Aſſigns, upon the Requeſt of the ſaid *Gill* and *E.* his Wife, his or her Executors, Adminiſtrators or Aſſigns, would and ſhould make one other Leaſe of the ſaid Premiſſes, to commence as aforeſaid, under the ſame Rents and Covenants as were contained in the former Leaſe. *Gill* died, and left his ſaid Wife Executrix, who proved his Will, and ſurvived the Expiration of the ſaid Term. Mr. *Fry* purchaſed the Reverſion of theſe Premiſſes, and ſold them to the Defendant, who had Notice of Lord *Bathurſt*'s Covenant to renew. The Plaintiff was Adminiſtratrix to ſaid *E.* the Widow of *Gill*, with her Will annexed, and alſo Adminiſtratrix *de bonis non* of *Gill* the Huſband. The Bill was brought to have a further Leaſe of twenty-one Years, according to the ſaid Covenant, which was decreed at the Rolls, and upon a Rehearing confirmed by *Talbot* Lord Chan. *Hil.* 10 *Geo.* 1. *Winged* and *Lefebury, MS. Rep.*

His Lordſhip was of Opinion, that the *Defendant having Notice*, had put himſelf in the Place of Lord *Bathurſt*, who was certainly bound by the Covenant; and that where a Man agrees to ſell at ſuch a Day, and one Party dies before that Sale, though an Action will not lie againſt the Heir, yet the Articles are a Lien upon the Land; it is a Purchaſe in Equity, and the Purchaſer is intitled to the Eſtate, and the other is a Creditor for the Money. *Ibid.*

44. *William Moon* being ſeiſed in Fee, according to the Cuſtom of the Manor of *Baldbeck*, of the Lands in Queſtion, borrowed 100 *l.* of Defendant *John Croſsby, jun.* and for ſecuring the Repayment thereof, by Indenture dated 7 *October* 1730. mortgaged the Premiſſes to him; after this *Moon*, by Letter dated 18 *April* 1731. authorized *Kreighton*, an Attorney at Law, to ſell this Eſtate, who accordingly ſold it to Plaintiff *by Parol* for 300 Guineas, and received one Guinea in *Earneſt*, and by Letter adviſed *Moon* thereof, and *Moon* by Letter dated 8 *June* 1731. tells Plaintiff that he accepts of the ſaid 300 Guineas. In *July* 1731. *Moon* writes a Letter to one *Harriſon*, offering to ſell theſe Premiſſes to him for the ſame Price that they had been offered

for

for to the Plaintiff; *Harriſon*, and Defendant *John Croſsby, ſen.* on Behalf of Defendant *Croſsby, jun.* agree with *Moon* for the Purchaſe of the Premiſſes for 300 Guineas; and accordingly *Moon*, by Indenture dated 16 *Auguſt* 1731. conveys the Premiſſes to *Croſsby, jun.* in Conſideration of 300 Guineas then paid; before this Conveyance *Harriſon* and *Croſsby, ſen.* who treated with *Moon* for the Purchaſe on Behalf of *Croſsby, jun.* had Notice of the Plaintiff's Title, but they being examined as Witneſſes for *Croſsby, jun.* both ſwore that before the Conveyance was executed to him they ſent for the Plaintiff, and that he agreed that all prior Contracts ſhould be void; and that it ſhould be referred to *Moon*, whether Plaintiff or *Croſsby, jun.* ſhould be the Purchaſer: Upon which *Moon* being wrote to, gave the Preference to *Croſsby, jun.* The Plaintiff having brought his Bill for a ſpecifick Performance of this Contract, two Objections were made by Defendant's Counſel; 1ſt, That there was no mutual Contract in Writing between *Moon* and the Plaintiff, but only an Agreement in Writing on the Part of *Moon*, the Plaintiff or his Agent having ſigned nothing; and in the next Place that this Contract in Writing may be diſcharged by Parol, was cited the Caſe of *Goman* and *Saliſbury*, 1 *Vern.* 240. To take off the Teſtimony of the Witneſſes who ſwore to the Waiver of the Contract, it was proved as to *Croſsby, ſen.* that he was a Tenant of the Land, and paid Rent to his Son Defendant *Croſsby, jun.* and as to *Harriſon*, that he had declared that he and *Croſsby, jun.* were to divide the Purchaſe between them, it being made for the Benefit of them both. Lord Chancellor was of Opinion, that the Objection as to *Croſsby, ſen.* was ſufficient intirely to take off his Teſtimony; but as to *Harriſon*, he thought the Objection went only to his Credit; however, upon the Whole he decreed for the Plaintiff with Coſts.——His Lordſhip ſaid, here plainly appears a Contract in Writing on the Part of *Moon*; and ſaid, he had often known the Objection taken, that a mutual Contract in Writing ought to appear on both Sides; but that Objection has as often been over-ruled. Then as to the other Matter he declared, though he would not ſay that a Contract in Writing would not be waived by Parol, yet he ſhould expect in ſuch a Caſe a very clear Proof; and the Proof in the preſent Caſe he thought very inſufficient to diſcharge a Contract in Writing; and obſerved, that the Statute of Frauds and Perjuries requires that " all Contracts and Agreements concerning Land " ſhould be in Writing." Now an Agreement to waive a Purchaſe Contract is as much an Agreement concerning Lands as the original Contract. However, he ſaid, there was no Occaſion now to determine this Point. *Eaſter*, 10 *Geo.* 2. *Buckhouſe* and *Croſsby & al'*, *MS. Rep.*

45. *A.* contracts with *B.* for the Purchaſe of an Office, and *B.* to procure him to be admitted to it with *all its uſual Fees*; *B.* muſt ſhew he has ſurrendered, for the *Rule* is, *That he who will have the Benefit of a mutual Agreement, muſt ſhew that he has performed his Part.* Vide *Grounds and Rudiments of Law and Eq.* 18.

But *quære*, if the Fees are dropt, there is no Pretence that *A.* ſhould be held to his Purchaſe.

(B) What Acts ſhall be taken to be done in Purſuance of, and ſhall go either in Satisfaction of the Whole or Part of an Agreement.

1. BY Marriage Articles it was covenanted that the intended Huſband, if his Wife ſurvived him, ſhould ſecure to her the Value of one Half of her Fortune, to be at her Diſpoſal. The Marriage took Effect, but the Huſband never altered the Nature of the Securities by which his Wife's Fortune was ſecured, and which were all in her own Name. The Huſband makes his Will, and thereby gives his Wife more than he was obliged to do by the Marriage Articles, and the Reſt he diſpoſed of in other Legacies, and died. Lord Chan. held, that this Proviſion made by the Will for the Wife, being more than the Huſband was obliged to do by the Marriage Agreement, ſhall be taken to be *in Purſuance of that Agreement, and ſhall diſcharge it.* By this Marriage Agreement the Huſband is made as a Debtor to the Wife, if ſhe ſhould ſurvive him, for ſo much as he had covenanted to give her by the Agreement; and therefore he having obliged himſelf by this Agreement, it is reaſonable he ſhould have the Wife's Fortune, though the Securities were not altered, but ſtill remained in the Wife's Name; and therefore this, though it is by Will, is a good Diſpoſition notwithſtanding the Securities were not altered. It may be more beneficial for the Wife to take under the Agreement than under the Will, and therefore ſhe ſhall have her Election to take the one way or the other. *Mich.* 6 *Ann. Corus* and *Farmer, MS. Rep.*

Note; In this Caſe the Wife inſiſted not only on having the Legacy, but alſo one Half of her Fortune, becauſe the Securities were not altered. *Ibid.*

2. *A.* marries *B.*'s daughter, but before the Marriage *A.* and *B.* enter into an Agreement contained in the Conditions of two Bonds; by one *A.* was to ſettle Lands for a Jointure upon his Wife, and the Heirs Male of her Body by him begotten; and by the other Bond *B.* was bound to pay *A.* 800 *l.* at a certain Day, as a Portion with his Daughter. The Day of Payment expires, and Part of the Principal is paid, and all the Intereſt. *B.* makes his Will, and deviſes Copyhold Lands to *A.*'s Wife, upon Condition that ſhe ſhould give to his Executors no Diſturbance for the 800 *l.* and dies, leaving his Wife Executrix, who afterwards marries *C.* the Defendant. *A.* enjoys the Copyhold Eſtate, his Wife dies, no Settlement being made upon her; then *A.* dies, leaving Iſſue a Son by this Marriage, whom he makes his Executor. *A.*'s Son ſues *B.*'s Executrix at Law upon *B.*'s Bond, and recovered, and had Execution. The Executrix ſued the Son upon his Father's Bond, and obtained Execution againſt him; then *A.*'s Son brings his Bill againſt the Executrix, alledging that there was a ſufficient Eſtate which deſcended to him from his Father, which was an equivalent Performance of the Settlement, which his Father had obliged himſelf to make; and prayed Relief againſt the Proceedings at Common Law. Lord Chan. If *A.* had left any other Son, then the End and Intent of the Condition would be evaded by the Son's leaving a Daughter; but as he had not, he held, that it was an equitable Performance; if there had been another Son beſides the Plaintiff, he would have intailed the Eſtate. He alſo held, that although *B.*'s Deviſe to the Wife of the Copyhold was no Bar to the Huſband's

Huſband's Demand of the 800 *l.* yet that ſhould be taken in Satisfaction of Part of the 800 *l.* and ſo decreed. *Eaſt.* 7 *Ann. Bridges* v. *Bere*, *MS. Rep.*

3. A Marriage Agreement was contained in a Condition of a Bond, *viz.* "That the Huſband ſhould purchaſe Lands of 800 *l.* Value, to "be ſettled upon himſelf for Life, Remainder to his Wife for Life, "Remainder to the Heirs Male of the Huſband begotten on the Body "of the Wife, Remainder to the Huſband's right Heirs." The eldeſt Son of the Marriage brings his Bill againſt his Father's Executors to have the Benefit of this Agreement: The Defendants inſiſted, that the Father in his Life-time purchaſed a Copyhold Eſtate which deſcended to Plaintiff, and likewiſe by his Will deviſed 100 *l.* Legacy to be raiſed out of Land to Plaintiff, and that this Copyhold and Legacy ſhall be taken as a Satisfaction of the Marriage Agreement, eſpecially in this Caſe where the Huſband and Wife were Tenants in Tail, and might bar the Iſſue. *Harcourt* C. decreed Plaintiff a Satisfaction of the Agreement in the Bond, and 4 *l. per Cent.* Intereſt of the 800 *l.* from his Father's Death; that the Copyhold Eſtate deſcended to him, muſt be taken as a Satisfaction *pro tanto* of the Agreement, according to the Value of the Land and the Purchaſe Money; but the 100 *l.* Legacy being deviſed out of Land, is not to be taken in Part of the Satisfaction: As to a Conveyance of ſix Acres, ſaid to be made by the Father to the Plaintiff in his Life-time to inquire whether it was a voluntary Conveyance, and then to go *pro tanto* in Satisfaction of the Agreement; but if the Purchaſe-Money was paid to the Father, then to be no Part of the Satisfaction. *Trin.* 12 *Ann. Wilks* and *Wilks*, *Viner's Abr.* Tit. *Condition*, (E. d.) *Ca.* 39.

4. By Marriage Articles it was agreed, that 6000 *l.* in the Hands of the Truſtees ſhould be laid out in the Purchaſe of Lands to be ſettled on the Huſband for Life, Remainder to the Wife for Life for her Jointure, Remainder to the firſt, *&c.* Son of that Marriage in Tail Male ſucceſſively, chargeable with 2000 *l.* for younger Children, Remainder to the Huſband in Fee; the Father by the ſame Articles covenants after his Deceaſe to ſettle other Lands upon the Huſband and the Heirs Males of his Body, Remainder to the Heirs of the Father. One Point was, the Huſband's Father having made a Settlement of the Lands agreed to be ſettled by the Marriage Articles on the Huſband and the Heirs Males of his Body, with Remainder to himſelf in Fee; if this be a good Performance of the Agreement, and if the Limitation ought not to have been on the Huſband for Life, with Remainder to his firſt, *&c.* Son in Tail Male ſucceſſively in ſtrict Settlement. *King* C. held, that the Settlement made by the Father was a good Execution of the Agreement; *ergo* confirmed the Settlement. 3 *Geo.* 2. *Chambers* and *Chambers*, *Viner's Abr.* Tit. *Contract* and *Agreement*, (F.) *Ca.* 16.

By the Articles theſe Lands were not intended to be ſettled as a Proviſion for the Children of that Marriage, they were taken Care of by the other Part of the Articles, by the Truſt-Money, but for the Support and Proviſion of the Huſband; and it is not like the common Caſe of Articles for a Settlement on the Marriage where no other Proviſion or Care is taken for them, and the different Manner of Penning the Articles in Relation to the Truſt-Money; and as to theſe Lands, the one to be in ſtrict Settlement to the firſt, *&c.* Son of that Marriage, the other Limitation to the Huſband and the Heirs Males of his Body generally, and not tied up to the Iſſue of that Marriage, ſhews plainly the Parties underſtood and had in Contemplation the Difference between a ſtrict Settlement upon the Iſſue of that Marriage and a general Settlement upon the Huſband and the Heirs Males of his Body. By Lord Chan. *Ibid.* —— *Fitz-Gibb. Rep.* 127. S. C. and Decree.

5. *A.* by Articles previous to his Marriage dated in 1677. agreed to ſettle certain Lands to the Uſe of himſelf and his intended Wife for their Lives and the Life of the Survivor, and after the Survivor's Deceaſe to the Uſe of the Heirs of the Body of the ſaid *A.* on his Wife begotten, with other Remainders over. The Marriage took Effect, and

and by Deed dated *April* 5, 1698. *reciting the ſaid Articles, and which is declared to be in Performance of the true Intent and Meaning thereof*, *A.* ſettled the ſame Lands to the Uſe of himſelf and his Wife for their Lives, Remainder to the Heirs of the Marriage, Remainder to the right Heirs of *A.* There is Iſſue of the Marriage *one Son* and two Daughters *M.* and *N.* In 1716. upon the Marriage of *A.*'s Son, *A.* ſettles other Lands to the Uſe of his Son for Life, Remainder to the Daughters of this Marriage, Remainder in Fee to the Son, with a Power to raiſe 2000 *l.* for younger Children; after the Son's Death *A.* levies a Fine of the former Lands to the Uſe of himſelf in Fee, and then makes his Will, and deviſes Part of his former Lands to his ſaid two Daughters *M.* and *N.* and *all the Reſt of his real Eſtate* to Truſtees, to the Uſe of Plaintiff his Grandſon for Life, Remainder to his firſt, *&c.* Son in Tail Male, Remainder to his Daughters in Tail, Remainder to Teſtator's ſaid Daughters *M.* and *N.* with ſeveral Remainders over; and with Directions out of the Profits to educate the Grandſon, and to place out the Reſt of the Profits at Intereſt, to be paid to the Grandſon at 21, and if he does not attain that Age, to be paid to his ſaid Daughters *M.* and *N.* their Executors, *&c.* The Queſtion was, whether the Settlement in 1698. was a proper Execution of the Articles of 1677? and if not, whether the general Deviſe to the Plaintiff ſhould be taken as a Satisfaction for what he was intitled to under the Articles of 1677? And held *per* Lord *Talbot*, that Plaintiff the Grandſon is not bound by the Deed which did not purſue the Articles; but then he ſhall make his Election (within ſix Months after he comes of Age) whether he will ſtand to the (*a*) Will or the Articles; and if he makes his Election to ſtand to the latter, then ſo much of the other Lands deviſed to him as will amount to the Value of the Lands compriſed in the Articles, and which were deviſed to the Daughters his Aunts, to be conveyed to them in Fee. Decreed accordingly, *Hil.* 1735. *Streatfield* and *Streatfield*, *Ca. in Eq. Temp. Talbot* 176.

(*a*) When a Man takes upon him to deviſe what he had no Power over, upon a Suppoſition that his Will will be acquieſced under, Equity will compel the Deviſee, if he will take Advantage of the Will, to take intirely, but not partially, under it. Said *per* Lord Chan. who cited *Noy*'s and *Mordaunt*'s Caſe. There being a tacit Condition annexed to all Deviſes of this Nature, that the Deviſee do not diſturb the Diſpoſition which the Deviſor hath made. So are the ſeveral Caſes that have been decreed upon the Cuſtom of *London*. *Ibid.* 182, 183.

(C) Where a Covenant is a ſpecifick Lien on the Lands, and where on the perſonal Eſtate, & econt'.

His Lordſhip ſaid, that it was plain the Intention of the Deed was, that the Parties ſhould rely and depend on the Security of the Father's Covenant, and Equity ought not to vary or alter the Security which the other Side has agreed to accept of, for that would be going beyond, and conſequently againſt the Intent of the Parties. *Ibid.* 106.——So if one covenant to give his Daughter 1000 *l.* Equity will not compel him to give any further Security than this Covenant, that being at firſt accepted. *Vide Prec. in Chan.* 89. 1 *Vol. Abr. Eq. p.* 132. *Ca.* 14. 1 *Will. Rep.* 461.

1. *A.* In Conſideration of Marriage ſettles Lands upon himſelf for Life, Remainder to his intended Wife for Life, Remainder to the Heirs of his Body on his Wife to be begotten, Remainder to his own right Heirs; and in the ſame Deed *A.* covenants for himſelf and his Heirs *not to ſuffer a Recovery, but that the Lands ſhould be enjoyed according to theſe Limitations.* The Marriage took Effect, and they have Iſſue a Daughter who marries the Plaintiff, and to whom *A.* gave a conſiderable Portion; then *A. ſuffers a Recovery* to the Uſe of himſelf and his Heirs, and deviſes theſe Lands in Truſt for his ſaid Daughter

Daughter for Life, Remainder to her firſt, *&c.* Son in Tail Male, and if ſhe ſurvived her Huſband, then to her in Fee; but if ſhe died firſt, then the Remainder over, and dies. On a Bill brought by the Daughter and her Huſband againſt the Deviſee and Executor of the Father for a ſpecifick Performance of the Covenant, Lord Chancellor was of Opinion, that the Covenant did not bind the Land ſo as to defeat the Will or Recovery; for in this Caſe the Intent of the Settlement is more effectually anſwered than it would have been if the Land had deſcended in Tail to the Daughter, for then it would have been alienable from the Iſſue (*a*) Male, whereas here it cannot; but the Covenant is good to bind the Aſſets; *ergo* Liberty was given to ſue the Executor, and to recover out of the perſonal Eſtate; and for that Purpoſe an Iſſue at Law was directed, but not to try what the Huſband but what the Wife or her Iſſue is damnified by the Breach of this Covenant; and it being alledged that the Teſtator did moreover give a Portion to the Daughter, the Defendant ſhall have Liberty to give in Evidence any Thing of that Kind which may tend to a Satisfaction of this Breach of Covenant. *Hil.* 1708. *Collins* and *Plummer*, 1 *Will. Rep.* 104, 107.

(*a*) Of the Marriage.

2. *A.* covenants before Marriage to ſettle *certain* Lands on his Wife for Life, and afterwards deviſes theſe Lands for Payment of Debts; the Covenant is a *ſpecifick Lien on the Lands*, and the Covenantor as to them but a Truſtee; and therefore during the Life of the Wife they are not to be affected by any Bond Debts. *Parker* C. *Eaſt.* 1718. *Freemoult* and *Dedire*, *& econtra*, 1 *Will. Rep.* 429.

But a Covenant to ſettle Lands of the Value of 60 *l. per Ann.* without mentioning any Lands in certain; this *no ſpecifick Lien*, but the Wife muſt come in as a Creditor in general, and the Maſter to value her Eſtate for Life, and the Wife to come in for that Valuation; but the Wife to have the Arrears before incurred as well as the Valuation of her Eſtate for Life. *Ibid.*

3. A long Term of Years was veſted in the Huſband in Right of his Wife; he made an under Leaſe for ten Years, and upon borrowing Money of the Leſſee, covenanted to grant him another Leaſe, to commence after the End of the ten Years, and to *continue during the Time he had any Right*, but died before he made ſuch Leaſe: Decreed at the Rolls, that this Covenant was a good Diſpoſition of the ſaid Term in Equity, becauſe the Huſband had a Power to diſpoſe of it, and that the (*b*) Covenant was ſuch a Lien as bound the Right in whoſe Hands ſoever it went. *Trin.* 9 *Geo.* 1. *Stead* and *Cragh*, 2 *Mod. Ca. in Law and Eq.* 42.

Note; It was not prayed in the Bill that the Defendant (the Huſband's Widow) ſhould be obliged to carry this Covenant into Execution, but that the Court would declare it to be a good Diſpoſition of the Term in Equity, and thereupon to grant an Injunction againſt the Defendant, who had brought an Ejectment. *Note* alſo, that the Widow did not claim either as Executrix or Adminiſtratrix, but by Virtue of that Right which ſhe had paramount that of her Huſband; and therefore demurred to the Bill, ſuggeſting that if there was any ſuch Covenant, it was only a bare Agreement between the Parties, and reſted in Covenant, which could only charge the Executors or Adminiſtrators of the Covenantor, and that the Bill might be diſmiſſed with Coſts; but it was decreed as above. *Ibid.* 43. (*b*) Vide *Poph.* 4. and 1 *Vern.* 396.

4. *A.* and *B.* enter into Articles for the Purchaſe of Part of *A.*'s Eſtate, *A.* dies before a Conveyance is made purſuant thereto, and his *Executors* pay away his *perſonal Aſſets in ſatisfying Debts by Specialty*, *which*

It appeared in the Cauſe, that *A.* ſold the ſame Lands to *D.* but after the Articles were executed for a Sale thereof to *D.* *D.* gave *A.* the Vendor 700 *l.* for Leave to relinquiſh his Bargain, and thereupon thoſe Articles were made void, by which it appears that it was a very extravagant Bargain, for otherwiſe ſo great a Sum would not have been given to relinquiſh it; and it was inſiſted for Defendants, *A.*'s Heir and Executors, that the Articles between *A.* and *B.* ought not to be carried into Execution. To which it was anſwered, that *B.* the Purchaſer under theſe preſent Articles, would relinquiſh the ſame upon the Payment of the 700 *l.* to him; for ſince *A.* had got ſo much Money by *D.* it was but juſt that *B.* ſhould have the Money on a ſpecifick Performance of his Articles; and the Court was of the ſame Opinion; but in regard *A.*'s Heir (a Defendant) was a Minor, and by Conſequence could make no Election, it was decreed as above. *Ibid.* 152.

were a Lien at Law on his real Eſtate: Though the Creditors by ſimple Contract ſhall in this Cauſe ſtand in the Places of the Creditors by Specialty, yet it ſhall be without Prejudice to *B.*'s Demands; and a ſpecifick Execution of theſe Articles was decreed, for that the Sale of the Eſtate by Virtue of thoſe Articles, and in Conſideration of ſo much Money to be paid for the Purchaſe, was a ſeparate and *ſpecifick Lien on thoſe Lands*, and this by the *conſtant Courſe of the Court*; and for ſo much of the Purchaſe Money to be paid as the Lands ſhall fall ſhort to anſwer *B.* he ſhall come in as a Creditor by Specialty on the other Lands. *Trin.* 11 *Geo.* 1. *Charles & al'* and *Andrews*, 2 *Mod. Ca. in Law and Eq.* 151, 153.

(D) Where Equity will decree Lands to be ſettled in ſtrict Settlement, and Why.

Vide the Caſe of *Trevor* and *Trevor*, 1 *Will. Rep.* 622. alſo 2 *Mod. Ca. in Law and Eq.* 161. and 1 *Vol. Abr. Eq. P.* 387. *Ca.* 7. S. C.

1. BY Marriage Articles Lands were covenanted to be conveyed to *A. for Life*, with *Remainder* to the *Heirs Male of his Body*. On a Bill brought for the Execution of ſuch Articles, the Lands ſhall be ſettled upon *A. for Life*, with *Remainder* to *his firſt*, &c. *Son in Tail Male*. Said *per* Lord Chan. *Cowper*, *Hil.* 1718. in the Caſe of *Collins* and *Plummer*, 1 *Will. Rep.* 106.

2. But *otherwiſe* where *Money* is *deviſed* to be laid out in the *Purchaſe of Lands* to be ſettled on *A. and the Heirs Male of his Body*; for in *Marriage Articles the Children are conſidered as* (*a*) *Purchaſers*, but in Caſe of a *Will*, where the *Teſtator* expreſſes his Intent to give an *Eſtate-tail*, Equity ought not to abridge the Bounty directed by the Teſtator. Said *per* Lord Chan. *Cowper* in the Caſe of (*b*) *Seale* and *Seale*, 1 *Will. Rep.* 291.

(*a*) In the Nature of Marriage Articles the *Iſſue* are particularly conſidered and looked upon as *Purchaſers*, and for which Reaſon Equity has reſtrained the general Expreſſions made uſe of by the Parties; for it cannot reaſonably be ſuppoſed that a valuable Conſideration would be given for the Settlement of an Eſtate, which as ſoon as ſettled the Huſband might deſtroy. Said *per* Lord Keeper *Harcourt* in the Caſe of *Bale* and *Coleman*, *Eaſt.* 1711. 1 *Will. Rep.* 145.——In this Caſe of *Bale* and *Coleman*, Lord *Harcourt* made a Diſtinction betwixt a *Deviſe* of a Truſt of Land to *A. for Life*, with a Power to make Leaſes, &c. *Remainder* to the *Heirs Male of his Body*, holding this to be an *Eſtate-tail*; but that in *Articles on a Marriage to ſettle* Lands to *A. for Life*, &c. *Remainder* to the *Heirs Male of his Body by the Wife*, the Articles being *executory*, and but as *Minutes*, the *Settlement* ſhould be according to the Intention, and conſequently to the firſt Son, &c. Cited by Lord Chan. *Parker* on pronouncing his Decree in the Caſe of *Trevor* and *Trevor*, *Eaſt.* 1720. 1 *Will. Rep.* 633. (*b*) *Vide* this Caſe abridged, *P* *C.*

(E) Of Variance between Articles and Settlement.

The Articles are prudent Articles; and though the Wife have an Eſtate-tail thereby, yet ſhe cannot bar it, but is reſtrained by 11 *H.* 7. and a

1. ARTICLES were made before and in Conſideration of Marriage, and entred into about *twenty-five Years ſince*, whereby Lands were agreed to be ſettled to the Uſe of the Huſband for Life, Remainder to the Wife for Life, Remainder to *the Heirs of the Body of the Wife by the Huſband*, Remainder to the *Huſband* in Fee. The Settlement was alſo made before the Marriage, and recited the Articles, and mentioned to be made *in Purſuance thereof*, but the Settlement varied

plain Miſtake appearing upon the Face of the Articles and Settlement, the *Length of Time* is *immaterial*. *Per* Lord Chan. *Ibid.* 124. *Note*; in this Caſe the Father mortgaged the Premiſſes for 500 *l.* and *got the Son* to join in a *Fine without any Conſideration*, and the Fee-ſimple and Equity of Redemption of the mortgaged Premiſſes were limited to the Father; *ergo* as the Son had joined in the Mortgage, the Court would not ſet that aſide, but the Father to keep down the Intereſt during his Life. *Ibid.* 124, 125.

varied from the Uſes in the Articles, *viz.* the Lands were limited to the Uſe of the Huſband for Life, Remainder to the Wife for Life, Remainder *to the Heirs of the Body of the Huſband on the Wife to be begotten*, Remainder to the Huſband in Fee. There was Iſſue one Son, (the Plaintiff) and the Huſband married again, and had ſeveral other Children. The Intent of the Parties was proved to be according to the Articles (*a*), that the Huſband ſhould have but an Eſtate for Life, and not have it in his Power to defeat and ſtarve the Iſſue. Lord Chan. *Cowper* decreed the Huſband and his ſecond Wife to join in a Conveyance to ſettle the Eſtate as by the Articles, *i. e.* to the Father for Life, Remainder to the Son in Tail; and the Father inſiſting to take Advantage of this Miſtake, the Conveyance was to be made at his Charge, and alſo to pay Coſts. *Trin.* 1710. *Honor* and *Honor*, 1 *Will. Rep.* 123.

(*a*) Marriage Articles are in *their Nature executory*, and ought to be conſtrued and moulded in Equity according to the Intention of Parties. *Per* Lord Chancellor *Parker*, 1 *Will. Rep.* 631.

2. Articles on Marriage to ſettle Lands on the Huſband and Wife for their Lives, Remainder to the Heirs Male of the Body of the Huſband by the Wife, Remainder to the Heirs Male of the Body of the Huſband by any other Wife, Remainder to the Heirs *Female* of the Body of the Huſband by this Wife. A Settlement is made before the Marriage, (*viz.* in 1685.) and ſaid to be *in Purſuance and Performance of the ſaid Articles*, whereby the Lands are limited to the Huſband for Life, *ſans* Waſte, and with Power to make Leaſes, Remainder to the Wife for her Life for her Jointure, Remainder to the firſt, *&c.* Son of the Marriage in Tail Male ſucceſſively, Remainder to the firſt, *&c.* Son of any other Marriage in Tail Male, Remainder to the *Heirs of the Body of the Huſband* by this Wife, Remainder over. By this Settlement there was an Omiſſion of Truſtees for ſupporting contingent Remainders, and inſtead of limiting a Remainder to the *Daughters* of the Marriage, the Limitation was to the *Heirs of the Huſband of the Marriage*, which gave the Huſband an Eſtate-tail, and conſequently a Power to bar the Daughters of that Marriage, and alſo the Remainders over by a Recovery. The Huſband had Iſſue of this Marriage one only Daughter *Mary*, and taking Advantage of this Miſtake, ſold Part of the Premiſſes to the Amount of 6000 *l.* and upwards, and having ſuffered a Recovery of ſuch Part as remained unſold, by Indenture 16 *Feb.* 1709. he conveyed the ſame to Truſtees *W.* and *H.* in Truſt for himſelf for Life, Remainder to ſuch Truſts as he ſhould declare by Will; and accordingly 27 *Dec.* 1722. he deviſed the Premiſſes to Defendant in Fee, (except a ſmall Tenement which he deviſed to one *Barrable* in Fee) and made her Executrix. *Mary* the Daughter married *B.* and they had Iſſue the Plaintiffs *M.* and *F.* both Infants; *Mary* their Mother being dead, the Plaintiffs brought their Bill againſt the Deviſee, in order to rectify the Miſtake in the Settlement; but as to the Premiſſes ſold, the Bill did not ſeek to diſturb the Purchaſe, only to recover the Purchaſe-Money out of the Aſſets of their Father. The Deviſee pleaded the Settlement of 1685. the Recovery, the Will, and the long Enjoyment of the Premiſſes; and the Plea being argued before *Gilbert* C. B. and the other Barons, the ſame

Vide the following Caſe.

Where Articles are entred into *before* Marriage, and Settlement made *after* Marriage different from the Articles, (as if by Articles the Eſtate was to be in ſtrict Settlement, and by the Settlement the Huſband is made Tenant in Tail, whereby he hath it in his Power to bar the Iſſue) Equity will ſet up the Articles againſt the Settlement: But where both Articles and Settlement are previous to the Marriage *at a Time when all Parties are at Liberty*, the Settlement differing from the Articles will be taken as a new Agreement between them, and ſhall controul the Articles.

Lee and *Goldwire*, *Novemb.* 10, 1736. (*ſo in the Book*) cited by Lord *Talbot*, *Mich.* 1733. in the Caſe of Lord *Glenorchy* and *Boſville*, *Ca. in Eq. Temp. Talbot* 3, 20. And although in this Caſe of *Weſt* and *Erriſſey* the Articles were made to controul the Settlement made before Marriage, yet that Reſolution no way contradicts the *general Rule* above, for in *Weſt* and *Erriſſey* the Settlement was expreſly mentioned to be made *in Purſuance and Performance of the ſaid Marriage Articles*, whereby the Intent appears to be ſtill the ſame as it was at the making the Articles. *Per* Lord Chan. *Talbot*. *Ibid.* 20. *Vide* the Caſe of *Streatfield* and *Streatfield*, *P. Ca.* *Vide* alſo the Caſe of *Glanville* and *Payne*, *Barnard. Rep. in Chan.*

ſame was over-ruled unanimouſly; but upon hearing the Cauſe before all the Barons, the Bill was (*a*) diſmiſſed without Coſts, it being dangerous (as it was ſaid) to ſet aſide a Settlement which ſeemed to have been deliberately and ſolemnly made; but upon an Appeal to the Houſe of Lords this Decree of Diſmiſſion was (*b*) reverſed, and decreed that the Truſtees, and the Deviſee *M. E.* (the Reſpondent) ſhould convey ſuch of the Premiſſes as were compriſed in the Articles to Truſtees, to the Uſe of the Appellants *M.* and *F.* and to the Heirs *Female* of their Bodies, as Tenants in Common, with Croſs Remainders to them in Tail Female; and the Reſpondents (the Deviſees *M. E.* and *Barrable*) to account for the Profits, and to pay the ſame to the Appellants (the Infants), and the Reſpondent the Executrix to account for the Purchaſe-Money that had been received by her Teſtator for ſuch Part of the Premiſſes as he had ſold, and pay the Intereſt thereof to the Appellants, and the Reſpondents to bring their Writings into the Court of Exchequer, and deliver up the Poſſeſſion to the Appellants, but as to the Principal Monies ariſing by the ſaid Sales, theſe were to be laid out in the Purchaſe of Lands in Fee, to be ſettled to the ſame Uſes as the Lands unſold were decreed to be conveyed. *Weſt* and *Erriſſey*, firſt *in Scacc'*, and afterwards *in Dom' Proc'*, 2 *Will. Rep.* 349.

(*a*) *Dec.* 1726.

(*b*) *Feb.* 1727.

It was ſaid for the Plaintiff and reſolved, that though here was Notice of the Marriage Articles, yet the 3000 *l.* ſecured by the Settlement on the ſecond Marriage was an actual Satisfaction of all Demands by theſe Articles; and though a Limitation by Articles to the Heirs Male of the Marriage after an expreſs Eſtate for Life to the Father ſhall be taken to mean a Remainder to the firſt, *&c.* Son, it does not follow that ſuch a Limitation to the Heirs of the Body muſt be equivalent to a Remainder limited to Daughters; eſpecially in this Caſe, where they were poſtponed to the Limitation to the Heirs Male of the Body of the Huſband by any Wife, and where there was an expreſs pecuniary Proviſion made for the Daughters by the firſt Wife, which was all they were to depend upon; beſides, that Sons are of a different Conſideration in Equity from Daughters, they being to ſupport the Name of the Family, which Daughters do not; alſo in the general Courſe of Marriage Settlements Daughters are provided for by pecuniary Portions, and not by Land; that the legal Eſtate being now in thoſe who claimed under the ſecond Marriage Settlement, and had an equal Equity, it would be hard to take the Benefit of the Law from them, by raking into old ſtale Articles, and diſturbing Settlements made on valuable Conſiderations, as that in the preſent Caſe was, where the Parties had both the Law and Equity on their Side. *Ibid.* 539. ——— The Caſe of *Weſt* and *Erriſſey* (above) was

3. By Marriage Articles dated 2 *March* 1693. Lands were to be ſettled on Huſband and Wife for their Lives, Remainder to their firſt, *&c.* Son of the Marriage in Tail Male, Remainder to the Heirs Male of the Body of the Huſband by *any* Wife, Remainder to the *Heirs* of the Body of the *Huſband by the firſt Wife*, Remainder to the Huſband in Fee, with *Proviſions* for the *Daughters of the firſt Marriage, if no Iſſue Male.* Huſband has one Daughter by the firſt Wife and no Son; the *Huſband* ſurviving the *firſt Wife* ſuffers a *Recovery*, and marries again, and takes *Notice of the firſt Marriage Articles in his ſecond Marriage Settlement*, (which was dated in 1698.) by which theſe Lands were ſettled to the Uſe of himſelf for Life, Remainder as to Part to the Uſe of his ſecond Wife for Life, Remainder to the firſt, *&c.* Son of the ſecond Marriage in Tail Male ſucceſſively, Remainder to Truſtees for 500 Years to raiſe 5000 *l.* for Daughters of this ſecond Marriage, (if no Son) Remainder to the Huſband in Fee; and as to the other Part of the Premiſſes, to the Uſe of Truſtees for 99 Years, in Truſt after the Huſband's Death to *raiſe* 3000 *l. for the Daughter of the firſt Marriage.* And this was declared to be in Satisfaction of all Monies ſhe was intitled to by the firſt Marriage Articles, and in the mean Time ſhe to have 100 *l. per Annum* for her Maintenance, Remainder to the Huſband in Fee. Three of the firſt Wife's Relations were Parties to this ſecond Marriage Settlement. The Huſband had Iſſue by this ſecond Marriage three Daughters but no Sons, and died in *Auguſt* 1720. The Queſtion was, (here being *Notice of the firſt Marriage Articles*, by which there was a Limitation after that to the Heirs Male of the Huſband by any Wife, to the *Heirs of his Body by his firſt Wife*)

whether

whether this being in Caſe of Articles, ſhould not be taken as if the *Limitation had been to the Daughters* of the Huſband by his firſt Wife, for then they could not be barred by the Recovery. But it was decreed that the Daughter of the firſt Marriage was not intitled by Virtue of the Limitation in the firſt Marriage Articles to the *Heirs of the Body of the Huſband by his firſt Wife. Trin.* 1729. *Powell* and *Price & econt' in Scacc'*, 2 *Will. Rep.* 535.

was cited as decreed *in Dom' Proc' econt'*. But it was reſolved, that there was a Diverſity between that and the preſent Caſe, for

in that Caſe no Portion was provided for the Daughters of the firſt Marriage, in the preſent Caſe Portions in all Events are ſecured to ſuch Daughters. In *Weſt* and *Erriſſey*, after the Limitation in the Articles to the Heirs Male of the Body of the Huſband and Wife, with Remainder to the Heirs Male of the Body of the Huſband by any Wife came, the Remainder to *the Heirs Female of the Body of the Huſband by the firſt Wife*, &c. ſo that the Daughters were more immediately in the View and Contemplation of the Parties in that than in the preſent Caſe. *ibid.* 540.——It was obſervable, (as *Comyns* B. ſaid) that in the Year 1693. when theſe Articles were made, it was uſual to conſtrue a Remainder to the Heirs Male of the Body, to mean and intend the firſt, &c. Son of the Marriage; and if ſo, it would be reaſonable to interpret Articles according to the Time in which they were executed; neither ought Length of Time to make any Alteration in Favour of the Daughter by the firſt Marriage, who had what was then thought and agreed upon to be a competent Proviſion for her; that it was a material Circumſtance in Favour of the ſecond Marriage Settlement, that three of the firſt Wife's Relations were Parties thereto; from whence it ſeemed that by the general Opinion of the Relations of the firſt Wife this 3000 *l.* in all Events was thought a ſufficient Proviſion for the only Daughter of the firſt Marriage, which might reaſonably induce the Court to think ſo too. And by the ſame Reaſon that the Daughters by the firſt Marriage would come in for the Eſtate, ſhe might have barred the ſecond Wife of her Jointure, and likewiſe her Daughters of their pecuniary Portions, which would be very hard. *Ibid.* 540, 541.——*Wherefore it was decreed as above. Ibid.* 541.——I hope I ſhall not be thought too prolix in my Abridgment of this Caſe, my Intention being to lay before the Reader the Diverſity betwixt the preſent Caſe and that of *Weſt* and *Erriſſey*, the Points in each having been determined upon great Deliberation.

(F) Where Money agreed to be laid out in Land ſhall be paid to the Heir.

1. TWO thouſand Pounds (whereof 1500 *l.* were the Wife's Portion, and 500 *l.* the Huſband's Money) were agreed by Marriage Articles to be laid out in a Purchaſe of Land to be ſettled upon *Huſband* and *Wife for their Lives*, Remainder to the *Heirs of the Wife by the Huſband*, Remainder to the *Huſband's Heirs*. The *Huſband receives the whole Money*, the Wife dies leaving a Son and three Daughters, then the Huſband dies Inteſtate, and the Eldeſt Daughter takes out Adminiſtration to him. The Son brings a Bill againſt her to have the (*b*) *Money paid to him*, electing that it ſhould not be laid out in Land and ſettled as had been agreed by the Articles. Decreed accordingly, and the Adminiſtratrix indemnified. *Mich.* 1710. *Benſon* and *Benſon*, 1 *Will. Rep.* 130.

Though a *Fine* cannot be levied of (*a*) *Money* agreed to be laid out in a Purchaſe of Land to be ſettled in Tail, yet a Decree can bind ſuch Money equally as a Fine alone could have bound the Lands in the principal Caſe if bought

and ſettled; and to decree a Purchaſe and Settlement to be made which the Son the next Moment may cut off, would be to decree a vain Thing. *Per* his Honour. *Ibid.*——Rule; *Equity will not decree a vain Thing.* Said by his Honour. *Ibid.* 131.——*Equity like Nature will do nothing in vain.* Said *per* Lord Chan. *Cowper. Ibid.* 389.——*Vide* the Caſe of *Seeley* and *Jago*, *P. C.* *Short* and *Wood*, *P. C.* and *Eyre's* Caſe, *P. C.* (*b*) This Money is a Debt by Specialty, and to be paid in that Degree; for it is agreed by the Articles, (to which the Huſband was a Party) that it ſhall be, within ſuch a Time, laid out in Land; and the *Huſband having received it*, and not having laid it out, has broken that Agreement; and an Agreement under Hand and Seal by Deed is a Covenant, and conſequently a Specialty. *Per* his Honour, in the ſaid Caſe of *Benſon* and *Benſon*, 1 *Will. Rep.* 131. *Vide* the Caſe of *Deg* and *Deg*, *P. C.* (*a*) It ſeems abſurd to talk of levying a *Fine* of *Money*. Said by Lord *Macclesfield*, *Trin.* 1723. in the Caſe of *Edwards* and *Edwards*, 2 *Will. Rep.* 174.

2. But a Perſon intitled only to an Eſtate-tail in Land ſhall not have the Money becauſe of the Remainder Man's Chance. *Vide* 1 *Will. Rep.* 471. and 3 *Will. Rep.* 14.

Ibid. 174. Lord Chan. ſaid, if there had been ſo much as a Parol Direction from the Son for the Payment of this 10000 *l.* to his Mother, he ſhould have regarded it, being of Opinion that it was in the Election of the Son to have made this Money, or to have diſpoſed of it as Money; but then he conceived that the Son muſt do ſomething to determine ſuch Election, which he has not done in the preſent Caſe; and then in a Court of Equity *the Heir is ever preferred* (a) *to an Adminiſtrator.* As to the Fine

3. *A.* being ſeiſed in Fee of the Manor of *K.* intermarried with Defendant, who had a Portion of 16000 *l.* 6000 *l.* whereof was paid to *A.* and 10000 *l.* Reſidue thereof, was agreed by all the Parties to be laid out in Land, to be ſettled as the Manor of *K.* had been ſettled, *viz.* on *A. for Life*, Remainder to the *firſt*, &c. *Son* of that Marriage in *Tail Male*, Remainder to *A. in Fee*, and until ſuch Purchaſe the 10000 *l.* was to be placed out upon Securities, and the Intereſt thereof to be paid to ſuch Perſons as ſhould be intitled to the Rents and Profits of the Manor of *K.* *A.* died, leaving Iſſue of this Marriage one Son only, who being intitled to the ſaid Manor of *K.* in Tail, Remainder to himſelf in Fee, levied a Fine thereof to the Uſe of himſelf in Fee, and then died without Iſſue and Inteſtate; whereupon the ſaid Manor deſcending to Plaintiff, ſhe brought her Bill to have the Mortgage upon which the 10000 *l.* had been placed out aſſigned to her. The Defendant, *A.*'s Widow, inſiſted that ſhe was intitled to the ſame as Adminiſtratrix of her Son; and that this 10000 *l.* being as yet in itſelf Money, ought by the Statute of Diſtribution to be divided betwixt herſelf, as *the Mother of the Inteſtate*, and *D. his half Siſter.* Lord Chan. *Macclesfield* decreed the Security for the 10000 *l.* to be aſſigned to Plaintiff, but all the Intereſt due at the Death of the Son to go to Defendant as his Adminiſtratrix. And the Reporter ſays, (as he underſtood his Lordſhip) though the Son died in a broken Part of the Half Year, this Intereſt ſhould (he ſaid) not be taken as (*a*) Rent, but ſhould be apportioned, and a Proportion thereof go to his Adminiſtratrix, but all the Intereſt due ſince the Son's Death was decreed to belong to the Plaintiff the Heir. No Coſts on either Side. *Trin.* 1723. *Edwards and Lady Elizabeth his Wife* and *Counteſs Dowager of Warwick*, 2 *Will. Rep.* 171, 176.

his Lordſhip held it to be immaterial, for that the Son had as good a Power before the Fine to diſpoſe of the Manor of *K.* or of the 10000 *l.* in Money, againſt *all* but *his Iſſue*, as he had after the Fine; and Iſſue he never had: But admitting that the Fine, as it compriſed the ſaid Manor, ſo it did alſo the Truſts of this 10000 *l.* it will make againſt the Defendant, becauſe by the Deed of Uſes the Uſe of the Fine is declared to be to the Conuſor and his Heirs, and conſequently would intitle the Plaintiff to this Money. *Ibid.* 175.

(*a*) See the Caſe of *Lingen* and *Sowray*, 1 *Will. Rep.* 172. *Prec. in Chan.* 400. and 1 *Vol. Eq. Ca. Abr.* *P.* 175. *Ca.* 5.

Ibid. 14. His Lordſhip ſaid, he could not ſee why he ſhould not have like Regard for the Iſſue in Tail as for the Remainder-man. It is poſſible the Son, before he can light on a Purchaſe and ſettle it, may die leaving Iſſue; and this is a Chance of

4. By Marriage Articles Money is to be inveſted in a Purchaſe, and to be ſettled on the *Huſband for Life*, Remainder to the *Wife for Life*, Remainder to the *firſt*, &c. *Son* of the Marriage in *Tail Male*, Remainder to *A.*'s *right Heirs.* The Huſband and Wife died, leaving one Son, who being of Age petitioned that the Money might be paid him, agreeable to the Caſe of *Short* and *Wood*, (*b*) in Lord *Parker*'s Time, and in many others of the like Nature, in regard that if the Lands were purchaſed, he would as the only Iſſue be intitled thereto in Tail, and Remainder to himſelf in Fee as Heir to his Father, and might by a Fine only enable himſelf to diſpoſe of the Premiſſes. But *King* C. would not order the Money to be paid to the Son until he ſhould be better ſatisfied from Precedents. *Trin.* 1724. *Eyre's Caſe*, 3 *Will. Rep.* 13.

which his Lordſhip ſaid he would not deprive ſuch Iſſue; alſo here may be a Wife which may be hindred of her Dower.——The Editor by way of Note ſays, That afterwards in the Caſe of Mr. *Onſlow*, *Hil.* 1732. (cited in that of *Mills* verſus *Banks*, *Ibid.* 8.) the Lord *King* declared his Perſeverance in Opinion as to this Point, obſerving that the Levying of a Fine is a Thing of Time, there being ſeveral Offices to paſs; and the Writ of Covenant is to be under the Great Seal: All which Impediments not being to be removed in an Inſtant, the Tenant in Tail may by them be prevented from perfecting a Fine, though never ſo much intended by him. But yet after all, the preſent Practice conforms to the Lord *Parker*'s Opinion. Nay, if a Feme Covert is intereſted in the Money articled to be laid out in Land and ſettled, her coming into Court and conſenting will be ſufficient to diſpoſe of ſuch her Intereſt. As to the Objection made by the Lord *King* in the principal Caſe, that by this Means a Wife might be hindred of her Dower; if the Party applying for Money were married, it would without doubt be expected that his Wife ſhould appear in Court, and give her Conſent thereto. *Ibid.* 14.

(*b*) *P.* *C.*

(G) Parol Agreements, or ſuch as are within the Statute of Frauds and Perjuries, & cont'.

1. A Parol Agreement and 20 *s.* paid for the Sale of an Houſe was decreed without farther Execution proved; and the Maſter of the Rolls ſaid, he ſhould have demurred on the Bill; but having now proceeded to Proof, he would decree it. *Trin.* 1667. *Anon.* 2 *Freem. Rep.* 128. *Ca.* 154.

2. The Father being about to alter his Will, for fear there ſhould not be aſſets to pay the Legacies thereby given, the Defendant, his Son and Heir apparent, and alſo Executor, in Conſideration that he would not alter his Will, promiſed him to pay the Legacies; whereupon the Father forbore to alter his Will, and dies. Decreed, that let the Aſſets be what they would, or however the Eſtate was ſettled, the Defendant ſhould pay the Legacies. And Lord Chan. ſaid, it was the conſtant Courſe of the Court to make ſuch Decrees upon Promiſes made that the Teſtator would not alter his Will. *Eaſt.* 1678. *Chamberlaine* and *Chamberlaine*, 2 *Freem.* 34.

Pr. in Chan. 4. S. C. cites it thus: That the Father being about to make his Will, and thereby to make certain Proviſions for his younger Children; his Son and Heir apparent perſuaded him not to make any ſuch Will, and that he would take Care his Brothers and Siſters ſhould have thoſe Proviſions; whereupon the Father forbore to make the Proviſions, and they were decreed againſt the Heir. *Vide* the Caſe of *Deveniſh* and *Baines*, *P. C.*

3. One that could read made an Agreement for 21 Years; the Leſſor himſelf drew the Leaſe but for one Year, and read it for 21, and after the Expiration of a Year ejected the Leſſee, and the Leſſee brought a Bill to be relieved upon all this Matter, which was in Proof; the Leſſee is not relievable in Equity, for it is within the Statute of Frauds; and being able to read, it was his own Folly: Otherwiſe if he had been unlettered. *Hil.* 35 & 36 *Car.* 2. *Anon. Skin.* 159.

4. By the Cuſtom of a Manor every Copyhold Tenant of that Manor may in the Preſence of two Witneſſes nominate his Succeſſor, and ſuch Nominee ſhall enjoy the Lands after him for Life, and the Perſon who nominates may except any Part of the Lands to any other Perſon, yet the Nominee continues Tenant to the Lord for the Whole, but the Perſon to whom any Part is excepted ſhall enjoy that Part during his Life, and if any Tenant dies ſeiſed leaving a Wife, and makes no Nomination, then ſhe ſhall have the Tenement during her Life, elſe it goes to the Lord. *J. S.* being a Copyholder of this Manor, intending by his Will to give the greateſt Part of his Copyhold Eſtate to his Godſon, and the other Part to his Wife; the Wife perſuades him to nominate her to the Whole, and that ſhe would give the Godſon the Part deſigned for him, and offered to give Security to that Purpoſe; thereupon the Huſband nominates her Succeſſor, and dies. She refuſing to let the Godſon enjoy the Lands intended him, he brought his Bill. The Defendant pleaded the Statute of Frauds, *&c.* for that there was no Memorandum, *&c.* in Writing; but decreed for the Plaintiff by all the Commiſſioners; and they ſaid, they decreed it *not as an Agreement* or a *Truſt*, but as *a Fraud*; and they were of Opinion, that as by the Cuſtom of the Manor an Eſtate might be created by Parol without Writing, a Truſt of ſuch Parol Eſtate

Eſtate might likewiſe be raiſed without Writing notwithſtanding the Statute (*a*). *Hil.* 1689. *Deveniſh* and *Baines*, *Prec. in Chan.* 3.

(*a*) And *Keck* Commiſſioner ſaid, that where a Tenant in Tail was about to ſuffer a Recovery in order to provide for his younger Children, and had been kept from it by the Iſſue in Tail promiſing to do it, it had been decreed in this Court. *Ibid.* 5.——*Vide* the Caſe of *Chamberlayne* and *Chamberlaine*, *P. C.*

5. *Sealing not neceſſary to bring an Agreement out of the Statute of Frauds*; as if *A.* had articled with *B.* for the Purchaſe of his Wife's Lands, and the Articles were in Writing, and *ſigned* by the Parties but *not ſealed*; but *A.* was put in Poſſeſſion of ſome Part of the Land; Equity will decree an Execution of the Agreement though it were *not under Seal* (*b*). *Hil.* 1690. *Wheeler* and *Newton*, *Prec. in Chan.* 16.

(*b*) In this Caſe Lord Commiſſioner *Rawlinſon* ſaid, that Agreements in Writing, though *not ſealed*, have ſome better Countenance ſince the Statute of Frauds than they had before. *Ibid.* 17.

Gilb. Eq. Rep. Mich. 10 *Ann.* 35. S. P.

6. If a Bill be brought to have Execution of a Parol Agreement which is in no Part executed, if the Defendant by Anſwer confeſſes the Agreement without inſiſting on the Statute of Frauds, the Court will decree an Execution, becauſe when the *Defendant confeſſes it there is no Danger of Perjury, which was the only Thing the Statute intended to prevent.* Said by his Honour, *Mich.* 1702. *Prec. in Chan.* 208.

Rule; *Equity to relieve againſt Fraud.*—All Statutes made againſt Fraud ſhall be conſtrued liberally and expounded beneficially to ſuppreſs Fraud. 3 *Co.* 82.——And

7. *A Court of Equity will relieve in Caſe of a Fraud although there be nothing in Writing to charge the Party*; as if *A.* agrees with *B.* by *Parol* for a Leaſe of a Piece of Ground, *B. enters* and *builds*, and then *A.* refuſes to grant him a Leaſe. On a Bill brought by *B.* to have an Execution of this Agreement, *A.* pleads the Statute of Frauds, the Agreement being only by Parol; his Plea was over-ruled *per* Lord Keeper, and the Maſter of the Rolls afterwards decreed *A.* to perform the Agreement, and to pay Coſts. *Mich.* 1703. *Floyd* and *Buckland*, 2 *Freem. Rep.* 268.

in the principal Caſe his Honour ſaid, that the *Statute of Frauds* was not made to encourage *Frauds and Cheats*; and that *B.* having *laid out his Money in Purſuance of the Agreement, and taken Poſſeſſion* of the Land, *A.* ought to execute a Leaſe. And *Butcher*'s Caſe was cited, (*vide* 1 *Vol. Eq. Ca. Abr. P.* 21. *Ca.* 9.) where a Parol Agreement was decreed, *Poſſeſſion being delivered in Purſuance thereof.*——And alſo a Caſe decreed by Lord *Nottingham*, where a Deed was ſealed for Security of Money borrowed, and the Deed becoming abſolute, the Defendant promiſed to ſeal a Defeaſance, and afterwards refuſing, a Bill was preferred to compel him; and though he inſiſted upon the Statute of Frauds, he was decreed to ſeal a Defeaſance though there was no Agreement in Writing for that Purpoſe. 2 *Freem. Rep.* 268, 269.——*Ibid.* 285. S. P. cited *per* Lord Keeper.——*Vide* 1 *Vol. Eq. Ca. Abr. P.* 20. *Ca.* 5. S. P.——So where *A.* had only a *parol* Leaſe for a great Number of Years, but having *begun to build* he had his Bargain compleated, and for this very reaſon, becauſe at Common Law it might be within the Statute of Frauds, *ergo* it is more proper for the Juriſdiction of a Court of Equity, than the Common Law. Cited *per* Lord Chancellor, *Hil.* 6 *Ann.* as the Caſe of *Foxcroft* and —— *Gilb. Eq. Rep.* 4.—— But *Ibid. P.* 11. his Lordſhip, *Mich.* 7 *Ann.* cites the Caſe of *Leiſter* and *Foxcroft*, (which I take to be the S. C.) as decreed *in Dom' Proc'*, where a *parol* building Leaſe was made of Ground, and when the Leſſor was dying he declared he thought he ought to have made a Leaſe in Writing: But the Heir told him, he ſhould not diſcompoſe himſelf, for that he would ſupply it; whereby, and by other fraudulent Means, the Leſſee was hindred from ſeeing the Leſſor, and having it done accordingly: The Lords held this to be out of the Statute, and made it good to the Leſſee.——Where there is a *parol Agreement* made for a Leaſe, and the Leſſee by Virtue thereof *enters* and *builds*, the Court will eſtabliſh it on the Foot of Fraud in the Leſſor, notwithſtanding the Statute of Frauds, *&c. becauſe Contracts executed in Part are not always within the Statute, though executory Contracts are.* Said *per Cur'*, *Trin.* 9 *Geo.* 1. in the Caſe of *Savage* and *Foſter*, 2 *Mod. Ca. in Law and Eq.* 37.

8. The Teſtator was making his Will, and (*inter al'*) was directing an Annuity of 40 *l. per Ann.* to be paid to Plaintiff by Defendant the Teſtator's Brother. The Defendant being preſent, deſired the Teſtator not to put it in his Will, but ſaid as he was a Chriſtian he would take Care to ſee it paid, and thereupon it was omitted. The Maſter of the Rolls decreed the Payment of this Annuity, and

that it ſhould be *charged* upon the *real Eſtate*. Upon an Appeal Lord Keeper affirmed the Decree as to the Payment of the Annuity, but ſaid he could not decree it a Charge upon the Land; but the Maſter of the Rolls being in Court ſaid, the Reaſon he went upon to charge the Land was, becauſe the Maintenance of a poor Scholar was a Charity, and was within the Statute of 43 *Eliz.* of Charitable Uſes, and it might amount to an Appointment within that Statute. *Eaſter* 1705. *Oldham* and *Litchford*, 2 *Freem. Rep.* 284.——*Vide* 1 *Vol. Eq. Ca. Abr.* 4th Edit. *P.* 231. *Ca.* 4. S. C. *but differently ſtated.*

The Ground his Lordſhip went upon was, that this was a Fraud upon the Teſtator and the Legatee; and his Lordſhip cited the Caſe of *Dutton* and *Pool immediately after the Statute*, where Sir *H. Pool* was making his Will, and intending to raiſe Portions for his younger Children by felling of Timber; but his eldeſt Son being by defired him not to cut down the Timber, becauſe it would deface the Eſtate, and he would anſwer the Value of it to his Brothers and Siſters; and thereupon he forbore to cut the Timber, and died; and he refuſing to make good his Promiſe, *Dutton*, who married one of the Daughters, brought his Action upon the Promiſe, and recovered. *Ibid.* 285.

9. The Provoſt and Scholars of *King's College*, *Cambridge*, being ſeiſed in Fee of the Tithes of *Prior's Quarter* in *Tiverton* in *Com' Dev' cum pertinentiis*, by Deed demiſed the ſame to *D.* for 21 Years, who afterwards for 350*l.* Conſideration covenanted to convey to Defendant, his Executors and Aſſigns, the ſaid Tithes during her Intereſt therein; then the Plaintiff treats with Defendant for theſe Tithes, and Defendant ſends his Son and two other Perſons with a Letter to Plaintiff, wherein Defendant ſaid, *That if he parted with the Tithes it ſhould be on the Conditions therein particularly mentioned.* Plaintiff accepted of the Terms, and the next Day ſent his Attorney to acquaint Defendant with it, and Defendant delivered to the Attorney a Copy of *D.*'s Agreement, and appointed a Day for executing the ſame; but in the mean Time Defendant went to *D.* (*who had Notice of Defendant's Agreement with Plaintiff*) and *ſettled* a Conveyance from her. Lord Keeper decreed Defendant to perform this Agreement, for that it was directly within the Statute of Frauds, as being an Agreement *ſigned by the Party to be charged with the ſame*, and there was no need of its being ſigned by both Parties; and Plaintiff by his Bill has ſubmitted to perform his Part of the Agreement. This though it was not at firſt a Contract but conditionally only, if the other would accept of it, yet when the other had accepted of it, it was all one; and Defendant intended it ſo, by his ſending his Son with the Letter, and two Perſons beſides. *Hil.* 5 *Ann. Coleman* and *Upcot*, *Viner's Abr.* Tit. *Contract and Agreement*, (J) *Ca.* 17.

If a Man (being in Company) makes offers of a Bargain, and then writes them down and ſigns them, and the other Party takes them up and prefers his Bill; this ſhall be a good Bargain, and the Party ſhall be compelled to a ſpecifick Performance of it. Said *per* Keeper. *Ibid.*

10. *A.* enters into Treaty with *C.* about a Parcel of Land, and ſo did *B.* *A.* tells *B.* that if he would deſiſt, and permit him to go on with his intended Purchaſe, he would let him a Parcel of Ground which he deſired; to this *B.* agreed, and *A.* afterwards compleated his Purchaſe with *C.* then *B.* deſires *A.* to let him have the Parcel of Ground; *A.* anſwers that now he could not, becauſe it would be more convenient to him; and ſays, though I intended to let you have it, as the Circumſtances then were, yet my Purpoſe and Intentions are now altered. *B.* brings a Bill to have a Performance of this Agreement; *A.* inſiſts that he made no abſolute Promiſe, and ſets forth ſuch Agreement as before; and alſo inſiſts upon the Statute, that there ought to have been an Agreement in Writing. Lord Chan. Here is no abſolute and poſitive Agreement, but the Words are ambiguous and uncertain; and the *Statute intended to ouſt* as well *all* ſuch *ambiguous Agreements* as to prevent Perjuries, *&c.* and this Agreement will not bind unleſs it were in Writing. 7 *Ann. Anon. Viner's Abr.* Tit. *Contract and Agreement*, (H) *Ca.* 32.

11. The Father purchaſes Lands to him and his Heirs, and when he was upon his Death-bed ſends for his eldeſt Son, and tells him, that theſe Lands were bought with his ſecond Son's Money, and that he intended to give them to him; whereupon the eldeſt Son promiſed that he ſhould enjoy them accordingly. The Father dies. Lord Keep. *Wright* and the Maſter of the Rolls held, that the eldeſt Son ought to have theſe Lands, becauſe by the Statute of Frauds there ought to have been a Declaration of the Uſe or Truſt in Writing. But *Cowper* C. was of another Opinion, becauſe of the Fraud in this Caſe, in that the eldeſt Son promiſed the Father upon his Death-bed that the other ſhould enjoy the Lands; ſo he took this to be a Caſe out of the Statute. *Mich.* 7 *Ann. Sellack* and *Harris*, *Viner's Abr.* Tit. *Contract and Agreement*, (H) *Ca.* 31.

12. *A.* agreed with *B.* to make him a Leaſe for 21 Years of Lands rendring Rent, *B.* paying *A.* 150 *l.* Fine. *B.* paid 100 *l.* in Part to *A.*'s Agent, which *A.* knew of, and ordered his Agent to prepare the Leaſe; but, before it was executed, *A.* repented and refuſed to grant the Leaſe. *B.* having paid 100 *l.* Earneſt, exhibited his Bill for a ſpecifick Performance. Lord Chan. The Payment of this 100 *l.* is not ſuch a Performance of the Agreement on one Part as to decree an Execution on the other; for the Statute of Frauds makes one Sort of Contracts, *viz.* Perſonal Contracts good if any Money is paid in Earneſt. Now that Statute ſays, that no Agreement concerning Lands ſhall be good except it is reduced into Writing; and therefore a parol Agreement, as it is in this Caſe, cannot be good within the Statute by giving Money in Earneſt; for there muſt be ſomething more than a bare Payment of Money on the one Part to induce the Court to decree a Performance on the other Part, either by putting it out of the Party's Power to undo the Thing, or where it would be a Prejudice to the Party performing his Part, as beginning to build, or letting the other into Poſſeſſion, *&c.* in ſuch Caſe where the Agreement hath proceeded ſo far on one Part, the Statute never intended to reſtrain this Court from decreeing a Performance of the other. But he would not put the Plaintiff to his Action to recover his 100 *l.* wherefore decreed it to be refunded. *Mich.* 8 *Ann. Lord Pengall* and *Roſs*, *MS. Rep.*

13. *J. Clarke* being ſeiſed of Copyhold Lands, had a Son which was dutiful, and for a Proviſion for him ſurrenders the Reverſion of the Copyholds after his Deceaſe to his ſaid Son in Tail, and 14 Years after he treats with Sir *Charles Clarke* for a Marriage between his Son and Sir *Charles*'s Daughter. Sir *Charles* propoſed to give with his Daughter 2000 *l.* if *J. Clarke* would make a ſuitable Jointure; and thereupon *J. Clarke* propoſed to ſettle Houſes in *Chancery-Lane* and in *Queenhithe*, but he having but only a Term for Years in them, Sir *Charles* rejected the Offer, and ſaid to *J. Clarke*, that he wiſhed the Copyholds might be the Lands, and the Houſes in *Queenhithe*. *J. Clarke* replied, that the Copyholds were already ſettled upon his Son; and that the Houſes in *Queenhithe* ſhould be ſettled upon his Daughter. Upon this Aſſurance the Marriage did proceed; and the Houſes in *Queenhithe* were covenanted to be ſettled for her Jointure, and to the Heirs of her Body; and this was mentioned in the Deed to be in full Satisfaction and Recompence of all her Thirds and Dower which ſhe might claim for herſelf or Children. The 2000 *l.* is paid, and the Marriage took Effect. Afterwards *J. Clarke* the Father buried his Wife, and married a ſecond Wife; before which ſecond Marriage, in Conſideration of a certain Portion to be paid, (400 *l.* of which was not paid at the Time this Bill was exhibited) he covenants with the Plaintiff to Jointure the

Copyholds upon his intended Wife; and to ſhew that he had a Power ſo to do, he produced the Settlement upon his Son's Wife, wherein was no Mention of the Copyholds. And to carry thoſe laſt Articles into Execution, the Plaintiff being Truſtee, preferred this Bill, and alledged, that the Surrender to *Clarke*'s Son was fraudulent. Lord Chan. ſaid, he knew not how the Law would adjudge of the Surrender, but he was of Opinion it ſtood clear of all Fraud, and was well deſigned for a Proviſion for the Son, who had merited ſuch Kindneſs from his dutiful Behaviour to his Father; and this is by the Father declared to be the Cauſe of the Surrender: And that what had been done in this Point every Father ought to do, in order to put it out of his Power to dock his Son of Maintenance when he comes to dote. But however (his Lordſhip ſaid) this Point is, the ſubſequent Agreement doth render the Son a valuable Purchaſer. The Caſe ſtands clear of the Statute of Frauds; for it was not neceſſary that that Part of the Agreement which relates to the Copyholds ſhould be reduced into Writing; for the Son then had a legal Eſtate in him. And this anſwereth the Clauſe in the Deed, which hath been made uſe of for to ſtrike this out of the Marriage Agreement; for when this Part of the Agreement was executed, what was more proper than ſuch a Clauſe? The Marriage muſt be underſtood to proceed both upon the Aſſurance of the Copyholds being ſettled upon the Son, and that Part of the Agreement compriſed in the Deed. The Bill was diſmiſſed with Coſts againſt *Clarke* the Son. It was then moved, that *J. Clarke* the Father might ſettle Lands upon his ſecond Wife adequate in Value to the Copyholds; and it was ordered, that the Maſter examine into the Value of the Copyholds, and ſee that ſuch Settlement is made. And that the 400 *l.* that remained unpaid of his Wife's Fortune ſhall be detained as Part until the Settlement was made. *Eaſt.* 8 *Ann. Heiſier* and *Clarke*, *MS. Rep.*

14. *A.* encourages the Courtſhip of his Son with *B.*'s Daughter, who promiſed by Letter to give her 500 *l.* if *A.* would ſettle 100 *l. per Ann.* on the Son, which *A.* refuſed; the Son and Daughter married privately, and after this Letter is written; then *A.* conſented and *B.* refuſed. On a Bill for Performance of this Agreement it was objected, that theſe Promiſes were within the Statute of Frauds, and that the Letter being after the Marriage ſhould not bind: But decreed *contra* by *Harcourt* Lord Keep. on the Circumſtances of the Father's Privity and Conſent to the Match and of the Marriage, by afterwards approving of it. That it was out of the Statute if no Letter, for the Agreement is admitted by the Anſwer; but this Caſe does not depend on parol Evidence or Admiſſions; for the Letter after Marriage, conſidering the Tranſactions before, is ſufficient. The Offer to ſettle 100 *l. per Ann.* ſhall be in Tail, with a Power to the Huſband to charge it with 500 *l.* for younger Children, being the Mother's Portion, and decreed accordingly. 1712. *Hodgſon* and *Hutchenſon*, *Viner's Abr.* Tit. *Contract and Agreement*, (H) *Ca.* 34.

15. The Court declared, and Counſel agreed, that if a Man bring a Bill for a ſpecifick Performance of a parol Agreement, (which is in no Part executed) ſetting forth the Subſtance of it, and Defendant by Anſwer confeſſes the Agreement, the Court may in ſuch Caſe decree an Execution notwithſtanding the Statute of Frauds, becauſe Defendant confeſſing the Agreement, there can be no Danger of Perjury from the Contrariety of Evidence, the only Miſchief that Statute intended

Prec. in Chan. 260. *Croyſton* and *Banes*, *Mich.* 1702. S. P.—— *Ibid.* 374. *Symondſon* and *Tweed*, *Mich.* 1713.—— *Gilb. Eq. Rep.* 35. S. P. and

C. *in totidem verbis.* —— *Vide Eq. Ca. Abr. p.* 16, 17, 19, 20.

tended to prevent; but in the principal Caſe the Defendant had not by his Anſwer confeſſed the Agreement charged in the Bill, which was only by Parol to ſettle ſome Lands and Houſes on the Plaintiff in Conſideration of his marrying Defendant's Daughter; ſo the Bill diſmiſſed. In all Caſes wherever Equity has decreed a ſpecifick Execution of a parol Agreement, yet the ſame had been ſupported and made out by Letters in Writing, and the particular Terms ſtipulated therein as the foundation for the Decree; otherwiſe the Court will never carry any ſuch Agreement into Execution. *Mich.* 10 *Ann. Anon. MS. Rep.*

His Honour built his Decree upon theſe Caſes; 1ſt, Where a parol Agreement was for a building Leaſe, and before it was reduced into Writing, the Leſſee began to build, and after differing on the Terms of the Leaſe the Leſſee brought a Bill, and the Leſſor inſiſted on the Statute of Frauds. The Lord Keep. diſmiſſed the Bill, but the Plaintiff was relieved *in Dom. Proc'*. And the ſecond was a Caſe in Lord *Jefferies*'s Time. *Ibid.*

16. *W.* leaſed an Houſe to *N.* for 11 Years, and was to allow 20 *l.* to be laid out in Repairs; the Agreement was reduced into Writing, and executed by both Parties; *N.* repaired the Houſe, and finding it to take a much greater Sum than the 20 *l.* told *W.* of it, and that he would nevertheleſs go on, and lay out more Money if he would enlarge the Term to 21 Years, or add 14, or as many as *N.* ſhould think fit. *W.* replied, that they would not fall out about that, and after declared that he would enlarge the Term, without mentioning any Term in certain. Maſter of the Rolls ſaid, that before the Statute written Agreements could not be controuled by a parol Agreement contrary to it, or altering it; but this is a new Agreement, and the laying out the Money is a Performance on one Part, and ought to be carried into Execution. *Mich.* 4 *Geo.* 1. *Viner's Abr.* Tit. *Contract and Agreement*, (H) *Ca.* 38.

17. *Where the Statute of Frauds has been uſed to cover a Fraud, the Court has always relieved.* The firſt Caſe in Lord *Nottingham's* Time, *where there was an abſolute Conveyance and a Defeaſance, which Defendant would not execute*, but inſiſted on the Statute, and it was overruled. Next in Lord *Jefferies*'s Time, where *putting the Party into Poſſeſſion was ſuch an Execution of the Agreement in Part as was good againſt a ſubſequent Purchaſer:* So where *one ſtands by and ſees the Party lay out his Money in building on the Defendant's Ground*, he was bound thereby. The Bill here was to *have a Leaſe according to Defendant's Promiſe, Plaintiff having laid out Money on the Premiſſes*; and Defendant inſiſts on the Statute, there being no Agreement in Writing, nor any certain Terms agreed upon; and ſays, what Plaintiff laid out was not on laſting Improvements; but admits Plaintiff built a Stable which coſt him 10 *l.* It was proved that the *Defendant told Plaintiff his Word was as good as his Bond, and promiſed the Plaintiff a Leaſe when he ſhould have renewed his own from his Landlord.* Lord Chan. ſaid, that Defendant is guilty of a Fraud, and ought to be puniſhed for it; and ſo decreed a Leaſe to Plaintiff, though the Terms were uncertain; it is the Plaintiff's Election for what Time he will hold it, and he doth elect to hold it during the Defendant's Term at the old Rent. Plaintiff to pay Coſts. *Mich.* 5 *Geo.* 1. *Anon. Viner's Abr.* Tit. *Contract and Agreement*, (H) *Ca.* 40.

1 *Vol. Abr. Eq. P.* 304. *Ca.* 10. S. C. but not S. P.

18. An Agreement though not in Writing being executed on one Part, and an *Enjoyment accordingly*, Equity won't deſtroy or avoid it ſo far as it has been already carried into Execution (*a*). Lord Chan. was

(*a*) Wherever a parol Agreement is *begun to be put in Execution*, and intended to be continued, there though there be no Writing, yet Equity will enforce the Execution thereof notwithſtanding the Statute of Frauds and Perjuries. *Per* Lord Chan. *Hil.* 6 *Ann. Gilb. Eq. Rep.* 4. *Vide Ibid.* 11.——The Foundation that Equity proceeds on in carrying Agreements into Execution *becauſe in Part performed*, (as it ſeems to me) is, that one Party would run away with the Benefit done by the other, unleſs the Court interpoſed.

was clearly of this Opinion. *Trin.* 1719. *Lockey* and *Lockey*, *Prec. in Chan.* 519.

19. *A.* agreed with the Defendant's Broker for 5000 *l. South-Sea* Stock, to be delivered about ten Days afterwards. The Broker according to Uſage made an Entry of this Agreement in his Pocket-Book; Stock being in the mean Time conſiderably riſen, the Defendant refuſed to tranſfer. On a Bill for a ſpecifick Performance of the Agreement, Defendant pleaded the Statute of Frauds and Perjuries. Lord Chan. ſeemed to be of Opinion that the Plea was good, and ſaid, that it had been ſo held in many other Caſes. But the Defendant having *barely pleaded the Statute*, without adding *that this Agreement was not reduced into Writing*, as he ought to have done, and ſo had not brought his Caſe within the Statute, the Plea was over-ruled. *Trin.* 1720. *Muſſell* and *Cooke*, *Prec. in Chan.* 533.

The Reporter ſays in this Caſe, mention was made of the Caſe of * *Scould* and *Butter* laſt Term, where on a Bill for a ſpecifick Performance of a Contract for *South-Sea* Stock, which *was reduced into Writing.* The Maſter of the Rolls decreed for the Plaintiff, but on an Appeal Lord Chan. reverſed the Decree, and the Party only to pay the Difference; and that to do otherwiſe might be the greateſt Hardſhip and Injuſtice in the *World*, as the ſudden Riſe of Stocks happened. *Ibid.* 534. * *Vide Cud* and *Rutter*, 1 *Will. Rep.* 570. which ſeems to be the ſame Caſe. See (A) *P. Ca.* See alſo *P. C.*

20. *A.* agrees with *B.* for the Purchaſe of nine Houſes, which were in Mortgage to *J. S.* and pays him a Guinea in Earneſt. *B.* writes a Note to *J. S.* to this Effect, "*Mr.* J. S. *pray deliver my* "*Writings to the Bearer, I having agreed to diſpoſe of them.*" *J. S.* refuſed to deliver the Writings unleſs all the Mortgage Money was paid him down; and afterwards bought the Houſes of *B.* himſelf. On a Bill for a ſpecifick Execution of this Agreement, the Queſtion was, whether the Letter or Note would bring the Agreement out of the Statute; (*for as to the Payment of the Guinea, that was agreed clearly to be of no Conſequence, (the Payment of Money being only binding in Caſes of Contracts for Goods.* Decreed that it would not (*a*); ſo the Bill was diſmiſſed, but *without Coſts*, for ſome *Fraud* in *B.* and *J. S.* to defeat *A.* of his Bargain. *Eaſter* 1721. *Seagood* and *Meale and Leonard*, *Prec. in Chan.* 560. *Note*; In this Caſe the Statute of Frauds and Perjuries was inſiſted upon by way of Anſwer.

(*a*) For the Agreement ought to have ſpecified the Terms thereof, which this did not though it was ſigned by the Party; for it mentions not the Sum that was to be paid, nor the Number of Houſes that were to be diſpoſed of, or to whom they were to be diſpoſed of, nor whether they were to be diſpoſed of by way of Sale or Aſſignment of Leaſe; and ſo all the Danger of Perjury, which the Statute was to provide againſt, would be let in to aſcertain this Agreement. *Per Cur'*, *Ibid.* 561.

21. If *A.* by Letter promiſes to give ſuch a Fortune with his Daughter to *B.* and *B.* marries the Daughter on the Encouragement of this Letter; this is ſufficient to bring the Agreement out of the Statute of Frauds, and *B.* ſhall recover, becauſe the Agreement is executed on his Part as far as it can be, and can never be undone after. Said *per Cur'*, *Ibid.*

22. So where a Man on Promiſe of a Leaſe to be made to him, *lays out Money on Improvements*, he ſhall oblige the Leſſor afterwards to execute the Leaſe, becauſe it was executed on the Part of the Leſſee; beſides, that the *Leſſor ſhall not take Advantage of his own Fraud to run away with the Improvements made by another.* Said *per Cur'*, in the above Caſe.

Rule; Equity looks upon that as done which ought to be done.

23. *But if no ſuch Expence had been on the Leſſee's Part, a bare Promiſe of the Leaſe, though accompanied with Poſſeſſion, would not have been ſufficient to have obliged the Leſſor to execute a Leaſe*; as where a Leſſee by Parol agreed to take a Leaſe for a Term of Years certain, and continued in Poſſeſſion on the Credit thereof; yet there being no Writing to make out this Agreement, it is directly within

the Statute. And ſo held by the Maſter of the Rolls in the Caſe of *Smith* and *Turner*, *Mich.* 1720. Said *per Cur'* in the Caſe of *Seagood* and *Meale & al'*, *Eaſter* 1721. *Prec. in Chan.* 561.

His Lordſhip ſaid, unleſs in ſome particular Caſes where there has been *an Execution of the Contract by entring upon and improving the Premiſſes, the Party's ſigning the Agreement is abſolutely neceſſary for the compleating of it; and to put a different Conſtruction upon the Act would be to repeal it.*

24. *A.* agreed with *B.* to ſell him an Houſe, and by their Conſent *C.* was employed to make a Draught of the Conveyance. *B. made ſeveral Alterations therein with his own Hand*, and delivered it back to *C.* to be engroſſed; *A.* executed the Writing, and got the Conveyance regiſtred. On a Bill to compel *B.* to pay the Purchaſe Money, as to ſuch Part of the Bill as ſought to compel him to accept the Purchaſe and pay the Money, *&c.* *B.* pleaded the Statute of Frauds, and ſaid, "That neither he nor any by him lawfully authoriſed ſigned any Writing, Agreement, Memorandum or Note, in "Relation to this Purchaſe, or whereby he any ways agreed thereto." Plea allowed. Lord *Macclesfield* C. *Mich.* 1721. *Hawkins* and *Holmes*, 1 *Will. Rep.* 770.——The Caſe of *Ithel* v. *Potter*, determined at the Rolls, *Trin.* 1719. on the very S. P. was cited.

That *A.* having regiſtred the Conveyance, (which looks artful on his Side) may put a Difficulty on him how to get back the Eſtate, but it being his own doing, and with a Deſign to faſten it on *B.* he muſt thank himſelf for it. The Reporter ſays, that his Lordſhip moreover laid Streſs on what *B.* mentioned in the anſwering Part, wherein it was ſworn that it had been agreed between him and *A.* that he (*B.*) might be off at any Time on paying the Charge of the Writings, which he ſaid he was willing to do. *Ibid.* 771, 772.

Vide P. C. where this P. is more fully ſtated.

25. A Letter wrote from a Father to his Daughter, by which he agrees to give her 3000 *l.* Portion, and this Letter not ſhewn to the Man who afterwards married the Daughter; this does not take the Promiſe out of the Statute of Frauds. *Trin.* 1722. *Ayliffe* and *Tracey*, 2 *Will. Rep.* 65. 2 *Mod. Ca. Law and Eq.* 3. S. C.

26. *H.* enters into a Contract in Writing with Plaintiff for the Purchaſe of a College Leaſe; Plaintiff agrees to renew the Leaſe in *H.*'s Name, or ſuch Perſon as he ſhould appoint. *H.* directs Plaintiff to renew the Leaſe in *C.*'s Name, and declares he bought it for him as his Agent. Plaintiff brings a Bill againſt both for the Reſidue of the Purchaſe Money. The Decree at the Rolls was againſt both Defendants to pay the Money, and in Caſe *H.* ſhould pay it, then he to be at Liberty to proſecute the Decree in Plaintiff's Name againſt Defendant *C.* the Principal. *C.* appeals, for that he did not give any Authority in Writing to *H.* to buy it for him, and therefore by the Statute of Frauds he ought not to be bound by the Contract. *Macclesfield* C. affirmed the Decree, for that the Authority to treat or buy for him may be good without Writing, though the Contract itſelf muſt be in Writing by the Statute of Frauds. *Mich.* 10 *Geo.* 1. *Waller* and *Hendon and Cox*, *Viner's Abr.* Tit. *Contract and Agreement*, (H) *Ca.* 45.

(*a*) This Queſtion firſt aroſe in the Caſe of *Pickering* and *Appleby*, *Mich.* 7 *Geo.* 1. which was an Action brought on an *Aſſumpſit* for 580 *l.* for ten Shares in the Stock of the Governors and Company of the Copper Mines in *England*, transferred and ſold by *Pickering* to *Appleby*; on the Trial of which *King* C. J. ſent this Point to be argued in *C. B.* and afterwards it was argued at *Serjeants-Inn* before all the Judges of *England*, but they being divided in Opinion, it was adjourned. *Comyns's Rep.* 354.——But ſee the following Caſe of *Crull* and *Dobſon*.

27. All the Judges of *England* being equally divided on this Queſtion (*a*), Whether a Contract for Stock be within the Statute of Frauds, which mentions *Goods, Wares and Merchandizes*, ſo as to require the Contract to be in Writing, or Earneſt Money to be paid? Therefore *King* C. would not determine this Point on a Demurrer, for a Caſe may be attended with ſuch Circumſtances as may make it juſt to decree a ſpecifick Performance of the Party's own Agreement, or at leaſt to pay the Difference. *Mich.* 1725. 2 *Will. Rep.* 308.——

It

It was ſaid *arg'*, that Lord *Cowper* had determined a Contract for Stock to be within the Statute of Frauds, and that if it exceeded 10 *l.* the ſame ought to be in Writing, in regard Stocks are Goods and Merchandizes within that Statute. *Ibid.* 307.

28. Defendant was a Broker, and had 5000 *l.* *South-Sea* Stock of the Plaintiff's in his Hands, who told him he would ſell when Stock came to 200 *l.* Defendant, when the Stock was riſen beyond that Price, told him he had ſold 1000 *l.* of it to *A.* at 200 *l.* *per Cent.* and 500 *l.* to *B.* who was his Partner, and the Reſt he had taken himſelf at that Price; and Entries were made in his Books accordingly, but in ſuch a Manner, that it looked as if done after the Riſe of Stock, and only deſigned as an Evidence in Caſe of a Diſpute. The Plaintiff inſiſted, that at the Time of the pretended Sale Stock was at 300 *l.* and inſiſts on that Price; the Affair was left to Arbitrators, and 4000 *l.* depoſited as a Security for ſo much as ſhould be due. The Arbitrators did nothing; ſo a Decree was for the 4000 *l.* againſt which Defendant petitions. The Court was of Opinion, it was a *fraudulent* Tranſaction; and that on the Sale, if ſuch there was, he ſhould have taken Earneſt; for it has been determined here, that ſuch a *Bargain is within the Statute of Frauds*, and *without Earneſt*, only *Nudum pactum.* The Decree ſhould have been to account for the 5000 *l.* and the Produce of it; but as the Plaintiff acquieſces under the Decree, and it is reheard on Defendant's Petition, the Court would do no more than affirm the Decree. *July* 8, 1725. *Crull* and *Dodſon*, *Sel. Ca. in Chan.* 41.

Viner's Abr. Tit. *Contract and Agreement* (C) *Ca.* 18. S. C. ſays, Lord *Macclesfield* decreed the Depoſit to be delivered to Plaintiff with Coſts; and that the Decree was reheard *July* 8, 1725. before *King* C. and affirmed. ——*Vide* (A) *P. C.* and alſo *P. C.*

(H) Voluntary Agreements, concerning them.

1. AN Huſband who had made no Proviſion for his Wife, agrees that her Fortune, which was in Truſtees Hands, ſhould be laid out in a Purchaſe of Lands to be ſettled on them and the Heirs of their Bodies. A Bill brought by a Creditor of the Huſband to ſet aſide this Agreement, (for that it was after Marriage, and voluntary, and ſo ought not to prevent him of his *Debt*) was diſmiſſed, but *without Coſts.* For *per Cur'*, If the Huſband himſelf had exhibited a Bill againſt the Truſtees for the Portion, it would not have been decreed to him without making ſome ſuch Settlement. *Eaſter* 1691. *Moor* and *Rycault*, *Prec. in Chan.* 22.

2. *A.* makes a voluntary Settlement of an Eſtate in *Ireland* of about 800 *l.* *per Ann.* (after his own Death) on *B.* and the Heirs of his Body. *B.* afterwards agrees that *A.* ſhall have this Eſtate again, granting him a Rent-charge of 600 *l.* *per Ann.* out of the ſame, but never delivered up the Settlement Deed, nor made any Conveyance of it. Then *A.* for 4000 *l.* purchaſed of, and *B.* releaſed, 300 *l.* *per Ann.* of this Annuity. Afterwards *B.* without any Conſideration, on *A.*'s Application releaſed the other 300 *l.* *per Ann.* Then *A.* dies, and his Deviſee brought his Bill to have a Reconveyance of this Eſtate and the Settlement delivered up; which was decreed accordingly by Lord Keeper; for a *voluntary Settlement may be ſurrendred voluntarily, and ſuch Surrender may be aided by a Court of Equity.* *Hil* 1696. *Wentworth* and *Deverginy*, *Prec. in Chan.* 69.

3. A ſecond Marriage Settlement is recited to be made in Conſideration that the Wife had parted with the former Settlement, which appeared to be made after the Marriage; but was recited to be in Conſideration of a Marriage Portion ſecured, but no Proof of any previous Agree-

ment

ment for ſuch Settlement; yet the Court preſumed it, and ſo the ſecond not voluntary againſt Bond-Creditors. *Mich.* 1699. *Anon. Prec. in Chan.* 101.

4. Equity will never help a defective Conveyance without Conſideration; as if a Man *voluntarily* makes a Conveyance to another of his Eſtate, and it proves defective; *ſecus* if it be for Money, Marriage Jointure, *&c.* And whereas it was affirmed at the Bar that Equity would *compel an Execution of a Truſt declared expreſly, though without Conſideration*; the Lord Keeper anſwered, that he did not think ſo truly. *Mich.* 13 *W.* 3. *Anon. Ca. in B. R. Temp. W.* 3. 603.

Vide the Caſe of *Clavering* and *Clavering*, 1 *Vol. Eq. Ca. Abr. P.* 24. *Ca.* 6.

5. *A.* on a Quarrel with his eldeſt Son made a Settlement of 100 *l.* a Year on his Wife, in Augmentation of her Jointure; and after being reconciled to his Son, *cancelled the Deed*; and ſo it was *found at his Death.* On a Trial at Law, the *Deed being proved to be executed*, was adjudged *good though cancelled*; and the Son, on a Bill brought in Chancery, was diſmiſſed. By Lord *Somers, Hil.* 1704. Cited by Lord Keeper *Wright* as Lady *Hudſon*'s Caſe, *Prec. in Chan.* 235.

Gilb. Eq. Rep. 37. S. C. *in totidem verbis.*

6. A Settlement voluntary at firſt may become good by Matter *ex poſt facto*; as where a Father going Preſident to the Bay of *Bengal*, does before his Voyage convey Land for raiſing a Portion for his Daughter, and *A.* afterwards marries her in Confidence of this Settlement. *Eaſter* 1714. *Eaſt-India Company* and *Clavel, Prec. in Chan.* 379, 380.

S. C. at the Rolls, *Eaſter* 4 *Geo.* 1. The Maſter held that the Plaintiff ought to have Relief tho' claiming under a voluntary Conveyance, for that the ſuppreſſing and deſtroying the Deed was a Fraud, tho' done by the Grantor herſelf, and tho' the Defendant was not aiding or abetting to it; and that a *Volunteer ſhall be aided in Equity againſt a Fraud.* And decreed that the Plaintiff be quieted in the Poſſeſſion, and the Title Deeds delivered to him. *Viner's Abr.* Tit. *Voluntary Conveyance,* (C) *in a Note to Ca.* 9. *as from a MS. Caſe.*

7. *A.* makes a voluntary Settlement on her Nephew *B.* and keeps the ſame in her own Poſſeſſion; but the Settlement was made without any Power of Revocation; and ſometime after the Nephew's Father by Stealth, and without *A.*'s Privity, got at this Settlement; and having an atteſted Copy thereof, put up the Deeds (there being two Parts) where they were before placed by *A.* and *A.* burns theſe Deeds, and ſettles the Eſtate on *C.* another Nephew. *B.* brought a Bill to eſtabliſh the firſt Settlement, which was diſmiſſed *with Coſts*; and after *C.* claiming under the After-Settlement, brought a Bill to have the atteſted Copy delivered up; and it was decreed accordingly, becauſe it was *indirectly* gained. *Mich.* 1719. *Naldred* and *Gilham*, 1 *Will. Rep.* 577.

8. On a Marriage Agreement, the Huſband being under Age, the Wife's Father gave *Bond to pay* 1500 l. *on his making a ſuitable Jointure-Settlement on the Wife, without taking any Notice whatſoever of the Iſſue.* Afterwards on Payment of the 1500 *l.* 147 *l. per Ann.* Lands were ſettled in a ſtrict Settlement. The Maſter of the Rolls held clearly, that the Settlement was good, and not voluntary or fraudulent againſt *Bond-Creditors*, being adequate to the Wife's Fortune; and that the Words of the Bond would bear ſuch a Conſtruction; and that a *Jointure-Settlement muſt be intended in the common Form, to the Iſſue, and a Jointure for the Wife.* *Mich.* 1719. *Brunſden* and *Stratton, Prec. in Chan.* 520.

9. If a Man voluntarily and without any Conſideration covenant to lay out Money in a Purchaſe of Land to be ſettled on him and his Heirs, Equity will compel the Execution of ſuch Contract though merely voluntary; for in *all Caſes where it is a meaſuring Caſt betwixt an Executor and an Heir, the latter ſhall in Equity have the*

Preference. Lord Chan. *Macclesfield*'s Opinion in the Case of *Edwards* and *Countess Dowager of Warwick*, *Trin.* 1723. 2 *Will. Rep.* 176.

10. *A.* having a considerable Jointure, and a real Estate of her own purchasing, and also 1000 *l. South-Sea* Stock, conveys Part of the real Estate to Trustees to the Use of herself during her Widowhood, Remainder to *B.* her second Son in Tail, Remainder over, and covenanted to transfer the *South-Sea* Stock to Trustees for herself during her Widowhood, and afterwards to her said second Son; but the Stock was never transferred. *A.* delivered Duplicates of these Deeds into her Attorney's Hands, with a Charge not to part with them; and often declared she had done this for the Sake of her Children. Afterwards *A.* marries the Defendant *King*; whereupon the second Son brought a Bill to have these Lands and Stock and mesne Profits since the Marriage, and the Deeds, to be delivered to him. The Lady swore she never gave Notice to *King* of these Writings, and *King* swore that he had no Notice of any of them before his Marriage with her, but on the contrary, that *A.* before her Marriage delivered to him a Particular of her Estate, wherein were comprised these Premisses and *South-Sea* Stock, which Particular was proved to be *A.*'s Hand Writing, but not to be delivered to *King* before the Marriage. Lord Chan. *King* said, as to the Widow, if she had kept these Deeds in her own Hands, and they had been got thence, or out of the Hands of her Agent, he thought she should not be bound by them; but there being Duplicates, and Evidence that she declared her Intention to be to put this out of her Power, he said he should make no Difficulty to decree against her, were she the Survivor and the only Defendant; but as she was in Possession, and visible Owner, it is hard to decree against *King*, who had no Notice of the Deeds; and that he inclined to give no Relief. Afterwards upon the Plaintiff's praying no Decree against his Mother or *King*, but only as to the Defendants who had the Deeds, that they might be delivered to him, his Lordship decreed accordingly; and that the Plaintiff might sue in the Trustee's Name, *without Prejudice to any Relief that* King *might have on his Bill*; and the Bill to be dismissed as to the Mother and *King* without Costs. *Trin.* 1726. *Cotton* and *King*, 2 *Will. Rep.* 358.

The Decree being without Prejudice to *King*, he now prefers his Bill in order to set aside these Settlements, and makes his Lady a Party; but it being now proved that these *voluntary* Settlements were made by the Lady before her Marriage Treaty with *King* was begun, and in a publick Manner; that she herself desired they might be publick; that she made an Entertainment for several of her Tenants, whereat being present, she acquainted them her younger Son *B.* was to be their Landlord in Case she married again; and if she married, her second Husband should marry her for Love. And it appearing that she had reserved to herself out of these Settlements her original Jointure made by her former Husband, (being 420 *l. per Ann.* Rent-charge) that she had nine younger Children by her former Husband, who at best were very slenderly provided for; and further, that *King* when he married her was in very mean Circumstances, an Half pay Lieutenant in *Ireland*, had two Sons by a former Wife; and that he had a considerable Sum of Money with this Lady, as she had been Executrix and Residuary Legatee of her former Husband; so that it was evident there had been *no Fraud or Imposition on* King, *who did not so much as pretend he could make any Settlement* or Jointure on his Lady. For these Reasons Lord Chan. *King* dismissed Plaintiff's Bill, as to that Part of it which sought to set aside any of the Settlements made by the Wife in Trust, &c. and as to the *South-Sea* Stock, though there was no actual Assignment by Deed, but *only a Covenant to transfer*, yet this was such an Assignment as would bind *King*, for it was not like a Bond from her to pay Money, since here *King* was to pay none, nor to part with any Thing which was his, it was only a Provision made by her before her Marriage Treaty with the Plaintiff, that in Case of her Marriage such a Part of her Estate should go to her Children, which was but reasonable. *Trin.* 1732. *King* and *Cotton*, 2 *Will. Rep.* (*a*) 606. *pl.* 190.——(*a*) There is a Mistake in the Numbring of the Pages of 2 *Will. Rep.* for Page 606. should be Page 674.

11. *It has been held, that the Consideration for the precedent Limitations in a Marriage Settlement has been applied even to the subsequent ones*; as where, in Consideration of a Marriage and Portion, Land has been settled on the Husband for Life, and then to the Wife for Life, Remainder to the Children, with Remainder to a Brother; these Considerations have extended to the Brother; and the *Reason* is, *because it may be very well intended that the Husband or his Parents would not have come into this Settlement unless all the Parties thereto*

See the Case of *Osgood* and *Strode*, *P. C.*

had agreed to the Limitation to the Brother. Per Lord *Macclesfield. Vide* 2 *Will. Rep.* 175.

12. *Edward Parry* covenanted to convey all his Lands (Part being in Mortgage) to himself and his Wife for Life, and to the Heirs of the Marriage, Remainder to *Edward Parry*, Plaintiff's Father, in Tail Male, who was a Stranger both in Blood and Consideration, and dying without Issue, devised the mortgaged Premisses to Defendant. Plaintiff brought his Bill to have the Articles executed in Favour of him, but it was dismissed. *Parry* and *Hughes in Scacc', East.* 4 *G.* 2. *MS. Rep.* But *otherwise if such Agreement had been in Favour of Children, Creditors, or such other good Considerations*; for though the making of the Agreement was *voluntary*, yet the *Cause of the Motive inducing to it was valuable and good. Ibid.*——So in Favour of a *Purchaser*, the *Seller* after Purchase being considered only as a *Trustee for the Purchaser. Ibid.*

13. The Father on his Marriage had articled to settle his whole Estate on that Marriage, but neglecting so to do, when the eldest Son of that Marriage attained his full Age, the Father without giving him Notice of the Articles, and with Threats to allow him nothing unless he complied, and on Promise to make an absolute Settlement on him in Case he would comply, prevailed on him to join in making a Settlement on the younger Children, and thereby to give the Father a Power to make a Jointure on another Wife; the Father afterwards gives Bond to make such Jointure, and marries. This Bond was set aside as against the Heirs, and the first Articles established, and the second Wife put to seek Satisfaction of her Bond out of the personal Estate. *Ivers* and *Ivers in Dom' Proc'* 1734-5. *Grounds and Rudiments of Law and Eq.* 19. *Ca.* 17.

14. The Father makes his Son of the first Marriage agree to a Provision for the Father's second Wife and their Children, in his the Son's own Wrong, and who was at the Time of the Agreement ignorant of his Right, and threatened by his Father to be kept at home bare, and without any Allowance, if he refused; but if he complied, he was to be allowed 260 *l.* a Year for his Maintenance, *&c.* The Son was relieved, and the Agreement set aside. *Scrope & Ux'* and *Offley*, 24 *May* 1735. *in Dom' Proc', Grounds and Rudiments of Law and Eq.* 19. *Ca* 18.

(I) Agreements by whom to be performed; and where the Person or Estate will be made liable to a Covenant or Agreement.

When *A.* was going to be married, his Wife's Uncle promised that he would settle his Freeholds and Copyhold upon his Wife and her Issue; and though this was by Parol only, yet this Court decreed an Execution of it, being in Consideration of Marriage. Cited by *Cur'* as Sir *John Otway*'s Case. *Ibid.*——And in the Case of *Stephens* and *Baily*, where Tenant *pur auter vie* to him and his Heirs articled for a Sale, and died; although this is such an *Estate as is not Assets to the Heir*, yet he was decreed to execute this Agreement. Cited *ibid.*

1. *A.* Articled for the Sale of Land, which he covenanted to convey, but did not covenant for him and his Heirs. Held that *A.*'s Heir shall be bound to perform this Agreement, for as much as *A.* after sealing of the Articles, was in Nature of a Trustee for the Plaintiff of those Lands; which Trust with the Lands descended to the Heir; and decreed *accord'*, *Trin.* 1694. *Gell* and *Vermedun, in Canc.* 2 *Freem. Rep.* 199.

2. A Steward has a general Authority to make Contracts with the Tenants, &c. but this will not bind the Lord without his Conſent and Approbation, or unleſs Part of the Bargain is actually executed. *Per* Lord Chan. *Cowper*, *Eaſt.* 3 *G.* 1. *Viner's Abr.* Tit. *Contract and Agreement*, (H) *Ca.* 35.

3. Marriage Articles were, *that within a Month after Marriage* the Huſband would *ſurrender a Copyhold to the Wife for Life, Remainder to the Iſſue, Remainder to the Heirs of the Wife, and if he ſhould neglect* or refuſe to make ſuch Surrender, *then he would leave the Wife* 500 l. *at his Death.* No Surrender is made; the *Huſband dies after the Month without Aſſets. Parker* C. *decreed that the Heir at Law ſhould ſurrender* to the *Plaintiff* and her Heirs, and till ſurrendered he was a Truſtee for her. Here was no Election; if done after the Month the 500 *l.* was not to be paid; thoſe are two expreſs Covenants, and it is not put in the Alternative, and here is no Purchaſer to be defeated; it is a Charge in Equity. *Mich.* 5 *Geo.* 1. *Wood* and *Peſey*, *Viner's Abr.* Tit. *Contract and Agreement*, (O) *Ca.* 36.

4. *A.* being ſeiſed of Lands in Right of his Wife, demiſed the ſame for 21 Years, and covenanted for *himſelf and his Heirs*, and for *his Wife and her Heirs*, to *make a new Leaſe.* If *A.* ſells the Reverſion to *B.* having Notice of the Covenant, the Eſtate of *B.* is bound, though at *Law ſuch a Covenant runs* not *with the Land. Wengood* and *Lefebury*, *MS. Rep.* Q. What Term and Year.

(K) Concerning unreaſonable Agreements; and in What Caſes Equity will give Relief on Covenants and Agreements.

1. THE Teſtator had by his Will deviſed (*inter alia*) ſeveral Lands to his Wife, Part of which were Copyhold, and were ſurrendred to the Uſe of his Will, and others were not; the Wife was Executrix, and married the Plaintiff, and they for a *ſmall Conſideration* got the Defendant and his Wife (who was Heir at Law to the Teſtator) to enter into Articles for the Conveying of theſe Lands, and making good the Teſtator's Will. It appeared they were not well appriſed of their Intereſt when they entred into the Articles, and there was ſome Art uſed to bring them to it. The Maſter of the Rolls would not decree the Articles of a Feme Covert for conveying her Inheritance to be ſpecifically performed, and left the Plaintiffs to their Remedy at (*a*) Law. Lord Keep. affirmed the Decree, but went upon the Fraud, and did not ſeem to take Notice of its being the Inheritance of a Feme Covert. *Trin.* 1697. *Preſton & Ux'* and *Waſey & Ux'*, *Prec. in Chan.* 76.

(*a*) A Court of Equity in Caſe of Articles has a diſcretionary Power to carry them into Execution, or not; and if it appears they are unfairly obtained, though not to ſuch a Degree as to ſet them aſide, yet Equity will not order a Performance, but will leave the Plaintiff to his Remedy at Law; but if the Party who obtained ſuch Articles has been in Poſſeſſion of the Eſtate, (if the Articles are for the Purchaſe of an Eſtate) and upon the Proſpect of having them performed he has improved the Eſtate, he will be allowed for ſuch laſting Improvements, on conſenting to deliver up the Articles, and to account for the Profits; otherwiſe if he goes on at Law (and fails there) he muſt not expect it. Said *per* Lord *Talbot* in the Caſe of *Savage* and *Taylor*, *Hil.* 1736. *Ca. in Eq. Temp. Talbot* 234, 236. *Rules*; Equity will not carry unreaſonable Bargains into Execution. *Vide* Caſes before the Houſe of Lords, *Brain* and *Wooley*, 9 *Feb.* 1721. *Carol* and *Chamberlyn*, 14 *July* 1721. *Tap* and *Stanhope*, 24 *March* 1720. Nor where a Perſon of a weak Underſtanding is drawn into it. *Vide* ſaid Caſe of *Carol* and *Chamberlyn*, *Grounds and Rudiments of Law and Eq.* 19. *Caſes* 8. & 9.

2. *A.* ſells an Eſtate to *B.* with general Covenants againſt Incumbrances, and a particular one againſt his Wife's Dower. During the Life of *A.* and his Wife *B.* articles to ſell this Eſtate to Defendant; and by the Articles it was agreed that the Defendant ſhould retain 400 *l.* of the Purchaſe Money in his Hands for two Years without Intereſt; and if in that Time *A.*'s Wife releaſed her Dower, the Defendant to pay 400 *l.* elſe to retain it abſolutely. *A.* dies; his Widow did not releaſe her Dower within two Years, but brought her Writ of Dower, but died before a Recovery of it. The Bill was to have the 400 *l.* paid; but Relief denied. *Per* Lord Chan. *Mich.* 1699. *Small* and *Fitzwilliams*, *Prec. in Chan.* 102.

For Defendant it was ſaid, (and Lord Chan. was of the ſame Opinion) that this 400 *l.* is not in Nature of a Penalty, but the Terms of the Agreement and the Meaſure of the Satisfaction for the contingent Incumbrance of Dower; and the Court would not have relieved on her Releaſe if after two Years, much leſs here, where ſhe was ſo far from releaſing that ſhe brought her Writ of Dower; and if ſhe had recovered it, and lived ſeveral Years, the Defendant could have had only the 400 *l.* and could not have been permitted, at leaſt in Equity, as Aſſignee of *B.* to ſue the Covenant of *A.* againſt his own Agreement in Writing, which took Notice of the Dower, and this Covenant and Agreement to retain the 400 *l.* as a Recompence for it; and as he run the Hazard of her living, he ought now to have the Advantage of her dying. *Ibid.*

Here have been ſolemn Agreements, which ought not ſlightly to be got over; but however, if the Defendant has his Money, Intereſt and Coſts, he will have no Reaſon to complain of having ſuffered; on the contrary it would be a very great Hardſhip on the Plaintiff to loſe all the Money which he paid; *Lapſe of Time in Payment may be recompenſed with Intereſt and Coſts*, and theſe Agreements were all intended only as a Security for Payment of the Money, which End is anſwered by the Decree. In 1720. when the Money was to have been paid, there was a great Scarcity of Money; alſo at that Time Defendant's Father was dead, which was the Act of God, and his Executors not acting, it was ſome Time before the Defendant took out Adminiſtration, with the Will annexed, of his Father, which was the Default of the Party; ſo that the Plaintiff's Payment of the Money at the exact Time was diſpenſed with. Said *per* Lord Chan. *Ibid.* 67 & 68.

3. *A.* articles to buy Land, and pays Part of the Purchaſe Money; afterwards he enters into ſeveral Orders of Court to pay the Reſidue by ſuch a Day, and in Default thereof to give up the Articles, and loſe what he had before paid; but not having complied with theſe Orders, he now brings his Bill to have the Purchaſe compleated, on Payment of what was due with Intereſt, and to be relieved againſt theſe Orders. Decreed accordingly, on Payment of Principal, Intereſt and Coſts. *Per* Lord Chan. *Trin.* 1722. *Vernon* and *Stephens*, 2 *Will. Rep.* 66.

4. Upon a Conteſt between *M.* and *T.* (who had a joint undivided Intereſt in an Eſtate, and who had agreed to ſet a Price upon each the other's Moiety) concerning the Meaning of their Articles in Writing, by which it was declared that *T.* ſhould ſet the Price, and that upon Payment of ſuch Price, together with the Repayment of 600 *l.* and Intereſt paid by *T.* to *H.* he was to convey. *T.* ſets 700 *l.* for his Right in Writing, and *M.* accepts thereof; then *M.* prefers a Bill to have the Agreement performed according to the Parties Meaning. *T.* inſiſts that he was to have the 700 *l.* beſides the 600 *l.* and Intereſt; but *M.* ſays, that *T.* at the Contract valued his Half but in 700 *l.* (and the Whole in 1400 *l.*) and that it was the Intent of all Parties that the 600 *l.* ſhould be included in the 700 *l.* and not be taken as two different Sums. Lord Chan. diſmiſſed the Bill, it appearing that as the Agreement was made in Writing, it was unequal and againſt Reaſon; for the 600 *l.* paid by *T.* was towards a Mortgage to *H.* and *M.* had paid towards the ſame about 530 *l.* which was 70 *l.* ſhort of *T.*'s Payment; and though *M.* by Anſwer offered to let his Part go on Payment of 700 *l.* including 600 *l.* paid, yet the other had 70 *l.* Advantage, and ſo unequal and unjuſt in *T.* to have 1300 *l.* for his Moiety, which made the Eſtate 2600 *l.* in Value; but he excuſed the Coſts on Account of an impertinent Examination on *M.*'s

Part. *Mich.* 8 G. 1. *Triſtam* and *Melhuiſh*, *Viner's Abr.* Tit. *Contract and Agreement*, (P) *Ca.* 10.

5. The Bill was to be relieved againſt a Contract in Writing for the Sale of eleven Shares of the *Luſtring* Company, at 58 *l.* a Share, with the 10 *l. per Cent.* which the Company had called in, and which the Defendant the Seller had agreed to pay, the Money to be paid on the next opening of the Books. Afterwards a *Scire Facias* iſſued to repeal the Patent granted to the Company, and at the ſame Time a Proclamation was publiſhed to forbid Proceedings in Transfers; and by the *Stat.* 6 *Geo.* 1. *cap.* 8. it was made a *Præmunire* to have any Dealings with thoſe Bubbles. The Company remitted the Call of 10 *l. per Cent.* and in Lieu thereof accepted of 2 *l. per Cent.* The Contract was made in 1720. and the Company never afterwards opened their Books, nor were they ever likely ſo to do. The Plaintiff was relieved; for the Maſter of the Rolls ſaid, it is againſt natural Juſtice that any one ſhould pay for a Bargain which he cannot have; there ought to be *quid pro quo*; but in this Caſe the Defendant has ſold the Plaintiff a Bubble or Moonſhine. The Seller in this Caſe is the chief Actor, he went to Market with the Bubble; and ſince no Transfer can be made, and Defendant having recovered at Law on theſe Articles, a perpetual Injunction was granted, and the Defendant, at the Plaintiff's Charge, to enter Satisfaction on the Judgment. *Eaſter* 1724. *Stent* and *Bailis*, 2 *Will. Rep.* 217.

Afterwards in *Mich.* Term 1725. on a Rehearing before Lord Chan. *King*, the Plaintiff inſiſted that it was indeed very reaſonable he ſhould run the Riſque of the Falling of the Stock, were it to fall ever ſo low; but tho' it were fallen, yet ought he ſtill to have ſome Stock for his Money. On the other ſide it was ſaid, that the Plaintiff and Defendant muſt both be intended to know what they were trafficking in, and the laſt Agreement between both Parties being that the Defendant ſhould have his Money in all Events, whether the Books opened or not; and ſince there was no Fraud to be imputed to the Defendant, who had himſelf been a fair Purchaſer of this Stock, and not the firſt Projector or Inventor, the Loſs ought to reſt where the Law laid it; and each Side having equal Equity, there could be no room for the Court to interpoſe: But his Lordſhip ſaid, he could not divide the Loſs, but would recommend it to both Parties to treat together, and ſhare the ſame; and for that Purpoſe a Day was given to the Parties, who (as the Reporter ſays, he heard) agreed the Matter. *Ibid.* 221.

6. If a Man buys an Houſe, and before ſuch Time as by the Articles he is to pay for the ſame the Houſe is burnt down by Caſualty of Fire, he ſhall not be bound in Equity to pay the Money. Said *per* his Honour in the Caſe of *Stent* and *Bailis*, 2 *Will. Rep.* 220.

7. *A.* granted to *B.* a Leaſe of Lands for 99 Years, determinable on the Death of three Lives; which Leaſe was granted upon a Surrender of an old Leaſe of the ſame Lands to *A.* and was to be *purſuant to the Covenants in the old Leaſe*, one of which was, that *upon the Death of any of the three Lives, the Leſſee if willing might ſurrender the old Leaſe; and thereupon* A. *upon Payment of an Heriot and* 8 *l. was to grant a new Leaſe for three Lives*, &c. But in this *new Leaſe* the *Covenant was, that* B. *on the Death of any of the three Lives would abſolutely ſurrender the ſame, and pay an Heriot and* 8 l. and one of the Lives being now dead, and *B.* refuſing to ſurrender this Leaſe and renew it, upon Payment of the ſaid Heriot and Fine, the Defendant brought an Ejectment, and *B.* exhibited this Bill, and got an Injunction, the End of which was to be relieved againſt the *Covenant in the new Leaſe.* It appeared that *A.* had ſo ſettled his Eſtate that the now Defendant was only Tenant for Life, and by Conſequence if he ſhould ſurrender the Leaſe, the Defendant had no Power to grant a new Leaſe for three Lives. And the Difference between the old Leaſe and the new was proved. Decreed *per* Lord Chan. that ſince the Plaintiff was a Purchaſer of this Leaſe (as every Leſſee is) the ſubſequent Settlement made by *A.* by which the Defendant is made Tenant for Life, ſhould not prejudice the Plaintiff, nor forejudge him of the Benefit of any Covenant in his Leaſe; therefore

there is no Reaſon to excuſe the Plaintiff for Non-performance of the Covenant on his Part, becauſe the Defendant is to all Intents capable to perform that Covenant on his Part. But his Lordſhip ſaid, it is clear that *A.* himſelf (who drew the new Leaſe) did draw it in a different Manner from the old one, which ſhould have been the Standard to guide him, and that it was drawn for his own Advantage, but in Equity it ſhall be taken as if it had ſquared with the old Leaſe; ſo that if the *Leſſee is not willing to renew*, he ſhall be quieted in his Poſſeſſion under the new Leaſe, as if he held by the old Leaſe. *Mich.* 10 *Geo.* 1. *Aſhton* and *Bretland*, 2 *Mod. Ca. in Law and Eq.* 58.

8. Leſſee for Years covenants not to alien without Licence of the Leſſor, under Penalty of forfeiting the Leaſe; he doth afterwards alien without Licence, Equity will not relieve him; for *per Cur'*, where a Man makes a Leaſe for Life or Years upon a Condition of Re-entry for a Forfeiture, or that the Leaſe ſhall be void if the Leſſee aſſigns or aliens without Licence, and afterwards the Leſſee doth aſſign it without Licence; this is a Forfeiture, and ſuch a Forfeiture againſt which Equity cannot relieve, *becauſe it is unknow what will be the Meaſure of the Damages* ; for *Equity never relieves but in ſuch Caſes where it can give ſome Compenſation in Damages, and where there is ſome Rule to be the Meaſure of ſuch Damages, to avoid being arbitrary. Mich.* 11 *Geo.* 1. *Wafer* and *Mocato*, 2 *Mod. Ca. in Law and Eq.* 112, 113.

9. A written Agreement being unreaſonable, the Court would not carry it into Execution; but decreed that it be delivered to the Party for whoſe Benefit it was deſigned, that he may have an Opportunity to make the moſt of it at Law. *Feb.* 27, 1726. *Squire* and *Baker*, *Viner's Abr.* Tit. *Contract and Agreement*, (P) *Ca.* 12.

10. Plaintiffs being Aſſignees under a Commiſſion of Bankruptcy againſt *J. S.* brought their Bill againſt Defendant as Executor of *D.* who had lent *J. S.* ſeveral Sums upon Bonds at 6 *l. per Cent.* Intereſt, and had taken Advantage of his neceſſitous Circumſtances, and compelled him to pay 10 *l. per Cent.* to which he ſubmitted, and entered into Agreements for that Purpoſe. Decreed at the Rolls, and affirmed by Lord *Talbot*, that the Defendant ſhould account, and that for what had been really lent legal Intereſt ſhould be allowed, and what had been paid above legal Intereſt ſhould be deducted out of the Principal at the Time paid. Plaintiffs to pay what ſhould be due, and if the Teſtator had received more than was due with legal Intereſt, that was to be refunded by Defendant, and the Bonds to be delivered up. *Mich.* 8 *Geo.* 2. *Boſanquett* and *Daſhwood*, *Ca. im Eq. Temp. Talbot* 38.

11. *A Bargain being hard and unreaſonable, it is a Reaſon ſufficient why a Court of Equity will not give its Aſſiſtance, as in the principal Caſe*, where a young Gentleman that has a Remainder in Tail expectant on the Death of his Uncle without Iſſue, and alſo expectant on his Father's Death, of an Eſtate of 300 *l. per Annum* Value, ſells this Remainder for 300 *l.* Two Manors are inſerted in the Deed, and it was agreed on all Hands that it was deſigned the Defendant ſhould have but one of them; the one did not know what he ſold, and the other did not know what he bought; ſuch a Contract never was aſſiſted, and there can be no Ground to give Relief to ſuch a Purchaſer. *Per* Lord Chan. *Hil.* 1740. in the Caſe of *Sir John Barnardiſton* and *Lingwood*, *Barnard. Rep. in Chan.* 341.

CAP. V.

Amendment.

(A) In what Caſes to be allowed, and in what not.

1. A Writ of Error being brought to reverſe a Judgment given in a *Formedon* for an Error in the Original, it was prayed in Chancery that the Original might be amended. Note; (*A Fine was levied of the Lands twenty Years ſince.*) And Lord Chan. ordered, that if the *Formedon* were brought *within five Years* after the *Fine*, it ſhould be *amended*, otherwiſe not. *Trin.* 1678. *Anon.* 2 *Freem. Rep.* 39.

2. On a Plea in Abatement for want of proper Parties, it is in the Power of the Court to diſmiſs the Bill without Prejudice, or to give Leave to amend on Payment of Coſts of the Day. *Per* Lord Chan. *Parker* in the Caſe of *Stafford* and *City of London*, *Eaſter* 1718. 1 *Will. Rep.* 428.

3. *A.* brought a Bill in the Dutchy Chamber againſt *B.* who demurred to the Bill, and the Demurrer being allowed, afterwards the Chancellor of the Dutchy gave Leave to *A.* to amend, which *B.* inſiſted to be utterly irregular, and that *A.* ought to be put to bring a new Bill, in Regard that by the *allowing of the Demurrer the Cauſe was out of Court, though before the arguing thereof* A. *might have amended* (*a*). *Trin.* 1725. *Lord Coningſby* and *Sir Joſeph Jekyll Maſter of the Rolls*, 2 *Will. Rep.* 300.

(*a*) Agreeable to what was urged by *B.* it was ſaid by Lord *Talbot*, 9 *Decemb.* 1736. in the Caſe of ——— verſus *Baines*, that after a *Demurrer to the whole Bill allowed the Bill is regularly out of the Court, and no Inſtance of Leave to amend it. Ibid.* in a *Note.*

4. There does not appear to be any Precedent in Chancery of an Amendment to a Bill in a Part wherein it has been diſmiſſed upon the Merits. Said *per King* C. aſſiſted by the Maſter of the Rolls in the Caſe of *Sir John Napier* and *Lady Effingham*, *Hil.* 1726. 2 *Will. Rep.* 402.

5. An Anſwer was amended after Hearing and Decree on a very full Affidavit of the Solicitor and his Clerk, that the Miſtake was in ingroſſing the Anſwer from the Draught, and the Draught produced. Upon ſolemn Debate before *King Chan.* aſſiſted by the *Maſter of the Rolls*, though *no Precedent could be ſhewn that this was ever done after the Cauſe heard*; and *this Matter had been before denied on a Petition and on a Motion. Mich.* 1727. in the Caſe of *The Counteſs of Gainſborough* and *Gifford*, 2 *Will. Rep.* 424, 427.

6. Where it appears to the Court that either the Examiner is miſtaken in taking the Depoſition, or the Witneſs in making it, the Court will order ſuch Depoſition to be amended, and the Witneſs to ſwear it over again even after *Publication*, for *until Publication* it is impoſſible

His Lordſhip ſaid, he thought it for the Advancement of Truth and Juſtice that ſuch Miſtakes ſhould be amended; and the ſooner the better, in Regard the Witneſs may be dead, or in remote Parts, before the Hearing; that it would be hard and unjuſt to pin a Witneſs down to what is a Miſtake, by denying to rectify it. *Ibid.* 647.

impoſſible to know the Miſtake; and *King* Lord Chan. in the principal Caſe ordered *accord'*, *Mich.* 1731. *Griells* and *Ganſell*, 2 *Will. Rep.* 646.

Barnard. Eq. Rep. 332. *Brinſdel* and *Sir John Tompſon* S. C. ſtates it, That Plaintiff had obtained three ſeveral Orders to amend his Bill upon Payment of 20 *l.* Coſts; and under theſe Orders had amended *accord'*. Then he moved for a fourth Order to amend upon the like Terms, when it was inſiſted that he ought to pay full Coſts. But the Court inclining to allow of the Amendment, the *Defendant conſented to it*, upon the Plaintiff's agreeing to wave the Exceptions which he had taken to the Anſwer. Hereupon the Plaintiff amended his Bill, by adding a new Ingroſſment of 15 Sheets; and it was now moved that this laſt Order might be diſcharged, or elſe that the Plaintiff might pay full Coſts for the Amendment. But Lord Chan. obſerved, that at the Time the laſt Order was made the Motion was defended, and there was *a Conſent*; for which Reaſon his Lordſhip would not diſcharge the fourth Order, or require that full Coſts ſhould be paid.

7. Where three or four Orders are obtained for the Amendment of a Bill, and new Ingroſſments made under thoſe Orders, the Rule is, if the Plaintiff moves for further Liberty to amend his Bill, he ſhall pay full Coſts to be taxed. Said *per* Lord Chan. *Hil.* 1740. *Anon. MS. Rep.*

(*a*) There is no certain Rules concerning the Amendments of Anſwers, and they are in the Diſcretion of the Court. Amendments have not been confined merely to Miſtakes in the Ingroſſment of an Anſwer, where that has differed from the original Draught; but Anſwers have been allowed to be amended where there have been Miſtakes in it in Matter of Fact. Said *per* Lord Chan. *Ibid.* And his Lordſhip alſo ſaid, that he had known an Anſwer allowed to be amended even after the Defendant has had a Proſecution of Perjury commenced againſt him for what he had ſworn in his Anſwer; but that has been only where the Circumſtances have been extremely ſtrong, to ſhew that it could have been only a mere Miſtake. In the principal Caſe the Nature of the Fact ſpeaks it, that as the Anſwer now ſtands, the Clauſe inſerted in it could not have been inſerted to ſerve any Intereſt of the Defendant; it was not a Fact aſſerted by the Anſwer, but admitted by it. *Ibid.*—*Barnard. Eq. Rep.* 50. S. C. and P.

8. Defendant moved for Leave to amend his (*a*) *Anſwer*, by ſtriking out particular Words, and inſerting others in their Room. Defendant made an Affidavit of the Miſtakes in the Anſwer, and which was corroborated by the *Affidavit of another Perſon*. Lord Chan. If there had been *only* the *Defendant's Affidavit* I would not allow of the Amendment, but as there is the Affidavit of *another Perſon* I will; and ordered *accord'*. *Eaſter* 1740. *Woodgate* and *Fuller*, *MS. Rep.*

CAP.

CAP. VI.

Annuity (a), and Rent-charge.

(a) Annuity is a yearly Payment of a certain Sum of Money granted to another in Fee, for Life or Years, *charging the Perſon only of the Grantor.* *Co. Lit.* 144. *b.* But if a Man would that another ſhould have a Rent-charge iſſuing out of his Land, but would not that his Perſon be charged in any Manner by a Writ of Annuity, then he may limit ſuch a Clauſe in the End of his Deed; *Provided always that this preſent Writing, nor any Thing therein ſpecified, ſhall any way extend to charge my Perſon by a Writ or an Action of Annuity, but only to charge my Lands and Tenements with the yearly Rent aforeſaid*; and then the Land is charged, and the Perſon of the Grantor diſcharged. *Co. Lit. ſect.* 220. And the *Reaſon* is, becauſe the *Perſon is not expreſly charged by ſuch a Grant*, but by Operation of Law. But a Proviſo *not* to charge the Land is repugnant. *Per Popham* J. C. *Hil.* 37 *Eliz. in Caſu Fulwood* and *Ward*, *Poph. Rep.* 87.——A Man ought to grant an *Annuity for him and his Heirs*, otherwiſe the Heir ſhall not be charged, nor can it continue after his Death; contrary of the Grant of a Rent out of Land, or a Grant of a Rent whereof he is ſeiſed. *Note*; a Diverſity for this charges the *Land*, but an *Annuity* charges the Perſon only. *Br. Charge*, *pl.* 54. cites 21 *H.* 7. 1. *per Butler*, where a Man *grants an Annuity to* J. S. *and his Heirs*; this ſhall not ſerve but during the Life of the Grantor, and yet there is a Fee-ſimple determinable upon the Life of a Man. *Br. Eſtates*, *pl.* 65. cites 21 *H.* 7. 4.——*But if* he had granted it *for him and his Heirs to the other and his Heirs*, it is otherwiſe. *But* of *Grant of a Rent out of Land to* J. S. *and his Heirs*, it is good, for the Land is charged; and in the other Caſe the *Perſon* is *charged*, which *cannot extend to the Heir without expreſs Words*. *Br. Ibid.*

(A) Concerning both.

1. *J. W.* by Will deviſed 10 *l. per Ann.* to *A.* for Life, chargeable on ſeveral Houſes, and made his Wife Executrix, and died; and after ſhe made her Will, and thereof *J. S.* Executor, and thereby alſo deviſed 10 *l.* for Life to *A.* And *J. S.* being ſeiſed in Fee of an Eſtate of Inheritance of his own, ſettled this Eſtate on himſelf for Life, Remainder to his firſt, ſecond, *&c.* Sons in Tail, Remainder to Truſtees for 99 Years, in Truſt to pay his *Debts* and *Legacies*, and afterwards that *A.* ſhould receive 20 *l.* a Year for Life, and afterwards died without Iſſue, whereby the Term veſted in the Truſtees to execute the Truſt; *A.* preferred his Bill againſt the Truſtees for Payment of the 20 *l.* deviſed to him by the ſeveral Wills, for that *J. S.* having waſted the Aſſets, it was a Debt due to him to which the Truſt was ſubject, as alſo for the 20 *l.* Annuity; and the Queſtion was, whether *A.* ſhould have the 20 *l.* only, or 40 *l.* in Regard that the ſeveral Annuities of 10 *l.* amounted to the Sum of 20 *l.* And the Eſtate on which the ſaid ſeveral Annuities were charged coming to *J. S.* and he having out of his *own* Eſtate alſo granted an Annuity of 20 *l.* to *A.* for Life, the other Queſtion was, whether that ſhould be conſtrued in Satisfaction of the 20 *l.* he was obliged to pay purſuant to the ſeveral Wills? And Lord Chan. agreed the Gifts by the Will good, and that where a Man being Debtor in 10 *l.* gives 20 *l.* that ſhall be a Satisfaction, not a Legacy; and ſaid his private Opinion was, that the 20 *l.* Annuity was intended for Satisfaction, and that there was no Caſe like this in Point; and decreed the 10 *l.* firſt deviſed to be paid prior to the other 10 *l.* deviſed by *J. S.* the Executor; and if *A.* will take the 20 *l.* Annuity by the Settlement, he may ſubject himſelf to all Incumbrances; but the In-

cumbrances prior in Point of Time to be preferred, and the other Incumbrancers had Notice of the Deed to be poſterior to their Incumbrances; and therefore the Incumbrance by Judgment being a Lien on the Land, prior to the Grant of the Annuity, ſhall be preferred before the Grant of the Annuity, becauſe his Charge on the Land is poſterior. Note; *It was agreed that Coſts ſhould be decreed againſt* A. *the Plaintiff, becauſe he knew in his Conſcience that* J. S. *intended the* 20 l. *Annuity for Satisfaction. Eaſt.* 7 *Ann. Daviſon* and *Goddard & Ux' & al', Gilb. Chan. Rep.* 65.

2. An Annuity of 40 *l. per Ann.* charged upon Land; the Tenant inſiſted to have a Deduction of 4 *s.* in the Pound for Land-Tax, but *becauſe the Aſſeſſment in the Pariſh where the Lands lay was no more than* 2 s. 6 d. *ſuch a Deduction was only allowed. Eaſt.* 8 *Ann. King* and *Weſton, MS. Rep.*

So in the Caſe of *Atwood* and *Lambrey*, heard at the Rolls before Sir *Joſeph Jekyll, Mich.* 1719. where one in 1683. in Satisfaction of a Widow's Dower mortgaged Lands, on Condition to pay her 20 *l. per Ann.* whereupon the Court held, that this being *an annual Payment ſecured by Land*, ſhould anſwer *Taxes* in *Proportion* as the *Land paid*, but *refuſed to make the Annuitant refund in Reſpect of the Payments ſhe had received Tax free, and for which the Party paying had omitted to deduct.* 3 *Will. Rep.* 128. in a Note. *Vide* the Caſe of *Green* and *Marygold, P.* 64. *Ca.* 8. and the Notes there.

1 *Will. Rep.* 600, 604. *Hil.* 1719. S. P. in the Caſe of *Blackborn* and *Edge, & econtra*, and which I take to be the ſame Caſe.

3. *J. S.* by Will directs that *A.* ſhould live at his Houſe at *C.* and that *A.*'s Son ſhould cohabit with her there, in the ſame Manner as he then did with the Teſtator; that *A.* ſhould be at all the Charges of Houſe-keeping, Servants Wages, and Coach-Horſes, to the Number that the Teſtator maintained; and to enable her ſo to do, he directed that an Annuity of 1200 *l.* ſhould be paid *A.* by Quarterly Payments during her Life. That in Caſe her Son ſhould marry, and *A.* ſhould think fit to live from him, and to quit the Houſe and Furniture, then ſhe to have 250 *l. per Ann.* for Life. The Son married, and he and his Wife were not inclined to live with *A.* at the ſaid Houſe. It was reſolved by Lord Chan. *Parker*, that the Son might live at the Houſe with his Mother as formerly he did with the Teſtator; but if he would live there with a greater Number of Servants, *&c.* than were in the Teſtator's Life-time, that his Mother was not bound to maintain them. That ſhe is only to maintain him in the ſame Plight and Manner as the Teſtator did. That there ought not to be any Abatement of the 1200 *l.* Annuity by Reaſon of the Son's Abſence, any more than there ought to be for the Years that he travelled after the Teſtator's Death; and though he had died there ſhould be no Abatement of the 1200 *l. per Ann.* by the ſame Reaſon there ſhould be no Abatement in Reſpect of the voluntary Abſence of the Son, for that the Teſtator intended that in all Events during the Life of the Mother there ſhould be the ſame Hoſpitality as in his Life-time, only in Caſe ſhe ſhould leave the Houſe (which was left to her Election) there ſhe was to have but 250 *l. per Ann.* That this 1200 *l. per Ann.* was to be paid her very exactly, (*viz.*) Quarterly during her Stay in the Houſe; and Care is taken that even the Repairs of the Houſe ſhall be paid out of the other Part of his Eſtate. *Hil.* 1719. *Anon. MS. Rep.*

The Will being made in *England*, and the Huſband and Wife and Truſtee all living in *England*, and this being a Proviſion for a Wife, the 80 *l. per Ann.* ſhall be intended 80 *l. per Ann.* of that Country where the Will was made, for it cannot be conceived that the Teſtator thought of ſending his Wife every Year to *Ireland* to fetch her Annuity. Said *per* Lord Chan. *Ibid. Vide* the Caſe of *Phipps* and *Earl of Angleſea, P. C.*

4. *J. S.* being ſeiſed in Fee of Lands in *Ireland*, and he and his Wife living in *England*, by his Will made in *England* deviſed theſe Lands to a Truſtee (who alſo lived in *England*) for 500 Years, in Truſt out of the Rents, *&c.* to pay an Annuity of 80 *l. per Ann.* to his Wife for Life. *Macclesfield* C. decreed the Plaintiff to be paid her

her Annuity in *Engliſh* Money, without and Charge of Remittance, and with Coſts. *Hil.* 1722. *Wallis* and *Brightwell*, 2 *Will. Rep.* 88.

5. *A.* by Will gives an Annuity of 20 *l. per Ann.* to *J. S.* out of his *perſonal* Eſtate. It happened that *J. N.* the Executor had ſaid, *that he would go to Gaol and leave the Legatees unpaid*; and though the Annuity was by the Will made payable Quarterly, yet it was three Years in *Arrear* (*a*). It was prayed that the Executor ſhould give Security for the Payment of the Annuity. The Executor having by his Anſwer ſubmitted it to the Court whether he ſhould give any Security. and appearing to have expreſſed himſelf in Words threatning to defeat the Annuity, his Honour ordered the Maſter to ſee a ſufficient Part of the perſonal Eſtate ſet apart and aſſigned to a Truſtee, in Truſt to ſecure the Annuity. *Trin.* 1723. *Batten* and *Earnley*, 2 *Will. Rep.* 163.

(*a*) *Note*; It was inſiſted for the Annuitant that theſe *Arrears* ſhould carry *Intereſt*. *Sed per Cur'*, this is only done where there are great Arrears; but it is not uſual to compute Intereſt for ſo ſmall a Sum. *Ibid.*

6. *A.* deviſed that his Executors ſhould ſell his Lands in *D.* and inveſt the Money ariſing from that Sale, and the Surplus of his perſonal Eſtate, in purchaſing an Annuity of 100 *l. per Ann.* for *J. S.* for *her Life*, out of which ſhe was to maintain her Children, and gave 30 *l.* to each Child, to be raiſed out of the ſaid Annuity and his perſonal Eſtate, and the Overplus (*b*) of his perſonal Eſtate he gave to *J. S.* The Teſtator dies, and the intended Annuitant dies three Months after the Teſtator. The Teſtator's Executors renouncing, Adminiſtration with the Will annexed was granted to Plaintiff, who was alſo the Adminiſtrator of *J. S.* (the intended Annuitant) and with the Children of *J. S.* brought this Bill againſt the Teſtator's Heir at Law, to compel him to join in a Sale of the deviſed Lands. *King* C. decreed the Land to be ſold, and the Money ariſing by the Sale, as *perſonal Eſtate*, to be paid to the Plaintiff, (the Adminiſtrator of the intended Annuitant) he paying the Childrens Legacies. But the *Heir at Law was ordered his Coſts* (*c*). *Mich.* 1725. *Yates* and *Compton*, 2 *Will. Rep.* 308.

In this Caſe it was inſiſted that the Eſtate in Queſtion deſcended to the Heir at Law, for which Reaſon he ought to have the Rents till the Sale. But the Court denied this, it being by the *Will changed into perſonal Eſtate*; and ſaid, that if the Executors had ſold the Land within three Months after the Teſtator's Death, and before the Death of the intended Annuitant, then (probably) the Annuitant's Adminiſtrator ſhould on her Death have had the Money, or (perhaps) ſhe might in her Life-time have come into Equity, and have prayed that at leaſt Part of the Money ſhould have been kept for the Children, and not inveſted in the Annuity; nor ought the Delay of the Executors in not ſelling the Land in Queſtion within the ſaid three Months to hurt the intended Annuitant or her Children. Said *per* Lord Chan. *Ibid.* 311.

(*b*) The Intention of the Will was to give all away from the Heir, and to turn this Land into perſonal Eſtate. Said *per* Lord Chan. *Ibid.* 310.

(*c*) Though by the Regiſter's Book the Decree appears to have been as here ſtated, yet it is not mentioned in what Right the Court took the Plaintiff to be intitled. *Ibid.* 311. in a Note.

7. *J. H.* being poſſeſſed of a Term for Years in certain Lands lying in the County of *Middleſex*, granted an Annuity of 40 *l.* to the Plaintiff, to be iſſuing out of theſe Lands; the Defendant being concerned for *J. H.* in the Management of his Affairs, knew that *J. H.* had granted this Annuity to the Plaintiff, and had ſeen the Deed, and paid him Part of the Annuity upon *J. H.*'s Account: Afterwards *J. H.* purchaſed the Reverſion of theſe Lands, and then the Defendant purchaſed the Term and Reverſion of *J. H.* Then *J. H.* dies, and the Defendant refuſed to pay the Plaintiff his Annuity, becauſe the Deed by which *J. H.* had granted it was *not regiſtred* in the publick Office appointed for that Purpoſe, according to the *Stat.* 7 *Ann. c.* 20. *ſect.* 1. which requires "that all Deeds or Conveyances "of, and all Incumbrances upon, any Lands lying in the County of "*Middleſex* ſhould be regiſtred, otherwiſe every ſuch Conveyance "ſhall be void againſt any ſubſequent Purchaſer for a valuable Conſi-"deration." The Defendant therefore inſiſted that he was a ſubſequent Purchaſer

Purchaſer for a valuable Conſideration, and that the Plaintiff's Claim of an Annuity could not affect him, becauſe it was not regiſtred, whereas his Conveyance was duly regiſtred. But all the Barons were clearly of Opinion, that the Plaintiff was intitled to have his Annuity out of theſe Lands againſt the Defendant notwithſtanding this Statute, for the Statute only intended to give ſuch Notice of former Incumbrances to Purchaſers that they might not thereby be defrauded; but if a Man knows of his own Knowledge that there is a prior Incumbrance, and notwithſtanding that Knowledge will be a Purchaſer, the Statute was never intended to relieve ſuch an one, though the firſt Incumbrance was not regiſtred; for where a Man purchaſeth with Notice of a prior Incumbrance, he purchaſes with an ill Conſcience, and in a Court of Equity his Purchaſe ſhall never be eſtabliſhed; and the Statute does not confine a Man's Notice to be only from this publick Office, for if he hath Notice by any other Ways or Means, it ſhall bind him in a Court of Equity. Therefore they decreed the Plaintiff his Annuity, and the Arrears of it. *Mich.* 12 *G.* 1. *Cheval* and *Nicholls in Scacc'*, *MS. Rep.*

If a Deviſe be of a *Rent-charge clear of all Taxes*, by expreſs Words, it will be ſubject nevertheleſs by the Land-Tax Act, becauſe there is no Saving, as in the Caſe of Covenants, &c. between Landlords and Tenants. But here the Words of Exception are not ſo ſtrong, it is not ſaid clear of Taxes, or without Taxes, but without any Deductions, ſo that Teſtator ſeems not to have had the Caſe of Taxes under his Conſideration, but Deductions of other Kinds; and there is no Reaſon why the Teſtator if he had intended it to be clear of Taxes ſhould not have mentioned the Word *Taxes*, ſince if no Land-Tax was then actually in Being, it was a kind of Tax that had been before, and was well known. That every Land-Tax is a new Grant to which all are Parties, and thereby is a Liberty to deduct out of all *Rent-charges* and *Annuities*. Said *per* his Honour. *Ibid.*

8. *A.* by Will in 1677. deviſed *Lands* of 62 *l. per Ann. to Truſtees, to pay out of the Rents and Profits* 30 l. per Ann. *to his Wife for her Life, without any Deductions, in Satisfaction for her Dower*; and the Queſtion was, whether there was to be an Allowance for the Land-Tax or not? Held *per* the Maſter of the Rolls, that this Deviſe was to be conſidered as a *Rent-charge* to the Wife, and therefore as all ſuch Rents are chargeable by the Land-Tax Act, ſo ought this; and the Saving in that Statute of *Covenants* and *Agreements* between *Landlords* and *Tenants* does not extend to this Caſe. But note, *That as the Party had paid the Annuity without deducting the Tax, the Court would not go back to make the Party refund, nor was it ſo much as prayed. Mich.* 1727. *Green* and *Marygold*, *Viner's Abr.* Tit. *Deviſe*, (M. d.) *Ca.* 3. —— *Vide* the Caſe of *King* and *Weſton*, *P.* 62. *Ca.* 2. and the Notes there.

It was obſerved that the 60 *l. per Ann.* given to the Wife was not made payable to her *during* the *Coverture*, or during the *joint Lives of her and her Huſband*, but generally, and ſo muſt be intended for her Life, as any general Deviſe or Grant muſt be taken to be for the Life of the Deviſee or Grantee. *Sed per Cur'*, Tho' this Clauſe be unſkilfully penned, yet it is plain and expreſs that the Teſtator's Son and his Wife ſhould have an Annuity of 100 *l. per Ann.* for their *reſpective Lives*, and ſuch expreſs Deviſe is not to be controlled by Words that are doubtful, and barely capable of another Conſtruction. The Teſtator may well be intended to have meant that during the Coverture 60 *l. per Ann.* out of the 100 *l. per Ann.* ſhould be allowed for the Maintenance of the Wife and her Daughter, and not that the Daughter's Maintenance ſhould remain a Clog on the Wife during her Life, if ſhe ſhould happen to ſurvive her Huſband, and when probably her Daughter would have had another Proviſion fallen to her on the Death of her Father, as in Fact ſhe had. *Ibid.* 122.

9. *A.* by Will directs that his Truſtees ſhould out of the Rents and Profits of his Eſtate raiſe and pay unto his Son *B.* and his Wife, (over and above what the Teſtator had by his ſaid Will before given them) 100 *l. per Ann. during their reſpective Lives*, 60 l. per Ann. *whereof to be paid to the Wife for the better Support of herſelf and Daughter, the Remaining* 40 l. per Ann. *to go to the Son.* The Son dies in the Teſtator's Life-time; the Son's Wife ſhall have the Whole 100 *l. per Ann.* Decreed by Sir *Joſeph Jekyll* Maſter of the Rolls, *Hil.* 1731. *Cowper* and *Scot & al'*, 3 *Will. Rep.* 119, 121.

10. Where

10. Where *A.* by Will charges the Reſidue of his perſonal Eſtate with 40 *l. per Ann.* to his Wife, to be paid Quarterly, and this Eſtate appears to conſiſt of ſome Bonds or Securities, the Court will order the Executor to bring before the Maſter ſuch Part thereof as may be ſufficient to preſerve this Annuity for the Widow. Decreed by *Talbot* Lord Chan. *Mich.* 1734. *Slanning* and *Style*, *& econtra*, 3 *Will. Rep.* 334, 336.

11. *J. S.* had a Rent-charge of 166 *l. per Ann.* granted to him and his *Aſſigns* for three Lives. *J. S.* and his Wife mortgage this Rent-charge to *B.* In the Premiſſes of the Mortgage Deed the Rent-charge was granted to *B.* his *Executors*, *Adminiſtrators* and *Aſſigns*, *Habendum* to him, his *Heirs* and *Aſſigns*, during the three Lives for which this Rent was originally granted; upon *ſpecial Truſt that* B. *his Executors*, *Adminiſtrators* and *Aſſigns*, *ſhall enjoy* 100 l. per Ann. *out of it to their own proper Uſe till the Mortgage Money was paid, if the Lives ſhould ſo long live.* The Mortgagee made his Will, and thereof Plaintiff his Executor. Though according to the *Habendum* of the Mortgage Deed, (which in this Caſe ought to take Place) the legal Eſtate in this Rent belongs to the Heir at Law, yet the Executor within the Meaning of the Truſt of the ſame Deed is intitled to the Benefit of it, it being expreſly declared by the Deed, that the Mortgagee, his *Executors*, *Adminiſtrators* and *Aſſigns*, ſhould enjoy the Benefit of 100 *l. per Ann.* Part of the Rent-charge, to their own Uſe till the Mortgage was ſatisfied, if the Lives continued ſo long. So decreed by the Maſter of the Rolls, upon Time taken to conſider of this Point, *Eaſter* 1740. *Kendal* and *Micfield*, *Barnard. Chan. Rep.* 46.

CAP. VII.

Anſwers, Pleas and Demurrers.

(A) Anſwer;——In what Caſes the Defendant is not obliged to Anſwer the Bill;——And how far the Anſwer of one ſhall affect another.

(B) In what Caſes an Anſwer (or Plea) may be put in without Oath.

(C) Of the Traverſe to an Anſwer;——And how a Corporation Aggregate anſwer.

(D) Of referring Anſwers (or Bills) for Scandal, Impertinence, Inſufficiency, &c.

(E) Plea;——What ſhall be a good Plea, and what not; and in what Caſes a Plea ſhall ſtand for an Anſwer, &c.

(F) Demurrer;——What ſhall be a good Cauſe of Demurrer, and what not.

(G) Anſwering, Pleading and Demurring to the ſame Bill, &c.

(A) Anſwer;——In what Caſes the Defendant is not obliged to Anſwer the Bill;——and how far the Anſwer of one ſhall affect another.

1. THE Bill was brought againſt an *Auditor* of the *Dutchy*, who *anſwers*, That he *doth not know any Thing that is prayed in the Bill, but as an Officer.* Reſolved by *all* the *Barons*, That he is not obliged to anſwer the Bill, *becauſe every Subject may have Knowledge of it, paying the uſual Fees; and it is not charged in the Bill* that the Defendant had any Intereſt in the Thing which is demanded, *neither is it alledged* that he hindred any Perſon from ſearching. *Eaſt.* 7 *Ann. Delove* and *Bellamey in Scacc' MS. Rep.*

2. Where the *Huſband* will anſwer to the *Prejudice* of the *Wife*, who is an *Executrix*, a Court of Equity, upon a Motion, will give Leave for her to anſwer ſeparately. *Eaſt.* 8 *Ann. Anon. MS. Rep.*

3. Regularly

3. Regularly *the Anſwer of one Defendant ſhall not be made uſe of as Evidence againſt another Defendant* (*a*); but one Defendant *ſaying* by his Anſwer that *he was much in Years, and could not remember the Matter charged in the Bill*, but *that* J. S. *was his Attorney, and tranſacted this Matter*; and *J. S.* being made a Defendant, and giving an Account of this Matter, here, upon a Motion for an Injunction, Lord *Cowper* ſaid, that *theſe Words* in the *Defendant's Anſwer* amounted to a *referring to the Co-Defendant's* Anſwer, *and for that Reaſon the Attorney's Anſwer ought to be received*, and accordingly was read againſt the firſt Defendant. *Mich.* 1715. *Ca.* 75. *Anon.* 2 *Will. Rep.* 300.

(*a*) The *Anſwer of one Defendant cannot be made uſe of againſt another*; and one Reaſon for this, amongſt others, ſeems to be, becauſe if that were allowed, *I might make a Friend Co-Defendant, who might put in Anſwer in my Favour, and the other Defendant would have no Opportunity of croſs examining to it.* 3 *Will. Rep.* 311. in a *Note* by the *Editor*.

4. One Defendant ſhall not be prejudiced by the *Admiſſion of another*. *March* 6, 1720. *Cheevers* and *Geoghegan*, *Viner's Abr.* Tit. *Chancery*, (X. a.) *Ca.* 6. cites it from a MS. Table.

5. A Man is not obliged to anſwer any Queſtion which may ſubject him to a Penalty (*a*). *November* 17, 1725. *Paxton's* Caſe, *Sel. Ca. in Chan.* 53.

(*a*) *Vide P.* C.

(B) In what Caſes an Anſwer (or Plea) may be put in without Oath.

1. IT was ruled by the Lord Keep. that a *Plea of Outlawry* ſhould be put in *without* Oath, becauſe of the *Averment of Identity of Perſons*; and his Lordſhip alſo ruled, that a *Plea of the Privilege of Oxford* ſhould be put in *without* Oath. *Mich.* 1674. *Maſters* and *Bruett*, 2 *Freem. Rep.* 143.

2. *Macclesfield* Lord Chan. *on Petition* allowed a *Quaker*, who was *committed for not anſwering* to a Bill exhibited againſt him, to *put in his Anſwer without Oath or Affirmation*, (his Conſcience being ſo tender that he could not prevail upon himſelf to do either) the *Bill appearing* to be *groundleſs*, and diſcharged him out of Cuſtody. *Hil.* 1721. *Wood* and *Story & al'*, 1 *Will. Rep.* 781.

His Lordſhip obſerved, that nothing could more prevent Juſtice than to make a Court of Juſtice and the Proceſs thereof a Means of Oppreſſion; and whenever that appeared to be the Caſe, his Lordſhip ſaid he would relieve the Party oppreſſed. *Ibid.* 782.——And in a Note there, it is ſaid that the like Order was ſaid to have been made by Lord *Harcourt* in Dr. *Heathcote's* Caſe. *Ibid.* 782.

(C) Of the Traverſe to an Anſwer;—And how a Corporation Aggregate anſwer.

1. IF the Defendant *denies the Fact*, he muſt *traverſe* or *deny it* (as the Caſe requires) *directly*, and *not by way of Negative pregnant*; as if he be charged with the Receipt of a Sum of Money, he muſt *deny* or *traverſe that he has not received that Sum, or any Part thereof, or* elſe *ſet forth what Part he has received*; and if a Fact be laid *anſwer it particularly*, or elſe it may be demurred to, for *that may be a Matter of Judgment*. *November* 17, 1725. *Paxton's* Caſe, *Sel. Caſes* 53. ——— So if Defendant anſwers, he muſt anſwer the Charge in the Bill, though what he anſwers might have been good by way of *Plea*. 10 *November* 1725. *Richardſon* and *Mitchell*, *Sel. Ca. in Chan.* 51. The Caſes of *Stephens* and *Stephens*, and *Edwards* and *Freeman*, were cited as Caſes in *Point*.

If a Man gives a *general Anſwer*, and a *particular Queſtion be aſked*, which is *included* in the *general*, yet he *muſt*

laid to be done with *divers Circumſtances*, the Defendant muſt not *deny* or *traverſe* it *literally* as it is laid in the Bill, but *muſt anſwer the Point of Subſtance poſitively* and *certainly*. *Clarend. Ord.* 18 *Car.* 2.

2. Where the *general Traverſe* is omitted at the End of a *full Anſwer*, yet the Anſwer is good, and not to be ſuppreſſed; for where every Clauſe in the Bill is *fully anſwered*, the adding the *general* Traverſe is rather *impertinent* than otherwiſe; and if *Iſſue* is taken upon *this* Traverſe, it is a *Denial only of every other Thing not anſwered before by the Anſwer*. Said *per Macclesfield* C. and his Lordſhip ſaid, that this general Traverſe ſeemed to him to have *obtained formerly* and in antient Times, *when the Defendant uſed only to ſet forth his Caſe in the Anſwer*, without anſwering every Clauſe in the Bill; and for that Reaſon it was the Practice for the Defendant to add at the End of the Anſwer this *general* Traverſe. *Mich.* 1722. *Anon.* 2 *Will. Rep.* 87.

3. Where a *Corporation Aggregate* (ſuch as the *Eaſt-India* Company) are Defendants, *they anſwer no otherwiſe than under their common Seal*, and are not *liable to a Proſecution for Perjury* though their Anſwer be never ſo falſe (*a*). Said *per Talbot* C. in the Caſe of *Wych* and *Meal*, *Trin.* 1734. 3 *Will. Rep.* 310, 311.

(*a*) A *Bill againſt a Corporation* to *diſcover Writings*; Defendants *Anſwer under their common Seal*, and ſo not being ſworn, will anſwer nothing in their own Prejudice. Ordered that the *Clerk of the Company, and ſuch principal Members as the Plaintiff ſhould think fit, anſwer on Oath, and that a Maſter ſettle the Oath. Per North* Keep. *Hil.* 34 & 35 *Car.* 2. *Anon.* 1 *Vern.* 117.——*Vide* the Caſe of *Wych* and *Meal*, Tit. *Demurrer, P. Ca.*

(D) Of referring Anſwers (or Bills) for Scandal, Impertinence, Inſufficiency, &c.

(*b*) Or a Bill. *Vide Ca.* 4.

1. IF an *Anſwer* (*b*) contains *ſcandalous* Matter, it may be *expunged* upon Motion, and the *Party* that *ſlanders* ſhall pay *Coſts*: This was agreed by all, but the Doubt was, whether this could be done at the Hearing of the Cauſe. Lord Chan. ſaid, he did not remember that it ever had been done; but ſaid, he would expunge the ſcandalous Matter if the Plaintiff would not inſiſt upon Coſts. But the Counſel not being ſatisfied with that, Precedents were ordered to be ſearched. *Trin.* 7 *Ann. Anon. MS. Rep.*

2. If the Plaintiff *refers the Anſwer for Scandal and Impertinence*, and the Maſter *finds it, neither*, the Plaintiff in his *Exceptions* to the Report *muſt ſhew wherein*, in what *Line or Page, and how far the Anſwer is ſcandalous or impertinent*; and it is *not ſufficient to ſay in general that it is ſcandalous and impertinent*. *Per* Lord *Macclesfield*, *Trin.* 1723. *Craven* and *Wright*, 2 *Will. Rep.* 181.

3. And it ſeems to be a ſtronger Caſe where Exceptions are taken to an Anſwer for *Inſufficiency*, and the Maſter reports it *ſufficient*, that the Exceptions to the Report ſhould ſhew wherein the Anſwer is inſufficient *Per Macclesfield* C. *Ibid.*

4. So if a *Bill* or *Anſwer* be referred for *Scandal*, and the Maſter *reports it ſcandalous*, if the Maſter has once *expunged this Scandal*, the *Party cannot then except to the Report*, becauſe when the Scandal is expunged, it cannot be made appear by the Record what that Scandal was, and it was the Party's own Fault that he did not except ſooner. *Per* Lord *Macclesfield. Ibid.* 182.

5. A Defendant having *anſwered the Bill, cannot afterwards refer it for Scandal* (*a*). This was made a Rule by *King* C. *Mich.* 1725. *Abergavenny* and *Abergavenny*, 2 *Will. Rep.* 311. Note; *By this Means an old Rule of Court was altered. Ibid.* 313.

(*a*) For when the Defendant has ſubmitted to anſwer the Bill, why ſhould he after that procure the Bill to be altered, and by that Means be made a new Bill? Said *per* Lord Chan. *Ibid.* 312.

6. After an Order to refer an Anſwer *for Inſufficiency*, it cannot be referred *for Impertinence*; yet it may be for *Scandal*, as was determined in the Caſe of *Elliſon* and *Burgeſs*, *Hil. Vac.* 1729. by *King* C. *Ibid.* 312. in a *Note* by the *Editor*.

7. When a Defendant is in *Contempt* for *want* of an *Anſwer*, and an *inſufficient* Anſwer is put in, *that is no Anſwer at all*; and the *Plaintiff* is not to begin his Proceſs *de novo*, but *go on regularly from the laſt Proceſs*. *June* 13. 4 *Geo.* 2. *Rep. of Sel. Caſes in Canc.* 5.

8. *J. S.* being indebted to *B.* in 1600 *l.* ſecured by a Judgment, mortgaged his Eſtate to *D.* *A.* the Judgment-Creditor brings a Bill againſt *D.* the Mortgagee, and *J. S.* praying to be relieved againſt this Mortgage in Reſpect of the Judgment, *D. at the Time of the Mortgage having had Notice of the Judgment.* *D.* by Anſwer *denied that at the Time of entring up of the Judgment he had any Notice of it.* This *Anſwer* was *reported* to be *inſufficient*, and then he anſwers again and ſays, that at the *Time of ſigning and entring up of the Judgment he had no Notice of it.* This *Anſwer* was alſo *reported* to be *inſufficient*; on an Exception being taken to this Report Lord Chan. held, that this *ſecond Anſwer* was *inſufficient*; and the Exception was allowed *accord'*. *Mich.* 1740. *Hinds* and *Dod*, *MS. Rep.*

Barnard. Eq. Rep. 258. S. C. held *accord'* ſays, Lord Chan. ſaid, that the Party had only ſworn in the Conjunctive *that at the Time of the ſigning and entring up of the Judgment he had no Notice of it*; whereas he ſhould have ſworn *that at the Time of the ſigning* or *entring up of the Judgment he had not this Notice.* His *denying* that he had *not this Notice at the Time the Judgment was entred up*, is by no Means material; it is his *having Notice* of the Judgment *at the Time of ſigning it*, that can *only affect him*; and that which makes it the more reaſonable to require of him an expreſs Denial of the Notice of the Judgment at the Time of ſigning it, is, that in his *former* Anſwer he only ſwore *that at the Time of entring up of the Judgment he had not this Notice*; which Anſwer was *clearly* on that Account *inſufficient*. *Ibid.* 259.

Of *putting in Anſwers where there is a Croſs-Bill*, vide **Croſs-Bill**, Tit. **Bill**, P.

(E) Pleas (*a*); —— What ſhall be a good Plea, and What not; and in What Caſes a Plea ſhall ſtand for an Anſwer, &c.

(*a*) A Plea in *Equity is a ſpecial Anſwer to a Bill*, or *ſome Part thereof*, ſhewing and relying upon one or more Things as a Cauſe why the *Suit* ſhould either be *diſmiſſed*, *delayed* or *barred*. *Vide P. C.* ——Pleas in Equity are of three Kinds: 1ſt, To the Juriſdiction. 2dly, To the Perſon. 3dly, In Bar. *Vide Harriſon's Accompliſhed Practiſer in the High Court of Chan. Vol.* 2. *p.* 376. 4*th Edit.*

1. ACCOUNT *ſtated* is a *good* Plea; but if there be any *Agreement* to *rectify Miſtakes*, it ſhall *not conclude* though under *Hand* and *Seal*. *Per Maſter of the Rolls*, 16 *July* 16 *Car.* 2. in the Caſe of *Proud* and *Combes*, 2 *Freem. Rep.* 183.

2. Defendant *pleaded* himſelf a *Purchaſer* for a *valuable Conſideration*; but *per* Lord *Bridgman* this is *no good* Plea, in *Regard Defendant did not plead himſelf a Purchaſer from ſome of the Plaintiff's Anceſtors*, for a Purchaſe from a Stranger without Title was held no good Plea; *ergo* the Defendant was ordered to anſwer (*b*). *Hil.* 1670. *Seymer* and *Noſworthy*, 2 *Freem. Rep.* 128.

(*b*) But *in Hil. Vacat.* 1674. *on Motion the Plea was held good by Lord Keep.* Finch, *and all the ſubſequent Proceedings ſet aſide.* Ibid.

3. On a Bill brought for *Diſcovery* of a *Title* and *Writings*, Defendant *pleaded* that he was a *Purchaſer* for a *valuable Conſideration without Notice.* But Lord Chan. held the Plea to be *ill*, becauſe *it did not ſet forth the particular Conſideration*; but if that had been expreſſed, it had been good (*a*). *Mich.* 1678. *Millard's Caſe*, 2 *Freem. Rep.* 43.

(*a*) His Lordſhip ſaid it had been ſo held in one *Snag's* Caſe. *Ibid.*

4. Plaintiff claims under the *Will* of *J. S.* (dated in 1659.) and exhibited his Bill to *diſcover Writings in Defendant's Cuſtody.* The Defendant *pleaded that he purchaſed the Lands of ſaid* J. S. *in* 1675. *for* 100 *l. without Notice of Plaintiff's Title.* But the Plea was over-ruled (*b*). *Hil.* 1681. *Rogers* and *Seale*, 2 *Freem. Rep.* 84.

(*b*) Upon *this Difference:* Where *the Plaintiff hath a Title in Law*, there *though the Defendant doth purchaſe without Notice, yet he ſhall diſcover Writings*; but *otherwiſe if the Plaintiff hath only a Title in Equity, for there if the Defendant purchaſed without Notice*, he ſhall never diſcover, *nor make good the Plaintiff's Title. Ibid.*

5. If the Attorney General of the Dutchy Court exhibits an Information at the Relation of one Part Owner of Coal Mines againſt the other, for *not contributing to the Charge of working them*, and by which the King would loſe his Duty of Lott and Cope, *Outlawry* in the *Relator* is a *good* Plea. Held by *Atkins* C. B. and *Ventris* J. 9 *July* 1690. in the Dutchy Chamber at *Weſtminſter-hall*, after a long Debate (*c*). *Attorney General of the Dutchy, at the Relation of Vermuden*, and *Sir John Heath & al', Pr. in Chan.* 13.

(*c*) For tho' Mr. Attorney General be Plaintiff, yet the *Relator* is to have the whole Benefit or Loſs of the Suit, and is himſelf Party to it, *for it would abate by his Death*, &c. and the *King's Name is only made Uſe of by the Form of the Court, and he is not directly concerned at all, and very little by Conſequence*; and the Suit is not for the *King's Duty* but the *Relator's* Intereſt. Said *per Cur', Ibid.*—A *Plea* of *Outlawry* muſt be pleaded *ſub pede ſigilli*: The Plea continues only in Force till the *Outlawry* be *reverſed*, but hinders all Proceedings in the mean Time; and when the *Outlawry* is *reverſed*, the Plaintiff upon paying 20 *s.* Coſts (*if the Plea is not argued*) ſerves the Defendant with a *new Subpœna* to anſwer the ſame Bill. *Ord. Chan.* 98.—Excommunication in the Plaintiff muſt be pleaded *ſub pede ſigilli.*

Vide P. Ca.

6. If the Plaintiff *replies* to the Defendant's Plea, he thereby admits it to be good, *if it be true*, and the *Validity* of the Plea can never after be conſidered, but only the *Truth of it*, as he proves it, or the Plaintiff diſproves it. *Mich.* 1695. *Parker* and *Blythmore*, *Prec. in Chan.* 58.

7. Plaintiff's *Bill ſuggeſted that Defendant had lent him Money, and that he had truſted the Defendant to compute the Intereſt*; *that there was a Miſcomputation, and that Plaintiff had paid more than was due, therefore the Bill prayed that Defendant might ſet forth how much Intereſt was due, and how much was over paid.* Defendant *pleaded the Statute* (*d*) *againſt Uſury as to legal Intereſt.* Maſter of the Rolls: The Defendant ſhall not *anſwer as to legal Intereſt*, but he ſhall *anſwer* to what he did *receive more than the Intereſt*; for ſhall not a Mortgagor have a Bill againſt the Mortgagee to account and diſcover how much he hath received more than the Intereſt and Principal, which is the ſame Caſe with this? The *Plea* was over-ruled as to all but the Words *legal Intereſt. Mich.* 8 *Ann. Anon. MS. Rep.*

(*d*) 12 *Car.* 2. By this Statute legal Intereſt was 6 *l. per Cent. per Ann.* but afterwards by 12 *Ann. c.* 16. *ſect.* 1. it was reduced to 5 *l.*

8. Defendant pleaded *Articles made on his Marriage, and that he was a Purchaſer for a valuable Conſideration, and had no Notice of the firſt Settlement*; but would not ſwear this Plea; *ergo* the Plea was over-ruled. *Hil.* 1717. *Marſhall* and *Frank & Ux'*, *Prec. in Chan.* 481.

9. In pleading the Statute of *Frauds*, it is neceſſary to ſay that the Agreement was *not* reduced into Writing. So ruled *per* Lord Chan. *Trin.* 1720. *Muſſell* and *Cook*, *Prec. in Chan.* 535.

10. *J. S.* brought a Bill to redeem, ſetting forth that his late Father being ſeiſed in Fee of certain Lands, mortgaged the ſame to *D.* and that at the Defendant's Deſire his Father conſented that this Mortgage ſhould be aſſigned to Defendant, who thereupon promiſed that he would help the Father to a Place, and take his Intereſt out of the Profits thereof. That Defendant never helped the Father to any Place, but inſtead thereof, after the Mortgage was forfeited, brought an Ejectment, and turned him out of Poſſeſſion; and alſo brought a Bill againſt the Father, who put in an Anſwer thereto; and then the Defendant by *undue Means* (*a*) procured the Cauſe to be heard *ex parte*, and the Report made *ex parte*, and confirmed abſolutely. To the now Bill the Defendant *pleaded* this *Decree* and *Report*, and *both made abſolute*, *ſigned* and *inrolled*. But *Macclesfield* C. (on the Circumſtances of Fraud) over-ruled the Plea, and would not ſuffer *it* to ſtand for an Anſwer, though it was objected that according to his Rule a Decree might be ſet aſide by *original* (*b*) *Bill*; but his Lordſhip replied, that ſuch a groſs Fraud as this was an Abuſe of the Court, and ſufficient to ſet aſide any Decree. *Trin.* 1722. *Loyd* and *Manſell*, 2 *Will. Rep.* 73.

(*a*) *i.e.* After the Anſwer put in, the now Defendant got a Perſon of a ſcandalous Character to make an Affidavit that the Father had left his Habitation, and (as he *believed* and was *credibly* informed) was gone beyond Sea, upon which he got an Order that Service of the *Subpœna* to hear Judgment on the Father's Clerk in Court might be good Service; whereas the Father was then living, and publickly appeared in the next County; and upon this falſe Affidavit and Order the Cauſe was heard. *Ibid.* 74. (*b*) The *Decree* being *ſigned* and *inrolled*, the Plaintiff had no other Remedy. Said *per* Lord Chan. *Ibid.* 74.

11. The Statute of Limitations is no good Plea *where the Eſtate in Law is in Truſtees. Per Cur'*, 9 *Geo.* 1. *Lawly* and *Lawly*, 2 *Mod. Ca. in Law and Eq.* 32, 33.

12. Where a Defendant inſiſts on the Benefit of the *Statute of Limitation* by way of *Anſwer*, he ſhall at the *Hearing* have the *like Benefit* as if he had *pleaded* it. Said *per* Maſter of the Rolls in the Caſe of *Norton* and *Turvill*, *Trin.* 1723. 2 *Will. Rep.* 145.

13. A Decree was made in the Exchequer againſt Tenant for Life to hinder him from committing Waſte, which *Decree and a perpetual Injunction to ſtay Waſte were founded on a Deed of Settlement*; and upon a Bill now brought (*in Canc.*) to ſet that Deed aſide, the Defendant pleaded the Decree in the Exchequer, but his Plea was over-ruled (*c*). *Mich.* 11 *Geo.* 1. *Wing* and *Wing & al'*, 2 *Mod. Ca. in Law and Eq.* 109.

(*c*) If the Decree had been ſet aſide, the Deed of Settlement would have fell of Courſe; and there was ſuch an Appearance of Hardſhip and Oppreſſion in this Cauſe, that the Court held it reaſonable to over-rule the Plea; but told the Defendant's Counſel, that at the Hearing they might take what Advantage they could thereof, and then the Court would conſider how far this Decree in the *Exchequer* ſhall conclude this Court in this Cauſe. *Ibid.* 112.

14. *W.* had made a Contract with *E.* for Land, and which *E.* aſſigned to *G.* *E.* had afterwards a Decree for Performance againſt *W.* he being the Party to the Contract; but decreed that *G.* ſhould ſtand in his Place, and indemnify him againſt that and all Decrees. After this *W.* and *G.* come to an Account, and mutual general *Releaſes* are given, in which the Words *all Orders and Decrees of the Court of Chancery* are inſerted. Afterwards upon Petition *E.* has an Order for Intereſt from the Time of *W.*'s taking Poſſeſſion, amounting to 700 *l.* founded upon the Decree made before the Releaſes were given, who thereupon brings his Bill to compel *G.* to pay it, he being by the Decree to ſtand in *W.*'s Place. *G. pleaded* this *Releaſe ſubſequent to the Decree*; and it was allowed *per Cur'*, though *it* was *not taken Notice of at the Time of ſtating and ſettling the Accounts. Hil.* 12 *Geo.* 1. *Waters* and *Glanville*, *Gilb. Eq. Rep.* 184.

15. Though

15. Though a Plea in *Bar* be *allowed*, yet the *Plaintiff may reply to the Truth of it*, and put Defendant on proving it, and *may except to any other Part of the Anſwer.* Ruled on Motion *per King* C. *Hil.* 12 *Geo.* 1. *Gilb. Eq. Rep.* 184.

16. A *Bill was to be relieved againſt a Judgment in Ejectment, which was obtained by Virtue of a Purchaſe under a* Venditioni exponas *of a Term for Years upon an Outlawry of the Plaintiff*, who inſiſted that his Title to the Lands was a Fee, and not a Term for Years; upon which an Injunction was granted. But *Defendant pleaded the Purchaſe under the Outlawry*, and it was *allowed*, and the *Injunction diſſolved. Hil.* 12 *Geo.* 1. *Robinſon* and *Hayes*, *Gilb. Eq. Rep.* 184.

17. A Bill was brought to redeem ſome Lands conveyed in 1694. to Defendant's Grandfather, by Plaintiff's Father, for 500 Years, to be void on Payment of 126 *l.* and Intereſt. Defendant *pleads*, that he is a *Deviſee of thoſe Lands under his Grandfather's Will, who in* 1692. *purchaſed them for a* 200 *Years Term, without Condition* of *Redemption*, and had enjoyed *fifteen* Years *quiet Poſſeſſion.* The Court over-ruled Defendant's Plea, for *not anſwering ſufficiently* as to the *Mortgage*; and the *Plea of the Purchaſe may be true, for it may be only a Term for Years to attend the Inheritance. Hil.* 12 *Geo.* 1. *Meder* and *Birt*, *Gilb. Eq. Rep.* 185.

18. *A.* the Mortgagee brought a *Bill* to *foreclоſe*, and *B.* the Mortgagor brought a *Croſs* Bill to *redeem*, on which was a *Decree for Payment of Principal, Intereſt and Coſts, or elſe to be foreclоſed, and on Payment to be let in. B. died*, and the Account being taken, the *Plaintiff* finding the Eſtate *inſufficient* brings a *new* Bill of *Reviver*, and *partly a ſupplemental Bill*, both to *review* the *former* Decree and Proceedings; and likewiſe to have an *Account of the Aſſets of* B. and thereout *to have Satisfaction for a Bond which was given for a Collateral Security with the Mortgage.* To this Bill the *Executor of* B. *pleads the former Decree in Bar*, that the Plaintiff *elected his Satisfaction, and had not ſo much as ſuggeſted that that Satisfaction was deficient*, ſo that it does not appear but that he may receive a *double Satisfaction* for his *Debt*; and that it was plain that he *had not waived the Mortgage by his Bill of Revivor. A.* inſiſted that it was the *Practice* of the *Court*; that *taking out* of *Proceſs*, or *making Uſe of any counter Security*, was in itſelf *a Waiver of the Foreclоſure*; and that a *Mortgagee* had always *his Election to waive and open the Foreclоſure*, and have *Recourſe to his Bond and Covenant*, if he thought proper. But *per Cur'*, the *Plaintiff* by his *Revivor* has *not waived the Mortgage*, or ſo much as *ſuggeſted a Deficiency*, ſo that the *Plea* muſt *ſtand* for an *Anſwer without Liberty to except. Hil.* 12 *Geo.* 1. *Birch's Caſe*, *Gilb. Eq. Rep.* 186.

19. A Bill was brought by *A.* the *Executor* and *Deviſee* of *B.* againſt *C.* and others, to have *an Account of great Quantities of Bullion, Goods* and *Effects*, to 9000 *l.* Value, put into Partnerſhip with, and ſent by Defendants to ſeveral Parts in *Aſia* and *Africa*, and to *have an Account of the Profits* of the ſaid *Trade.* The Defendants inſtead of anſwering *pleaded* (in *Bar* of *any Diſcovery*) the *ſeveral Acts of King* William, *for eſtabliſhing the* Eaſt-India *Company, and the Privileges granted to the ſaid Company of trading to the ſeveral Places mentioned in the Bill, excluſive of all other Perſons*, and *alſo the Forfeitures and Penalties which any other Perſon trading thither ſhould incur* without Licence from the Company; and *alſo pleaded the Act of the ſixth of* Ann. *for granting further Privileges to the ſaid Company.*

pany. The Court ſaid, though there was no Pretence to have a Diſcovery, yet ſuch *Plea muſt have the greateſt Strictneſs and Exactneſs, which tends to ſupport wrong doing*; and they don't ſay that either *B.* or themſelves had not a Licence. That *where two go on in an unlawful Trade, they ſeemed to have intirely waived that Unlawfulneſs as between themſelves*; ſo diſallowed the Plea, and the Defendants were ordered to anſwer. *Hil.* 12 *Geo.* 1. *Gaſcoyne* and *Sidwell & al'*, *Gilb. Eq. Rep.* 186. The Reporter ſays by way of Note, That *B.* at the *Time* of *this Trade* was a *Director* of the *Eaſt-India* Company. *Ibid.* 187.

20. Bill againſt an *Executor* to have an *Account of Aſſets and Satisfaction of a Debt of* 660 l. *ſecured by Judgment againſt the Teſtator*, alledging a *Devaſtavit*, *&c.* The Defendant by *Schedule* ſet forth the *Aſſets*, and *denied* by her Anſwer *any Waſte*; and for *Plea* to any *Relief* ſaid, *that her Teſtator was in Execution on the ſaid Judgment in his Life-time, and was diſcharged from thence by the expreſs Order of the Plaintiff*; and therefore pleaded ſuch Diſcharge in Bar, ſuch *Diſcharge being a Releaſe of the Debt both in Law and Equity*; and the *Plea* was *allowed*. *Eaſter* 12 *Geo.* 1. *Beatniff* and *Gardiner*, *Gilb. Eq. Rep.* 190.

21. A Bill was brought for Diſcovery of Tithes by a Leſſee of a Parſon. The Defendant pleads the 13 *Eliz. c.* 20. *ſect.* 1. *againſt Non-reſidence* in Bar; and held to be a good Plea, both as to the Diſcovery and Relief. *Per Gilbert* C. B. *Price*, *Page* and *Hale*, Barons. *Eaſter* 12 *Geo.* 1. (*in Scacc'*) *Quilter* and *Muſſendine*, *Gilb. Eq. Rep.* 228. And *Hale* B. ſaid, that *no Conſtruction could be too liberal to make Parſons reſide and take Care of the Pariſhes*. *Ibid.* 230. (*a*). ——*Vide* Tit. *Tithes*, *P. C.*

The Act ſays, That no Leaſe to be made of any Benefice or Eccleſiaſtical Promotion with Cure, or any Part thereof *not impropriated*, ſhall endure longer than while the Leſſor ſhall be ordinarily reſident and ſerving the Cure of ſuch Benefice *without Abſence above* 80 *Days in any one Year* (*b*), but every ſuch *Leaſe immediately upon ſuch Abſence ſhall ceaſe*.

(*b*) Year ſhall not refer to the Æra, but muſt be intended a Solar Year, *i. e.* 365 Days, and the *Abſence any* 80 *Days* within that Compaſs. *Gilbert* C. B. and *Priee* and *Page* Barons, in *Quilter* and *Muſſendine*, *Gilb. Eq. Rep.* 229. (*a*) Vide *Grounds and Rudiments of Law and Equity* 230.

22. If a *Bill* be brought *by* an *Heir claiming by Deſcent* againſt another *ſuggeſting ſome Fraud*, and praying a Diſcovery, if *Defendant pleads he is a Purchaſer for a valuable Conſideration*, ſuch *Plea* which goes to the Plaintiff's Title is always good *both* as to the *Relief* and *Diſcovery*. Said *per Page* Baron in the Caſe of *Quilter* and *Muſſendine*, *Gilb. Eq. Rep.* 229.

23. So in Caſe of a *Bill* for an *Account* againſt one as Bailiff, *ſuggeſting Fraud*; if the Defendant *pleads that at ſuch a Time he did account*, he need not go on and ſet out an Account. So ſaid *per* the ſame Baron. *Ibid.*

24. Bill for a ſpecifick Performance of a Promiſe by Defendant to procure Plaintiff to be made Deputy to Defendant's Son, as Clerk of the Houſe of Peers, or otherwiſe to provide for Plaintiff, in Conſideration of Plaintiff's inſiſting upon and ſoliciting in procuring a Reverſionary Grant of that Place for Defendant's Son, which Defendant now enjoyed. Defendant pleaded the Statute of Frauds, and that the Promiſe was not in Writing, nor to be performed within one Year; and alſo the Statute of Limitations, that the Promiſe was made above ſix Years before the Bill filed. Plea allowed in both Reſpects. *Trin.*

The Court held, that a parol Promiſe to be performed upon a Contingency which may or may not happen within a Year after the making, is void within the Statute of Frauds. And ſo if made above ſix Years before the Bill or Action brought, is barred by the Statute of Limitations though the Contingeucy or Time of Performance happens within the ſix Years. *Ibid.*

Trin. 1726. *in Scacc'*, *Reynolds* and *Cowper*, *Viner's Abr.* Tit. *Contract and Agreement*, (H) *Ca.* 47.

Though this is a Caſe reported by the Serjeant in his *Reports of Caſes in B. R.* yet it is a Chancery Caſe.

25. *A.* and *B.* were intitled to a perſonal Eſtate by the Statute of Diſtributions, and an Account thereof was ſtated between them; afterwards *A.* by Bill demands a Diſcovery of particular Items, ſuppoſed not to be comprized in it, and yet at the ſame Time allows the Account to be fairly taken. Defendant pleads the ſtated Account in Bar: And it was inſiſted for him, that either the Items muſt be denied in particular, by falſifying them, or ſaying they were not allowed, or elſe a Surcharge muſt be brought in; but that here neither of theſe Ways is taken, ſo that the Plaintiff would unravel the Account without pointing out one Error in it. Lord Chan. allowed the Plea, and ſaid, *this muſt not be ſuffered. Mich.* 3 *Geo.* 2. *Bourke* and *Bridgeman*, 2 *Barnard. Rep. in B. R.* 272.

26. A *Defendant in his Plea of a Purchaſe for a valuable Conſideration omits to deny Notice*, if the *Plaintiff replies* to it, all the *Defendant* has to do is to *prove his Purchaſe*, which if he does, the Bill will be diſmiſſed with Coſts (*a*); and in ſuch Caſes it is *not material* if the *Plaintiff proves Notice*, for it was the *Plaintiff's own Fault that he did not ſet down the Plea to be argued. Hil.* 1730. *Harris* and *Ingledew*, before Sir *Joſeph Jekyll*, Maſter of the Rolls, 3 *Will. Rep.* 91, 94.

(*a*) For otherwiſe the Defendant might be tricked by the Plaintiff, who having found that the Defendant had made a Slip in his Plea, might decline arguing it, and reply to it. *Ibid.* 94.

Vide Tit. *Ideots and Lunaticks, P. C.*

27. The Court of Chancery ordered the Profits of a Lunatick's Eſtate to the Committee for the Maintenance of his Perſon. The Lunatick dies, his Adminiſtrator brings a Bill for an Account of the perſonal Eſtate, and of the Rents and Profits of the real Eſtate of the Lunatick received in his Life-time by the Committee. The Defendant, the Committee, pleads this Order in Bar of ſuch Part of the Bill as ſought to compel him to account, *&c.* and the Plea was ordered to ſtand for an Anſwer *without Liberty to except. King* Chan. *Eaſt.* 1731. *Sheldon* and *Mr. Juſtice Forteſcue Aland & al'*, 3 *Will. Rep.* 104.

28. The Statute of Limitations is *no good Plea* where the *Bill charges a Fraud*; but then it ſhould be charged by the Bill that the *Fraud was diſcovered within ſix Years before the Bill filed* (*b*). But in the principal Caſe there being a Charge of great Frauds, and ſome Circumſtances thereof not fully denied, the Defendant was ordered to anſwer the Bill, with Liberty for the Plaintiffs to except, and the Benefit of the Statute of Limitations to be ſaved to the Defendant. *King* C. *Mich.* 1732. *South-Sea Company* and *Wymondſell*, 3 *Will. Rep.* 143.

(*b*) Lord *Warrington's* Caſe was cited *arg'* as a Caſe in Point.

29. In the Caſe of the *South-Sea* Company, in whom the Eſtates of the late Directors are veſted by Act of Parliament of the 7 *G.* 1. *cap.* 27.——where the Statute of Limitations might have been pleaded againſt the late Directors, it is pleadable againſt the Company, who ſtand in ſuch Directors Place. So held *per King* C. in the Caſe of the *South-Sea Company* and *Wymondſell*, 3 *Will. Rep.* 143.

30. So in the Caſe of an *Aſſignee* under a Commiſſion of Bankruptcy, who, though he claims under the Acts concerning Bankrupts, and alſo by Virtue of the Aſſignment, yet as he *ſtands only in the Place of the Bankrupt*, againſt whom the *Statute* of *Limitations* is *pleadable*, ſo is he (the Aſſignee) liable to be barred thereby. Said *per* Lord Chan. *King* in the Caſe *ſupra*. *Ibid.* 144.

31. The Defendant pleads to the whole Bill, and on arguing the Plea *it* was ordered to *ſtand for an Anſwer, without ſaying one way or other, whether the Plaintiff might except.* After this Plaintiff puts in Exceptions to the Anſwer, ſuppoſing the *Plea to be now as an Anſwer.* *Talbot* C. (on having Precedents firſt looked into by the Regiſter, and being ſatisfied what had been the Courſe of the Court in ſuch Caſes) held, that when the Court orders that the Plea ſhall ſtand for an Anſwer, without ſaying more, it muſt be intended a *ſufficient* Anſwer, an *inſufficient* Anſwer being as *no* Anſwer (*a*); wherefore in the principal Caſe the Plea being taken to be a ſufficient Anſwer, and *no expreſs Liberty to except*, the Exceptions were diſcharged. *Hil.* 1733. *Sellon* and *Lewen*, 3 *Will. Rep.* 239.

(*a*) *Vide* 2 *Will. Rep.* 558.

32. In a *Plea of Purchaſe*, Defendant in his *Denial* of Notice *denied that at the Time of making his Purchaſe, and paying his Purchaſe Money, he had any Notice of the Plaintiff's Title*, &c. And *Talbot* C. held, that *Notice before*, is *Notice at the Time of the Purchaſe*; and that the Party will in ſuch Caſe, on its being made appear that he had Notice *before*, be *liable* to be *convicted* of *Perjury*; wherefore his Lordſhip held the Plea well enough. *Hil.* 1733. *Jones* and *Thomas*, 3 *Will. Rep.* 243.

In all Caſes of a Plea of *Purchaſe* or *Marriage* Settlement, *Notice muſt be denied*, though not charged by the Bill; and it may be ſufficient to deny it either by the Plea or Anſwer, notwithſtanding the Objection that it ought to be in the Plea, ſince all the *Defendant has to do is to prove his Plea*, for the Defendant is not to prove a *Negative*, *viz.* that he had *no* Notice. However, it ſeems beſt to deny Notice both in the Plea and Anſwer. By Lord *Parker*, *Hil.* 1719. *Aſhton* and *Curzon*.—The S. P. determined by Lord *King* in the Caſe of *Weſton* and *Berkeley*, 17 *July* 1729. Both theſe Caſes, 3 *Will. Rep.* 244. in a Note to the Caſe of *Jones* and *Thomas*.

33. Defendant pleaded to a Bill, and died before the Plea came on to be argued. Plaintiff revived, and upon coming on of the Plea, *Talbot* C. was of Opinion that it could not be argued, but that Defendant's Repreſentative muſt plead *de novo*. 14 *December* 1735. (*b*) *Micklethwaite* and *Calverly & al'*, *Rep. in Eq. Temp. Talbot* 3. The Reporter by way of *N. B.* ſays, that the Reaſon ſeems to be, becauſe the Repreſentative may have a Plea to defend him without denying the Merits; for if an Executor or Adminiſtrator can truly plead *Plene Adminiſtravit* upon a *Scire Facias* at Law, (which muſt always iſſue in ſuch Caſe) the Execution can only be *De bonis Teſtatoris quando acciderint*, but the *Anſwer* of the *Teſtator* in a Court of Equity will *bind the Executor who has Aſſets. Ibid.*

(*b*) *Q.* If it ſhould not be *Mich.* 1733. which is the Reaſon I have placed it here.

34. 3000 *l.* was to be raiſed by a Truſt Term in a Marriage Settlement for Portions of ſuch Daughters as ſhould be living and unadvanced by the Father at his Death. There being ſeveral Daughters, *B.* one of them, after ſhe came of Age in the Life-time of her Father, and whilſt ſhe was unmarried, releaſes all her Share in the 3000 *l.* to the Owner of the Inheritance. *B.* marries, the Father dies, and a Bill is brought by her Huſband as in her Right to have her Share, *&c.* Defendant *pleads the Releaſe in Bar.* Lord Chan. ordered the Plea to ſtand for an Anſwer. *Hil.* 1734. *Robinſon* and *Bavaſor*, *Viner's Abr.* Tit. *Aſſignment*, (D) *Ca.* 29.

Choſes in Action, and *Poſſibilities*, are aſſignable in Equity, *if made upon Conſideration*; but here no Conſideration appears, and at Law a Poſſibility may be releaſed; but *this is a Demand in Equity under a Truſt, and therefore ſhall be ſupported by a Conſideration.* Said *per* Lord Chan. *Ibid.*

35. *Bill* to ſet aſide an Award, and *to be relieved againſt an Action at Law on the Bond of Submiſſion.* The Defendant *pleaded as to ſo much of the Bill* as ſought to ſet aſide the Award, and ſtaying the Defendant's Proceedings at Law; *and he ſet forth the Submiſſion and Bond*, whether then the Plaintiff *is not intitled to any Relief. Ibid.*

Note; Mr. *Viner* makes a *Quære, if the Money had been equal to or exceeded the Penalty of the*

and Award to be fairly made, &c. But the Plea was *over-ruled*, becauſe it covered too much; for the Plaintiff in all Events is intitled to Relief againſt the Penalty of the Bond, though the Merits are with the Defendant. *Potter* and *Davy*, *Mich.* 1734. *Viner's Abr.* Tit. *Arbitrement*, (J. a.) in the Margin of the 7th Caſe.

36. *A.* by *Parol* agreed to *leaſe certain Mines for* 21 *Years*, in *Purſuance whereof Plaintiff entred and ſought for Lead*, and now *ſued* for a *Diſcovery* and *Performance* of the Agreement. *Defendant* pleaded *the Statute, and that Plaintiff after his Entry quitted the Mines, and never inſiſted on his Bargain till Defendant had diſcovered the Lead.* Benefit of the *Plea* ſaved to the Hearing. *Wynn* and *Lloyd*, *MS. Notes* (*a*).

(*a*) 2 Term and Year.

37. In the *Pleading* of a *Purchaſe* or *Mortgage*, the *Defendant* ought to ſhew, *that the Vendor* or *Mortgagor being* or *pretending to be ſeiſed in Fee of the Premiſſes, did make ſuch Conveyance* or *Mortgage*, &c. otherwiſe the Perſon undertaking to ſell or mortgage may be a mere Stranger, and have no Intereſt in the Premiſſes though he takes upon him to ſell or mortgage them. Said by Lord *Talbot* in the Caſe of *Head* and *Egerton*, *Eaſt.* 1734. 3 *Will. Rep.* 281.

38. After a *Plea put in* there can be *no* Motion for an *Injunction* till the *Plea* is *argued*; but the *Court*, at the *Inſtance* of the *Plaintiff*, will *ſpeed* the *arguing* of the *Plea*, and will give Leave that if the *Plea ſhould be over-ruled, that then the Plaintiff may move at the ſame Time for an Injunction.* Said *per Talbot* C. *Mich.* 1735. in the Caſe of *Sir William Humphreys* and *Orlando Humphreys*, 3 *Will. Rep.* 296.

39. The *Bill* was for a *Sum of Money due to the Plaintiff's Wife.* The Defendant (who was her Brother) pleaded a *Releaſe made by her, upon ſecuring to her another Sum by Bond*, which *Releaſe was executed by her as a ſingle Woman*, ſhe living as ſuch at that Time in the Houſe of the Defendant; *and moreover*, that *after the Marriage came to be known, the Huſband* (the Plaintiff) *had accepted Intereſt*, and thereby ratified her Act. Lord Chan. *Hardwicke:* Perhaps this may be a *good* Defence, but it is *not proper* for a Plea. A *Plea is proper when the Matter of the Defence can be reduced to a ſingle Point, which will bar the Plaintiff's Demand* (*b*); *and then it is of Uſe*, becauſe *by having the Judgment of the Court upon that Point, the Parties are ſaved the Expence of an Examination:* But where *many Circumſtances go to the Defence*, as in this Caſe, *it is of no Sort of Uſe*, becauſe there muſt be an *Examination afterwards* whether thoſe Circumſtances be *true* or *falſe*: And it would be highly improper that the Court ſhould firſt give Judgment upon the Circumſtances, and that an Examination ſhould come afterwards. *Auguſt* 1739. *Anon.* Pleas and Demurrers after the laſt Seal, *Lincoln's Inn Hall*, *MS. Rep.*

(*b*) *Vide* (E) *P.* the Note there.

40. *If a Broker is employed by an Executor to diſpoſe of the Eſtate, without charging him with ſome particular Colluſion or Concealment, he may* demur; *or if the Nature of his Employment doth appear, he may* plead it, *as in the Caſe of* —— and *Atkins*, 17 *December* 1742. at *Lincoln's Inn Hall*, where a Bill was brought againſt *A.* to *charge him with the Receipt of the Eſtate of* B. and he *pleaded* that *he was employed as Broker by the Executor*, and the *Plea* was *allowed*. *MS. Rep.*

(F) Demurrer (*a*); —— What ſhall be a good Cauſe of Demurrer, and What not.

(*a*) A *Demurrer* is the Allegation of the Defendant, which admitting the Matters of Fact, or ſome of them alledged by the Plaintiff in his Bill, to be true, ſhews, that as they are ſet forth by the Plaintiff himſelf, they are inſufficient for him to proceed upon, or to oblige the Defendant to make Anſwer unto; and therefore it demands the Judgment of the Court, whether the Defendant ſhall be compelled to make Anſwer to the Plaintiff's Bill, or *to ſome certain Part thereof.*

1. A. Seiſed of the Manor of *W.* worth 110 *l. per Ann.* and of a Farm in *W.* worth 250 *l. per Ann.* articles to ſell the Manor; and if that the Manor were not worth 110 *l. per Ann.* he would make it up with the Farm Lands. Plaintiff got a Decree upon theſe Articles, which was ſo penned that the whole Farm was by general Words included. The Defendant exhibited a Bill to have the Decree explained; to which the *now* Defendant demurred, and Demurrer allowed. *Per* Lord Chan. and Baron *Turner*, 18 *February* 15 *Car.* 2. *Read* and *Hanby*, 2 *Freem. Rep.* 179.

2. The *Heir* of a Mortgagee exhibited a *Bill* to *have the Mortgagor redeem*, or *elſe to be foreclоſed.* Defendant demurred, *becauſe the Executor, who might have Title to the Money, was not made a Party* (*b*); and the Demurrer *allowed.* 12 *May* 16 *Car.* 2. *Freake* and *Horſeley*, *Ibid.* 180.

(*b*) *Vide* 2 *Freem. Rep.* 52. *Ca.* 57.

Eaſter 1680. *Anon.* where a Bill was brought againſt the *Heir* of the *Mortgagee* to redeem, and *neither the Executor nor Adminiſtrator were made Parties*; and this Exception being taken at the Hearing of the Cauſe, Lord Chan. *would not proceed*; for if it ſhould fall out upon the Account, that Money ſhould be paid by the Mortgagor, that is to be *paid* to the *Executor* or *Adminiſtrator*, and *not* to the *Heir*; and ſo the Account ought not to be controverted without their Privity.

3. A *Creditor* of *J. S.* deceaſed, prefers his *Bill* againſt *B.* for *a Diſcovery of the Eſtate of* J. S. *ſuppoſed to be in his Hands.* *B.* demurs, becauſe *there is no Executor* or *Adminiſtrator of* J. S. *Plaintiff* or *Defendant*; and held to be a *good* Demurrer, *becauſe if no Perſon will adminiſter, the Plaintiff as Creditor may*; *and it is neceſſary that the Executor or Adminiſtrator ſhould be a Party, becauſe they may perhaps ſhew how the Plaintiff's Demand is ſatisfied. Mich.* 1692. *Conway* and *Stroude*, *MS. Rep.* 2 *Freem. Rep.* 188. S. C. *in totidem verbis.*

4. *A Bill prays a Diſcovery*, and *chargeth the Defendant with profeſſing the* Romiſh *Religion.* To this the *Defendant demurs*, becauſe *he is not obliged to anſwer to that which will ſubject him to divers Penalties* (*c*). The *Demurrer* was *allowed*, and it was *ordered, that he ſhall not anſwer that Part which concerns his Religion. Wynn* and *Doughty*, *Mich.* 8 *Ann. MS. Rep.*

(*c*) *Vide* (A) *P. Ca.*

5. *A. ſeiſed* of *Land*, and *B.* of a *Fee-Farm iſſuing out of it*, paid Taxes *only* after the Rate of 1 *s.* and 3 *d. per* Pound, and *retained for the Fee-Farm at the Rate of* 4 *s. at which the Land-Tax was*; on which *B. brought his Bill*, and prayed that *A. ſhould ſet forth the Value of the Land*, and *what Rent he received, and what he had paid for Taxes. A. demurred*, and *Demurrer* allowed, notwithſtanding *Skerington*'s Caſe was cited; the *whole Matter there appearing*, and *this being on a Demurrer*, which was made the *Difference. Hil.* 9 *W.* 3. *Pickering*'s Caſe, *Caſes in B R. Temp. W.* 3. 171.

6. *Bill* in the *Dutchy* for Lands; the *Defendant* demurred, *becauſe the Plaintiff did* not *expreſly aver* the *Lands* to be *within* the *Dutchy*, which is a circumſcribed Juriſdiction; and the *Demurrer was held good* by Lord *Lechmere*, Chancellor of the Dutchy Court, *King* C. J. and

Page and *Reeves* Barons. *Eaſt.* 10 *Geo.* 1. Lord *Coningſby*'s Caſe, 2 *Mod. Ca. in Law and Eq.* 95.

2 *Will. Rep.* 300. 7. On a *Demurrer* to the *whole* Bill, if the *Demurrer be allowed*, the *Bill* is *regularly out of Court*. *Vide* the Caſe of *Lord Coningsby* and *Sir Joſeph Jekyll*, Tit. *Amendment*, *P.* 59. *Ca.* 3.

It has been a uſual Thing for a Plaintiff in order to have a Diſcovery to make the Book-keeper, or any other Officers of a Company Defendants, who have not demurred, but anſwered; whereas if this Demurrer ſhould be allowed, the Officers of Companies are never likely to anſwer again; and though the Plaintiff be intitled to a Diſcovery, (as in the Principal he plainly is) he would never be able to get one; and conſequently there would be a Failure of Juſtice. Said *per* Lord Chan. *Ibid.* 312. (*a*). Though his Anſwer cannot be read againſt the Company, yet it may be of Uſe to direct the *Plaintiff* how to pen his *Interrogatories* towards obtaining a better Diſcovery. *Per* Lord Chan. *Ibid.* 312 (*b*). It is a *general* Rule, that *no one need be made a Party againſt whom, if brought to a Hearing, the Plaintiff can have no Decree. Thus a Reſiduary Legatee need not be made a Party*; and for the ſame Reaſon in a *Bill* brought by the *Creditors of a Bankrupt againſt the Aſſignees under the Commiſſion, the Bankrupt himſelf need not be made a Party.* By the Maſter of the Rolls, in the Caſe of *De Golls* and *Ward*, *Hil.* 1732. Though with Regard to making the Bankrupt a Party, it ſeems formerly to have been held otherwiſe. See 2 *Vern.* 32. And however the Rule laid down by his Honour may hold in general, yet the Determination of Lord *Talbot*, in the Caſe of *Wych* and *Meal* above, appears to have been founded on great Reaſon and Juſtice. 3 *Will. Rep.* 311. in a Note.

8. In a *Bill* againſt the *Eaſt-India* Company, an *Officer of the Company* was made a *Defendant* in *order to diſcover ſome Entries and Orders in the Books of the Company.* The *Officer demurred*, for that *it was not ſo much as pretended by the Bill that he was any way intereſted in the Matter in Queſtion*, and that his Anſwer could not be read *againſt the Company*, but that the Plaintiff might examine him as a Witneſs (*a*); and that it was plain the Plaintiff could have no Decree againſt him (*b*). But *Talbot* C. *over-ruled* the Demurrer, *leſt there ſhould be a Failure of Juſtice*, in Regard the *Company can anſwer no otherwiſe than by their Common Seal, and are not liable to a Proſecution for Perjury though their Anſwer be never ſo falſe*, no Inſtance of ſuch Demurrer having ever been allowed, and no Manner of Inconvenience can enſue from obliging ſuch Officers to anſwer. *Trin.* 1734. *Wych* and *Meal*, 3 *Will. Rep.* 310, 312. *Vide* Tit. *Anſwer*, (C) *Ca.* 3. and the Note there.

9. A Defendant may demur at the Bar *ore tenus*, but then on its being allowed *he cannot have his Coſts*. *Talbot* C. *Trin.* 1735. *Tourton* and *Flower & al'*, 3 *Will. Rep.* 369, 371. ——— What is ſaid in the Caſe of *Durdant* and *Redman*, 1 *Vol. Eq. Ca. Abr. P.* 42. *Ca.* 4. that *Coſts ought to be paid for a new Demurrer inſiſted on at the Bar* ore tenus, is not now the Practice. 2 *Will. Rep.* 371. *in a Note.*

10. If a *Bill* is brought by a *Creditor* or a *Reſiduary Legatee* againſt the *Executors*, and other *Reſiduary Legatees*, without ſome ſpecial Reaſon, as *Inſolvency*, *Colluſion*, or the like, which makes it neceſſary to go into Equity; this may be demurred to. *Bickley* and *Dovington*, *MS. Notes* (*c*).

(*c*) *Q.* Term and Year.

11. A *Bill* alledging a *Cuſtom touching Church Aſſeſſments*, praying an *Injunction* to a *Suit* in the *Eccleſiaſtical* Court, *demurred* to and *allowed*. *Dunn* and *Coates*, *MS. Notes.*

12. Any *Man made a Party that is not charged to claim an Intereſt may demur, for he ought to be examined as a Witneſs*; and therefore where a *Bill* was brought againſt *A.* to *diſcover Letters that would be Evidence in a Cauſe* between *C.* and *D.* and to *produce thoſe Letters in Evidence*; *A. demurred*, and the *Demurrer* allowed. *Vernon* and *Swirburn*, *MS. Notes* (*d*).

(*d*) *Q.* Term and Year.

13. *J. S.* brings a *Bill* againſt *B.* his Father to *recover divers Sums of Money* from the Father, and alſo 10000 *l.* on a *ſtale* Bond of *above twenty Years* ſtanding. The Defendant *demurred* as to *that Part of the Bill that prayed Relief on the Bond*, or *to recover the*

Money due thereon; for that *the Plaintiff had a Remedy for the ſame at Law, the Bond appearing to be in his Cuſtody, and taken in his own Name*; and the *Demurrer* was *allowed*. *Vide* 3 *Will. Rep.* 395.

14. The *Bill* was for a *Diſcovery*, and to *perpetuate the Teſtimony of* A. *who could prove the Allegation*, which was an *uſurious* Contract, *viz. a Bond of* 4000 l. *dated* —— *Day of* Auguſt 1720. *from the Plaintiff's Father to the Defendant* Green, *in Truſt for the Defendant* Monk, upon which the Plaintiff's Father (then a Commoner) had allowed 10 *l. per Cent.* Premium, and ſo had received only 3600 *l.* The *Bill* did *not pray Relief*, nor *offer to pay what was really due.* The *Defendants* ſeverally *demurred* and *anſwered*, and by their *Anſwer offered to accept what was ſtated by the Bill to have been received*, &c. (The Bond had not been put in Suit). And for *Cauſes* of *Demurrer* the *Defendants ſhewed*; 1ſt, That the *Diſcovery ſubjected them to a penal Statute.* 2dly, That the *Court ought not to perpetuate Teſtimony to deſtroy their Debt.* And Lord Chan. *Hardwicke* held the firſt a *good Cauſe of Demurrer*, but *not* the *ſecond*; and *declared the Courſe of the Court to be, that where one Cauſe of Demurrer was good*, and the *other ill*, the *Demurrer* muſt be *over-ruled.* Therefore *for the Sake of the Precedent* he could *not allow the Demurrer to ſtand as to the firſt Cauſe*; but over-ruled it, with a Direction that the *Defendants ſhould not be obliged to anſwer as to the Uſury. Auguſt* 9, 1739. *The Earl of Suffolk* and *Green and Monk, at Lincoln's Inn Hall, MS. Rep.*

(G) Anſwering, Pleading and Demurring to the ſame Bill, &c.

1. *J. S.* had a *legal* Title, but the *Deed by which he claimed the Eſtate being loſt*, he brought his *Bill* to *ſet it up*, to which the Defendant *anſwered as to Part*, and *pleaded himſelf a Purchaſer for a valuable Conſideration*, without Notice, *&c. J. S. replies to the Plea*, and *Defendant* proves his *Plea*, and *J. S. proves no Notice upon Defendant.* At the Hearing of the Cauſe the Maſter of the Rolls was of Opinion that the *Plea was good. Mich.* 1695. *Parker* and *Blythmore, MS. Rep.*

Prec. in Chan. 58. S. C. and P. ſays, his Honour at the Hearing was of Opinion that the *Plea was good*; but ſaid the Queſtion was, whether the Court could *now* conſider of that at all, the *Plaintiff having admitted the Plea to be good, by replying to it*, and nothing being now in Queſtion, but *whether it be true or not*; and if it ſhould not be ſo, no Plaintiff would ever ſet down any Plea to be argued, but would reply, and put the Defendant to the Charge of examining, and then conteſt the Validity of the Plea at the Hearing; and beſides, the Defendant would be prevented from making ſuch other Defence as he might by relying on his Plea.

2. It is a *Rule* in Equity, that *the Anſwer over-rules the Plea* where Defendant *anſwers the ſame Things* he inſiſts upon in his *Plea* that he ought not to anſwer to. 20 *Jan.* 1717. *Earl of Clanrickard* and *Burk*, *Viner's Abr.* Tit. *Chancery*, (W. a.) *Ca.* 1.

3. *Defendant* has *Leave* to *plead*, *anſwer* and *demur*, but *not to demur alone.* The Defendant *demurs* and *anſwers* only by *denying Combination, or ſome ſuch trifling Matter.* This is in Effect a *Demurrer* only; *ergo* ſet aſide. *Per King* C. *Trin.* 1725. *Stephenton* (or *Stephenſon*) and *Gardiner & al'*, 2 *Will. Rep.* 286.

4. So where a Defendant obtained the like Leave, and *anſwered* only by *denying*, and *demurred to every other Part of the Bill.* Held by Lord Chan. that he ought to *anſwer ſome material Fact of the Bill*,

Bill, and the *Demurrer* was diſcharged *with Coſts*. *Attorney General* and —— *Viner's Abr.* Tit. *Chancery*, (W. a.) *Ca.* 2.

His Honour ſaid it had been ſo determined in Lord *Stafford*'s Caſe, who *pleaded after Time prayed to anſwer*.

5. On Time given to anſwer Defendant may put in a Plea, for that is an Anſwer, and on Oath, but *cannot put in a Demurrer*. Ruled by the Maſter of the Rolls, *Trin.* 1728. *Anon.* 2 *Will. Rep.* 464. *Ibid.*

6. A Defendant cannot demur and plead, or demur and anſwer to the ſame Part of a Bill, for the Plea, *&c.* over-rules the Demurrer. *King* C. and *Raymond* C. J. *Mich.* 1730. *Jones* and *Com' Strafford & al'*, 3 *Will. Rep.* 76, 81.

7. A Bill is brought by the Lord of a Manor to recover a Fine for a Copyhold, on a Suggeſtion that the Defendant was admitted by Attorney, but ſometimes pretends the Attorney had no Authority to make ſuch Admittance. Defendant anſwers as to Part, and demurs as to Relief, Demurrer good. *Mich.* 1732. *North* and *Stafford*, 3 *Will. Rep.* 148.

Viner's Abr. Tit. *Arbitrament*, (T. a.) *Ca.* 39. *March* 15, 1734. S. C. cites it as a MS. Caſe, and ſtates it thus: A bill was brought againſt the Defendant a Supercargo for an Account in 1721. who in his Anſwer ſet forth that there was a Submiſſion and Award, and Releaſes given. A Bill was now brought to ſet aſide the Award, at leaſt ſo far as related to a particular Parcel of Goods charged to have been ſold by him to *J. S.* abroad to the Amount of 10000 *l.* ſetting forth that Plaintiffs had *received an Account of this Tranſaction ſince the Award*; and ſuggeſts that Defendant had *concealed* all this *from the Arbitrators*, omitting it out of the Account laid before them, and that the Sale of theſe Goods were entred in a particular Book, *&c.* The Defendant as to Diſcovery and Relief *pleaded the former Proceedings, Award, Releaſes*, &c. Lord Chan. ſaid, that the Rule that *Awards cannot be ſet aſide unleſs for Partiality or Corruption is too narrow*; for if there be *Fraud made Uſe of by either of the Parties to miſlead the Arbitrators*, that is a Reaſon; ſo in Caſe of a Judgment at Law, or a Decree here: And the Facts charged amount to this, as ſuppreſſing the Book, *&c.* and omitting Goods out of Account laid before Arbitrators. Defendant denies ſuppreſſing the Book by Anſwer; but if he did ſell, and not enter or not diſcloſe, that amounts to the ſame Thing; and the Defendant is affected by this as well as the other. The Plea goes too far, being to Relief as well as for Diſcovery; for if Defendant be not bound to diſcover, yet if Plaintiffs can prove their Caſe, it is too much to ſay they are not intitled to Relief. —— 1 *Vol. Eq. Abr. P.* 77. *Ca.* 16. *but not S. P.*

8. *If an Account ſtated, and Releaſes are pleaded to a Bill, to ſet aſide an Award, and to have an Account; and Defendant ſwears the Accounts taken by the Arbitrators were true Accounts, but does not anſwer particular Concealments and Frauds alledged in the Bill, the Plea is bad*, as the following Caſe will evince. —— In 1730. a Bill for an Account was brought againſt Defendant, a Supercargo of the *South-Sea* Company. At the Hearing all Matters were referred, an Award made, and mutual Releaſes executed. Plaintiffs now brought a new Bill, ſuggeſting that ſince the Award they had received Information of Effects to the Value of 119000 Dollars, concealed by Defendant from the Arbitrators. Defendant pleaded the Award and Releaſes, and anſwered, that the Account taken by the Arbitrators was fair and juſt, but did not anſwer to the Concealment particularly mentioned in the Bill. *Talbot* Chan. It is a Rule, and ſo are the expreſs Words of the Statute, that Awards made between Parties ſhall not be ſet aſide but for Corruption or Partiality in the Arbitrators; but there are other Reaſons equally miſchievous and proper to be relieved againſt in this Court, as where there is Fraud and Cancealment in either of the Parties. It is true Arbitrators are in the Nature of Judges, and in ſome Reſpects have a greater Latitude, not being confined within the Rules of Law or Equity, and therefore may make ſuch Allowances as could not be admitted in Courts of Judicature: But as at Law, where Judgments are obtained by Fraud or Surprize, nothing is more common than to ſet the Judgment aſide; ſo upon Decrees Bills of Review are daily brought in this Court where Evidence ariſes that could not be come at at the Time of the Decree, there is the ſame Reaſon in the Caſe of Awards; and in this Caſe it cannot be imagined that Defendant had accounted for theſe Matters, ſuppoſing the Fact to be true, for this would have occaſioned a conſiderable Difference in the Award;

Award; *ergo* for this Reaſon the Plea was over-ruled, and Defendant put to anſwer over. *South-Sea Company* and *Bumſtead*, 15 *March* 1734. *MS. Rep.*

9. If a *Demurrer* be to *Part* of the Plaintiff's Bill, and an *inſufficient* Anſwer to the *Reſidue*, yet the Plaintiff cannot except until the Demurrer is argued, and *this according to the Courſe of the Court. Trin.* 1734. *London Aſſurance* and *Eaſt-India Company*, 3 *Will. Rep.* 326.

But if to a Bill the Defendant *anſwers* as to *Matter of Diſcovery*, and *pleads only as to Relief*, the Plaintiff may except to any Matter of Diſcovery before the Plea argued; *for that plainly no Matter of Diſcovery is covered by the Plea.* So ruled by the Maſter of the Rolls on a Motion to diſcharge the Exceptions, and Mr. *Vernon*, who was for the Motion, did afterwards *admit the Courſe of the Court to be ſo.* 14 *December* 1719. *Note* alſo, the Lord *Parker* ſome Time before ruled it in the ſame Manner. 3 *Will. Rep.* 327. in a *Note.*

CAP. VIII.

Appeals. *

* By a ſtanding Order of the Houſe of Lords, made 24 *March* 1725. *Appeals* are to be brought *within five Years* after the *Decree* or *Order* in the Court below is *ſigned* and *inrolled. Forteſ. Rep.* 10.

1. FINCH ſeemed to hold, that an *Appeal* would lie from the *Lord Mayor's Court* in Chancery, as it doth from the *Grand Seſſions* in *Wales*; but it will not out of the Exchequer, becauſe the Plaintiff there comes by Privilege as the Debtors to the King; and all the Courts in *Weſtminſter-hall* are upon a Level, and of *equal Antiquity. Mich.* 1675. *Anon.* 1 *Freem. Rep.* 312.

2. Held *clearly* by *Lord Chan.* that upon an *Appeal*, either from the *Rolls* to his *Lordſhip*, or from *him* to the *Houſe* of *Lords*, *no new Matter not in iſſue in the Cauſe below ſhould be ſuffered or inſiſted on*; and his Lordſhip ſaid, that rather than give way to a Precedent of ſuch general Inconvenience as this would be, he would diſmiſs the Appeal, though by it the Plaintiff were forced to bring a new Bill, or a Bill of Review for his Relief. *Trin.* 1710. *Thompſon* and *Waller*, *Prec. in Chan.* 295.

Vide Ca. 4. *and the Notes there.*

3. An Appeal lies from a Decree made in the *Iſle of Man*, by the *King of the Iſland*, to the King in Council here, *though there is no Reſervation in the Grant made of the* Iſle of Man *by the Crown of the Subjects Right of Appeal to the Crown. Mich.* 1716. *Criſtian* and *Corren*, before a Committee of Council at the *Cockpit*. Lord C. J. *Parker* aſſiſting at Council upon this Occaſion ſaid, he thought that the *King in Council had neceſſarily a Juriſdiction in this Caſe, in order to prevent a Failure of Juſtice.* 1 *Will. Rep.* 329.

4. On an Appeal from the *Rolls* to *Lord Chan.* the Cauſe is open, and the Party is at Liberty to read new Proofs, and offer what he can againſt the Decree, for the Decree is to be inrolled as Lord Chancellor's

Gilb. Eq. Rep. 151. *Trin.* 4 *Geo.* 1. S.C. and P.—The Rule is, that on an *Appeal* the whole Caſe is open; but on a *Rehearing* only ſo much as is petitioned againſt; if all do not Petition, only to the Petitioners it is open. *Trin.* 1725. *Hayward* and *Colley*, *Sel. Ca. in Chan.* 24.——*Vide Ibid.* 14.——On *Appeal* may bring new *Matter*, but in *Review* muſt proceed *ex eiſdem Actis*, unleſs there be a Clauſe to receive new Matter. *Trin.* 1725. *Popping's* Caſe, *Sel. Ca. in Canc.* 48.

cellor's Decree, and the Appeal is only to give his Lordſhip an Opportunity of hearing what can be offered why his Lordſhip ſhould not ſign and inrol it as his Decree. *Per* Lord Chan. *Trin.* 1718. *Wright* and *Pelling*, *Prec. in Chan.* 496.

5. An *Appeal* from Decrees made in the *Plantations* lies only to the King in Council. *Vide* the Caſe of *Sir John Fryer* and *Bernard*, *Mich.* 1724. 2 *Will. Rep.* 261, 262.

Note; In this Caſe the Lord Chan. does not act as Chancellor, but by Authority of the Sign Manual, and under this particular Power and Juriſdiction.

6. *No Appeal* lies from an *Order made by the Lord Chancellor* (whom his Majeſty by his Royal Sign Manual had intruſted with the Care, *&c.* of Ideots and Lunaticks) touching *Lunaticks*, to the Houſe of Lords, but only to the King in Council; the Cuſtody of Ideots and Lunaticks being in the Power of the King, who may delegate the ſame to ſuch Perſon as he ſhall think fit by Writing under his Majeſty's Royal Sign Manual. Reſolved in *Dom' Proc'* (after long Debate, and reading the Statute of 17 *Ed.* 2. *de Prærogativâ Regis* of Ideots, *c.* 9 & 10.) 14 *February* 1726. *ex parte Pitt.* —— In Conſequence of the above Reſolution, an Appeal was brought before the King in Council, where, after ſome Debate touching the Juriſdiction, the Matter of Appeal was heard and determined *May* 15, 1728. 3 *Will. Rep.* 108. *and the Notes there.*

7. An Agreement was ſigned by the Parties, and by Conſent made an Order of Court to ſubmit to ſuch Decree as ſhould be made, and neither Party to bring an Appeal, yet the Cauſe allowed to be reheard. *Hil.* 1733. *Buck* and *Fawcett*, 3 *Will. Rep.* 242.

Vide Tit. **Rehearing.**

CAP. IX.

Apportionment (a).

(a) Apportionment ſignifies a Diviſion or Partition of a Rent, Common, *&c.* or a making of it into Parts. *Co. Lit.* 147. *b.*

(A) In what Caſes, & econt.'

1. A. By Deed made his Heir Tenant for Life, with Remainder over, and charged the Eſtate with a Sum of Money to be raiſed by Sale of the Inheritance for any Number of Years not exceeding 21, or for 99 Years, determinable upon four Lives. The *Tenant for Life* brought his *Bill*, that *there might be a Contribution, and not that he who is the Heir of the Family ſhould be forced to bear the Load of the whole Charges, but that the whole Inheritance may be apportioned and bear a Part of the Burthen.* Plaintiff's Council argued, that the Words are capable of a double Conſtruction,

viz. that the Money ſhould be raiſed by Sale of the Land for 99 Years, or of the Inheritance; and this muſt be the Conſtruction, *for a Man cannot alien the Inheritance for a Number of Years*; and when the Words of a Deed will bear a double Conſtruction, the Court will ſo conſtrue it, that the whole Charge may not be thrown upon Tenant for Life, who is Heir of the Family. Lord Chan. ſaid, if he could help the Heir he would, but that the Words would not bear it; for the Perſon who made the Deed having taken ſuch nice Care that it ſhall not be ſold but for ſo many Years, and the Words cannot poſſibly admit of a Conſtruction that the whole Fee may be aliened. *Hil.* 6 *Ann. Hele* and *Wynn, MS. Rep.*

2. Money was covenanted to be laid out in Land, to be ſettled to the Uſe of *A.* for Life, Remainder to the firſt, *&c.* Son of the Marriage in Tail Male, Remainder to *A.* in Fee; and in the mean Time the Money being 10000 *l.* was to be placed out upon Securities, and the Intereſt ariſing therefrom to be paid to ſuch Perſons as ſhould be intitled to the Rents of the Lands when purchaſed and ſettled according to the above Limitations. The 10000 *l.* was placed out on a Mortgage, and the *Intereſt payable Half-yearly*; *A.* died in a broken Part of the Half-year. *Macclesfield* C. ſaid, (as the Reporter ſays he underſtood his Lordſhip) that though *A.* died in a broken Part of the Half-year, yet this Intereſt ſhould not be taken as *Rent* (*a*), but ſhould be *apportioned*, and a Proportion thereof go to *A.*'s Adminiſtrator. *Trin.* 1723. *Edwards* and *Lady Warwick*, 2 *Will. Rep.* 171, 176.

(*a*) *Vide* the Caſe of *Jenner* and *Morgan*, Tit. *Rent*, *P. C.* and the Notes there.

3. By a Truſt in a Marriage Settlement, Portions for Daughters were to be raiſed payable at 18 or Marriage; and Maintenance in the mean Time, payable Half-yearly, *viz.* at *Lady-day* and *Michaelmas*, till the Portions became payable. The eldeſt Daughter attained her Age of 18 on the 16th of *Auguſt* 1727. and her Maintenance had been paid till *Lady-day* 1727. the Queſtion was, if any Proportion of the Maintenance was to be paid from *Lady-day* to the 16th of *Auguſt*. And the Maſter of the Rolls decreed Maintenance to be paid for that Time in Proportion; and his Honour ſaid, that Maintenance is always favoured, being for the daily Subſiſtence of Children, and not like Intereſt (*b*), which is only for Delay of Payment of what is due; but here the Portion is not due till 18 or Marriage, and therefore no Delay. *Mich.* 1728. *Hay* and *Palmer*, 2 *Will. Rep.* 501.

(*b*) *Vide* the above Caſe, where the Court apportioned Intereſt on a Mortgage.

4. Upon a Petition at the Rolls by Sir *Robert Raymond* C. J. and *Ventris*, Eſq; Adminiſtrators with the Will annexed to the late Lord C. J. *Holt*; and being alſo appointed Truſtees by the Court to execute the Truſts of the ſaid Will, (the Executors and Truſtees by the ſaid Will having renounced their Truſt) for Direction of the Court on this Caſe, *viz.* The Reſidue of the Teſtator's *perſonal Eſtate was decreed to be laid out in the Purchaſe of Land, to be ſettled according to the Directions in the Will; and until proper Purchaſes could be made, the Money was to be put out on Government or other Securities, with the Approbation of the Maſter*; *and the Intereſt* of the Money *was to be paid to the Truſtees, to be accounted for by them to ſuch Perſons as ſhould be ſucceſſively intitled to the Rents of the Lands when purchaſed, according to the Will*, &c. Part of the *Truſt Money was inveſted in* South-Sea *Annuities*; Mr. *J. H.* being *Tenant for Life*, (with Remainder to his Brother Mr. *R. H.*) *died 25th of* January 1728. The Widow and *Adminiſtratrix of* J. H. *claims an Apportionment of the Half-year's Dividend* or Annuity due and *paid the Lady-day next after her Husband's Death, as Intereſt due to him at the Day*

of

of his Death; on the other Hand *R. H.* as next in Remainder, inſiſts, that in Regard his Brother *J. H.* the Tenant for Life, died before *Lady-day* 1729. when the Half-year's Dividend or Annuity became due and payable, he, as next in Remainder, is intitled to the whole Dividend, as he would have been to the whole Half-year's Rent, if the Money had been laid out in Land. It was ordered that the Half-year's Dividend ſhall be apportioned to the Truſtees, and that ſo much thereof, as by Computation was due to *J. H.* at the Day of his Death, ſhould be paid to the Adminiſtratrix, and the Reſidue to *R. H.* the next in Remainder; for that theſe Annuities are in Nature of Intereſt, which though payable but Half-yearly, (as Intereſt is often reſerved on Mortgages and other Securities) yet where Intereſt is given for Life, it is always computed to the Day of the Death of the Tenant for Life, or to the Day of paying the Principal. But as to *another Claim* by her as Adminiſtratrix to her Huſband, *as to the growing Intereſt of* 6000 l. South-Sea *Annuities*, which were *ſold by the Truſtees* 11*th of* Auguſt 1727. *in order to raiſe Money for a Purchaſe, from the* Lady-day *next before ſuch Sale*; the Court was of Opinion that ſhe was not intitled to any Allowance for Intereſt of that Sum, tho' the Truſtees having purchaſed the ſame in the Middle of the Half-year, when three Months Intereſt had incurred upon them, and Mr. *J. H.* had made an Allowance for ſo much Intereſt as was incurred at the Time of the Purchaſe out of his Eſtate for Life, and the Sums ſo deducted by the Truſtees out of the next Dividend were added to the Principal Truſt Money; yet the Court would not make her any Allowance for the Intereſt incurred from *Lady-day* 1727. to *Auguſt* the 12th following, when the Annuities were ſold; becauſe they being ſold to make a Purchaſe of Land, *J. H.* the Tenant for Life, would be intitled to the growing Half-year's Rent at *Michaelmas*, in Lieu of Intereſt, and ought not to have both. *Per Jekyll* Maſter of the Rolls, *Hil.* 3 *Geo.* 2. *Raymond* C. J. and *Ventris*, *Viner's Abr.* Tit. *Apportionment*, (F) *Ca.* 3.

Vide Tit. **Contribution and Average**; and alſo Tit. **Rent.**

CAP.

CAP. X.

Aſſignment.

(A) Of what Things (or Intereſt) it may or may not be.

1. EQUITY *will not protect* the *Aſſignment* of *any Choſe in Action*, unleſs in *Satisfaction of ſome Debt due to the Aſſignee*; but *not when the Debt* or *Choſe in Action is aſſigned to one to whom the Aſſignee owes nothing precedent*, ſo that the *Aſſignment* is *voluntary*, or for Money then given. *Per* Lord Keep. *Bridgeman*, 10 *July* 27 *Car.* 2. *Anon.* 2 *Freem. Rep.* 145. *Ca.* 185.

A Choſe in Action *is aſſignable in Equity* upon a *Conſideration paid*, but there muſt be a Conſideration. *Vide* 1 *Vol. Eq.* and the reſpective Notes

Caſes Abr. P. 44. *C.* 2. ——*Vide* alſo the following Caſes, to each Caſe.

2. An *Aſſignment* by a *Widow* of a *Term of Years in Truſt for herſelf* and *Child*, juſt before her ſecond Marriage, and *without the Privity of her ſecond Huſband*, held *good*; *but* a *Power reſerved therein to diſpoſe of the Remainder of the ſaid Term after the Deceaſe of herſelf* and *Child*, held *void*, becauſe *ſuch Remainder not being diſpoſed by her before Marriage veſted in the Huſband. Eaſter* 1685. *Blithe's* Caſe (*a*), 2 *Freem. Rep.* 91, 92.

Vide the Caſe of *Cotton* and *King*, *P. C.*

Vide the Caſe of *Lord Antrim* and *Duke of Buckingham*, *P. C.*

(*a*) *Vide* this Caſe more fully abridg'd, *P. C.*

3. *A Bill of Exchange* was given by *A.* for *Value received*; *B. aſſigns* it to *C.* for a *juſt Debt*; *C.* brings an *Indebitatus Aſſumpſit* on *this Bill againſt A.* and had Judgment; *A.* brings his Bill *to be relieved againſt this Judgment*, becauſe *there was really no Value received at the Time of giving this Bill*, and *C. would have no Prejudice who might ſtill reſort to* B. *upon his original Debt*: It was inſiſted upon that *A.* might be relieved againſt *B.* or any claiming as Servant or Factor of, or to the Uſe of *B.* But Lord Keep. *Sommers held*, that *C. being an honeſt Creditor*, and *coming by this Bill fairly for the Satisfaction of a juſt Debt*, he could not relieve againſt him, *becauſe it would tend to deſtroy Trade, which is carried on every where by Bills of Exchange*; and his *Lordſhip* would not *leſſen an honeſt Creditor's Security. Mich.* 9 *W.* 3. *Anon. MS. Rep.*

Comyns's Rep. 49. S. C. *in totidem verbis.*

2 *Freem. Rep.* 250. *Kingsland* and *Courtney*, *Hil.* 1700. Seems to be the same Case, and as *I take it, came before Lord Keeper on an Appeal.* It is there stated thus: *A. possessed of Lands for a Term of* 1000 *Years*, devised *the same to* B. *for* 50 *Years*, if *he should so long live*; and after *B.*'s Decease *he devised the same to C.* and *C. assigns his Interest to D.* And Lord Keeper (having taken Time to consider) held this Assignment to be good, and said, this was a stronger Case than *Lampett*'s, because *the first Devisee being for a Term of* 50 *Years only, the* Devisor *had a Remainder in him for the Residue of the Term*; but in *Lampett*'s Case, the *Devise being for Life*, the *Devisor had nothing but a mere Possibility (a)*; and his Lordship said, this was the Case of *Sheriff* and *Wrotham*, 2 *Cro.* 509. and was like *Locroft*'s Case, cited in the Rector of *Chedington*'s Case—and held that *B.* took no *Estate* for *Life* by *Implication*; but in Case *he had overlived the* 50 *Years*, then the *Executor of the Devisor should have held it during the Life of* B. as when a *Devise* is made *to* A. *and the Heirs Male of his Body*; *if he dies without Issue, then to* B. *and his Heirs*: This will *not enlarge the Estate of* A. so as to *make him Tenant in Tail general*, for *he shall have it only to him and the Heirs Male of his Body. Ibid.* 251. (a) A *Possibility* is *assignable* in *Equity* if *made upon a good Consideration. Vide* the following Cases.

4. *A Remainder of a Term is an assignable Interest*; as if *J. G.* being *possessed of a Term of* 2000 *Years, devised the Estate to his Wife for* 50 *Years, if she should so long live*; and after *her* Decease *to his Son for* 50 *Years, if he should so long live*; and after *his Decease* to *his two Grandchildren during the Remainder of the said Term of* 2000 *Years*. One of the *Grandchildren* assigns his Interest in the Life-time of the Father or Grandmother, and the Question was, whether this was such an Interest vested in the Life-time of the Father or Grandmother as was assignable in the Life-time of the Father or Grandmother. It was argued that it was not, for that it was a contingent Interest until after the Decease of the Father and Grandmother; and if so, although it be such an Interest vested as cannot be defeated by the first Devisees, and such a one as may be released in the Life-time of the first Devisees, yet it cannot be assigned over; and the Cases of *Matthew Manning* and *Lampett* were cited. On the other Side it was insisted, that here is but Part of the Term carved out, *viz.* 50 Years and 50 Years, and the Remainder of the Term rested in the Devisor, which had Power to devise as he thought fit, and the Devisee might assign over; and in *Manning* and *Lampett*'s Cases the *whole Term was devised to the Party for Life*, and *was in him during his Life*, and *nothing but a Possibility in the executory Devisee*. And the Master of the Rolls was of Opinion, *that this was an assignable Interest*, and *that the Moiety passed by the Assignment*; and decreed *accord'*. *Trin.* 1700. *Kingslader* and *Courtney*, 2 *Freem. Rep.* 238.

5. *J. S.* being *drawn in to execute a Conveyance of his Estate*, which he being sensible of, makes his Will, and thereby *devises all his Estate in the first Place for Payment of his Debts*, and the Surplus for other Persons. His Creditors brought a Bill to be relieved against the Conveyance, and to have the Lands subjected to the Payment of their Debts. And Lord Keep. and the Master of the Rolls held, that this was but in Nature of an Equity of Redemption, which may be assigned; and that as *J. S.* himself might have come here to be relieved against this Conveyance, so may his Devisee; tho' urged that if these Deeds had been unduly obtained, (which was denied) yet this Devise was but in Nature of a Right of Action, which was not assignable; and therefore the Creditors could have no Benefit of it. *Hil.* 1700. *Blake* and *Johnson*, *Prec. in Chan.* 142.

Here is an equal Privity of Estate, as in Case of an Assignment of a Bond; and as to its being a hard Bargain, that not material, for there is the same Reason that a *bad Bargain if fair and without Fraud* should be decreed, as if it had been a good one; and it is plain here was no Fraud nor Surmise in this Case, for the Indenture between *H.* and his Assignees bears Date the same Day with the Lease, and recites it, and what the Fine and Rent was, and then agrees

6. *A.* for a certain Sum had articled with the City of *London* to lay a Pipe, which should not convey less than 19 Tun of Water an Hour to *Stocks Market* and *Cheapside*; Defendants and one *Houghton*, *who was no Party to the Bill*, and *others*, *who were not brought to Hearing* before the Pipes laid, employed *Houghton* to take a Lease from the City of these Waters to himself, but they had agreed among themselves

ſelves that there ſhould be 900 Shares of that Leaſe, and that *Houghton* ſhould have 300 Shares to himſelf, and the other 600 Shares were to be to the other Parties in other Proportions. *Houghton* took a Leaſe accordingly for 51 Years at 2600 *l.* Fine, and 700 *l. per Ann.* Rent, and *covenanted for himſelf and his Aſſigns to pay the Rent*, &c. by Indenture of ſame Date with the Leaſe, and made between *Houghton* and four others, (two of which were only brought to Hearing). *Houghton* aſſigns this Leaſe to thoſe four Perſons, in Truſt for himſelf as to 300 Shares, and for their own Benefit as to 600 Shares. *A.* lays the Pipe, which did not carry above five Ton of Water *per* Hour, and the Leaſe proved a very hard Bargain; and *Houghton* failed. The City brought their Bill againſt the *Aſſignees of the Leaſe to pay the Rent in Arrear, and the growing Rent, and to perform the other Covenants in the Leaſe*; and as *againſt* A. *it was that if* Houghton *had not fully performed his Articles with the City, he might do it, that the other Defendants might have the Benefit of them.* Lord Keep. decreed the Aſſignees to pay the Rent for the Time paſt, but would make no Decree that they ſhould continue the Payment of it during the Term, for they are chargeable no longer than the Privity of Eſtate continues; and if they can aſſign it over, that Ground of the Charge is gone. *Eaſter* 1701. *City of London* and *Richmond, Alderſey, & al'*, *Prec. in Chan.* 156.

agrees to divide it into 900 Shares, *&c.* Said *per* Lord Keeper. *Ibid.* 157.— 2 *Vern. Rep.* 421. *Eaſter* 1701. S. C. ſtates it thus: That the City articled with *A.* to lay a Pipe as aforeſaid, and that while this was doing they treated with *H.* and granted him a Leaſe of this Water, in Conſideration of 2750 *l.* Fine, and 700 *l. per* Rent 15 *Years*. That *H.* aſſigns over the Leaſe to Defendants *R. D. G.* and *B.*

but it did not appear that *G.* and *B.* accepted the Aſſignment, which was in Truſt for ſuch Perſons as ſhould buy Shares, the Whole being divided into 900 Shares, valued at 10 *l.* each Share. That the Pipe would not diſcharge above ſix Tun *per* Hour, ſo inſtead of being a beneficial Bargain, it would not produce above 300 *l. per Ann.* *H.* being inſolvent, and Rent in Arrear, the Bill was brought againſt the Aſſignees of the Leaſe, as alſo againſt ſeveral who had bought Shares, to have the Arrears of Rent paid, and the growing Rent, and the Performance of the Covenants in the Leaſes. 1ſt, It was allowed that *H.* ought to be a Party, but that all the Sharers ought not, the Aſſignees by dividing of it into ſo many Shares, having made it impracticable to have them all before the Court. 2dly, That poſſibly the Aſſignees might not be liable at Law, if it was an incorporeal Inheritance, for they had no Privity of Eſtate, yet enjoying the Thing demiſed ought in Equity to anſwer the Rent: But it was agreed the Decree ought only to be for the Arrears of Rent, ſince the Aſſignments, and what ſhould incur and become due whilſt they ſhould continue the Poſſeſſion; but if they ſhould get rid of it by aſſigning over, they were not to be prevented from ſo doing in Equity, or to be decreed to pay the Rent during the Reſidue of the Term, or longer than they continue the Poſſeſſion; and how far an Aſſignee named or not named is bound to perform Covenants in a Leaſe, the Caſe of *Spencer*, 5 *Co.* 16. *a.* was cited. It was objected that the Rent reſerved being 700 *l. per Ann.* and the real Value not 300 *l. per Ann.* it was againſt the Rules of Equity not to decree in Specie ſuch a hard and unreaſonable Bargain; to which Lord Keep. anſwered, as a beneficial Bargain will be decreed in Equity, ſo if it happens to be a loſing Bargain, for the ſame Reaſon it ought to be decreed. It was objected that the Aſſignees in this Caſe were but in the *Nature* of *Truſtees* for the *other Sharers*, and *Equity ought to decree againſt the* Ceſtuy que Truſt, and *not againſt* the *Truſtees*; *ſed non allocatur.* *Ibid.* 422, 423.

7. One having a Bond, receives the Money due upon it, and afterwards aſſigns it as a Security for a juſt Debt; the Aſſignee cannot ſet up this Bond in Equity, which being ſatisfied before, can receive no new Force from the Aſſignment. Said *per* the Maſter of the Rolls, in the Caſe of *Turton* and *Benſon*, *Mich.* 1718. 1 *Will. Rep.* 497. *Vide Lucas's Rep.* 450.——and *Prec. in Chan.* 525.

It is incumbent on the Aſſignee of a Bond to be informed by the Obligor concerning the *quantum* due upon ſuch Bond, which if he neglects to do, it is his own Fault, and he ſhall not afterwards take Advantage of his own Laches. Said *per* his Honour, 1 *Will. Rep.* 497.

8. A *Guardianſhip* is *not* aſſignable. *Per* Lords Commiſſioners, *Hil.* 1722. in the Caſe of *Eyre* and *Lady Shaftſbury*, 2 *Will. Rep.* 121.

Sed vide Tit. *Guardian, P.*

9. Tenant for Life with *Power to make* a *Jointure of* 500 *l. per Ann.* in Conſideration of Marriage and 10000 *l.* covenants to make ſuch Jointure, but dies without doing it. It was held, that the *Articles* are a *Lien* on the Eſtate, and that by the Execution of them the Covenantor became a Truſtee for the Feme, and that *ſuch Truſt* is

deviſeable

deviseable and *assignable* in Equity. *Mich.* 1722. in the Case of *Lady Coventry* and *Lord Coventry*, 2 *Mod. Ca. in Law and Eq.* 19.

2 *Mod. Ca. in Law and Eq.* 83. S. C. and *Decree*, says, on reading the Proofs it appeared that there was no more than 20 *l.* paid to Plaintiff as a Consideration for said Assignment, and that the Benefit thereof was worth more than 200 *l. per Ann.* to *Hoskins* the Father; and that twelve Years of the old Lease was unexpired at the Time the *Plaintiff* executed this Assignment; and that it appeared by a Letter (which was proved to be written by Defendant *Hoskins*'s Father to Plaintiff purporting) that he and the Plaintiff were to pay 250 *l.* to the City for a Fine, on renewing the Lease, when they were to pay only 20 Marks, and no more; and all that the Defendant *Hoskins* proved was, that the Lands were not of so great a Value at the Time of the Assignment as they were now, and that the City insisted on 150 *l.* Fine, which was true; but the Reason was, because *Hoskins* the Father would have a Lease made to him exclusive of the Plaintiff. *Ibid.* 85.

10. *A.* by Licence from King *Henry* 8. granted certain Lands to the Mayor, *&c.* of *G. in Trust* that *whenever the Lease made by her to* P. *and* B. *his Wife should determine, that they the Mayor*, &c. *would make a new Lease to them the said* P. *and* B. *or to the Heirs of the said* B. at any Time, on Request on Payment of 20 Marks, and under the yearly Rent of 20 Marks, for the Term of 31 Years, with the same Covenants, *&c.* as in the old Lease; and upon the Expiration of the said Term, the Mayor, *&c.* were at any Time, on the Request of the Heirs of the Wife, to grant a new Lease to them in the same Form. The Plaintiff and *H. Hoskins* (Defendant *Hoskins*'s Father) were Coheirs of *B.* and in 1712. *Hoskins* the Father got an Assignment from the Plaintiff of his Right for 20 *l.* Consideration only, when the Lands appeared to be of the Value of 200 *l. per Ann.* Therefore Plaintiff brought his Bill against Defendant *Hoskins* (*Son* and *Executor* of said *H. Hoskins*) to set aside *this Assignment as obtained by Fraud* and *Imposition, by misinforming the Plaintiff of his Right*, and against the *Mayor*, *&c. to have a Lease made to Plaintiff and Defendant* Hoskins *as Coheirs to* B. *and according to the Covenants in the original Lease.* The Defendants by their Answer acknowledge that Plaintiff and Defendant *H.* are Coheirs to *B.* and that *A.* made such a Grant, *&c.* and that Leases have been made of those Lands according to the Covenants in the original Lease: That Plaintiff for 80 *l.* paid him by Defendant's Father, assigned all his Right in the said Lease to him, and by another Deed covenanted that he (Defendant's Father) might make Use of his Name in taking a new Lease, *&c.* and that his Name might be inserted in such new Lease, in Trust for Defendant: And that the City accordingly made a new Lease to Defendant's Father, (according to the Covenants in the original Lease) without naming the Plaintiff and Defendant *Hoskins*, and denied Fraud, *&c.* The Court set aside the Assignment, and decreed a new Lease to be made to the Plaintiff, and to the Heirs of *Hoskins* (the Father) according to the Covenants in the original Lease made by *A.* and Defendant *Hoskins* to account for a Moiety of the Profits, *&c.* during his Father's Life, and since his Death, and to pay Costs. *Hil.* 10 *Geo.* 1. *Evans* and *Hoskins and the City of Glocester*, *MS. Rep.*

Future contingent Interests are more assignable in Equity than at Law. Said by his Honour in S. C. *Ibid. Sed vide* the following Cases. That a *Possibility of a Term* is *assignable* for a *good Consideration*, was *(inter al')* determined in the Case of *Theobald* and *Diffay in Dom' Proc'* in *March* 1729-30. 1 *Will. Rep.* 574. *in a Note.*

11. *A.* being bound to pay *J. S.* a Sum of Money in a Year after his Death, *gave a Note* by way of collateral Security, *that the Money should be paid out of such Arrears of Rent as should be due at his Death*; the Benefit whereof Plaintiff now prayed by the Bill. But the Master of the Rolls said, this Assignment or Agreement is utterly void, for it cannot create any specifick Lien, because the Thing itself, *viz.* the Arrears, was not then in Being, nor is it to take Effect till *A.*'s Death, and then it is too late, for the Arrears then become Part of his Assets liable to his Debts generally; and this differs from the Case of *Off-reckoning or of Pay, due or to become due*, &c. (which

Cases

Caſes were objected) becauſe in thoſe Caſes the Thing aſſigned is certain, and the Aſſignee has a certain Intereſt, but notwithſtanding the Aſſignment or Agreement, he (*A.*) had it ſtill in his Power to receive all the Arrears, and ſo defeat his own Aſſignment. *Mich.* 1730. *Lady Gray* and *Dutcheſs of Hamilton*, *Viner's Abr.* Tit. *Aſſignment*, (D) *Ca.* 28.

12. A *Choſe in Action* though not aſſignable at Law, yet is *ſo* in *Equity*, where the *Huſband may aſſign it alone*, as *he may any other Part of the Wife's perſonal Eſtate:* So may a *contingent* Intereſt which the Huſband has in Right of his Wife; or a *Poſſibility* of a Term; as appears from the Caſe of *Theobald* and *Diffay*, decreed firſt by Lord *Macclesfield*, afterwards affirmed by Lord Chan. *King*, and laſt of all by the Houſe of Lords; which though not good ſtrictly by way of Aſſignment, yet will operate as an Agreement, where for a valuable Conſideration. 2 *Will. Rep.* 608.

A Choſe in Action is not aſſignable by *Law*—but a Term for Years, which is only a Chattel real, may be aſſigned (*by Law*) by the Huſband without the Wife, and alſo the Truſt of ſuch a Term. *Vide Parker* and *Wyndham*, Tit. *Baron and Feme*, *P. C.*

13. If *A.* deviſes 1000 *l.* to *B.* payable at her Age of 25. Then *B.* intermarries with *J. S.* who together with his Wife *then an Infant* (*a*) aſſigned over the ſaid 1000 *l.* Legacy to *W.* for a valuable Conſideration. *King* Lord Chan. held this Aſſignment to be good, and that *W.* was intitled thereto, with Intereſt from the Time the Wife came to the Age of 25. *Eaſter* 1731. *Duke of Chandos* and *Talbot*, 2 *Will. Rep.* 601, 609.

The Caſe of *Beckley* and *Newland* was cited, (*vide* Tit. *Agreements, &c. P.* 21. *Ca.* 19.) which was an Agreement concerning a much more remote *Poſſibility* than that in the principal Caſe; and yet Lord *Macclesfield* eſtabliſhed it by a Decree. *Trin.* 1723.—Where the Huſband may aſſign the Wife's Legacy, payable out of an Eſtate in Reverſion, *vide* the Caſe of *Atkins* and *Dawbury*, *Mich.* 1 *Geo.* 1. *Gilb. Eq. Rep.* 88. and 1 *Vol. Eq. Ca. Abr. P.* 45. *C.* 9. S. C. (*a*) Though the *Wife* was an *Infant when the Aſſignment was made*, yet that could not be material, for if ſhe had been of Age, and joined, the Deed as to her would have been void, and ſhe might have pleaded *Non eſt factum*; but being a perſonal Thing, the Huſband alone might have aſſigned it. 2 *Will. Rep.* 608.

14. A *contingent Intereſt* or *Poſſibility*, and which may be releaſed by the Bankrupt, is *aſſignable* by the *Commiſſioners*. Sir *Joſeph Jekyll*, Maſter of the Rolls, *Mich.* 1731. *Higden & al'* and *Williamſon*, 3 *Will. Rep.* 132.

Vide this Caſe abridg'd, Tit. *Bankrupt*, *P. C.* *Vide* the Caſe of *Jacobſon* and *Williams*, 1 *Vol. Eq. Ca. Abr. P.* 54. *Ca.* 7. cites it as a MS. Caſe.—S. C. 1 *Will. Rep.* 382. more fully reported.

15. If a Man in his own Right be intitled to a Bond, or other Choſe in Action, he may aſſign it though without any Conſideration; *Secus* where the Huſband is poſſeſſed of a Choſe in Action in Right of his *Wife* only, in which Caſe he has *no abſolute Title to it* (*b*), but only a *Right to endeavour to reduce it into Poſſeſſion, if he can, during the joint Lives of him and his Wife*, which if he does not do, and he dies, the ſame will remain as it was only in the Wife. Admitted *per* Counſel, on all Sides, and *King* Chan. was of the ſame Opinion. *Trin.* 1733. *in Caſu Lord Carteret* and *Paſchal*, 3 *Will. Rep.* 197, 199.

To ſupport this Opinion the Caſe of *Burnet* and *Kinaſton* was cited and relied upon as in Point. *Vide* 1 *Vol. Eq. Ca. Abr. P.* 69. *C.* 5. 4th Edit. with my References.—*Vide* this Work, *P. C.*

(*b*) A *Choſe in Action will not veſt abſolutely in the Huſband by the Marriage.* *Per* Lord Chan. *King*, and *Raymond* C. J. *in Caſu Jones* and *Com' Stafford & al'*, *Mich.* 1730. 3 *Will. Rep.* 87.

16. But Baron poſſeſſed of a Choſe in Action, as he may releaſe or forfeit it, ſo if he ſhould aſſign it for a *valuable* Conſideration, it would be good (*c*). Agreed in the ſaid Caſe of *Lord Carteret* and *Paſchal*, 3 *Will. Rep.* 199.——*Secus*, as it ſeems, *if there be no Conſideration. Vide P. C. and the Notes there.*

(*c*) *In Equity.*

If a Judgment be given to *A.* in Trust for a Feme Sole, who marries, and by Consent of her Trustees is in Possession of the Land extended, the Husband alone may assign

17. If a Feme Sole has a Decree to hold and enjoy Lands till a Debt due to her is paid, and she is in Possession of the Lands under this Decree, and marries, and then the Husband and Wife continue in the Possession, *&c.* till the Baron's Death; the Husband alone in his Life-time may assign it, for this is an equitable Extent, and to be taken as it would be were it a legal Extent; in which Case it is plain that the Husband alone may assign the extended Interest. *Vide* the Case of *Lord Carteret* and *Paschall*, Tit. *Baron and Feme, P. C.* 1733.

over this extended Interest, as he may the *Trust of a Term to which his Wife is intitled*, according to Sir *Edward Turner*'s Case, (1 *Vern.* 7.) cited by *King* C. in the Case of *Lord Carteret* and *Paschall*, *Trin.* 1733. *Vide* this Case, Tit. *Baron and Feme, P. C.* And also *Packer* and *Wyndham, P. C.* *Vide* same Tit. 1 *Vol. Ab. Eq. P.* 58. *C.* 4. *Tudor* and *Samyne*.

18. 3000 *l. was to be raised by a Trust-Term in a Marriage Settlement for Portions of Daughters as should be living, and not advanced by the Father at his Death.* There being several Daughters, *B. one of them, after she came of Age, in the Life-time of her Father, and whilst she was unmarried, releases all her Share in the* 3000 l. *to the Owner of the Inheritance.* *B.* marries, the Father dies, and a *Bill is* now *brought* by *her* as in her Right *to have her Share*, &c. Defendant *pleads the Release in Bar*, and *insisted*, that this *Share of* B. *though a Possibility only at the Time of the Release, was assignable in Equity*, tho' *not* at *Law*; and by the *same Reason might be released in Equity*, and that *Possibilities* are *assignable* in *Equity*; and cited *Higden* and *Watkinson*, *Tibbals* and *Dufay*, *Cases in Parliament*, 16 *March* 1729. Lord Chan. said, that *Choses in Action*, and *Possibilities, are assignable in Equity*, if *made upon Consideration* (*a*), but *here* no *Consideration appears*; and at *Law* a *Possibility may be released*; but *this is a Demand in Equity under a Trust*, and *therefore* shall be *supported by a Consideration*; and *ordered* the *Plea* to *stand* for an *Answer*. *Hil.* 1734. *Robinson* and *Bavasor*, *Viner's Abr.* Tit. *Assignment*, (D) *Ca.* 29.

(*a*) *Quod Nota.* —*Vide* C. *P.* and the Notes there. *Vide* also the Notes to the Case of *Lady Gray* and *Dutchess of Hamilton*, *P.* 88. *C.* 11.

Vide Tit. Baron and Feme, P.

CAP.

CAP. XI.

Award.

(A) Award, for what Cauſes ſet aſide; — And here concerning Submiſſion and Awards made purſuant to a Rule of Court, according to the Stat. W. 3. (a)

(a) The *Stat.* of 9 & 10 *W.* 3. *cap.* 15. *ſect.* 1. enacts, That after the 11th of *May* 1698. all Merchants and others deſiring to end any Controverſy (for which there is no Remedy but by perſonal Action, or Suit in Equity) by Arbitration, may agree that their Submiſſion of the Suit to the Award or Umpirage of any Perſons ſhall be made a Rule of any of his Majeſty's Courts of Record, which the Parties ſhall chuſe, and may inſert ſuch their Agreement in their Submiſſion, or the Condition of the Bond or Promiſe: And upon producing an Affidavit of ſuch Agreement, and upon reading and filing ſuch Affidavit in the Court ſo choſen, the ſame may be entred of Record in ſuch Court, and a Rule of Court ſhall be therepon made that the Parties ſhall ſubmit to, and finally be concluded by, ſuch Arbitration or Umpirage; and in Caſe of Diſobedience thereto, the Party neglecting or refuſing ſhall be ſubject to all the Penalties of contemning a Rule of Court, and Proceſs ſhall iſſue accordingly, which ſhall not be ſtopped or delayed by any Order, *&c.* of any other Court, either of Law or Equity, unleſs it appears on Oath that the Arbitrators or Umpire miſbehaved themſelves, and that ſuch Award was corruptly or unduly obtained.

Sect. 2. Any Arbitration or Umpirage procured by Corruption or undue Means ſhall be void, and ſet aſide by any Court of Law or Equity, ſo as ſuch Corruption or undue Practice be complained of in the Court where the Rule is made for ſuch Arbitration, before the laſt Day of the next Term after ſuch Arbitration made and publiſhed to the Parties.

1. BILL to ſet aſide an Award made purſuant to a Rule of Court in *B. R.* for *Miſbehavionr in the Arbitrators* upon this Caſe. The Plaintiff and Defendant entred into an Arbitration Bond, and ſubmitted to make it a Rule of Court, and an *Award was made purſuant to the Submiſſion by Rule of Court, but the Plaintiff not liking the Award applied to the Court of* B. R. *to ſet it aſide, and made ſeveral Objections to it*; and the Court being divided in Opinion, a Rule was made to hear Counſel why the Award ſhould not be ſet aſide; and afterwards the Rule was diſcharged; but the *Court being divided* in Opinion, the Plaintiff could not obtain a Rule for an Attachment for Non-performance of the Award, and therefore brought an Action upon the Arbitration Bond, and got Judgment, and then *Ward*, the *Defendant* at *Law*, brought his *Bill* to be *relieved againſt the Award.* The Queſtion was, whether the *Plaintiff* at Law, *not having purſued the Method preſcribed by* Stat. 9 W. 3. cap. 15. by Attachment, but *has brought an Action upon the Arbitration Bond at Common Law, and has not pleaded the Statute to the Juriſdiction of this Court*, whether upon theſe Circumſtances the Court may not proceed to examine the Award, *&c.* The Defendant's Counſel inſiſted that the Award being made by Rule of Court purſuant to ſaid Statute, and ſet out to be ſo made by Defendant's Anſwer, and the Defendant ought to have the Benefit of the Statute as well as if he had pleaded it; and the Parties to the Award have no Remedy but by Application to the Court

Court where the Rule was made; that this Statute was pleaded to the Juriſdiction of this Court *tempore Cowper* C. and the Plea was allowed. Ordered that the Maſter ſhould make a State of the Caſe for the Reſolution of the Court. *Eaſter* 6 *Geo.* 1. *in Canc. Ward* and *Periam & al'*, *Viner's Abr.* Tit. *Arbitrement*, (H. a.) *Ca.* 18.

2. When *Submiſſion* to an Award is *by Bond*, which is afterwards *made a Rule of Court*, the Court will *allow the ſame Objection to the Award as they would do when the ſame came before them on an Action on the Bond*; otherwiſe there might be a Contradiction; but *when a Submiſſion is only by Rule of Court*, that Court will not receive Objections to it, for it is the ſame as if the Whole had been in the Rule; and the Court will not relieve when the *Matter has been examined by another Court that had Juriſdiction*, unleſs *the Equity be that ſome Matter of Fraud in the Award had come to the Knowledge of the Party ſince the former Examination*, which *did not appear before the other Court*. *Per* Lord Chan. who (as Mr. *Viner* ſays) had taken formerly the ſame Diſtinction in *B. R. Ibid. Ca.* 19. cites it from a MS. Rep. as the Caſe of *Coxeter* and *Anderſon*.

3. A hard Award made without hearing one of the Parties, was denied to be ſet aſide, becauſe he had *Notice*, and might have been heard if he pleaſed; and as to the Hardſhip, the Court ſaid the Arbitrators were Judges of the Parties own chooſing. Bill diſmiſſed *with Coſts*. *Mich.* 10 *Geo.* 1. *Waller* and *King*, 2 *Mod. Ca. in Law and Eq.* 63.

4. Bill was *for an Account, and to impeach an Award* between Plaintiff and Defendant *B. touching a Partnerſhip* in buying and ſelling Diamonds in *France* in 1719. and the *Bill was againſt the Arbitrators as well as the Parties*; Defendant *B.* (the Party) *as to the Account*, &c. *pleads the Award*, &c. and the *Arbitrators as to a Diſcovery of ſeveral Particulars prayed* by the Bill, *and as to any Relief againſt them, plead the Submiſſion, and that by Conſent it was made an Order of this Court*, &c. Lord Chan. allowed *B.*'s Plea to the Account, *&c.* but *over-ruled the Arbitrators* Plea, as covering too much, *i. e.* ſeveral Particulars, which might tend to ſhew a Partiality, *&c.* in their Proceedings. *Note*; In Debate of the Caſe it was argued, that an Award made upon a Submiſſion purſuant to the Statute *W.* 3. could not be ſet aſide but for *Partiality* or *Corruption* in the Arbitrators complained of *within two Terms after the Award made* (*a*), and in the preſent Caſe, though the Act of Parliament was not particularly relied upon, yet it appeared that the Submiſſion was made an Order of this Court, and that was ſaid to be ſufficient to bring it within the Statute; but the Bill was filed within a few Days after, ſo that no Advantage could be taken of not complaining according to the Act *within two Terms, &c.* And it was urged, that though the *two Terms* do elapſe before any Complaint, yet that does not ouſt this Court of Juriſdiction and Power to ſet aſide the Award at any Time for Miſbehaviour, *&c.* And a Caſe of *Ward* and *Walker* (*b*) was cited by Mr. Attorney General, of an Award ſo ſet aſide by Lord *Macclesfield*, which had been made under a Submiſſion, made a Rule of Court. But Lord Chan. ſeemed to doubt, as thinking the Statute giving *two Terms, &c.* concluded all Courts and all Manner of Equity, *&c.* *Godfrey* and *Boucher*, 4 *Geo.* 2. *Viner's Abr.* Tit. *Arbitrement*, (J. a.) *Ca.* 38.

(*a*) The Act ſays, *before the laſt Day of the next Term after ſuch Arbitration made and publiſhed to the Parties.*

(*b*) Mr. *Viner* in his Notes upon this Caſe ſays, *Quære* the Caſe of *Ward* and *Walker*, if the Bill there was not brought within the two *Months* (*c*).——*Barnard. Rep. in B. R.* 152. *Eaſt.* 2 *Geo.* 2. *Alardes* and *Cambel and Williams in Scacc.* ſays, the Opinion of the *C. B.* was, that Courts of Equity are not confined to allow of Exceptions to Awards within the Time preſcribed by the *Stat. W.* 3. as Courts of Law are; and that *Hale* and *Comyns* agreed, but that *Carter* B. differed. (*c*) *Terms*.

The

5. The Bill was to ſet aſide an Award: There were ſeveral ſtated Accounts between Plaintiff and Defendant, whereby conſiderable Sums were due from Defendant, but the Arbitrator, without Regard to any of theſe ſtated Accounts, made up an Account his own Way, bringing in the Plaintiff indebted to Defendant 25 *l.* and awarding the Plaintiff to aſſign over to Defendant a Mortgage which he had on the other's Eſtate, upon which mutual Releaſes were to be given. Plaintiff, *about two or three Days before the Time for making the Award was expired*, ſent to deſire the Arbitrator to defer making his Award until he ſhould talk with him about his Demands, to ſupport the ſtated Accounts, and know what Objections were made againſt them, which the Arbitrator would not comply with. The Submiſſion (*after the Award was made*) was confirmed by an Order of this Court. It was inſiſted for the Defendant, that this Submiſſion being confirmed by an Order of Court, purſuant to the Statute, it could not be ſet aſide but for *Corruption*, or ſome other *undue* Means; and that in Point of Time the Party was confined to make his Complaint even as to that before the End of the next Term after the Award was made. It was held by Lord *Talbot*, 1ſt, That within the Act of 9 & 10 *W.* 3. *c.* 15. the *Confirmation muſt be prior* to the making of the Award. 2dly, That with Regard to the Time within which the Complaint was to be made, it was in this Caſe *impoſſible* for the Party to apply within a Term after the Award made, becauſe the Submiſſion was not confirmed till the End of the next Term after making the Award. 3dly, It was acting *unduly* to proceed in making the Award when the Plaintiff had deſired to be heard againſt the Arbitrators determining in Contradiction to ſo many ſtated Accounts. Award ſet aſide *with Coſts*, notwithſtanding the Plaintiff's Application to the Arbitrator was not till within two or three Days before the Time for making the Award was out, there appearing to be juſt Ground for the Plaintiff to deſire to be heard, and in Regard it would be difficult to aſſign a Reaſon for rejecting ſo many ſtated Accounts ſo lately allowed and paſſed between both the ſubmitting Parties. *Trin.* 1735. *Spettigue* and *Carpenter*, 3 *Will. Rep.* 361.

6. One of the Parties to an Award having made a Submiſſion in Court, purſuant to the Statute, dies before the Money paid; no *Sci. Fa.* can iſſue againſt the Heir or Executor to enforce Payment for the Award, though eſtabliſhed by the Court, is not in Nature of a Judgment or Decree to be proſecuted, but of a Contempt, which dies with the Perſon. So held all the Judges, they being conſulted in this Matter as a Matter concerning all the Courts. *Prec. in Chan.* 223.——*Vide* the Caſe of *Webſter* and *Biſhop*, 1 *Vol. Eq. Ca. Abr. P.* 51. *Ca.* 1. *4th Edit.*

7. Where *Arbitrators* direct that an Application ſhall be made to Parliament to confirm their Award, ſuch Award is not binding unleſs an Act of Parliament be applied for and obtained purſuant to ſuch Direction. *Per* Lord Chan. *Eaſter* 1741. *Gibſon* and *Smith*, *MS. Rep.*

Where a Bill in Equity lies to compel a ſpecifick Performance of an Award, vide the Caſe of *Hall* and *Hardy*, *P.* 28. *C.* 35.—— *Vide* the Caſe of *South-Sea Company* and *Bumſtead*, *P.* 80. *Ca.* 8. *concerning* Pleading, *&c. to a Bill to ſet aſide an Award.*

CAP. XII.

Bankrupt.

(A) Who may not be a Bankrupt; —— What will amount to an Act of Bankruptcy.

(B) Concerning ſuing out a Commiſſion of Bankruptcy; —— And what is a Dealing in ſuch Commiſſion within the Statute.

(C) Concerning the Commiſſioners.

(D) Concerning the Aſſignees; —— And what Acts or Agreements of the Bankrupt will bind them.

(E) Concerning the Clerk to the Commiſſion.

(F) Who are allowed to come in as Creditors under the Commiſſion (a); —— And here of contingent and future Debts.

(a) *Vide* (L) *P.*

(G) In what Caſes Intereſt ſhall be allowed to a Creditor.

(H) Who are obliged to come in as Creditors.

(I) Concerning joint and ſeparate Commiſſions, and Creditors coming in under ſuch Commiſſions.

(K) What ſhall be ſaid the Bankrupt's Eſtate, or ſuch an Intereſt in him as may be ſold, aſſigned, &c. under the Commiſſion, & econt'.

(L) Of Diſtribution, &c.

(M) Caſes relating to Purchaſers.

(N) Concerning Aſſignments made by a Bankrupt juſt before his Bankruptcy, in order to give Preference to ſome of his Creditors.

(O) Of ſetting off mutual Debts.

(P) Bankrupt arreſted, in what Caſe diſcharged.

(Q) Concerning Bankrupt's Certificate, and the Allowance thereof.

(R) In what Caſes a Commiſſion of Bankruptcy may be ſuperſeded.

(A) Who may not be a Bankrupt;——What will amount to an Act of Bankruptcy.

1. HAVING *Eaſt-India* Stocks, or the Dealing in them, will not make a Man liable to Bankruptcy, nor do they ſeem to be Wares, Goods or Merchandizes, within the Intent of the Clauſe of the Statute of 13 & 14 *Car.* 2. *cap.* 24. (*a*). Said *per King* C. *Mich.* 1725. in the Caſe of *Colt* and *Nettervill*, 2 *Will. Rep.* 308.

(*a*) Before the making this Statute Sir *John Wolſtenholme*, who was an Adventurer in the *Eaſt-India* Company, and by Reaſon of his having a Share in the Stock of that Company, and ſelling for Money Part of the Return which he had in Specie there for his ſaid Adventure, was adjudged to be a Bankrupt, though he had a great Eſtate in Lands, and did not get the moſt Part of his Living by Buying and Selling. *Vide Nelſ. Abr.* 336. *Ca.* 8.—*Hughes's Abr.* 315. *Ca.* 7.——But now by the ſaid Act, *Sect.* 3. *No Perſon who ſhall adventure any Money in the* Eaſt-India *Company, or* Guinea *Company, or any joint Stocks of Money by them raiſed for carrying on the Trade by the ſaid* Eaſt-India *Company, or* Guinea *Company, to be managed, or who ſhall adventure any Money in any Stocks for managing the* Fiſhing Trade, *or the Trade called the* Royal Fiſhing Trade, *and ſhall receive their Dividends in Fiſh, or Merchandizes in Specie, and ſhall ſell or exchange the ſame, ſhall by Reaſon of ſuch Adventure, Selling or Exchanging, be adjudged a Merchant within any Statute for Bankrupts.*——Sect. 4. *Provided that every Perſon* who ſhall trade in any other way *than in the ſaid* Royal Fiſhing Trade, *or the Trade managed by the ſaid Eaſt-India* Company, *or the Guinea* Company, ſhall, by Reaſon of the ſaid Trading and Merchandizing, be liable to Commiſſions of Bankrupts as fully as if this Act had never been made.

2. A Perſon being *under the Age of* 21 bought Goods, and *after the Age of* 21 committed an Act of Bankruptcy, *in Reſpect of thoſe Goods*, on which a Commiſſion iſſued. Lord Chan. *Macclesfield* doubted whether he might not be a Bankrupt; but *King* C. was clear of Opinion he could not; and ſaid, if Commiſſioners find a Man a Bankrupt who is not ſo, Action will lie againſt them. *Trin.* 11 *Geo.* 1. in *Whitlock*'s Caſe, *Sel. Ca. in Chan.* 46.

3. *No Member of the Bank of* England *ſhall be adjudged a Bankrupt by Reaſon of this Stock in the Bank*, by *Stat.* 8 & 9 *W.* 3. *cap.* 20. *ſect.* 47.

4. *So of the* South-Sea *Company*, by *Stat.* 8 *Geo.* 1. *cap.* 21. *ſect.* 12.

5. *So of the* Royal Exchange *and* London Aſſurances. *Vide Stat.* 6 *Geo.* 1. *cap.* 18. *ſect.* 10.

6. So of Perſons circulating Exchequer Bills. See the Statute relating thereto.

7. *A.* had a *running Accompt with* B. *a Banker, and had* 3000 l. *in his Hands*; *B.* paid *A.* 1000 *l.* for which *A. inſtead of a Receipt gave* B. *a promiſſory Note*, who aſſigned it to *H.* and then *B. became a Bankrupt. H. ſued the Note*, and *A. not being able to prove* on the Trial *that* B. *was a Bankrupt at the Time of the Aſſignment*, *H. recovered*, then *A.* brought a *Bill for an Injunction*, and *to have a Diſcovery, whether the Aſſignment was not made after the Time it bore Date.* No *Proof was made of the Bankruptcy at the Time of the Aſſignment*, only that he could not pay it, *but never kept out of the way. King* C. that does *not amount to an Act of Bankrupty*; and if People are ſo careleſs to give Notes inſtead of Receipts, it is more fit they ſhould ſuffer than innocent Perſons, who know nothing of their Tranſactions. *Bill* diſmiſſed. *Trin.* 11 *Geo.* 1. *Parkenham* and *Bland* and *Hoſkins*, *Sel. Ca. in Chan.* 42.

It was *inſiſted* that *though* this was a *promiſſory Note*, it ſhould be conſidered *only* as a *Receipt*, *A.* having at that Time Money in *B.*'s Hands, and it could not be imagined *A.* intended to be liable on the Note at the ſame Time that ſo much Money was due to him; and if ſo, then the 1000 *l.* ſhould be taken as ſo much Money paid, and deducted out of the 3000 *l.* ſo he ſhould come in for his diſtributive Share of 2000 *l.* of the Bankrupt's Eſtate, and not be a Creditor for 3000 *l.* and pay the 1000 *l.* Note; *But held as above. Ibid.* 43.

8. *L.* having two promiſſory Notes ſigned by *A.* payable to *L.* or Order, four Months after Date; *L.* when about three Months was to run, endorſed them to *M.* for Goods then delivered; and *A.* abſconding about one Month after, *L.* on *M.*'s going to him, procures himſelf to be denied, and then *M.* ſues out a Commiſſion of Bankruptcy againſt *L.* who petitioned to ſuperſede the Commiſſion. By a late Statute (*a*), a Creditor by Note payable at a future Day may ſue out a Commiſſion as well as come in as a Creditor; but the Debtor's denying himſelf to ſuch a Creditor is not an Act of Bankruptcy, it muſt be a keeping Houſe, *&c.* in order to defeat or delay Creditors of their Debts, which could not be here, becauſe *M.* had then no Debt due to demand, ſo Commiſſion ſuperſeded. It was objected, that *L.* was Debtor to *M.* immediately upon the Goods delivered; *ſed non allocatur*; for *per* Lord C. it was Part of the Contract that *M.* would ſtay for the Money till the Notes became due. *Mich. Vac.* 1733. *Ex parte Levi*, *Viner's Abr.* Tit. *Creditor and Bankrupt*, (B) *Ca.* 14.

(*a*) 5 *Geo.* 2. *cap.* 30. *ſect.* 22. which enacts, *That it ſhall be lawful for any Perſons taking Bills, Notes or other Security for Money* payable at a future Day, to *petition for a Commiſſion, or join in petitioning.*

9. *B.* was *arreſted* for 28 *l.* and though he *had Money ſufficient to pay the Debt, yet chuſed rather to go to Priſon, in order, as he declared, to force his Creditors to come to a Compoſition.* And *per* Lord Chan. this *is an Act of Bankruptcy* within 1 *Jac.* 1. though *without ſuch Intent*; yielding himſelf to Priſon was not, unleſs he lay there two Months; otherwiſe where the Party procures himſelf to be arreſted upon a *ſham* Debt; and that by the Statute of *Eliz.* is immediately an Act of Bankruptcy. *Trin. Vac.* 1734. *ex parte Barton*; *Ibid. Ca.* 15.

(B) Concerning ſuing out a Commiſſion of Bankruptcy; — And What is a Dealing in ſuch Commiſſion within the Statute.

1. *B. Gave* J. S. *two Notes*, the *one for* 50 *l.* and the *other for* 53 *l. payable at different Times.* Before the *Day of Payment of the ſecond Note*, *J. S. took out a Commiſſion of Bankruptcy* againſt *B. who was really a Bankrupt*, but petitioned to ſet this Commiſſion aſide, as irregularly taken out, it being taken out at the ſingle Petition of *J. S.* to whom only 50 *l.* and not 103 *l.* was *then* due. And *Harcourt* C. ſuperſeded the Commiſſion (*b*), but *denied* to aſſign the Bond, the *Commiſſion not appearing to be taken out* maliciouſly *or* fraudulently, which are the Words of the Act. *Trin.* 1714. *Ex parte Mackerneſs*, 1 *Will. Rep.* 260.

(*b*) His *Lordſhip* ſaid, that in a late Caſe the Lord C. J. *Parker* was of the ſame Opinion; and that Lord *Trevor*, diſcourſing with Lord *Parker* and *himſelf*, ſeemed to concur in ſuch Opinion. — *Vide* the Notes to the following Caſe.

The Statutes of 7 *Geo.* 1. *cap.* 31. *ſect.* 1. and 5 *Geo.* 2. *cap.* 30. *ſect.* 22. have altered the Law in theſe Points, for by the former Statute Creditors on Securities *payable at a future Day*, are admitted to prove their Securities as if they were payable preſently, and are intitled to a proportionable Part of the Bankrupt's Eſtate, though they muſt not join in ſuing forth the Commiſſion till ſuch their Debts become payable. But by the *latter* Act, Perſons having Bills, Notes, or other Securities for Money, *payable at a future Day*, may petition for a Commiſſion, or join in petitioning.

2. It was reſolved by Lord Chan. *Parker*, that if a Creditor by *Bond* before the Day of Payment ſues out a Commiſſion of Bankruptcy againſt the Obligor in the Bond, it is irregular, and that the Commiſſion ought to be ſuperſeded; for though it be *debitum in præſenti*, yet it cannot be ſo much as put in Suit, much leſs can there be a Com-

Commiſſion of Bankruptcy taken out on ſuch a Bond, whereby all the real and perſonal Eſtate of the Bankrupt is (as it were) ſeized in Execution. *Hil.* 1719. *Ex parte James. Ibid.* 610.

3. An *Indorſee* of Notes (to the Amount of 100 *l.*) *purchaſed in at an under Value, i. e.* at 10 *s.* in the Pound, petitioned for a Commiſſion againſt the *Drawer*. Objected, that ſuch Creditor who came by his Debt in this Manner was not intitled to ſue out a Commiſſion. But *Macclesfield* C. held that he was plainly a Creditor, juſt as if the *Drawees* had paid the Bankrupt an under Rate for them. *Hil.* 1721. *Ex parte Lee*, 1 *Will. Rep.* 782.

And his Lordſhip held, that though they had been given *without any Conſideration*, yet they are now his Debts, and the legal Right veſted in the Indorſee; *ſecus* in Caſe of an Aſſignment of a Bond, for as much as *ſuch Aſſignee*, not being the *legal Creditor*, could not have taken out a Commiſſion;—Had the *Indorſement of the Notes* in the principal Caſe been *made after the Bankruptcy*, it might be a *Quære* whether ſuch Indorſee would be intitled to a Commiſſion, as not being a Creditor for 100 *l.* or capable of taking out a Commiſſion at the Time of the Party's becoming a Bankrupt. *Per* his Lordſhip. *Ibid.*

4. Defendant became indebted to Plaintiff in 1730. and *afterwards* committed an Act of Bankruptcy, upon which *Plaintiff* (being the petitioning Creditor) *took out a Commiſſion* againſt him, *in order to overreach and make void as many of his Conveyances and Settlements*, &c. *as poſſible*. The *Creditors* on a *Bill* filed *endeavoured to prove him a Bankrupt as far backward as* they could, and *did actually prove* to the Satisfaction of the Court, *that he committed an Act of Bankruptcy in the Year* 1726. Then it become a Queſtion, whether the Commiſſion of Bankruptcy, and all that was done under it, was not wrong, in Regard that the Debt of the petitioning Creditor, on which it was grounded, was contracted ſubſequent in Time to the firſt Act of Bankruptcy. After *arg'* and Time taken to conſider, *Talbot* C. diſmiſſed the Plaintiff's Bill without Prejudice (*a*). *Mich.* 1734. *De Gols* and *Ward*, *Ca. in Eq. Temp. Talbot* 243.

(*a*) But this Decree was *reverſed* in the Houſe of Lords *by the Opinion of all the Judges*, *Feb.* 17, 1737.

5. *Stat.* 1 *Jac.* 1. *cap.* 15. *ſect.* 17. enacts, *That if after any Commiſſion of Bankruptcy ſued forth and dealt in by the Commiſſioners, the Offender happen to die before the Commiſſioners ſhall have diſtributed the Goods, or any of them, the Commiſſioners ſhall in that Caſe proceed in Execution upon the Commiſſion for the Offender's Goods, Lands and Debts, as they might have done if the Party were living.*

6. A Commiſſion of Bankruptcy iſſued againſt *H.* at eleven of the Clock in the Morning; at three in the Afternoon the Commiſſioners declare him a Bankrupt, and execute an Aſſignment at ſix, and then have Notice that the Bankrupt died at ten of the Clock that Day; this is a Dealing within the Act of 1 *Jac.* 1. *cap.* 15. *ſect.* 17. and the Proceedings ſhall ſtand. *Per* Lord Chan. *Hil.* 1735. *Warrington* and *Norton*, *Ca. in Eq. Temp. Talbot* 184.

His Lordſhip ſaid, he knew no particular Act as diſtinct from another which can be called a Dealing. It has been ſaid, that the declaring him a Bankrupt was the Act meant, but that Declaration of the Commiſſioners being only diſcretionary and for Caution, and not at all binding to any Body, it is not probable that the Act ſhould intend that only a Dealing which it has not any where given the Commiſſioners Power to do; *whatever is done in Purſuance of the Commiſſion is a Dealing in it, if never ſo minute*; and the rather, for *theſe being remedial Laws*, are to be *beneficially conſtrued in Favour of the Creditors*; and ſaid, he could not therefore put a narrow conſtrained Conſtruction upon the Words *dealt in*, in order to overthrow this Commiſſion, and all the juſt Right of the Creditors claiming under it. *Ibid.* 186.

(C) Concerning the Commiſſioners.

1. *Commiſſioners of Bankrupts* iſſued their Warrant to ſeize *Goods of a Bankrupt on Board twelve Ships in* Topſham Bay; the *Goods were conſigned to Perſons in* Holland, *who had not paid the Bankrupt for them.* The *Maſters* refuſed to deliver the Goods notwithſtanding the Warrant; and *this occaſioned the Commiſſioners themſelves to demand the Goods in Perſon, which were ſtill refuſed. The Court* on Motion for an Order upon the Maſters for their Contempt, *ordered them to deliver the Goods upon Payment of the Freight Money*; and they to be indemnified by the Creditors againſt the Bill of Lading, which was ſent to the *Conſignees. Mich.* 8 *Ann. Anon. MS. Rep.*

2. The *Commiſſioners* cannot examine the *Wife of a Bankrupt againſt her Husband* touching his Bankruptcy. By the *Common Law* ſhe cannot be a Witneſs for or againſt her Huſband (*a*); and though the Statute of 21 *Jac.* 1. *authorizes the Commiſſioners to examine the Wife touching any Concealment of his Goods or Effects*, yet neither does that or the late Statute (*b*), *extend to examine the Wife touching the Bankruptcy of her Husband*, or whether he had committed any Act of Bankruptcy, and how and when he became a Bankrupt. *Per Parker* C. *Hil.* 1719. *Ex parte James*, 1 *Will. Rep.* 610, 611.

(*a*) 1 *Inſt.* 6. *b.* 2 *Vern.* 79.

(*b*) 5 *Geo.* 1. *cap.* 24.

3. And if the *Commiſſioners commit the Bankrupt's Wife*, and the *Warrant* of Commitment mentions it to be *as well for refuſing to diſcover the Goods and Effects of the Bankrupt*, as *to diſcover the Time and Manner of his Bankruptcy*, the Wife being to continue in Priſon till ſhe ſhould make this *laſt Diſcovery*; the Commitment is *illegal*, and ſhe ſhall be diſcharged. Held *per* Lord Chan. *Ibid.* 611.

4. Till the Statute of 5 *Geo.* 1. *cap.* 24. the Commiſſioners *could not examine* the *Bankrupt* himſelf *touching his Bankruptcy.* Said *per* Lord Chan. *Ibid.*

5. By 5 *Geo.* 2. *cap.* 30. *ſect.* 43. *The Commiſſioners ſhall not be capable of acting until they reſpectively ſhall have taken an Oath* to the Effect following, *viz.* I *A. B.* do ſwear that I will faithfully, impartially and honeſtly, according to the beſt of my Skill and Knowledge, execute the ſeveral Powers and Truſts repoſed in me as a Commiſſioner in a Commiſſion of Bankruptcy againſt and that without Favour or Affection, Prejudice or Malice.

So help me God.

6. *Which Oath any two of the Commiſſioners are impowered to adminiſter to each other, and they are required to keep a Memorial thereof*, ſigned by them, among the Proceedings on each Commiſſion.

7. On a Petition (in *Feb.* 1739.) in the Caſe of *Haliday a Bankrupt* againſt ſeveral of the *Commiſſioners for taking more than* 20 s. *a-piece at each Meeting*, and *likewiſe ordering great Sums of Money to be charged for their eating and drinking.* Lord Chan. *declared them uncapable, by Virtue of the* Stat. 5 Geo. 2. cap. 30. ſect. 42. (*c*) *to be any longer as Commiſſioners in the Execution of the ſaid Commiſſion, and that no further Proceedings ought to be had thereupon*, and *that*

(*c*) *This Statute enacts, that there ſhall not be paid out of the Eſtate of the Bankrupt any Monies for Expences in eating or drinking of the Commiſſioners, or of any other Perſon at the Times of the Meeting of the Commiſſioners or Creditors; and if any Commiſſioner ſhall order ſuch Expence to be made, or eat or drink at the Charge of the Creditors, or out of the Eſtate of ſuch Bankrupt, or receive above* 20 s. *each Commiſſioner for each Meeting, every ſuch Commiſſioner ſhall be diſabled to act in any Commiſſion of Bankrupts.*

all further Proceedings be ſtayed; that Petitioners be at Liberty to apply by Petition to have ſaid Commiſſion renewed and directed to ſuch *new* Commiſſioners as his Lordſhip ſhould think fit, and Petitioners and Aſſignees Solicitors reſpectively to leave with the Secretary of Bankrupts the Names of five Perſons whom they ſhall propoſe for his Lordſhip's Conſideration, in order that proper Perſons may be appointed Commiſſioners in ſuch renewed Commiſſion; and that the preſent Aſſignees be removed; and after the Commiſſion ſhall be renewed, an Advertiſement is to be publiſhed in the *Gazatte*, appointing a Meeting of the Creditors for choice of new Aſſignees, and that after ſuch Choice, the ſurviving Commiſſioners in the preſent Commiſſion, or any three of them, and the Aſſignees ſo removed, do join with the major Part of the Commiſſioners, to be named in the renewed Commiſſion, in making an Aſſignment of the ſaid Bankrupt's Eſtate and Effects to the new Aſſignees, and that forthwith after the Execution of ſuch Aſſignment, the *old Aſſignees* do deliver over to the *new* all the Effects of the Bankrupt remaining in *Specie* in their Hands, Cuſtody or Power, and all Books, *&c.* upon Oath, and that they do deliver Poſſeſſion of the Bankrupt's real Eſtate to the *new* Aſſignees; and that the *old Aſſignees* (*a*) petitioned againſt do, out of their own Pockets, *pay the Coſts of the Petitioner's preſent Application*, and the *Coſts of renewing the ſaid Commiſſion*, to be taxed by the Maſter, in Caſe the Parties ſhall differ about the ſame. *Viner's Abr.* Tit. *Creditor and Bankrupt*, (O) *Ca.* 3.

(*a*) 2. If it ſhould not be *Commiſſioners.*

8. *A.* was declared a Bankrupt, and the Commiſſioners being informed that he was imbezilling and concealing his Effects, and fraudulently conveying away and alienating his Eſtate, thought it neceſſary to have him before them *before the firſt Day appointed in the* Gazette *for his Examination*; and accordingly, at the Requeſt of the petitioning Creditor, they ſummoned him perſonally to attend them to be examined touching the ſaid Complaint, and upon his refuſing to comply with the Summons, they got a Judge's Warrant, and the Bankrupt, by Virtue thereof, was committed to *Newgate*, and upon his being brought before the Commiſſioners, purſuant to their Warrant directed to the Keeper of *Newgate*, and refuſing to be examined, they recommitted him to *Newgate*, *there to remain without Bail* or *Mainprife*, *according to the Intent of the Statutes in that Caſe made and provided.* And upon the Bankrupt's Petition, the *Commiſſioners Right of committing the Bankrupt was* (inter al') *conteſted:* But upon great Debate of this Matter, Lord Chan. was *clearly* of Opinion that the *Commitment by the Commiſſioners was legal*; *and therefore* his Lordſhip ordered that ſuch Part of *A.*'s Petition as *prayed to be diſcharged* out of Priſon ſhould be *diſmiſſed.* 1742. *Ex parte Lingood*, *MS. Rep.*

For Commiſſioners Power in aſſigning Bankrupt's Eſtate, vide poſt. P.

(D) Concerning

(D) Concerning the Aſſignees;——and what Acts or Agreements of the Bankrupt will bind them.

It was objected that this was a fraudulent Deed, and within 1 *Jac.* 1. *c.* 15. *becauſe made ſo near the Act of Bankruptcy*; but his Lordſhip ſaid, the *Deeds meant by that Statute are Deeds made to defraud Creditors*, whereas this is a *Deed made to ſecure a juſt Debt. Ibid.* 496. —2 *Will. Rep.* 430. *Mich.* 1727. S. C. cited *per* Maſter of the Rolls in the Caſe of *Small* and *Oudley & al'*, *Mich.* 1727. ſays, the Deed of Aſſignment was made by Mrs. *Cock* in *Contemplation of her Bankruptcy*, and in *Truſt for her own Children*, and as to Part it was but a Direction to her Truſtees to aſſign her Stock in the *Bank*, *&c.* And Lord *Macclesfield* declared that this was ſo far from being an Act of Fraud in Mrs. *Cock*, *tho' it was for her own Children*, that it ſeemed to be *juſt* and *commendable*. *Vide* the Caſe of *Small* and *Oudley & al'*, *P. C.* and *Jacob* and *Shepherd*. (*a*) It ſhould be *Macclesfield*.

1. MRS. *Cock* about *two Months before her Bankruptcy having Truſt Money in her Hands belonging to her Children*, makes a Deed, declaring the *Truſt of what belonged to her Children reſpectively*. Upon the Bankruptcy of the Mother the Children bring their Bill to have this Deed eſtabliſhed, and to have the Preference of their Mother's other Creditors. The Creditors would have ſet this Deed aſide, but *Parker* (*a*) C. calling it an *honourable* Deed, eſtabliſhed it throughout. *Eaſt.* 8 *Geo.* 1. *Cock* and *Goodfellow*, *Lucas's Rep.* 489, 498.

2. *Aſſignees can take nothing* but what the *Commiſſioners* can aſſign; and the *Commiſſioners can aſſign nothing but what the Bankrupt could honeſtly aſſign to them.* Said *per* Lord *Macclesfield*, *Eaſt.* 8 *Geo.* 1. in the Caſe of *Cock* and *Goodfellow*, *Lucas's Rep.* 497.

3. Defendant made a *Leaſe* of an Inn to *A.* for Years, with a Proviſo *that the Leſſee, his Executors or Adminiſtrators, ſhould not aſſign the Term without* Leſſor's *Conſent under his Hand in Writing*, with a *Power of Re-entry in ſuch Caſe to the Leſſor*, and *that the Leaſe ſhould be void. Leſſee* dies, and his *Executor enters* and enjoys the Premiſſes, and *then becomes a Bankrupt.* The *Commiſſioners aſſign* (*b*) this Leaſe to the *Aſſignees* choſen by the Creditors, and afterwards in Conſideration of 50 *l.* they (the Aſſignees) aſſigned it to Plaintiff, who brought this *Bill to be relieved againſt this Proviſo*, and *to ſtay Proceedings in an Ejectment brought by the Leſſor againſt him upon this Proviſo.* Defendant by his *Anſwer inſiſts upon the Forfeiture at Law, and that the Proviſo ought not to be ſet aſide in Equity.* Lord Chan. held *clearly*, that the Aſſignment by the Commiſſioners (*being done by Authority of a Statute, which will ſuperſede any private Agreement between even the Parties*) and the Aſſignment over by the Aſſignees *was no Breach of the Condition*; *ergo* decreed *Plaintiff to hold and enjoy, and an Injunction to ſtay Proceedings at Law.* On an Appeal to Lord *Macclesfield* from a Decree of Diſmiſſion at the Rolls. *Mich.* 11 *Geo.* 1. *Goring* and *Warner*, *Viner's Abr.* Tit. *Creditor and Bankrupt*, (R) *Ca.* 9.

(*b*) The firſt Aſſignment by the Commiſſioners is not a perfect and compleat Aſſignment within the Meaning of the Statute, and paſſes only the legal Intereſt, ſubject to a Truſt, to be ſold and diſpoſed of for the Benefit of the Reſt of the Creditors; and the Diſpoſition is not compleat till ſold by them for the Benefit of the Creditors; ſuch Aſſignment is only formal, and in Eaſe of the Commiſſioners, and in order only to make a Sale thereof for the Benefit of the Creditors, the Commiſſioners Aſſignees ſtand in the Bankrupt's Place, and are in Effect his *Aſſignees*; and it is unjuſt that ſuch a Proviſo ſhould fruſtrate and overthrow the Intent of a Statute made in Favour of honeſt Creditors, and deprive them of the Advantage they may make of a beneficial Leaſe; and *this Caſe* is an *Exception* out of the *general* Rule, (*and which holds true generally*), *that the Commiſſioners nor their Aſſignees can be in no better a Condition than the Bankrupt himſelf* (*c*), and conſequently cannot aſſign over without Licence. Said *per* Lord Chan. *Ibid.* (*c*) *Vide* 3 *Will. Rep.* 144. *Mich.* 1732. where it was held clearly *per King* C. *that the Aſſignees cannot be in a better Caſe than the Bankrupt. Vide* the Caſe of the *South-Sea Company* and *Wymondſell*, *P. C.* and alſo *C.* 5. *P.* 101.

But it *afterwards* appearing *that the Paper, in which he charged the Diamonds at a leſs Value than what he ſold them for*, was *not delivered* to *Mr. Pitt*, it was looked upon *not as an actual Fraud*, but *only a Preparation to it*, of which he *might* have *repented*, ſo *no Coſts againſt the Aſſignees. Ibid.*

4. *J. S.* had Diamonds conſigned to him by Governor *Pitt* to *ſell for his Uſe*; he charged them fraudulently at a leſs Price than he charged

charged them for, and after became a Bankrupt. Upon which a Queſtion aroſe, whether the Aſſignees under the Commiſſion ſhould pay Coſts; and reſolved *they ſhould out of the Eſtate*; for if the *Bankrupt had been here himſelf, he muſt have paid Coſts*, and the *Aſſignees ſtand in his Place as to his Eſtate. Per* Commiſſioners *Gilbert* and *Raymond*, *Trin.* 1725. *Child* and *Pitt*, *Sel. Ca. in Canc.* 16.

5. The *Aſſignees* are *bound* by all *Acts* done by the *Bankrupt before* he became ſo, *whether* of a *legal* or *equitable* Nature, *if they were done upon a valuable Conſideration* and *without Fraud*; and whatever *Diſpoſition* of his Eſtate he makes, that will *affect* himſelf, does *equally conclude the Aſſignees who ſtand directly in his Place. MS. Notes.*

The *Law is very clear*, that the *Aſſignees are exactly in the ſame Place as the Bankrupt*, and ſtand in his Place to every Particular, and any *Agreement entred into ſhall bind them*; and though there may not be the ſame Remedy againſt them, that is not from the Nature, but the Neceſſity of the Thing; for *he ſhall make an adequate* and *compleat Satisfaction* as far as his Fortune in the Hands of the Aſſignees will admit of. Chief J. *Raymond* and Baron *Comyns*, aſſiſting the Lord Chan. *King*—*Trin.* 2 *Geo.* 2. in the Caſe of——— and *Du Rhone*, *Sel. Ca. in Canc.* 77.

6. The *new Aſſignees* under a Commiſſion of Bankruptcy *petitioned that* J. S. *the Adminiſtrator of* D. *who was the ſurviving Aſſignee* (of the former Aſſignees) *under the Commiſſion, might account before the Commiſſioners for the Effects of the Bankrupt come to his Hands*, ſuggeſting that he (the Adminiſtrator) had confeſſed that he believed his Inteſtate kept the Bankrupt's Money in a ſeparate Bag, with a Note in it ſhewing it to be ſuch. But the Adminiſtrator denying this upon Oath, and that he did not believe the Fact to be ſo, and likewiſe ſwearing that his Teſtator died indebted by Specialty ſeveral thouſand Pounds beyond all his Aſſets; *King* C. ordered the Petition to be diſmiſſed, and directed a Bill to be brought. *Trin.* 1729. *Ex parte Markland*, 2 *Will. Rep.* 546.

The *Order* deſired by the *new Aſſignees* that the *Adminiſtrator might account before the Commiſſioners* would be of no Uſe, ſince the *Creditors might notwithſtanding bring their* Action *or* Bill againſt the Adminiſtrator. Said *arg'* and admitted *per* Lord Chan. *Ibid.* 547.

7. *Though the Aſſignee of the Effects of a Bankrupt claims under the Act of Parliament*, yet as the *Statute of Limitations might be pleaded againſt the Bankrupt*, by the *ſame Reaſon* it is *pleadable* againſt ſuch *Aſſignee*. Said *per King* C. *Mich.* 1732. *South-Sea Company* and *Wymondſell*, 3 *Will. Rep.* 144. *Vide P. C.*

8. *John Savage* was ſeiſed of Copyhold Land within the Manor of *Whitchurch* and *Dodington*, the Cuſtom of which Manor is, that the firſt Wife ſhall have her Free-Bench in all the Land the Huſband was ever ſeiſed of during the Coverture, that the ſecond Wife ſhould have a Moiety, and the third a third Part, ſo long as ſhe kept her Huſband above Ground. *J. S.* in Conſideration of Marriage with *Elizabeth* the Daughter of *A.* covenanted within two Months after the Marriage to ſettle all his Lands to the Uſes following, *viz.* For the one Part to him and his Wife for Life, Remainder to his firſt Son in Tail Male, *&c.* Remainder to the firſt and every other Daughter in Tail Female, Remainder to his own right Heirs; as to the other Moiety to himſelf for Life, Remainder, *ut ſupra*, to the Iſſue, *&c.* provided that the Lands not ſettled in Jointure on his Wife ſhould be charged with the Payment of 300 *l.* for younger Childrens Portions; provided alſo that the Lands ſettled on the Wife ſhould be in Lieu of her cuſtomary Eſtate. By Indorſement on the Articles of the ſame Date with them, it was mutually agreed by all the Parties, that *J. S.* ſhould have a Power to charge the Land not ſettled in Jointure with 300 *l.* for the Payment of his Debt. *J. S.* became a Bankrupt,

and died without performing the Articles, or executing the Power; and the Aſſignees brought their Bill againſt the Heir and the younger Children of *J. S.* to have 300 *l.* which *J. S.* might have raiſed for the Benefit of Creditors; and the younger Children filed their Bill againſt the Heir, the Mother, and the Aſſignees, to have their Fortunes raiſed: And on this Caſe the Points following were determined by *King* Lord Chan. 1ſt, As the Jointure ſettled on the Wife is not made expreſly in Lieu of her Free-Bench, but only mentioned in the Proviſo; and ſhe being an Infant at the Time of making the Articles, and not Party to them, whether ſhe ſhould be excluded from claiming her Free-Bench; and it was held ſhe ſhould, and be obliged to abide by her Jointure. And the Caſe of *Vizet* v. *Longdon* was cited, where a Sum of Money was ſettled on a Woman before Marriage for her Proviſion and Maintenance; and the Maſter of the Rolls was of Opinion, ſhe ſhould have both that and her Dower; but the Chancellor reverſed the Decree, and confined her to her Settlement. 2dly, Whether the Settlement ſhould be carried into Execution; and reſolved it ſhould, for as it muſt have been ſpecifically executed againſt the Covenantor if he had not become a Bankrupt, ſo the Aſſignees who ſtand in his Place ſhall make it good. 3dly, Whether the Power of charging the Land with Debts was veſted in the Aſſignees; and it was compared to a Power of Revocation which a Man leaves unexecuted, and for which his Creditors ſhall have Remedy againſt the Heir. By my Lord Chan. decreed that the Aſſignees, who were in Poſſeſſion of the Land, ſhould account for all the Profits; for as to the Money chargeable on the Eſtate, he ſaid the charging it was a perſonal Act, which not being done, he would not ſupply the Defect. The Court decreed the Settlement ſhould be ſtrictly executed, and the Reverſion in Fee to the Aſſignees. *Mich.* 6 *Geo.* 2. *Jordan* and *Savage & al'*, and *econt'*, *MS. Rep.*

9. *J. S.* makes Payment of a Debt to a Creditor ſoon after he becomes a Bankrupt, *and the Creditor had no Notice of the Bankruptcy at the Time he received the Money*; the *Aſſignees* under the Commiſſion ſhall *not be allowed to recover the Money back again in an* Indebitatus Aſſumpſit, *but only in an Action of* Trover; and the *Reaſon is*, that *they cannot inſiſt upon having the Money by way of Contract*, but as a *Tort*. *Per* Lord Chan. *Mich.* 1740. *Bourne* and *Dodſon*, *Barnard. Rep. in Chan.* 207.

In general no Perſon ſhall be allowed to come into Equity for a Redemption but he that has the legal Eſtate of the Mortgagor, according to the *Rules* laid down in the Caſes of *Bickley* and *Dorrington*, and *Monk* and *Pomfret*, *both of them lately determined* by

10. A Queſtion ariſing, whether an *Aſſignment of a Term by a Bankrupt* was to be conſidered as an *abſolute Sale*, or by way of *Mortgage* only? At a Meeting of the Bankrupt's Creditors the Matter under Conſideration was, *whether the Aſſignees ſhould bring a Bill in order to be let into a Redemption of this Leaſehold Eſtate*, or not, and the *Majority* of the *Creditors* were *againſt* ſuch Bill. The Aſſignees thereupon could not bring it, being *diſabled* by the 5 *Geo.* 2. *cap.* 30. *ſect.* 38. which enacts, that *no Suit in Equity ſhall be commenced by the Aſſignees without the Conſent of the major Part in Value of the Creditors preſent at a Meeting, purſuant to Notice in the* London Gazette.——Whereupon the *Reſt of the Creditors* who were for the Bill, *brought a Bill in their own Names againſt the ſuppoſed Mortgagee*, and

Lord Chan. *Hardwicke*. So if an *Executor is willing to get in the Debts of his Teſtator*, there is no Foundation for a *Creditor* to bring his Bill for that Purpoſe; and therefore where there are proper Perſons to get in the Eſtate of another, a Court of Equity will not ſuffer either the *Creditors of the Teſtator*, or the *Creditors of a Bankrupt*, to bring a Bill in order to get in that Eſtate. But if an *Executor*, or *Aſſignees* under a Commiſſion, *will collude with a Debtor*, there is no Doubt but a *Creditor* may bring his *Bill in order to take Care of that Eſtate*, and *charge the Aſſignees* or Executors *with ſuch Colluſion*. *Per Parker* J. *Ibid.*

and alſo *againſt the Commiſſioner's Aſſignees, praying to be let into the Redemption of this Leaſehold Eſtate.* The *Aſſignees* by their Anſwer *ſaid, that they were deſirous it ſhould be redeemed,* but the *ſuppoſed* Mortgagee oppoſed it, and *inſiſted that it was an abſolute Purchaſe.* The Queſtion now was, whether this Bill was well brought? And Mr. J. *Parker*, who ſat for the Lord Chan. was of Opinion that it was, and that *if the Aſſignees refuſe to bring a Bill that is for the Benefit of the Bankrupt's Eſtate, any Creditor has a Right to bring ſuch Bill under Peril of Coſts*; and decreed that the Aſſignees in the firſt Place ſhall have Liberty to redeem, and in Default thereof that the Plaintiffs ſhall have this Redemption. *Eaſt.* 1740. *Franklyn* and *Fern*, *Barnard. Rep. in Chan.* 30, 33.

11. Where a *Creditor neglects to receive of the Aſſignees his Dividend*, and they afterwards break with the Money in their Hands, *ſuch Creditor ſhall not be allowed to come upon the Bankrupt's Eſtate* for that Money, but muſt take his *Remedy againſt the Aſſignees. Vide* (L) *P. C.* 9.

(E) Concerning the Clerk to the Commiſſion.

1. THE Clerk to a Commiſſion of Bankruptcy, in the Preſence of the Perſon at whoſe Inſtance he iſſued out the Commiſſion, no other Perſon being by, *took away a Scrutore, and opened it, in which were all the Papers of the Bankrupt, and made a pretended Sale by an Appraiſer.* On *Petition* he was ordered *to be examined, on Interrogatories, as to the real Value of the Goods*, and *to pay the Value*, and *all Coſts occaſioned by this Irregularity*; and all the Goods not diſpoſed of to be delivered over; and to be *removed from the Clerkſhip. King* Lord Chan. *Trin.* 11 *Geo.* 1. *Mozene, &c. Creditors of Abraham, Sel. Ca. in Canc.* 45.

2. *Johnſon* was both *Clerk and Commiſſioner to a Commiſſion of Bankruptcy*, by which Means he had Fees for both, and thereby *four* Commiſſioners were always preſent, including the Clerk, whereas *three* are ſufficient. *On Petition he was removed, Trin.* 11 *Geo.* 1. *Wood's Caſe, Ibid.* 46.

3. By *Stat.* 5 *Geo.* 2. *cap.* 30. *ſect.* 46. *All Bills of Fees or Diſburſements demanded by any Solicitor employed under any Commiſſion of Bankrupts, ſhall be ſettled by one of the Maſters in Chancery, and the Maſter who ſhall ſettle ſuch Bill, ſhall have for his Care in ſettling the ſame, as alſo for his Certificate thereof*, 20 s.

4. The *Clerk to a Commiſſion may be diſcharged by the Aſſignees*, for they are Truſtees for the Creditors, and may employ whom they pleaſe; and therefore the former Clerk was ordered to deliver up all Papers on being paid his Bill. 23 *December* 1728. *Anon. King* C. *Viner's Abr.* Tit. *Creditor and Bankrupt*, (G. a.) *Ca.* 2.

(F) Who are allowed to come in as Creditors under the Commiſſion;——And here of contingent and future Debts.

1. *A.* Lends Money to *B.* and *C. on their Bond*; *B. becomes a Bankrupt*, and the *Commiſſioners* aſſign his Eſtate in Truſt for his Creditors; *A. ſues the Bond againſt C.* and getting Judgment *takes him in Execution*; and *C.* thereupon *paid A.* 24 *l.* but *C.* being *old* and *very poor*, *A. conſented to diſcharge him out of Cuſtody*. *Harcourt* C. decreed *A.* the Petitioner (and the *Obligee* in the Bond) *to come in as a Creditor for a Moiety of what remained due on the Bond*; for the Execution againſt *C.* being ſubſequent to the Aſſignment of the Bankrupt's Eſtate, ſhall not (at leaſt in Equity) diſcharge *A.*'s Demand out of the Bankrupt's Eſtate.—— But *in Regard each in Equity was liable but to* half *the Debt*, and *C.* was not the *original* Debtor for the Whole, *A.* ſhall only have Relief for a *Moiety* (*a*) of his remaining Debt againſt the Aſſignees.—— But his Lordſhip ſaid, had the *Bankrupt* been the *original* Debtor, and had borrowed all the Money, then *A. ſhould have come in* before the Aſſignees *as a Creditor* for *all* his Debt. *Trin.* 1713. *Ex parte Smith*, 1 *Will. Rep.* 237.

(*a*) Q. Why ſhould not the *Petitioner* in this Caſe be allowed to come in for the *Remainder* of his *whole* Debt out of the *Effects* of the *Bankrupt*, ſince *each of the Obligors was liable to him for the Whole? Ibid.* 238. *in a Note by the Editor.*

2. If a Man *trade with a Bankrupt between the Act of Bankruptcy and the Commiſſion ſued out, whether by Delivery of Goods, or Payment of Money*, without Notice of the Act of Bankruptcy, *the Bankrupt keeping open Trade*, ſuch Perſon ſhall come in as a Creditor. *Trin.* 1716. *Croſly's Caſe*, *Viner's Abr.* Tit. *Creditor and Bankrupt*, (H) *Ca.* 6.

3. On a *Petition* praying *to be admitted a Creditor on a Note, payable at a future Day, given for Goods ſold and delivered*, the *Commiſſioners having refuſed to admit the Petitioner as ſuch, in Regard the Bankruptcy was between the Date of the Note and Time of Payment.* But *Parker* C. ſaid, that this came improperly before him for his Determination on a Petition; that he had nothing to do in ſuch Caſes but to direct and ſee that the Commiſſioners do their Duty, and cannot order them to admit any one Creditor. But ſaid, he might *ſtay ſo much Money in Commiſſioners Hands as will anſwer the Proportion of the Debt in Caſe it ſhould be allowed of*; and that a Bill might be brought for that Purpoſe in order to determine it. Objection, That Bankrupt might plead Certificate and Diſcharge at Law, if an Action were brought on ſuch a Note. But *per Cur'*, That is not ſo, becauſe the Cauſe ſays, *Cauſa actionis* accrued before the Bankruptcy, which cannot be in this Caſe till the Money is payable; and why may not ſuch a Note for a precedent Debt be ſaid *debitum in præſenti & ſolvendum in futuro*? as to the Honeſty of the Note, that may be inquired into, and will be no Objection, becauſe the Honeſty of the Judgment, Bond, *&c.* are liable to the ſame Inquiry; and though *this Note was given to S.* who is now abroad, yet *it being now aſſigned to another*, there is no Occaſion for an Inquiry on *what Terms it was given him*, and to call him to be examined to it, becauſe *prima facie*

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it carries the *Face of Truth.* It is uſual *not to grant a Commiſſion on the Petition of Creditors on ſuch Notes till the Day of Payment comes* (*a*). *Trin.* (*b*) 6 *Geo.* 1. *Burdock's Caſe, Viner's Abr.* (H) *Ca.* 7.

(*a*) *Vide* the Act 7 *Geo.* 1. *cap.* 31. *poſt.* (*b*) Q.

4. *A Trader contracted with the* Eaſt-India *Company at one of their Sales for a Purchaſe of a Parcel of Goods* to be *paid* for at a *future* Day, and *before the Day of Payment he became a Bankrupt*; this is not within the Statute of 7 *Geo.* 1. *cap.* 31. *becauſe the Goods were not delivered,*—nor was the Contract ſigned by the Party. *King* C. *Mich.* 1726. *Ex parte Eaſt-India Company,* 2 *Will. Rep.* 396.

Viner's Abr. Tit. *Creditor and Bankrupt,* (H) in *the Margin of* Ca. 7. S. C. ſays, in *Mich. Vac.* 1726. the *Eaſt-India* Company *prayed* by Petition *to be admitted as a Creditor on a Sale of their Goods* at a future Day, but *refuſed,* being a Caſe *not* within the *Stat.* 5 *Geo.* 1. *c.* 31. and *Petition diſmiſſed without Prejudice to their ſeeking to recover at Law.*—And Mr. *Viner* by way of *N. B.* ſays, the *Company* in this Caſe *inſiſted* on ſeveral *Allowances,* as *Intereſt, Warehouſe Room, &c.* but *not* allowed—for even in the Caſe of *a Bond no Conſideration ſhall be had* or Allowance made *for Intereſt after the Time of the Bankruptcy.*——If a *Bond* or *Note* be given *upon* a *Contingency,* and *before it happens* the *Obligor* or *Giver* of the Note *becomes* a *Bankrupt,* and *then* the *Contingency* happens; *this is not within the Stat.* 7 *Geo.* 1. *cap.* 31. neither ſhall the *Debt ariſing after the Bankruptcy be ſatisfied under the Commiſſion. Per King* C. 2 *Will. Rep.* 397. *Ex parte Eaſt-India Company.*——But if the *Contingency happens* before the Bankrupt's Eſtate be *fully diſtributed, ſuch Creditor ſhall come in pro ratâ. Vide Ex parte Caſwell, &c. P.* 106. *C.* 9.

5. Formerly in Caſe a Trader contracted a Debt payable at a future Day, and afterwards (but before the Day of Payment) became a Bankrupt; this not being a Debt until after the Bankruptcy, at which Time the Bankrupt could not do any Act to alien or leſſen his Eſtate to the Prejudice of his Creditors, ſuch Contract was held void, and the Creditor not allowed to come in for a Satisfaction under the Commiſſion. And in ſome Caſes it was thought hard that if one on the *Buying of Goods,* or for *other valuable Conſideration,* ſhould give a *Bond* or *Note under his Hand,* payable at a future Day, and *actually had the Goods delivered to him,* or *the Money lent him,* and before the Day of Payment the Debtor ſhould become a Bankrupt; that in this Caſe the Creditor could not come in under the Commiſſion; wherefore for the Remedy of this the ſaid Statute of the 7 *Geo.* 1. *cap.* 31. (*c*), was made, which, *ſect.* 1. enacts, *That every Perſon who ſhall give Credit on Securities, payable at future Days, to Perſons who are or ſhall become Bankrupts, upon good Conſideration,* bona fide, *for Money or other Thing not due before the Time of ſuch Perſons becoming Bankrupt, ſhall be admitted to prove their Securities or Agreements as if they were payable preſently, and ſhall have a Dividend* in *Proportion to the other Creditors, diſcounting* 5 l. per Cent. per Ann. *from the actual Payment to the Time ſuch Money would have become due.*——And *ſect.* 7. *The Bankrupt ſhall be diſcharged from ſuch Securities as if ſuch Money had been due before the Time of his becoming Bankrupt.*

(*c*) A Creditor on a *Bond* with *Condition to pay Money at a future Day,* ſubſequent to an Act of Bankruptcy, could not before the making of this Statute *be admitted to prove ſuch Debt,* or to have any *Dividend before ſuch Security became payable*; and this Act recites it to have been a Q. for Remedy whereof it was made. And ſo was the Opinion of all the Judges, *Mich.* 2 *Geo.* 2. *B. R. in Coſu Tully* and *Sparkes,* 2 *Ld. Raym. Rep.* 1549.—But then no ſuch Creditor can petition, or join in a Petition, for a Commiſſion by Virtue of the ſaid Act; though now by the Statute of the 5 *Geo.* 2. *cap.* 30. *ſect.* 22. Perſons taking *Bills, Notes,* or other *Securities* for Money *payable at a future Day,* may petition for a Commiſſion, or join in petitioning.

6. 5 *Geo.* 2. *cap.* 30. *ſect.* 26. *The Commiſſioners ſhall forthwith, after they have declared the Perſon a Bankrupt, cauſe Notice thereof to be given in the* Gazette, *and ſhall appoint Time and Place for the Creditors to meet, (which Meeting for the City of* London, *and all Places within the Bills of Mortality, ſhall be at* Guildhall) *in order to chooſe Aſſignees; at which Meeting the Commiſſioners ſhall admit the Proof of any Creditor's Debt, that ſhall live remote from the Place of ſuch Meeting, by Affidavit or ſolemn Affirmation, and permit any Perſon duly authorized by Letter of Attorney, (Oath or Affirmation being*

made of the Execution thereof, either by an Affidavit ſworn, or Affirmation made before a Maſter in Chancery Ordinary or Extraordinary, or before the Commiſſioners viva voce, *and in Caſe of Creditors reſiding in foreign Parts, ſuch Affidavits or Affirmations to be made before a Magiſtrate where the Party ſhall be reſiding, and ſhall, together with ſuch Creditor's Letter of Attorney, be atteſted by a Notary Public) to vote in the Choice of Aſſignees in the Place of ſuch Creditor.*

7. *E. by Marriage Articles in* 1716. *covenanted to pay Truſtees* 4000 l. *in Caſe he ſhould die, leaving a Son and other Children who ſhould arrive to* 21, *to be equally*, &c. *E.* becomes a Bankrupt, and has a Son and four other Children, all Infants, who petition, *praying that ſufficient Part of the Eſtate might be ſet apart in order to be divided when*, &c. Lord Chan. diſmiſſed the Petition, *not being within the* 7 *Geo.* 1. (*a*), *it being uncertain whether ever any Thing will become due.* Objected, that this Demand will be diſcharged by Certificate by *Stat.* 5 *Geo.* 2. But *per* Lord Chan. that Clauſe only relates to inrolling Proceedings; and this is not a Debt due or ariſing at the Time of the Bankruptcy. *Trin.* 1734. *Ex parte Jefferies, Viner's Abr.* (J) *Ca.* 7.

(*a*) Before the making of this Statute it was a Queſtion, whether *Bonds* or promiſſory *Notes payable at a future Day*, though certain in all Events, could be let in; and the Difference now in ſuch Caſes is to be adjuſted by Rebate of Intereſt, but in the principal Caſe how is it poſſible to adjuſt the Difference upon a *Contingency which may never happen? Per* Lord Chan. who allowed the Caſe upon *Bottomree* (*b*) Bonds, where *Contingency had happened* before a Diſtribution actually made. *Ibid.* (*b*) *Vide Ca.* 10.

This Caſe *wholly* depends upon the *Deed of Diſtribution* made by the Commiſſioners *aſcertaining the Dividend*; for if *no Deed of Diſtribution had been made*, the Creditor would have been allowed to have come upon the Bankrupt's Eſtate, and *would not have been confined to have taken his Remedy againſt the Aſſignees.* Said *per* Lord Chan. *Ibid.*

8. Commiſſioners of Bankruptcy *appoint a Dividend to be made of the Bankrupt's Eſtate*; *A Creditor* under the Commiſſion *neglects to receive of the Aſſignees his Proportion* of that Dividend; *the Aſſignees afterwards break and run away with the Dividend* that was in their Hands; the *Creditor ſhall not be allowed to come upon the Bankrupt's Eſtate for that Money*, but *muſt take his Remedy againſt the Aſſignees as well as he can.* Cited *per* Lord Chan. as a Caſe that had been put in the Caſe of *Smith* and *Duke of Chandos*, *Hil.* 1740. *Barnard. Chan. Rep.* 419.

It was *objected*, that the *Bond would be barred after the Bankrupt's Certificate allowed*, which would not be, unleſs it were to be looked upon as then due. *Sed per Cur'*, *This cannot be* if the *Obligee is careful in declaring upon this Bond*; indeed if the Party *declares upon the Bond only, he ſhall be barred: Secus* if he *ſets forth as well the Condition as the Bond in the Declaration*, for then it muſt *appear* that the *Cauſe of Action did not accrue at the Time of the Obligor's becoming a Bankrupt. Ibid.* 499.

9. *Before* the *making* of the *following Act*, if an *Obligor* in a *Bottomry Bond* became *Bankrupt before the Return of the Ship*, and *the Ship did not return before the Diſtribution made*, the Obligee could not have the Benefit of the Diſtribution upon the Commiſſion. Held *per King* C. *Mich.* 1728. *Ex parte Caſwell, Ex parte Cagaler, Ex parte Bateman*, 2 *Will. Rep.* 497, 499.——But now by the Statute of the 19 *Geo.* 2. reciting, That whereas Merchants, and other Traders, frequently lend Money on Bottomree, or at Reſpondentia, and in the Courſe of their Trade frequently cauſe their Ships or Veſſels, and the Goods and Merchandizes loaded thereon, to be inſured; and where Commiſſions of Bankruptcy have iſſued againſt the Obligor in ſuch Bottomree, or Reſpondentia Bond, or the Under-writer, or Aſſurer in ſuch Aſſurance, before the Loſs of the Ship or Goods, in ſuch Bond or Policy of Inſurance mentioned, hath happened, it hath been made a Queſtion, Whether the Obligee or Obligees in ſuch Bond, or the Aſſured in ſuch Policy of Inſurance, ſhould be let in to prove their Debts, or be admitted to have any Benefit or Dividend under

 ſuch

ſuch Commiſſion, which may be a Diſcouragement to Trade: It is enacted, *That from and after the 29th Day of* October 1746. *the* Obligee in any Bottomree, *or* Reſpondentia Bond, *and* the Aſſured in any Policy of Inſurance *made and entered into upon a good and valuable Conſideration, bona fide,* ſhall be admitted to claim; *and after the Loſs or Contingency ſhall have happened, to prove his, her, or their Debt and Demands in reſpect of ſuch Bond or Policy of Inſurance, in like Manner as if the Loſs or Contingency had happened before the Time of the iſſuing of the Commiſſion of Bankruptcy againſt ſuch Obligor or Inſurer; and ſhall be intitled unto, and ſhall have and receive a proportionable Part, Share and Dividend of ſuch Bankrupt's Eſtate, in Proportion to the other Creditors of ſuch Bankrupt, in like Manner as if ſuch Loſs or Contingency had happened before ſuch Commiſſion iſſued; and all and every Perſon or Perſons againſt whom, from and after the ſaid 29th Day of* October, *any Commiſſion of Bankruptcy ſhall be awarded, ſhall be diſcharged of and from the* Debt or Debts *owing by him, her or them, on every ſuch Bond and Policy of Inſurance as aforeſaid, and ſhall have the Benefit of the ſeveral Statutes now in Force againſt Bankrupts, in like Manner, to all Intents and Purpoſes, as* if ſuch Loſs or Contingency had happened, and *the Money due in reſpect thereof had become payable before the Time of the iſſuing of ſuch Commiſſion.*

10. Upon a Treaty of *Marriage between the Plaintiff's Nephew and the Defendant's Daughter,* a Settlement was agreed upon, and *Articles entered into between Plaintiff and Defendant*; and *alſo before the Marriage the Plaintiff, by a ſeparate Writing* ſigned and ſealed, *reciting, that a Marriage was intended,* &c. and in Conſideration thereof he promiſed to *pay Defendant* 40l. per Ann. *by Quarterly Payments during Plaintiff's Life; but if the intended Huſband and Wife, or either of them, ſhould die during Defendant's Life, then the Annuity to ceaſe.* The *Marriage was had*; Plaintiff ſoon after became a *Bankrupt,* and *obtained his Certificate*; Defendant *did not come in under the Commiſſion,* but *afterwards for two Years and Half's Annuity accrued ſince the Bankruptcy, brought an Action of Covenant.* Plaintiff *pleaded the Bankruptcy* and *Certificate.* Ch. J. *King* was of Opinion, that this Agreement was not within the Statute of 7 *Geo.* 1. *cap.* 31. *becauſe of the Impoſſibility of ſetting a Value on this Annuity, being on three Contingencies*; and Verdict for the now Defendant; and upon arguing this Point in *C. B.* all the Judges were of the ſame Opinion.—Plaintiff now brought *a Bill for an Injunction,* ſuggeſting *that the Agreement was a Fraud,* being private, and not in the Articles; and that the *Verdict was againſt Conſcience,* for that the *now* Defendant *ought to have come in under the Statute,* being within the ſaid Act of 7 *Geo.* 1. But the Maſter of the Rolls, on Motion for continuing the Injunction, ſaid, had it been *Res Integra* he knew not what he might have done; *but now the Point was determined at Law,* ſo *diſallowed* the *Cauſe, for that there was no Fraud. Trin.* 1723. *Fletcher* and *Bathurſt,* *Viner's Abr.* (J) *Ca.* 4.

Note; This Caſe is miſplaced in Point of Time.

Vide Diſtribution, &c. P.

(G) In what Cases Intereſt ſhall be allowed to a Creditor.

1. IF a Trader being indebted on *ſimple* Contract *pledges Goods for the Payment, and promiſes Intereſt*, ſuch Creditor *ſhall have Intereſt even between the Act of Bankruptcy and the Commiſſion. Trin.* 1726. *Croſly's Caſe, Viner's Abr.* Tit. *Creditor and Bankrupt*, (B. a.) *Ca.* 1.

2. And for *Debts* on *Specialty*, the *Creditor* ſhall have *Intereſt* as well *between the Act of Bankruptcy* as before. *Ibid.*

3. A *Mortgagee* ſhall have his *Intereſt* run on upon a Bankrupt's Eſtate, *becauſe he hath a Right in Rem*; but as to *other* Intereſt, it *ceaſeth* on the *Bankruptcy*. *Per King* C. 18 *July* 1729. *Ibid.*

(H) Who are obliged to come in as Creditors.

Lord Chan. put the Caſe of *A. in building a Ship*, who becomes *a Bankrupt*, and *after B. furniſhes Materials to finiſh it, B.* ſhall have *all* his Money, *and not come in Average with the other Creditors.*

1. *A.* By *Articles* was to *build Houſes. B. furniſhes him with Materials*, and takes an Aſſignment of the Articles *for his Security*, but *before* the *Aſſignment A. was a Bankrupt. B.* has a *ſpecial* Equity, in as much as by what he advanced *A. was enabled to perform his Agreement to the common Benefit of the Creditors*; and therefore *B. ſhall have all his Money he advanced after he had a ſpecific Intereſt in the Articles*; but *as to what he gave Credit for before*, he *truſted as another Creditor. Eaſt.* 1715. decreed *per* Lord Chan. *on a Rehearing*, *Langton* and *Hall*, *Viner's Abr. Creditor and Bankrupt*, (K) *Ca.* 4. *Ibid.* in S. C.

2. *A. a Trader*, ſeiſed of Lands in Fee, borrowed Money of *B.* on a Judgment, and afterwards articled with *C.* to ſell the Lands to him for 5000 *l.* to be paid down, and 650 *l.* to be paid at *Chriſtmas* following; then *A.* becoming a Bankrupt, *B.* brought his Bill againſt *C. A.* and the Aſſignees under the Commiſſion, praying the 650 *l.* remaining unpaid, might be paid to him towards Satisfaction of his Judgment: And it was decreed at the Rolls, that the Aſſignees convey the Premiſſes to *C.* as the *Bankrupt* had articled to do, *they ſtanding in his Place*, and thereupon *C.* to pay the Aſſignees the 650 *l.* for the Benefit of the Creditors, and *B. the Judgment Creditor* to come in for a *Proportion* (*a*) only with the Reſt of the Creditors. *Mich.* 1721. *Orlebar* and *Fletcher and Duke of Kent*, 1 *Will. Rep.* 737.

(*a*) By the Statute of 21 *Jac.* 1. *cap.* 19. *ſect.* 19. *Creditors by* Judgment, Statute *or* Recognizance, *whereof no Extent is ſerved or executed, on a Bankrupt before his Bankruptcy, ſhall not be relieved for more than a ratable Part of their juſt Debt*; and accordingly it has been determined at *Law*, that where a *Judgment* was *not* ſerved or executed, the *Conuzee* thereof ſhould only come in *pro rata* with the *other* Creditors of the Bankrupt. Cited *per* his Honour, *Ibid.* 739.——In the principal Caſe *it was inſiſted upon that* though *B.* the Judgment Creditor could not come in upon the Bankrupt's Eſtate for any more than his Proportion with the other Creditors, yet he would be at Liberty to extend his Judgment againſt the Purchaſer who bought the Land prior to the Bankruptcy; *and this, as the Reporter ſays, ſeemed to be admitted.*——But that *C.* could not be deemed a Purchaſer till he had paid the Remainder of the Money, which was Part of the perſonal Eſtate of the Bankrupt, and muſt be liable to his Creditors; and that *C.* was not compellable to pay it, unleſs upon his having a good Title, which was to be made him by the Aſſignees, who had the legal Eſtate of the Premiſſes aſſigned to them by the Commiſſioners. *Per* his Honour, *Ibid.* 739.

3. On

3. On a *Diſtreſs for Rent* Goods were ſold, and 77 *l. remained* in the *Conſtable*'s Hands, *who became a Bankrupt.* The *Tenant* dies, and *his Executor prays to be paid this Money by the Aſſignees in Preference to other Creditors.* Obj. This comes to the Conſtable's Hands by due Courſe of Law; and cited *March* 9, 1721. *Ex parte Peirſon*, before Lord *Macclesfield*, where was cited *Wright* and *Dixon*, *Mich.* 6 *Geo.* 1. *C. B. Goods taken in Execution by Wilcox, Bailiff of Weſtminſter, and he died; Judgment and Execution ſet aſide*; and ruled by *B. R.* that *the Widow and Executrix of* W. *ſhould refund the Money, though ſhe alledged ſhe had not Aſſets to pay Specialties.* But *per* Lord Chan. *both* the Caſes cited are *againſt Executors*; and though the *Law makes a Difference between one Creditor* and *another*, yet *in Caſe of Bankruptcy all Creditors are upon an equal Foot*; if *any Thing remained in Specie it might be otherwiſe*, but *here* the Money is *imbeziled* by the *Conſtable*; Petitioner to come in as a Creditor with the Reſt. *Mich. Vac.* 1733. *Ex parte Dobſon*, *Viner's Abr.* Tit. *Creditor and Bankrupt*, (K) *Ca.* 7.

4. An *Attorney had been employed by one who became a Bankrupt*; Aſſignees petition to have up Papers, and that the Attorney might come in for his Demands *pari paſſu* with other Creditors. *Per* Lord Chan. The Attorney hath a Lien upon the Papers in the ſame Manner againſt *Aſſignees* as againſt the *Bankrupt*; and tho' this doth *not ariſe by any expreſs Contract* or Agreement, yet *it is as effectual*, being an *implied Contract by Law.* But as to *Papers received after the Bankruptcy, they cannot be retained*; and therefore, *if the Aſſignees deſire it*, the Bill may be taxed, and upon Payment, Papers delivered up; and *although* the Attorney *had come in and proved his Debt*, yet a Creditor, who hath a Security, may come in and prove his Debt, becauſe poſſibly his Security may prove deficient. *Mich.* 1734. *Ex parte Buſh*, *Viner's Abr.* Tit. *Creditor and Bankrupt*, (K) *Ca.* 8.

(l) Concerning joint and ſeparate Commiſſions, and Creditors coming in under ſuch Commiſſions.

1. TWO joint Traders becoming Bankrupts, a joint Commiſſion is taken out againſt them, upon which the Commiſſioners aſſign the real and perſonal Eſtate of them, or either of them; afterwards the ſeparate Creditors take out ſeparate Commiſſioners againſt both, and the Commiſſioners on the ſeparate Commiſſion aſſign over the ſeparate Eſtate and Effects to other Aſſignees. Upon Petition by the ſeparate Aſſignee for Liberty to ſue at Law for the ſeparate Eſtate, *King* C. was of Opinion, that the firſt Aſſignment paſſed as well the ſeparate as the joint Eſtate of the two Partners the Bankrupts, and conſequently that the Conveyance under the ſecond Commiſſion was void, and that the ſecond Aſſignees could do nothing at Law; and his Lordſhip ſaid, he would not ſuffer them to ſpend and waſte the Eſtate in vexatious Suits at Law, but would not hinder their joining in a Bill for an Account of the ſeparate Eſtate. *Mich.* 1728. *Ex parte Cook*, 2 *Will. Rep.* 500.

But in this Caſe, for the Eaſe of both Parties, his Lordſhip ordered it to be referred to a Commiſſioner in each of theſe Commiſſions to take an Account of the whole Partnerſhip Effects, and alſo of the ſeparate Effects of each of the Partners; and if the Commiſſioners find any Thing different, they were to be at Liberty to ſtate it ſpecially; and with Regard to the Surplus of the Partnerſhip Effects beyond what will pay the Partnerſhip Debts, and alſo touching the Surplus of the ſeparate Effects, if there ſhall remain any over and above what will pay the ſeparate Debts, each Side to be at Liberty to apply to the Court concerning any of the ſaid Surpluſſes. *Ibid.* 501.

2. *A.* and *B.* joint Traders, become bound in a Bond jointly and ſeverally to *J. S.* and afterwards become Bankrupts, and there are joint and ſeparate Commiſſions taken out againſt them, that there may be an Equality. *J. S.* may chuſe under which Commiſſion he will come, but ſhall not come under both at the ſame Time; and in the principal Caſe *J. S.* having received a Dividend under the joint Commiſſion whilſt this Matter was in Suſpenſe, ſhall not bind him; for provided he brings that back again, he may come in for a Satisfaction out of the ſeparate Effects. Ordered by *Talbot* C. *on Debate*, *Hil.* 1735. *Ex parte Rowlandſon*, 3 *Will. Rep.* 405.

3. If *A.* and *B.* are *joint* Traders, and *J. S.* owes *A.* and *B.* on their *joint* Account 100 *l.* and *A.* owes *J. S.* 100 *l.* on his *ſeparate* Account, *J. S.* cannot deduct ſo much as *A.*'s Proportion of the 100 *l.* comes to out of the *joint* Debt; *for that the Co-Partnerſhip Debts of* A. *and* B. *are to be* (*a*) *firſt paid before any of the ſeparate Debts*; but if there be a Surplus beyond what will pay the Partnerſhip Debts, then out of *A.*'s Share of the Surplus *J. S.* may deduct the ſeparate Debt of *A.* Cited *per* Lord Chan. *Cowper* in the Caſe of *Lord Laneſborough & al'* and *Jones*, *Trin.* 1716. 1 *Will. Rep.* 325, 326.

(*a*) It is *ſettled*, and *is a Reſolution of Convenience*, that in Caſe of *joint Traders becoming Bankrupts*, the *joint* Creditors ſhall be *firſt* paid out of the *Partnerſhip* or joint Effects, and the *ſeparate* Creditors out of the *ſeparate* Eſtate of *each* Partner. And if any *Surplus* of the *Partnerſhip Effects* after *all the Partnerſhip Debts* paid, the *ſeparate* Creditors to come in—and if there be a *Surplus of the ſeparate Eſtate*, beyond what will *ſatisfy the ſeparate Creditors*, it ſhall go to ſupply any Deficiency that may remain as to the *joint* Creditors. Cited *per* Lord Chan. *King*, *Mich.* 1728. *Ex parte Cook*, 2 *Will. Rep.* 500. —— *Vide* 1 *Vol. Eq. Ca. Abr.* 55. *Ca.* 6.

Fitz-Gibb. Rep. 283. S. C. cited *arg' per* Mr. *Fazakerly*, (*Eaſt.* 4 *Geo.* 2. in *B R.*)

4. On a *joint* Commiſſion the *joint* Creditors are *firſt to come in on the Partnerſhip Effects*, and if there *remains a Surplus*, then *the ſeparate Creditors are to be admitted.* *King* C. 22 *April* 1729. *Horſey's Caſe*, 3 *Will. Rep.* 23, 25.

as the Caſe of *Horſey & al'* againſt *Heyham & al'*, ſays, it was ordered (22 *April* 1729.) that the *joint Eſtate* ſhould go to the *joint Creditors*, and the remaining Part of the joint Eſtate which reſpectively belonged to each, ſhould go to their *reſpective Creditors* upon a *joint Commiſſion* ſued out againſt the then Defendants.

5. The Plaintiff's Bill ſet forth, that in *November* 1725. Plaintiff and *A.* and *B.* became Partners in Trade, and that they all then being at *Holland*, did according to the Cuſtom there execute before a Notary Articles of Co-Partnerſhip, and did jointly and ſeverally declare that each had advanced 24600 Guilders, which Sum was to pay the Debts particularly mentioned in the Inventory annexed to the ſaid Articles; but no other Debts were to be paid, nor any Debts which any of the Co-Partners might contract on their own private Account. That by the Articles it was further agreed, that a certain Sum therein mentioned ſhould be allowed for Maintenance, *&c.* and that all Loſs and Gains ſhould be equally ſhared and borne. The Partnerſhip was carried on till the 12th of *May* 1728. when *A.* quitted, and for 1227 *l.* 5 *s.* 4 *d.* releaſed his Claim to Plaintiff, and *B.* and they carried on the Partnerſhip according to the ſaid Articles, and *B.* was intruſted with the Partnerſhip Goods, and which he imbeziled and applied to his own Uſe, and ſuffered the Partnerſhip Debts to be unpaid, and having contracted private Debts on his own Account became a Bankrupt, and 30 *November* 1733. a ſeparate Commiſſion of Bankruptcy was taken out againſt him. That the Commiſſioners Aſſignees took Poſſeſſion of the Partnerſhip Effects, and have received ſeveral of the Partnerſhip Debts, and intend to apply the ſame to the

ſeparate Creditors, whereas theſe Effects ought to be applied to pay the Co-Partnerſhip Debts, and to make the Plaintiffs Satisfaction for what the Bankrupt had imbezil'd to his own ſeparate Uſe, and the Reſidue to be divided into equal Parts, *viz.* Two Thirds to the Plaintiffs, and one Third to *B.* to which Third he is intitled, and is to be *Part of his ſeparate Eſtate*; and the Bill prayed that the Defendant may be reſtrained from ſelling any Part of the ſaid Effects. The Aſſignees by their Anſwer admit the Bill to be true, and that they ſold ſome of the Stock, with Plaintiff's Conſent, to the Amount of 6500 *l.* and ſubmit to apply the Bankrupt's Eſtate as the Court ſhall direct. Decreed by Lord *Talbot*, That the Maſter ſhould take an *Account* of the *Partnerſhip Debts received by Plaintiffs in* Holland, and of *the Partnerſhip Eſtate in* England received by the Aſſignees, and of the *Partnerſhip Debts owing by the Bankrupt and the Plaintiffs.* That the *joint Creditors of the Bankrupt* and *the Plaintiffs come in and prove their Debts* before the Maſter. That an Account be taken what *Imbezilment the Bankrupt has made of the Co-Partnerſhip Eſtate*, and in taking Accounts, *Plaintiffs* and *Defendants* to be examined on Oath, to produce all Books, *&c.* and to have all juſt Allowances. That what the Maſter ſhall certify the *Co-Partnerſhip Debts ſhall amount to*, ſhall in the *firſt Place be paid by the Plaintiffs and Defendants to the joint Creditors* in Proportion to their Debts, and as far as the *Copartnerſhip Eſtate* in their Hands will extend. That if it ſhall appear any of the *Partnerſhip Eſtate remains in the Plaintiffs and Defendants Hands* after the Partnerſhip Debts are paid, *then the Maſter to divide the ſame into three Parts*, and the *Plaintiffs are to take two Thirds*, and out of the *Bankrupt's third Part they are to take what* it ſhall appear the *Bankrupt has imbezzled of the Partnerſhip Effects*; and if there ſhall be any Reſidue of the *Bankrupt's third Part after the Partnerſhip Debts* and *the Imbezilments of the Bankrupt are ſatisfied*, then the ſame is to be *paid* or *retained by the Aſſignees for the Benefit of the Bankrupt's ſeparate Creditors.* That the Maſter may ſtate any Thing ſpecially, and *all Parties are to be paid their Coſts* of Suit *out of the Co-Partnerſhip Eſtate.* 1734. *or* 1735. *Groſs & al'* and *Duſfreſnay & al', Aſſignees of Prevoſt, MS. Rep.*

6. *A.* and *B.* were *Partners*, but the *Partnerſhip being diſſolved*, and *A. ſetting up for himſelf, became a Bankrupt*, and a Commiſſion iſſued out againſt him; and then *B. failed, and a Commiſſion iſſued againſt him*; the *joint Creditors* were admitted to *prove their joint Debts under the ſeparate Commiſſions.* Cited *per* Mr. *Fazakerly*, (*Eaſt.* 4 *Geo.* 2. in *B. R.*) as the Caſe of *Stephens* v. *Brown and Adlamb*, 22 *January* 1728. *in Canc. Gitz-Gibb. Rep.* 283.

7. On 11 *Sept.* 1742. a joint Commiſſion was taken out againſt *A.* and *B.* and the Commiſſioners Aſſignees poſſeſſed themſelves of all the *joint* and *ſeparate* Eſtate of the Bankrupts. *J. S.* a *Creditor of the ſeparate Eſtates of both the Bankrupts*, and *T. L. a ſeparate Creditor of* B. *one of the Bankrupts*, on Behalf of themſelves and *all the ſeparate Creditors of the ſaid Bankrupts*, by Petition ſet forth, that before the Date of the Commiſſion the Bankrupt *A. owed the Petitioner* J. S. 50 l. *by Bond*, and 29 l. *for Goods ſold on his ſeparate Account*, and *that the Bankrupt* B. *alſo owed him* 30 l. *for Goods ſold on his ſeparate Account*, and that *B. owed the Petitioner* J. L. 60 l. *on his ſeparate Account, by two Notes of Hand which were then due.* That the Petitioners had applied to the Commiſſioners to be admitted

Creditors

Creditors under the ſaid Commiſſion, which they had refuſed, inſiſting it was a *joint Commiſſion*; *ergo* they *prayed that they and the ſeparate Creditors might come in and prove their Debts under the Commiſſion, and that the Commiſſioners might take joint and ſeparate Accounts of the* joint *and* ſeparate Eſtates, *and that what ſhould be found on ſuch Accounts to belong to the ſeparate Eſtates, might be applied towards Satisfaction of the reſpective ſeparate Creditors, and that they may be paid their Coſts of Application.* Ordered, that the *major* Part of the Commiſſioners in the ſaid Commiſſion, by Notice in the *Gazette*, appoint a Time and Place *for the ſeparate Creditors of each of the Bankrupts* to come in and prove their Debts under the *joint* Commiſſion. That the Commiſſioners take *ſeparate Accounts* of the *joint* and *ſeparate* Eſtates of the Bankrupts come to the Hands of the Aſſignees, or of any others by their Order, or for their Uſe, *diſtinguiſhing joint and ſeparate Eſtates of each Bankrupt from the other.* That what on ſuch Account ſhall appear to belong to the *Bankrupts joint Eſtate*, ſhall be applied by the *Aſſignees towards Satisfaction of the joint Creditors*; and in Caſe there ſhall be any *Surplus of the joint Eſtate after all the joint Creditors ſhall be paid their whole Demands*, then the *Moiety* of the *Surplus* is to be carried to the Account of the *ſeparate* Eſtate, and to be applied to ſatisfy the *ſeparate* Creditors; and if there is any *Surplus* of the *ſeparate Eſtates*, after all the *ſeparate Creditors* ſhall be paid their whole Demands, then ſuch *Surplus of the ſeparate Eſtates*, or either of them, ſhall be carried to the Account of the *joint Eſtate*, and to be applied towards Satisfaction of the *joint* Creditors, and the reſpective *ſeparate Eſtates to bear a proportionable Part of the Charge of ſuing out the Commiſſion* and *executing it, to be ſettled by the Commiſſioners*; and the *Coſts* of this Application to be paid by the *Aſſignees out of the Bankrupts ſeparate Eſtate*; *to be taxed by a Maſter*, if the Parties cannot agree. Lord *Hardwicke* C. *December* 1742. *Ex parte Powel* and *Powel Bankrupts*, *MS. Rep.*

Vide **Diſtribution**, (L) P.

(K) What ſhall be ſaid the Bankrupt's Eſtate, or ſuch an Intereſt in him as may be ſold, aſſigned, &c. under the Commiſſion, & econt.

1. *J. S.* was Aſſignee of Commiſſioners of Bankruptcy iſſued out againſt *B.* who had contracted with Defendant for as much Salt Petre as came to 244 *l.* but not having ready Money to pay for the ſame, propoſed to mortgage to him an Eſtate he had in his own Poſſeſſion, by way of Security for the Money, and accordingly left with the Defendant the Title Deeds to get the Aſſignment drawn, but before the Aſſignment was perfected, *B.* became a Bankrupt. *J. S.* brought his Bill to *have the Deeds delivered up for the ſelling of the Eſtate to ſatisfy the Creditors.* Decreed that the Deed be brought before the Maſter, and delivered by *Schedule* to the Plaintiff *with Coſts*; though *no Reaſon was given for this Decree. Mich.* 10 *Ann. Brander* and *Robs, Gilb. Eq. Rep.* 35. The *Reporter* adds, *Sed hoc Durum à multis habebatur. Ibid.* 36.

Prec. in Chan. 275. *Mich.* 1713. *Brander* and *Boles*, S. C. *in totidem verbis*, ſays, it was urged for Defendant that this was more than a Pledge of the Deeds, for that an Aſſignment was intended to be made; that if it had been made, the Court would not have taken it from him without Payment of the Money; though its not being made was owing to the Death of the Attorney, who was to have drawn the Aſſignment, which was an *Accident*; and this Court often relieves *Accidents*, and therefore the Deeds ought not to be delivered up without Payment of the Money. But decreed as above, *without giving any Reaſon for ſuch Decree.*

2. A. *made a Bill of Sale of Leaſes and perſonal Eſtate to* B. *and* C. in Truſt *to pay* A.*'s Debts*; at *firſt* B. acted in the Truſt, but afterwards C. *took the Whole into his Poſſeſſion, and acted alone*, and became a Bankrupt. Upon a *Bill brought by* A. *againſt* C. *and the Aſſignees under the Commiſſion, for an Account of the ſaid Truſt Eſtate*, *Cowper* C. at firſt doubted by reaſon of the 21 *Jac.* 1. *cap.* 19. *ſect.* 11. (*a*), but afterwards held this *Caſe not within this Statute*, in Regard *this Aſſignment to* B. *and* C. *was with an honeſt Intent*, viz. *For the Payment of the Debts of* A. *Ergo* decreed the *Aſſignees under the Commiſſion againſt* C. *to account for all the Eſtate of* A. and that the ſame ſhould *not be liable to the Bankruptcy of* C. *Trin.* 1716. *Coperman* and *Gallant*, 1 *Will. Rep.* 314, 321.

It was *argued*, that if a *Factor* becomes a Bankrupt, the Goods bought by him as Factor ſhall not be ſubject to his Debt. Lord Chan. aſked if there was any Caſe of that? and ſaid, that if a *Factor* continues a long Poſſeſſion of Goods, by which they are taken as his own, and Credit given to him on that Account, it would alter the Caſe; *for if Poſſeſſion and Diſpoſition be given to a Perſon that becomes a Bankrupt, tho' no Intent of Fraud appear, yet if it* gives a falſe Credit, *there is the ſame Inconvenience as if Fraud was intended*; for if the *Bankrupt* appears the *viſible* Owner, ſo as to gain *a falſe Credit*, there is the ſame Inconvenience, and it matters not whether it was by *Fraud*, or only by *Neglect*, or out of *Humour*. *Vinr's Abr.* Tit. *Creditor and Bankrupt*, (T) *P.* 89. *Trin.* 1716. *in S. C.* cites it as from a MS. Rep. (*a*) This Statute enacts, that *if at any Time hereafter* any Perſon or Perſons ſhall become *Bankrupt, and at ſuch Time as they ſhall ſo become Bankrupt, ſhall by the Conſent and Permiſſion of the true Owner or Proprietary have in their Poſſeſſion, Order and Diſpoſition, any Goods or Chattels whereof they ſhall be reputed Owners, and take upon themſelves the Sale, Alteration or Diſpoſition as Owners, that in every ſuch Caſe ſuch Goods ſhall be liable to the Bankrupt's Debts, as if they had been the proper Goods of the Bankrupt.*——In *Mich.* Term. 1708. an Action of Trover for a Parcel of Diamonds was brought againſt the Aſſignee under *Levi*'s Commiſſion, to whom before the Bankruptcy the Plaintiff had delivered the Diamonds to ſell; but it appearing upon the Trial before *Holt* C. J. that the real Property of the Diamonds belonged to the Plaintiff, the above Clauſe of the 21 *Jac.* 1. was inſiſted upon by the Defendant's Counſel; and this ſeeming an Hardſhip upon the Plaintiff, it was made a Caſe in *B. R.* where on *Argument* it was adjudged that *theſe Jewels being originally the Plaintiff's*, and *the Bankrupt having no more than a bare Authority to ſell them for the Plaintiff's Uſe, were not liable to the Bankruptcy*. Cited *arg'* in the Caſe of *Copeland* and *Gallant*, as the Caſe of *L'Apoſtre* v. *Le Plaiſtrier*, 1 *Will. Rep.* 318.

3. A Feme Sole Mortgagee in Fee marries, and her Huſband becomes a Bankrupt, and the Commiſſioners aſſign over all his real and perſonal Eſtate; afterwards the Bankrupt dies; the Widow brought a Bill againſt the Aſſignees for the Writings relating to the Mortgage, and to have the Benefit of the Mortgage. The Maſter of the Rolls at *firſt* delivered his Opinion *ſolemnly* for the Widow, but afterwards gave his Opinion for the Aſſignees, that they were intitled to the Mortgage; *for here being in the Mortgage Deed a Covenant to pay the Money to the Wife, this Debt or Choſe in Action was well aſſigned by the Commiſſioners to the Aſſignees, and veſted in them*, like the Caſe of *Miles* and *Williams*, *Trin.* 1714. *in B. R.* 2 *Will. Rep.* 249. *Where a Bond made to a Wife* dum ſola *was adjudged to be liable to the Huſband's Bankruptcy, and aſſignable by the Commiſſioners*; but ſaid, that *if there had been any Articles before the Marriage that this Money ſhould continue to the Wife as her Proviſion*, or ſhould be aſſigned in Truſt for her; they (the Articles) would have been a *ſpecifick Lien* upon the Mortgage, and have preſerved it from the Bankruptcy. *Trin.* 1718. *Boſvil* and *Brander*, 1 *Will. Rep.* 458.

And his Honour ſaid, that if the Aſſignees had been Plaintiffs in Equity, and deſired the Aid thereof to ſtrip the Widow of all that ſhe had in the World, Equity would hardly have lent any Aſſiſtance againſt her, *becauſe the Aſſignees claiming under the Bankrupt Huſband could be in no better Plight than the Huſband would have been*; and had he in Equity ſued for the Money, or prayed a Foreclоſure, Equity (probably) would not have compelled the Payment to him without his making ſome Proviſion for his Wife, or at leaſt upon her Application againſt the Huſband and the Mortgagor, might have prevented the Payment of the Money to the Huſband, unleſs ſome Proviſion was made for her. *Ibid.* 459.

4. *In the above Caſe* another Point was, *viz.* as to 200 *l. Part of the Wife's Portion, on a Note given by the Huſband at his Marriage, ſignifying his Conſent that the Wife ſhould have this* 200 *l.* The Court held the ſame was *ſpecially* bound thereby, and ſo the Plaintiff with reſpect to this *only* was relieved. *Ibid.* 461.

5. A Trader in *London* having Money of *J. S.* (who reſided in *Holland*) in his Hands, bought *South-Sea* Stock as Factor for *J. S.* and took the Stock in his own Name, but entred it in his Account-Book as bought for *J. S.* after which the Trader became Bankrupt. *Determined* that the Truſt Stock was not liable to the Bankruptcy. By Lord *Parker*, who ſaid, *it would leſſen the Credit of the Nation to make ſuch a Conſtruction. Trin.* 1721. *Ex parte Chion*, 3 *Will. Rep.* 187. *in a Note by the Editor.*

6. *J. S.* deviſes Lands to his Daughter, being a *Feme Covert*, *for her ſeparate Uſe* excluſive of her Huſband, and that he ſhould not be Tenant by the Curteſy, nor have theſe Lands for his Life in Caſe he ſurvived his Wife, *but that they ſhould upon her Death go to her Heir*; *but* J. S. *appoints no Truſtees*, *J. S.* dies, and then the Huſband becomes a Bankrupt. The deviſed Premiſſes ſhall not be ſubject to the Bankruptcy, for as the Teſtator had a Power to deviſe the Premiſſes *to Truſtees* for the ſeparate Uſe of the Wife, *Equity will ſupply the want of them*, and *make the Huſband Truſtee*; and the *Aſſignees* were decreed by the Maſter of the Rolls to join in a Conveyance for the *ſeparate Uſe of the Wife. Mich.* 1725. *Bennet* and *Davis*, 2 *Will. Rep.* 316, 319.

7. Where a *Bond* was given by the *Huſband for Payment of a Sum of Money to his Wife* in Caſe ſhe ſurvived him, *and he after became a Bankrupt. King* C. held, that *no Part of the Eſtate ſhould be deferred from being diſtributed*, the Act ordering a Diſtribution to be made within a limited Time; eſpecially here being neither *debitum in præſenti*, and perhaps might never be *debitum in futuro*, for the Wife might die in the Life-time of the Huſband;——Beſides, *after Certificate allowed, the Bankrupt might trade again and become ſolvent* and able to pay the Bond.——But though the Debt was *contingent* when the Obligor became a Bankrupt, yet *if the Contingency happened before the Diſtribution made*, then ſuch *contingent Creditor* ſhould come in for his Debt.——So if ſuch *Contingency* happened *before* the *ſecond Dividend* made, the *Creditor ſhould come in for his Proportion thereof* though after the firſt Dividend. *Per King* C. *Mich.* 1728. *Ex parte Caſwell*,—— *Ex parte Cazalet*,——*Ex parte Bateman*, 2 *Will. Rep.* 497, 499.

3 *Will. Rep.* 132. S. C. ſtates it, That *A.* ſeiſed in Fee of a Copyhold Eſtate, ſurrendred it to the Uſe of his Will, and afterwards deviſed it *to his Daughter for Life*, then to Truſtees *to be ſold, and the Money to be divided amongſt ſuch of his* Daughter's *Children as ſhould be living at the Time of her Deceaſe.* The Teſtator died, and the Daughter had Iſſue (*inter al*') a Son, who being a Bankrupt, the Commiſſioners aſſigned over all his Effects. The Bankrupt got his Certificate, and then his Mother died. On a Bill *brought by the Aſſignees for the Bankrupt's Share of the Money ariſing by the Sale*, it was decreed for the Plaintiffs, *(for the Reaſons above)* diſtinguiſhing the principal Caſe from that of *Jacobſon* and *Williams*, (1 *Will. Rep.* 385.——*Gilb. Eq. Rep.* 140.——1 *Vol. Eq. Ca. Abr. P.* 54. *C.* 7.) for there the Huſband the Bankrupt could not have come at his Wife's Portion *by the Aid of Equity* without making ſome Proviſion for her; and it was not reaſonable the Aſſignees, *who ſtood but in his Place*, and *derived their Claim from him*, ſhould be more favoured.

8. An Eſtate was deviſed to be ſold, and the *Monies ariſing from ſuch Sale to be divided amongſt ſuch of the Children of* A. *as ſhould be living at* A.'s *Death. B.* one of *A.*'s Children, became a Bankrupt, and the Commiſſioners aſſigned over his Eſtate, after which *B.* got his Certificate allowed, and then *A.* died. Decreed that this Share of the Money, which on *A.*'s Death belonged to *B.* ſhould be paid to the Commiſſioners, for that not only the *latter* Statutes relating to Bankrupts mention the Word *Poſſibility* (*a*), but alſo becauſe 13 *Eliz. cap.* 7. *ſect.* 2. impowers the Commiſſioners to aſſign all that the Bankrupt *might depart with*; and here *B.* in the Life-time of *A.* might have releaſed this contingent Intereſt.—Beſides, the 21 *Jac.* 1. *ſect.*

(*a*) The Words of the *Stat.* 5 *Geo.* 2. *cap.* 30. are, *all ſuch Effects of which the Party was poſſeſſed or intereſted in, or whereby he hath, or may expect any Profit, Poſſibility of Profit, Benefit or Advantage whatſoever.*

ſect. 19. enacts, *that the Statutes relating to Bankrupts ſhall be conſtrued in the moſt beneficial Manner for Creditors. Higden* and *Williamſon*, firſt heard at the Rolls, *Mich.* 1731. and afterwards affirmed by *King* C. in *Mich.* 1732. 1 *Will. Rep.* 385. *in a Note by the Editor.*

9. *J. S.* by Will *gives to his Daughter A.* (then Wife of *B.*) *his Gold Watch, Jewels, China and Houſhold Goods, to be at her Diſpoſal,* and *to do therewith as ſhe ſhould think fit.* Teſtator dies, the *Daughter's Huſband becomes a Bankrupt:* This is a *Deviſe* to the *ſeparate Uſe of the Wife*, and not aſſignable by the Commiſſioners. Decreed for the Wife at the Rolls, 1733. *Kirk* and *Paulin*, *Viner's Abr.* Tit. *Creditor and Bankrupt*, (T) *Ca.* 43.

A Caſe was cited as before *Cowper* C. *viz. A Deviſe to a Feme Covert for her Uſe and Benefit*; and held, that becauſe *it was not for her ſeparate Uſe*, but *only* for her Uſe and Benefit, it was the Huſband's. But his Honour ſaid, *he was very much* diſſatisfied *with that Determination*; and ſaid, in the principal Caſe the *Intent appears* to give it to the *ſeparate* Uſe of the Wife. *Ibid.*

10. Where a *Merchant beyond Sea conſigns Goods to a Factor in London* who receives them, the *Factor* in this Caſe being *only a Servant for the Merchant, can have no Property* in ſuch Goods; neither will they be affected by his Bankruptcy. *Per King* C. in the Caſe of *Godfrey* and *Furzo*, *Trin.* 1733. 3 *Will. Rep.* 185.

Vide Ex parte Chion, *P. C.*

11. *J. S. not in Debt*, nor *then a Trader*, makes a *voluntary* Settlement on a Child, and *afterwards* becomes a Trader, and about *ſixteen Years after became a Bankrupt.* Sir *Joſeph Jekyll*, Maſter of the Rolls, held, that this Settlement was not within the *Stat.* 1 *Jac.* 1. *cap.* 15. *ſect.* 5. (*a*), and therefore *not liable to the Bankruptcy*, the *Party not being a Trader when he made the Settlement* (*b*). *Trin.* 1734. *Lilly* and *Oſborn*, 3 *Will. Rep.* 298.

The Caſe of *Criſp* v. *Pratt*, *Cro. Car.* 548. was *cited*, and upon which his Honour *grounded* this Decree, tho' at *firſt* he inclined to be of Opinion, that this Caſe came exactly within the Words of the Act, *being a Proviſion for a Child*, and *merely voluntary, as againſt Creditors. Ibid.* 299. (*a*) This Statute ſays, *That if any Perſon which hereafter is or ſhall be a Bankrupt ſhall convey, or procure or cauſe to be conveyed, to any of his Children, or other Perſons, any Manors, Lands, Goods*, or transfer his Debts into other Mens Names, *except the ſame be purchaſed, conveyed or transferred, for or upon Marriage of his or her Children*, (both the Parties married being of the Years of Conſent) *or ſome other valuable Conſideration, it ſhall be in the Power of the Commiſſioners to ſell or diſpoſe of the ſame* in as ample Manner *as if the Bankrupt had been actually ſeiſed or poſſeſſed thereof.* (*b*) In the Caſe of *Criſp* and *Pratt*, the *Perſon at the Time the Settlement was made not being in Debt*, but a clear Man, *nor then ſo much as a Trader*, and *the Settlement being two Years before he was concerned in Trade*, and *ſix Years before any Act of Bankruptcy committed by him*, was the *Reaſon* why *three Judges* againſt *one* held the *Settlement not within this Act.* 3 *Will. Rep.* 299.

12. *Stat.* 19 *Geo.* 2. made for amending the Laws relating to Bankrupts, enacts, *That after the 29th Day of* October 1746. *no Perſon who is or ſhall be* bona fide *a Creditor of any Bankrupt for or in Reſpect of Goods really and* bona fide *ſold to ſuch Bankrupt, or for or in Reſpect of any Bill or Bills of Exchange really and* bona fide *drawn, negotiated or accepted by ſuch Bankrupt, in the uſual and ordinary Courſe of Trade and Dealing, ſhall be liable to refund, or pay to the Aſſignee or Aſſignees of ſuch Bankrupt's Eſtate, any Money which, before the ſuing forth of ſuch Commiſſion, was really and* bona fide, *and in the uſual and ordinary Courſe of Trade and Dealing, received by ſuch Perſon of any ſuch Bankrupt, before ſuch Time as the Perſon receiving the ſame ſhall know, underſtand, or have Notice that he is become a Bankrupt, or that he is in inſolvent Circumſtances.*

(L) Of Diſtribution, &c.

1. *J. S.* ſeiſed of Lands *in Fee* owes a Debt by *Statute*, and *afterwards* becomes a *Bankrupt*, and the *Statute Creditor extends the Lands*, then a Commiſſion of Bankruptcy iſſued out, and whether the Lands ſhould be liable to the Statute Creditor, was the Queſtion. And *all* the Judges of *C. B.* (*upon a Reference to them by Lord Chan.*) held, that the Clauſe of the Statute of 21 *Jac.* 1. *cap.* 19. *ſect.* 9. (*a*), was full and plain, that *all the Bankrupt's Creditors*, unleſs where there was a Mortgage, *ſhould be equally paid.* —— And *Trevor* Ch. J. ſaid, A *Judgment* or *Recognizance did no more bind the Land* than the *Teſte* of a *Fi. Fa.* bound the Goods *at the Time of making this Statute*; and it was plain, if the *Fi. Fa.* was not ſerved and *executed*, ſuch Creditor, *notwithſtanding his ſuing out his Fi. Fa.* ſhould only come in *pro ratâ* with the Creditors *even by ſimple* Contract. *Eaſt.* 1706. *Sir George Newland and Beckley* v. ——— 1 *Will. Rep.* 92, 93.

(*a*) By this Statute it is enacted, That *the Commiſſioners may examine upon Oath, or by any other Ways, any Perſons for the Diſcovery of the Debts owing to all ſuch Creditors as ſhall ſeek Relief by ſuch Commiſſion, and every Creditor having Security for his Debts by Judgment, Statute, Specialty, or other Security, or having no Security, or having made Attachments in* London, *or other Place, of the Goods of ſuch Bankrupt* whereof there is no Execution or Extent ſerved and executed upon any Lands, Goods or Eſtate of ſuch Bankrupt, *before ſuch Time as he ſhall become a Bankrupt, ſhall not be relieved upon any ſuch Judgment*, Statute, *Specialty, Attachments, or other Security, for any more than a ratable Part of their Debts with the other Creditors, without reſpect to any Penalty contained in ſuch Judgment*, Statute, *Specialty, or other Security.*

2. *A.* draws a Bill of *Exchange* in *England*, *payable to B.* or *C.* in *Holland* for 100 *l.* *C. accepts this Bill*; afterwards A. *and* C. *become Bankrupts*, and 40 *l. per Cent. was paid out of* C.'s *Effects to his Creditors*, and now B. and the *Reſt of the Creditors of* A. would come in for the Whole 100 *l. alledging that though this ſhould be granted them, yet the Effects of* A. *would not extend to ſatisfy them their juſt Debts of* 100 *l. even including the* 40 l. per Cent. *which they had received out of* C.'s *Eſtate. Macclesfield* C. *directed* that the Creditors of *A.* come in for 60 *l. per Cent. only*, and if the 40 *l. per Cent.* ſhould appear to have been paid out of *C.*'s *own Effects*, then the Creditors of *A.* to come in for the Whole 100 *l.* out of which they muſt anſwer 40 *l. per Cent.* to the Creditors of *C. Hil.* 1722. *Ex parte Ryſwicke*, 2 *Will. Rep.* 89.

It is *material* whether this Payment of 40 *l. per Cent.* made by the Aſſignees under C.'s Commiſſion was *out of the Effects which* A. *had in* C.'s *Hands*; for if ſo, it *would be as if paid by* A. *herſelf*, and *then there can be but* 60 l. per Cent. *due*, and *A.'s Creditors ſhall come in for no more.* ——But if *the* 40 l. per Cent. *was paid out of* C.'s *Eſtate*, then his Eſtate is a Creditor for this 40 *l.* and *A.'s Creditors muſt come in Creditors for the Whole* 100 l. and be taken as *Truſtees for the* 40 l. *Debt paid out of* C.'s *Effects. Per* Lord Chan. *Ibid.* 90, 91.

3. If A. *was Principal in a Bond*, and B. *Surety*, for Payment of 100 *l.* and A. *and* B. *becoming Bankrupts*; A. *had paid* 40 *l.* the *Creditors* of A. *or* B. would come in only for the *remaining* 60 *l.* —— But *if* B. *the Surety had paid the* 40 *l.* or *if it had been paid out of his Effects*, then B. or his Eſtate had been Creditor for this 40 *l.* and conſequently the *Creditors or Aſſignees under the Commiſſion againſt* A. *the Principal*, though the 40 *l.* had been paid by the Surety, *muſt have come in for* the *Whole* 100 *l.* and as to the 40 *l. they muſt have been accountable to* B. *the Surety. Per* Lord Chan. in the above Caſe, *Ibid.* 91.

4. *A.* gives a promiſſory Note for 200 *l.* payable to *B.* or Order; *B.* indorſes it to *C.* who indorſes it over to *D.* A. B. *and* C. *become Bankrupts*, and D. *receives* 5 s. *in the Pound on a Dividend made by the Aſſignees under* A.'s *Commiſſion*; *D.* ſhall come in as a Creditor for

150 *l. only* out of *B.*'s Effects, and *if* D. *paid Contribution Money for more than* 150 l. *it ſhall be returned. Ordered per* Lord Chan. *King, Eaſt.* 1727. *Ex parte Lefebvre* (*or Lefebure*) 2 *Will. Rep.* 407.

5. *H.* and *D. May* 1716. gave Bond to *M. T.* for Payment of 120 *l.* In 1727. *M. T.* aſſigned a Bond to *R.* her Daughter the Petitioner; *H.* and *D.* both died, *H.* died inſolvent, *D.* left a conſiderable real Eſtate, which *devolved to A.* who *entred and ſold Part of the Lands,* and *after became a Bankrupt*; and *his Aſſignees were in Poſſeſſion of the Lands unſold.* The *Petitioner* prayed that *theſe Lands might be liable to the Bond Debt of* D. *preferable to the general Creditors of* A. It was inſiſted for the Petitioner, that ſince the *Stat.* 3 & 4 *W. & M. cap.* 14. *of fraudulent Deviſes,* Lands in Hands of Deviſees *are made liable to Bond Debts* as in the Hands of the Heir; and *here the Aſſignees ſtand in the Place of the Bankrupt,* and *ſubject to the ſame Equity*; and the *Bankruptcy* and *Aſſignment* is *no* Alienation *bona fide* within the *Exception* and *Intent* of the Statute; *and the Caſe of Executors becoming Bankrupts, having Aſſets remaining in Specie, is common, and always held the Creditors of Teſtator to have a Preference.* But it was inſiſted upon *econt'*, that there is no ſpecifick Lien: The *Aſſignment is an Alienation,* and the *Caſe* of *Executors differs*; an *Executor is looked upon as a Truſtee.* Lord Chan. ſaid, this is a Point of too much Difficulty to determine in this ſummary Way; let the Petitioner bring a Bill by *Eaſter* Term, and *ſtay ſufficient of the Eſtate in the mean Time in the Aſſignees Hands. Trin. Vac.* 1733. *Ex parte Warren & Ux', Viner's Abr.* Tit. *Creditor and Bankrupt,* (X) *Ca.* 12.

6. *J. S. mortgaged Lands to* W. *for* 1157 l. and *afterwards mortgaged the ſame, together with other Lands, to* H. *as a collateral Security for* 500 l. *due by Bond,* and about *ten Days afterwards* J. S. *was declared a Bankrupt.* Part of the Premiſſes were ſold for 1050 *l.* and the Money paid to *W.* but the Commiſſioners refuſing to ſell the Reſidue, and the Aſſignees refuſing to ſatisfy the Demand of *H.* or to admit him to have any Share of the Bankrupt's Eſtate, he *petitioned for a Sale to be made of the Reſt of the mortgaged Premiſſes, and the Money to be applied towards the Diſcharge of the Demands of* W. *and himſelf*; *and in Caſe of any Deficiency, then to be admitted a Creditor on the ſaid Bankrupt's Eſtate for what ſhould remain due after ſuch Sale, and to ſtay any Dividend in the mean Time.* Lord Chan. referred it to Commiſſioners to take an Account of what was reſpectively due to *W.* and *H.* on their reſpective Mortgages; and ordered the mortgaged Premiſſes remaining unſold to be ſold, and the Monies to be applied firſt in diſcharging of *W.*'s Mortgage, and then of *H.*'s, together with his Coſts of this Application, to be ſettled by the Commiſſioners; and in Caſe Petitioner and Aſſignees ſhould differ about the ſame, and if the ſame ſhould not prove ſufficient to pay Petitioner his Principal, Intereſt and Coſts, then he to be admitted a Creditor for ſuch Deficiency, and to a Dividend, *&c.* and that *W.* and *H.* be examined touching the Account, and to produce upon Oath all Deeds, *&c.* 31 *May* 1737. upon the Petition of *William Holwell,* Eſq; *Viner's Abr.* Tit. *Creditor and Bankrupt,* (X) *Ca.* 13.

7. By *Stat.* 5 *Geo.* 2. *cap.* 30. *ſect.* 33. *Perſons choſen Aſſignees of the Eſtate and Effects of a Bankrupt, ſhall at ſome Time after the Expiration of four Months, and within twelve Months from the Time of iſſuing of ſuch Commiſſion, cauſe twenty-one Days Notice to be given in the* Gazette, *of the Time and Place the Commiſſioners and Aſſignees intend to meet, to make a Dividend or Diſtribution of ſuch Bankrupt's*

Eſtate and Effects; at which Time the Creditors, who have not before proved their Debts, ſhall then be at Liberty to prove the ſame; which Meeting for the City of London, *and all Places within the Bills of Mortality, ſhall be at* Guildhall; *and upon every ſuch Meeting the Aſſignees ſhall produce to the Commiſſioners and Creditors then preſent, fair and juſt Accounts of their Receipts and Payments touching the ſaid Bankrupt's Eſtate and Effects, and of what ſhall remain out-ſtanding, and the Particulars thereof; and ſhall, if the Creditors then preſent, or the major Part of them, require the ſame, be examined upon Oath or ſolemn Affirmation before the Commiſſioners, or the major Part of them, touching the Truth of ſuch Accounts; and in ſuch Accounts the Aſſignees ſhall be allowed and retain all ſuch Sums of Money as they ſhall have expended about ſuch Commiſſion, and all other juſt Allowances; and the Commiſſioners ſhall order ſuch Part of the neat Produce of the ſaid Bankrupt's Eſtate, as ſhall appear to be in the Hands of the ſaid Aſſignees, as they ſhall think fit, to be divided amongſt ſuch of the Bankrupt's Creditors who have duly proved their Debts, in Proportion to their reſpective Debts; and the Commiſſioners ſhall make ſuch their Order for a Dividend in Writing under their Hands, and ſhall cauſe one Part of ſuch Order to be filed amongſt the Proceedings under the Commiſſion, and ſhall deliver unto each of the Aſſignees a Duplicate of ſuch their Order likewiſe under their Hands; which Order of Diſtribution ſhall contain an Account of the Time and Place of making ſuch Order, and the* Quantum *of all the Debts proved, and the Sum total of the Money remaining in the Hands of the Aſſignees to be divided, and how much in the Pound is then ordered to be paid to every Creditor; and the ſaid Aſſignees, in Purſuance of ſuch Order, and without any Deed of Diſtribution, ſhall forthwith make ſuch Dividend, and ſhall take Receipts in a Book from each Creditor for the ſame, and ſuch Order and Receipt ſhall be a full Diſcharge to ſuch Aſſignees.*

8. Sect. 37. *Within eighteen Months next after the iſſuing of any ſuch Commiſſion, the Aſſignees ſhall make a ſecond Dividend, in Caſe the Eſtate was not wholly divided upon the firſt Dividend, and ſhall cauſe a Notice to be inſerted in the* Gazette, *of the Time and Place the ſaid Commiſſioners intend to meet to make a ſecond Dividend, and for the Creditors, who ſhall not before have proved their Debts, to come and prove the ſame; and at ſuch Meeting every Aſſignee ſhall produce upon Oath or Affirmation his Accounts of the Bankrupt's Eſtate and Effects, and what upon the Balance thereof ſhall appear to be in his Hands, ſhall by the like Order of the Commiſſioners be forthwith divided, as aforeſaid; which ſecond Dividend ſhall be final, unleſs any Suit at Law or in Equity ſhall be depending, or any Part of the Eſtate ſtanding out that cannot have been diſpoſed of, or that the major Part of the Creditors ſhall not have agreed to be ſold and diſpoſed of, or unleſs ſome future Eſtate or Effects of the ſaid Bankrupt ſhall afterwards come to or veſt in the Aſſignees; in which Caſe the Aſſignees ſhall, as ſoon as may be, convert ſuch future Eſtate and Effects into Money, and ſhall within two Months next after the ſame ſhall be converted into Money, by the like Order of the Commiſſioners, divide the ſame.*

9. *Commiſſioners appoint a Dividend to be made of the Bankrupt's Eſtate,* a Creditor *under the Commiſſion neglects to receive of the Aſſignees his Proportion of that Dividend.* The *Aſſignees afterwards run away with the Dividend* that was in their Hands. The *Creditor* ſhall *not*

His Lordſhip obſerved, *that this Caſe wholly* depends upon the Order of Diſtribution made by the Commiſſioners aſcertaining the Dividend, *for if no ſuch Order of Diſtribution had been made,* the Creditor would have been allowed to have come upon the Bankrupt's Eſtate, and *would not have been confined to have taken his Remedy againſt the Aſſignees. Ibid.*

not be allowed to come upon the *Bankrupt's Eſtate* for that Money, but muſt take *his Remedy againſt the Aſſignees as well as he can.* Cited by Lord Chan. as a Caſe that had been put, in the Caſe of *Smith* and *Duke of Chandos*, *Hil.* 1740. *Barnard. Rep. in Chan.* 419.

Vide (J) *P.* and (K) *P.*

(M) Caſes relating to Purchaſers.

1. A *Pretended* Sale of Lands by *Ward* ſhortly before his *Bankruptcy* to his Brother, *was ſet aſide*, on a Bill brought by the Aſſignees, on the *Stat.* 1 *Jac.* 1. *cap.* 15. *whereby voluntary Conveyances by Perſons who after become Bankrupts are void.* —— Obj. That *ſuch a Conveyance would be void at Law*, and need not come into this Court to ſet it aſide; *ſed non allocatur. Hil.* 1733. *De Golls* and *Ward*, *Viner's Abr.* Tit. *Creditor and Bankrupt*, (K. a.) *Ca.* 1.

2. A *Bankrupt* whoſe Eſtate is in Mortgage, *conveys the Equity of Redemption to a third Perſon after an Act of Bankruptcy*, but *before the Commiſſion iſſued*; *this ſhall not defeat the Aſſignees.* —— But where a *bona fide* Purchaſer for a valuable Conſideration, *and without Notice*, has a Conteſt with the Aſſignees, Equity will not take any Advantage from him, therefore not compel a Diſcovery. *Talbot* C. *Hil.* 1734. *Collet* and *De Golls and Ward*, *Ca. in Eq. Temp. Talbot* 65. *Vide* this Caſe Tit. *Notice*, *P. C.* and *Purchaſer and Vendee*, *P. C.*

3. An Iſſue being directed to try the Bankruptcy of *John Ward*, upon Trial at Bar in *B. R. he was found to become Bankrupt* 26 *Aug.* 1725. and now upon the Equity reſerved, Plaintiffs (Truſtees for the *South-Sea* Company) *prayed an Account*, *and to ſet aſide Conveyances that* John Ward *had made ſince his becoming Bankrupt.* The Nature of the Caſe (*as ſtated by Lord Chan.*) was of a Gentleman having a very great Eſtate, and not much indebted, except the Demand by the *South-Sea* Company. —— By Deeds of Conveyance of 25 and 26 *Auguſt* 1725. *and by ſubſequent Deeds*, all the real and perſonal Eſtate of *J. W.* even to Houſhold Goods, are *veſted in Truſtees to pay pretended Creditors*, the Son joining with the Father, but not one of the pretended Creditors; —— and no Diſtreſs from any Creditor, *&c.* — Amongſt other Truſts is the extraordinary Power in the Deed of *Sept.* 1725. for *J. W.* to charge any other Debts; and laſt of all the whole Surplus of all the Eſtates is veſted in the Bankrupt's Son. —— Then come the Marriage Articles in *June* 1729. and therein every one of the former Deeds are recited to be in Conſideration of the Marriage of the Son with *A. B.* and 4000 *l.* Portion, (*but not proved paid*). The Surplus agreed to be ſubject to a Term of 200 Years, to pay 400 *l.* a Year to *J. W.* for Life, if he ſhould particularly demand it, and then for his Son and his Wife: Then *J. W.* was to purchaſe Lands of 1600 *l. per Ann.* in Tail General to his Son, Remainder to his right Heirs, with Power as to Portions for Children, and Power for Truſtees to provide Coach and Horſes for *J. W.* —— Then there is another Deed of ſooner Date by the Son, ſubjecting the Manor of —— to ſome Uſes. —— A Bill was brought by the Aſſignees to ſet aſide theſe Deeds, *&c.* An Iſſue was directed, and the Jury find *J. W.* Bankrupt, 26 *Auguſt* 1725. being the Date of the firſt Deed of Releaſe, *Viner's Abr.* Tit. *Creditor and Bankrupt*, (K. a.) *Ca.* 2. S. C. and Decree ſays, Lord Chan. ſaid, this was an extraordinary Caſe, and he believed none like it before, and hoped never would again; and that therefore it was incumbent on the Court to do all they could to prevent the like; and obſerved, that here appeared a Scheme of Fraud thro' many Years to defraud juſt Creditors. *Ibid. p.* 122. Lord Chan. in S. C. declared, that he had ſpoke with the C. J. of *B. R.* who had told him that the Jury found *John Ward* Bankrupt from executing the Deed of 25 *Auguſt* 1725. and that no Act of Bankruptcy was proved before or after, but the Execution of that Deed, and no other Act of Bankruptcy till 1726. *Viner's Abr.* Tit. *Creditor and Bankrupt*, (K. a.) *P.* 121.

leaſe, by which that Deed is over-reached.——And the *Judges certify that this Deed was the Act of Bankruptcy, as being made to defraud his Creditors*——The Queſtion is, what the Conſequence of this Verdict is? 1ſt, In Law, and next how in Equity.——At Law this Deed, and all ſubſequent ones, are void. But it was objected from the *Stat.* 21 *Jac.* 1. that the Commiſſion of Bankruptcy was not taken out till 20 *November* 1730. above five Years after the Act of Bankruptcy, and by a Clauſe in that Statute, Purchaſers in ſuch Caſe are not to be impeached, *&c.*——But his Lordſhip held, that this Clauſe only affects Purchaſers *bona fide*, without Notice of the Fraud and Act of Bankruptcy;——and here the Son muſt have had Notice of the Act of Bankruptcy, ſo that the Son is not protected by this Deed.——Next here is Equity; and here his Lordſhip took Notice that there are Circumſtances of actual Fraud, and that here appeared a long Series from 1725.——The Power in the Deed of *September* 1725. to charge the Eſtate with any other Debts is Fraud apparent, becauſe it reſerves in Effect the whole Eſtate in the Bankrupt himſelf, *&c.*——The next Conſideration is how far the ſeveral Defendants are to be affected; this is to be conſidered in two Reſpects; 1ſt, Under the Deeds from 1725. prior to the Articles.——2dly, How upon the Marriage Articles?——1ſt, As to the Deeds prior to the Articles, they concern the Truſtees for the pretended Creditors, and thoſe Creditors; but no Proof of any real Debts; and the firſt Deed for that Reaſon found void, and therefore this is out of the Caſe. Then the Queſtion is under thoſe Deeds how it ſtands with the Son; and his Lordſhip held, that he is affected with the Act of Bankruptcy, and Fraud, being Party to the firſt Deed, *&c.* and at beſt it is all voluntary as to him, and the Surplus in all the ſubſequent Deeds is reſerved to him.——Next as to the Marriage; and here his Lordſhip ſaid, was the only Appearance of Difficulty;——ſo as to the Perſons provided for; and as to *J. W.* himſelf, he cannot partake of the Conſideration;——all the Parties to be conſidered are *Ward*'s Son, and his intended Wife and the Iſſue:——1ſt, As to the Son, his Caſe is not immediately the Marriage Articles, he had Notice of the Bankruptcy of his Father before. It was objected, that the Son is to be conſidered as a Purchaſer by the Articles, and the Statute not mentioning Notice; and where the Commiſſion is not ſued out within five Years, *&c.* But his *Lordſhip* held, that *Articles in Equity are the ſame as actual Conveyances at Law, and no more to be impeached in Equity*; but *held*, that the Son could take nothing under the Articles but what he had before; but ſuppoſe it ſo, his Lordſhip ſaid, the Clauſe in the *Stat.* 21 *Jac.* 1. not to be conſidered in the large Senſe contended for, ſo as to extend to all Purchaſes; but held, that this Clauſe is to be compared to the Clauſe in the *Stat.* 13 *Eliz. cap.* 7. which *provides againſt Purchaſers having Notice of the Fraud.* The *Stat.* 21 *Jac.* 1. takes Notice of the former Acts againſt Bankrupts, and is for further Proviſion for Creditors. Therefore his Lordſhip held this Caſe like the Caſe, and warranted by the Conſtruction made on the ſeveral Statutes about Leaſes by Eccleſiaſtical Perſons, 1 *Vent.* 244. *Bayly* and *Murin*, the laſt Reſolution in that Caſe—— And *ſo held that* all *the Statutes againſt Bankrupts are to be conſtrued together, and to be conſidered* all *as one Statute*,——and no Pretence but that the Son had Notice, and therefore he (the Son) cannot protect himſelf under the Statute.—Next as to his Wife and Iſſue—The Son's Wife, for what appears, is an innocent Perſon;——no Evidence to ſhew her Father had any other Notice than what appears

from

from the Deeds. But his Lordſhip thought Notice of the Deeds was no Notice of the fraudulent Intent of theſe Deeds, other than as to the Son, who was Party, *&c.* And if the Son's Wife had not Notice of the Bankruptcy, ſhe cannot be affected in Equity by the Bankruptcy.—— Next as to the Iſſue of the Marriage; 1ſt, As to the Heirs of the Body of the Son, that is an Eſtate-tail in him; and his Lordſhip agreed that in *Marriage Articles where the Limitation is to the Heirs of the Body by the Wife, there it ſhall be carried into ſtrict Settlement*; but *otherwiſe where the Limitation is general to all the Iſſue*; and that this was the real Intent appears by the Proviſion of 6000*l.* which is expreſly for the Iſſue of the Marriage, and extends to the eldeſt Son as well as to the Reſt of the Children. —— This 6000*l.* is ſecured by a Power and Truſt; and his Lordſhip held, that the Iſſue are to be affected with the Notice to the Father and Mother and Truſtees.——As to Plaintiff's Objection, that the Proviſion is of the Surplus only after the fictitious Debts paid; this would be ſtrange, and their Proviſion ought to be what was really due. As to the Bankrupt's Power to charge other Debts, his Lordſhip held his joining in the Marriage Articles was an Extinguiſhment of that Power, and amounted to a Revocation.——*Ergo* decreed the Marriage Articles to be ſet aſide as to all the Uſes, except as to the Jointure of the Wife, and the 6000*l.* for the Iſſue. —— *Mich.* 1739. *Read* and *Ward, MS. Rep.*

(N) Concerning Aſſignments made by a Bankrupt juſt before his Bankruptcy, in order to give Preference to ſome of his Creditors.

1. *J. S.* being indebted to *B.* in 180*l.* afterwards aſſigned over all his Effects, *&c. except a few Shillings and ſome deſperate Debts*, to *C.* his Father-in-Law, towards Satisfaction of a pretended Debt due to him from *J. S. B.* brought an Action againſt *J. S.* and took him in Execution. After the making of the Act 5 *Geo.* 2. *cap.* 30. *ſect.* 10. (*a*), *C.* takes out a Commiſſion of Bankruptcy againſt *J. S.* under which *B.* is prevailed on to come in, and be Aſſignee, *being told that otherwiſe the Bankrupt's Father-in-Law would ſink the Eſtate, and get him diſcharged.* Then the Bankrupt petitioned that he might be diſcharged out of Execution, ſince *B.* had proved his Debt under the Commiſſion. (*b*) —— *B.* propoſed to waive all Benefit under the Commiſſion. *Parker* Chan. held the Commiſſion to be plainly ſued out fraudulently by the Bankrupt's Father-in-Law to diſcharge the Bankrupt out of Cuſtody, and not for the Advantage of Creditors (*c*). That *B.*'s Propoſal ought to be accepted, and that a Creditor cannot be

(*a*) Whereby a Bankrupt in Caſe he ſurrenders himſelf, be examined, and four Fifths in Number and Value of his Creditors ſign his Certificate, and teſtify their Conſent, is to be diſcharged, *&c.* —— Tit. *Vide Certificate, P.*

(*b*) If Fraud appears on the Bankrupt's Side, and an honeſt Debt on the Creditor's, Equity ought not to interfere in Prejudice of the honeſt Creditor, and in Favour of the fraudulent Bankrupt.—— And that it might be thought neceſſary that *B.* ſhould prove his Debt under the Commiſſion, in order to oppoſe the Bankrupt's Diſcharge. Said *arg'*, and admitted as reaſonable, *per* Lord Chan. *Ibid.* 561, 562.—— The Reaſon of its having been frequently ruled, that a Creditor could not come in before Commiſſioners, and then detain the Bankrupt in Priſon, was 1ſt, Becauſe it would be unconſcionable the Creditor ſhould detain the Bankrupt for Non-payment of his Debts, and yet ſeize all his Eſtate wherewith he was to pay it. 2dly, Becauſe by coming in under the Commiſſion, the Creditor *elected* to have the Benefit of the Bankrupt's Eſtate towards ſatisfying his Debt, and therefore ought to waive his Execution of the Body. But in the principal Caſe there was no Eſtate left to ſeize, and therefore no *Election* could be made, in Regard all the Bankrupt's Eſtate had been before aſſigned away to the Bankrupt's Father-in-Law. *Ibid.* 562.

(*c*) Rule 3 *The Creditor's Good is the proper End of ſuing out Commiſſions of Bankruptcy.*

be ſaid to elect to be ſatisfied out of a Bankrupt's Eſtate where there is none; which more particularly diſtinguiſhes this Caſe; *ergo* would not diſcharge the Bankrupt. *Trin.* 1719. *Ex parte Salkeld*, 1 *Will. Rep.* 560, 563.

2. A Goldſmith being greatly indebted ſhut up his Shop, and having a Stock likewiſe in Partnerſhip in the Wine Trade, aſſigned *two Thirds* thereof, of about 300 *l.* Value, to *J. S.* a Creditor, without the Knowledge of *J. S.* and never after opened his Shop, *but the next Day went off, and was after found to have become Bankrupt ſuch a Day after the Day of the Aſſignment.* On a Bill by *J. S.* againſt the Aſſignee, and the Partner in the Wine Trade, the Maſter of the Rolls held the Aſſignment good; and held, that there might be juſt Reaſon for one becoming Bankrupt to prefer one Creditor to another; as where he was a *faithful Friend*, or *Money lent in Extremity without Profit*, and *all that ſuch Creditor has to ſubſiſt upon*; whereas Dealers in Trade may have been Gainers; and that the Time of the Aſſignment, if made before the Bankruptcy, is not material, but the Juſtice of the Debt; and its being without Notice of the Creditor is no Objection, for this ſhews that there was no Fraud or Importunity; and if ſuch Aſſignment to a ſingle Creditor be a *Choſe en Action*, he may apply for Relief here, for he can go no where elſe; *ſecus* if a legal Eſtate had been conveyed. His Honour cited the Caſe of *Cock* and *Goodfellow* (*a*), and the Caſe of *Jacob* and *Shepherd* (*b*), and Sir *Stephen Evans*'s Caſe; and ſaid, that though preferring ſome Creditors, in hopes of after Favours, may be of miſchievous Conſequence, yet by reaſon of the Precedents he muſt decree in Favour of the Aſſignment. *Mich.* 1727. *Small* and *Oudley*, 2 *Will. Rep.* 427.

(*a*) *Vide* (D) *P.* 100. *Ca.* 1. and the Notes there.

(*b*) *Vide* the following Caſe, and the marginal Note.

3. *J. S.* a Trader was juſt on the Brink of Bankruptcy, a Deed ready engroſſed was brought to him, *which he executed a little before his Bankruptcy*, and in Contemplation thereof, *to give a Preference to ſome of his Creditors.* On an Appeal *Macclesfield* C. ordered *a Trial, to be informed when the Trader became a Bankrupt*; and *the Execution of the Deed being found to have been before the Bankruptcy*, it was decreed in Favour of the Deed. Cited by the Maſter of the Rolls in the Caſe of *Small* and *Oudley above*, as the Caſe of *Jacob* and *Shepherd*, 2 *Will. Rep.* 431.

So likewiſe in Sir *Stephen Evans*'s Caſe, who having executed a Deed immediately before his Bankruptcy, and with a View to give a Preference to ſome of his Creditors, the ſame prevailed. Cited by his Honour in the Caſe of *Small* and *Oudley*, *Ibid.* 431.

(O) Of ſetting off mutual Debts.

1. IN the Caſe of *Lord Laneſborough & al'* v. *Jones*, *Trin.* 1716. Lord Chan. *Cowper* ſaid, that where there is *mutual* Credit between a *Bankrupt* and *another* only, the Balance ſhall be paid, and that the Clauſe in the Statute (*c*), is not to be conſtrued of *Dealing in Trade only*, or in Caſe of *mutual running Accounts*, but alſo where *one Credit is upon Mortgage* and *the other upon Note*, and that it is natural Juſtice and Equity, in *all Caſes of mutual Credit*, that only the Balance ſhould be paid. 1 *Will. Rep.* 325, 326.

(*c*) 4 *Ann. cap.* 17. *ſect.* 11.

2. *J. S.* in 1711. had 5000 *l.* Stock in the *Hudſon's Bay* Company, and was their Banker or Caſhier, and upon that Account was indebted to the Company in 800 *l.* and ſoon after became a Bankrupt. The Aſſignees bring a Bill againſt the Company to *transfer the*

5000 l.

5000 l. *to them with the Dividends.* The Company by their Anſwer inſiſt, that by Virtue of a By-Law *the Stock and Dividend of each Adventurer ſhall be obliged to ſuch Debts and Engagements as ſuch Adventurer ſhall become engaged in to the Company, and that the Committee of the Company for the Time Being ſhall and may diſtrain the ſame until ſuch Debts and Engagements are fully ſatisfied*; that the Company is not obliged to transfer the Stock to the Plaintiffs until they pay the 800 *l.* due to the Company; and they alſo inſiſted upon the Clauſe in the *Stat.* 5 *Geo.* 2. *cap.* 30. *ſect.* 28. (*a*), of ſetting off Debt againſt Debt; and that *J. S.* having Credit in their Books for 5000 *l.* Stock, and the Company on the other Hand having Credit in *J. S.*'s Books for 800 *l.* they might deduct and have an Allowance of the 800 *l.* out of the 5000 *l.* Stock. Lord Chan. *King* was of Opinion, that the *By-Law* (*b*) *was not good*; but *Raymond* C. J. and *Price* B. who aſſiſted his Lordſhip, *thought it a good By-Law.* But Lord Chan. thought this Caſe to be within the Clauſe of the above Statute, and therefore ſaid, he needed not give any direct Opinion as to the By-Law, that here was mutual Credit given, and therefore decreed *that the Company may retain the* 800 l. *out of the Dividends due to the Bankrupt's Eſtate, ſubſequent to the Bankruptcy, and ſhall not be obliged to come in as a Creditor under the Commiſſion* (*c*). *Mich.* 12 *Geo. Gibſon & al', Aſſignees of Sir Stephen Evans a Bankrupt,* and *Hudſon's Bay Company, Viner's Abr.* Tit. *Creditor and Bankrupt,* (N. a.) *Ca.* 2.

(*a*) The Statute ſays, *Where it ſhall appear that there hath been mutual Credit given, or mutual Debts between the Bankrupt and any other Perſon, the Commiſſioners or Aſſignees ſhall ſtate the Account, and one Debt may be ſet againſt another, and the Balance of ſuch Account ſhall be claimed or paid.*

(*b*) His Lordſhip ſaid it was aſſuming a Legiſlative Power, and altering the Law; it was different from an Agreement between private Partners in Trade; theſe Sort of Companies were of a publick Nature, all People were admitted into them, and great Part of the perſonal Eſtates of the Kingdom were inveſted in them; that it did not only make Debts by ſimple Contract equal to Specialty and Judgments, but gave them the Preference. It gave them a Power to attach their Creditors Effects, and to be their own Carvers; it ſubverted the legal Courſe of Adminiſtration, and was *inconſiſtent with the Statute of Bankrupts, which makes all Debts equal.* Lord C. J. *Raymond* and Mr. Baron *Price* ſaid, this By-Law extends only to their own Members, and tends to the Benefit and Advantage of the Corporation. All *By-Laws for the Benefit and Advantage of Trade are good,* unleſs ſuch By-Laws be *unreaſonable* or *unjuſt*: That this *in their Opinion* was neither; not unreaſonable, becauſe it extends only to their own Members, whoſe Conſent is implied in all By-Laws, and every Man that buys Stock muſt take it ſubject to the Engagements laid upon ſuch Stock by the Company; it is not unjuſt, becauſe the Stock is only to be retained as a Pledge till the Debt be ſatisfied, which every Debtor in Juſtice is bound to do; that the Aſſignees ſtand in the Place of the Bankrupt, and *can be in no better Condition than the Bankrupt himſelf. Viner's Abr. Ibid.* (*c*) Mr. *Viner* in the Margin of this Caſe ſays, *The Judges gave no direct Opinion as to the Point decreed, but ſeemed to agree with the Chancellor.*

(P) Bankrupt arreſted, in what Caſe diſcharged.

TWO Perſons having Authority to ſeize the Effects of a Bankrupt, broke open a Cloſet where the Bankrupt was, to ſearch for them; two Officers came ſoon after them, and took him in an Action, and threw him into the *Compter*, where he was ſerved with ſeveral other Actions in Cuſtody. Ordered that they (*i. e.* the *Officers*) at their own Coſts ſhould procure him to be diſcharged, or to ſtand committed, *being an Abuſe of the Proceſs of the Court. Mich.* 12 *Geo.* 1. *Anon. Sel. Ca. in Chan.* 64.

Vide (Q) *P. C.*

(Q) Concerning the Bankrupt's Certificate, and the Allowance thereof (*a*).

(*a*) And his Diſcharge, &c.

1. G. Brought an Action for Rent againſt *B.* a Bankrupt, and obtained Judgment before Bankrupt's Certificate allowed, which not being allowed till after the Rules for Pleading were out, the Bankrupt had no Opportunity to plead it, and take the Benefit of the Act 4 & 5 *Ann. c.* 17. (*b*)—But in the *Sci. Fa.* againſt the Bail the Certificate was pleaded, and Plea over-ruled, ſo that the Bankrupt had no Relief but in Equity, or by *Audita Querela, which is an equitable Remedy at Law.* On a Motion for an Injunction, *Cowper* C. refuſed to grant one, though urged that there were ſeveral Precedents of this Sort, (but none ready to produce) *becauſe this was a merciful Law made in Favour of Bankrupts*, and in Prejudice of Creditors; *ergo* not to be extended in Equity further than at Law. *Mich.* 3 *Geo.* 1. *Bagſhall* and *Gore*, *Viner's Abr.* Tit. *Creditor and Bankrupt*, (S. a.) *Ca.* 5.

(*b*) By Stat. 4 & 5 *Ann. c.* 17. *All Bankrupts ſurrendering and conforming themſelves as in this Act, ſhall be diſcharged from all Debts owing at the Time of the Bankruptcy, and if they be proſecuted for any Debt due before, they ſhall be diſcharged on common Bail, and plead that the Cauſe of Action accrued before they became Bankrupts, and give the ſpecial Matter in Evidence; and if Judgment be given againſt the Plaintiff, the Defendant ſhall recover his Coſts.*—And by *Stat.* 5 *Geo.* 2. *cap.* 30. *ſect.* 7. it is enacted, *That a Bankrupt who ſhall ſurrender and conform as by this Act is directed, and ſhall afterwards be impleaded for any Debt due before he became Bankrupt, ſuch Bankrupt ſhall be diſcharged upon* common Bail, *and may plead in general that the Cauſe of Action did accrue before ſuch Time as he became Bankrupt; and the Certificate of ſuch Bankrupt's conforming, and the Allowance thereof, ſhall be ſufficient Evidence of the Trading, Bankruptcy, Commiſſion, and other Proceedings precedent to the obtaining ſuch Certificate, unleſs the Plaintiff can prove the ſaid Certificate was obtained unfairly, or make appear any Concealment by ſuch Bankrupt to the Value of* 10*l.*

2. Commiſſioners of Bankruptcy having made an Aſſignment of the Bankrupt's Eſtate, and the Bankrupt afterwards obtains his Certificate, cannot make a ſubſequent Aſſignment. *Vide* the Caſe of *Jacobſon* and *Williams*, 1 *Vol. Eq. Ca. Abr. 4th Edit. P.* 54. *C.* 7. and the References there.

3. Though a Creditor comes in under a Commiſſion of Bankruptcy and proves his Debt, and is prevailed upon to be an Aſſignee, (being informed that otherwiſe he ſhould loſe his Debt) yet if the Bankrupt has no Eſtate, the Creditor may take the Bankrupt in Execution, if he will waive any Benefit of the Statute. *Vide Ex parte Salkeld, P. C.*

4. *Hil.* 1719. *Ex parte James*, it was reſolved by Lord Chan. *Parker*, that ſuch of the Bankrupt's Creditors as came in under the Commiſſion, by which all the Bankrupt's Eſtate both real and perſonal (by Means whereof he ſhould pay his Debts) was ſeized, ſhould not be allowed to impriſon the Bankrupt for not paying thoſe Debts; wherefore his Lordſhip ſaid, he would order the Bankrupt to be diſcharged out of Cuſtody, as to any Action brought by thoſe who had come into the Commiſſion of Bankruptcy, and had ſought Relief thereby. And though it was objected, that the Bankrupt ought not to be diſcharged till he had perfected his Examination, yet his Lordſhip held the contrary; for it did not appear that the Bankrupt was in Contempt, or had refuſed to be examined; if he had, yet when the *Commiſſion was irregularly ſued out*, (as it was in the principal Caſe (*c*), there ought not to be any Proceedings upon it by way of examining the Bankrupt, or otherwiſe. 1 *Will. Rep.* 612.

(*c*) *Vide* (B) *P.* 96. *C.* 2.

5. A Creditor petitioned againſt the Allowance of a Bankrupt's Certificate, upon which the Bankrupt gave him a Bond for Payment of his whole Debt in Conſideration of withdrawing his Petition; and afterwards the Bankrupt's Certificate was allowed, and the Creditor put the Bond in Suit againſt the Bankrupt, who pleaded the Clauſe in the Act, *and that the Bond was obtained in order to procure his Diſcharge*; and on a Verdict for the Plaintiff, the Bankrupt brought his Bill, *inſiſting that the Bond was obtained from him under his Neceſſities, and within the Reaſon of the Clauſe in the Statute, which makes Bonds void for conſenting to the Bankrupt's Diſcharge* (*a*). But *Parker* C. refuſed to relieve the Bankrupt, and diſmiſſed his Bill *with Coſts*. *Eaſter* 1720. *Lewis* and *Chaſe*, 1 *Will. Rep.* 620.

His Lordſhip ſaid, that here is an honeſt Creditor, and the Bankrupt if he pays him all, ſtill pays but what in Conſcience he ought. *He that comes into Equity to avoid the Payment of a juſt Debt, ought to come with a very clear Caſe if he hopes to ſucceed.* That the Defendant could not be ſaid to do amiſs in petitioning the *Great Seal* againſt the Allowance of the Certificate, neither can it now appear what Succeſs that Petition would have been attended with; he might have had juſt Cauſe to petition, and the Bankrupt no Right to have his Petition diſallowed, and Plaintiff, if he had a fair Defence, ought to have made uſe of it againſt the Petition; but in Caſe of treating with the Defendant to withdraw it, he might inſiſt *upon reaſonable Terms to have his juſt Debt*. If the Bill were to be diſmiſſed, the Plaintiff muſt only pay what he *juſtly* owes; but were he to be relieved, the Defendant would thereby be put into a worſe Condition than any of the other Creditors, for the Bankrupt's Eſtate being diſtributed, he cannot now have his Proportion thereof, but muſt loſe his whole Debt; *and it is the Plaintiff's Fault to come ſo late*, which makes the Caſe ſtill the ſtronger againſt him. That *the Law makes no Diſtinction whether the Bankrupt becomes ſo by his own extravagant way of Living, or by Misfortunes*; and therefore he is the leſs to be favoured. That *it is hard to bar Creditors of the full Remedy which the Law gives for the Recovery of their Debts*; that *where the Words of the Statute are plain*, they *muſt be ſubmitted to*; but then the Bankrupt ought in all ſuch Caſes to bring himſelf within it; and that it would not be fair to put the Defendant, *who has the Law of his Side*, in a worſe Condition than any of the other Creditors, whoſe Debts are extinguiſhed by the Statute; *therefore decreed as above*. *Ibid.* 621, 622.

(*a*) *Vide* the Act 5 *Geo.* 2. *P.* 127. *pl.* 12.

6. A Queſtion was, concerning the *Form of Certificates* on the late Act. And *per Parker* C. the Commiſſioners are to certify one Day that the Bankrupt hath in all Things conformed, *&c.* and then the next Day the Creditors certify on the ſame Parchment their Conſent, at the Foot of which the Commiſſioners are to certify that the Creditors had conſented according to the Terms of the Act, *Trin.* 6 *Geo.* 1. *Burdock*'s Caſe, *Viner's Abr.* Tit. *Creditor and Bankrupt*, (S. a.) *Ca.* 9.——*Vide* the Act 5 *Geo.* 2. *P.* 126. *pl.* 11. *which takes in all the other Acts relating to Bankrupts Certificates.*

7. *J. S.* and *B.* his Surety entered into a Bond to *C.* for Payment of 120 *l.* Afterwards in *March* 1711. *B.* became a Bankrupt, and was ſo found. In *Eaſter* Term 1715. *C.* ſues *B.* on this Bond *before his Certificate allowed*, but he had ſurrendred his Effects, and ſubmitted to be examined. *B.* (his Certificate not being allowed) pleaded *Non eſt factum* to the Bond, and Judgment was obtained againſt him, and he ſurrendred himſelf in Diſcharge of his Bail. *B.* afterwards obtained an Allowance of his Certificate, upon which the Court of King's Bench made a Rule *niſi* that *B.* ſhould be diſcharged out of Priſon, which was afterwards made abſolute. In *Eaſter* Term 1719. the Obligee brought a *Sci. Fa.* upon the Judgment, and the Bankrupt *pleaded the Stat.* 5 *Ann.* and *that the Cauſe of Action accrued before his Bankruptcy*; and upon Iſſue joined, a Verdict and

His Lordſhip ſeemed to admit, that were the Caſe only Matter of *Miſpleading*, Equity ſhould not relieve; but ſaid, it weighed with him that this Matter had been determined in *B. R.* and the Bankrupt diſcharged there.

Bankrupt was one intended to be relieved within the Act; the Debt was incurred long before the Bankruptcy; though this being a *Sci. Fa.* upon the Judgment, the Judgment might be ſaid in Law to be the Cauſe of the Action, and that was after the Bankruptcy. That the Certificate not being obtained and made abſolute, when *Non eſt factum* was pleaded to the Bond, this might excuſe ſuch Plea, for it was objected that the ſaid Act had preſcribed in what Manner the Bankrupt was to take Advantage of his Diſcharge and Certificate, *viz.* by Pleading it, and if the Bankrupt had not purſued this Method, it was his own Fault. That here had been a long Acquieſcence under the Diſcharge made by the Court of King's Bench. That it was of Weight that the Bankrupt had upon Oath given up his all; therefore what was the Obligee contending for? *Ibid.* 72, 73.

Judgment was given againſt the Bankrupt, he (as was alledged) not being able to get the Commiſſion, or a Copy thereof, to produce at the Trial. The Bankrupt brought a Bill to be relieved againſt theſe Proceedings at Law, and Lord Chan. granted an Injunction, but the Maſter of the Rolls diſmiſſed it, *in regard the Act touching Bankrupts*, and *their Diſcharge, was to be pleaded, and taken Advantage of at Law.* Upon Appeal *Macclesfield* C. reverſed this Decree, and granted a perpetual Injunction againſt *C.* the Defendant. *Trin.* 1722. *Blackhall* and *Combs*, 2 *Will. Rep.* 70.

But if ſuch Creditor will waive any Benefit under the Statute, and ſtay a reaſonable Time, and there is an Improbability of the Bankrupt's being able to gain his Certificate ſigned by four Fifths in Number and Value of his Creditors, or allowed by the Court;

8. *J. S.* a Creditor of *B.* a Bankrupt, came in under the Commiſſion and proved his Debt, and afterwards arreſted the Bankrupt, who now petitioned to be diſcharged. *King* C. ſaid, it had been the Conſtruction of the Court of Equity upon the Statute of 1 *Ann. cap.* 12. which diſcharges a Bankrupt of his Debts on a Certificate by four Fifths of his Creditors; and allowed by the Chancellor, that where a Trader becomes a Bankrupt, and any one of his Creditors comes in under the Commiſſion to prove his Debt, though with Deſign only to oppoſe the Bankrupt's Certificate, yet this is an Election to take his Remedy for his Debt under the Commiſſion, and if pending that the Creditor ſues and arreſts the Bankrupt, it is taken to be an Oppreſſion; therefore ordered that the Creditor at his own Expence diſcharge the Bankrupt out of Cuſtody. *Mich.* 1726. *Anon.* 2 *Will. Rep.* 394, 395.

in ſuch Caſe if the Creditor applies to the Court, declaring his Conſent to waive any Right or Share of the Bankrupt's Eſtate under the Commiſſion, and praying that he may ſue the Bankrupt, his Lordſhip ſaid, he thought it reaſonable for the Court to give Leave to ſuch Creditor to proceed at Law againſt the Bankrupt for his Debt. *Ibid.*

9. On a *joint* Commiſſion of Bankruptcy againſt two Partners, the *ſeparate Creditors*, though they have taken out *ſeparate* Commiſſions, ſhall be at Liberty to come in to oppoſe the Allowing of the Certificate. *Per King* C. (on Time taken to conſider, and on looking into Precedents.) 22 *April* 1729. *Horſey*'s Caſe, 3 *Will. Rep.* 23, 24.

So on the other Hand, if there be two Parties and one of them becomes a Bankrupt,

10. Where two Partners are Bankrupts, and a *joint* Commiſſion is taken out againſt them, if they obtain an Allowance of their Certificate, this will bar as well their *ſeparate* as their *joint* Creditors. *Ibid.* 24.

and on a *ſeparate* Commiſſion ſued out againſt him his *Certificate is allowed*, this does not only diſcharge the Bankrupt of what he owed *ſeparately*, but alſo of what he owed *jointly* and *on the Partnerſhip Account*; but by the Act of Parliament, the Bankrupt upon making a full Diſcovery, and obtaining his Certificate, is to be diſcharged of *all his Debts*. Now the Debts he owes jointly with another, are equally his Debts as what he owes on his ſeparate Account, conſequently he is to be diſcharged of both his *joint* and *ſeparate* Debts. And ſo it has been determined by the Judges of *B. R.* *Per* Lord Chan. *Parker*, 3 *July* 1721. *Ex parte Yale*, 3 *Will. Rep.* 24. *in a Note.*

(*a*) 1 *Ann. cap.* 12. 4 & 5 *Ann. cap.* 17. 5 *Ann. cap.* 13. 5 *Geo.* 1. *cap.* 24. 6 *Geo.* 1. *cap.* 22.

11. By 5 *Geo.* 2. *cap.* 30. *ſect.* 10. (which takes in all the other Statutes (*a*) relating to the Bankrupt's Certificate) *No Diſcovery upon Oath, &c. to be made by a Bankrupt of his Eſtate and Effects purſuant to this Act, ſhall intitle ſuch Bankrupt to the Benefits allowed by this Act, unleſs the Commiſſioners, or the major Part of them, ſhall under their Hands and Seals certify to the Lord Chancellor or Keeper, or Commiſſioners for the Cuſtody of the Great Seal, &c. that ſuch Bankrupt hath made a full Diſcovery of his Eſtate and Effects, and in all Things conformed himſelf according to the Directions of this Act, and that there doth not appear to them any Reaſon to doubt of the Truth of ſuch Diſcovery, or that the ſame is not a full Diſcovery of ſuch*

Bankrupt's Eſtate and Effects, and unleſs four Parts in five in Number and Value of the Creditors of ſuch Bankrupt who ſhall be Creditors for not leſs than 20*l.* reſpectively (*a*), *and who ſhall have proved their Debts under ſuch Commiſſion, or ſome other Perſon by them reſpectively duly authorized thereunto, ſhall ſign ſuch Certificate,* and *teſtify their Conſent to ſuch Allowance and Certificate, and to the Bankrupt's Diſcharge, in Purſuance of this Act, to be alſo certified by ſuch Commiſſioners: But the Commiſſioners ſhall not certify the ſame till they ſhall have Proof by Affidavit or Affirmation in Writing of ſuch Creditors, or of the Perſon by them authorized, ſigning the ſaid Certificate, and of the Power and Authority by which any Perſon ſhall be authorized to ſign ſuch Certificate for any Creditor, which Affidavit or Affirmation, together with ſuch Authority to ſign, ſhall be laid before the Lord Chancellor,* &c. *with the ſaid Certificate, in order for the allowing and confirming the ſame; and unleſs ſuch Bankrupt make Oath, or ſolemnly affirm in Writing, that ſuch Certificate and Conſent of the Creditors thereunto were obtained fairly and without Fraud; and unleſs ſuch Certificate ſhall after ſuch Oath or Affirmation of the Bankrupt be allowed and confirmed by the Lord Chancellor,* &c. *or by ſuch two of the Juſtices of the King's Bench, Common Pleas, or Barons of the Exchequer, to whom the Conſideration of ſuch Certificate ſhall be referred by the Lord Chancellor,* &c. and any of the Creditors of ſuch Bankrupt are to be heard, if they ſhall think fit, againſt the making ſuch Certificate, and againſt the Confirmation thereof; *nor ſhall any Commiſſioner ſign ſuch Certificate till after four Parts in five in Number and Value of the ſaid Creditors ſhall have ſigned the ſame as aforeſaid.*

(*a*) Though a Creditor of a Bankrupt under 20*l.* cannot aſſent or diſſent to the Certificate, yet he hath a Right to petition and ſhew any Fraud againſt allowing it. *Per* Lord Chan. *Mich.* 1734. *Ex parte Allen, Viner's Abr.* Tit. *Creditor and Bankrupt,* (S. a.) *Ca.* 18.

12. Sect. 11. *Every Bond, Bill, Note, or other Security whatſoever given by any Bankrupt, or by any other Perſon to the Uſe of any Creditor as a Conſideration to perſuade him to ſign ſuch Certificate, ſhall be void, and the Party ſued on ſuch Contract may plead the General Iſſue, and give this Act and the ſpecial Matter in Evidence.*

13. Sect. 13. *If any Bankrupt who ſhall have obtained his Certificate ſhall be* taken in Execution, *or* detained in Priſon *on Account of any Debts owing before he became a Bankrupt, by reaſon that Judgment was obtained before ſuch Certificate was allowed, it ſhall be lawful for any one of the Judges of the Court wherein Judgment has been ſo obtained on ſuch Bankrupt's producing his Certificate allowed, to order any Sheriff or Gaoler who ſhall have ſuch Bankrupt in his Cuſtody to diſcharge ſuch Bankrupt without Fee.*

14. Where a Bankrupt is in Execution before the Commiſſion, and a Creditor comes in and receives a Dividend out of the Eſtate, the Court will put him to his Election either to diſcharge the Bankrupt or renounce the Dividend (*b*).——But where *A.* ſued out a Commiſſion of Bankruptcy againſt *B.* in 1726. and in 1727. received a Dividend of 2 *s.* 6 *d.* in the Pound, and now lately took *B.* in Execution for the Reſt of his Debt; upon which *B.* petitions to be diſcharged, but was denied. *Per* Lord Chan. *Mich. Vac.* 1733. *Ex parte Blewin, Viner's Abr.* Tit. *Creditor and Bankrupt,* (S. a.) *Ca.* 17.

(*b*) And this in Conformity to the Law, where if the Creditor will take the Debtor in Execution, he cannot afterwards take Execution by *Fi. Fa.* becauſe the Body is deemed a Satisfaction;——But otherwiſe if a Creditor takes a *Fi. Fa.* firſt, and levies ſhort, &c. there he may take out a *Ca. Sa.* afterwards. *Ibid.*

15. Bankrupt in Priſon on a *meſne* Proceſs at the Suit of *A.* prayed that *A. might make Election whether he would come in under the Commiſſion, or take his Remedy at Law. Per* Lord Chan. *A.* may make

a *ſpecial* Election, to take his Remedy at Law, and to come in under the Commiſſion, ſo far as to prove his Debt, and aſſent or diſſent to Certificate, becauſe that will (*not* *) affect his Remedy at Law, but he is to *waive any Dividend or further Benefit under the Commiſſion*; and *A.* accordingly made his Election. *Mich.* 1734. *Ex parte Hoſey*, *Viner's Abr.* Tit. *Creditor and Bankrupt*, (S. a.) *Ca.* 19.

* The Word (*not*) is not in the Original.

Settled *on great Debate*, that a Creditor is at Liberty to elect to proceed at Law, and notwithſtanding may aſſent or diſſent to Certificate. The Caſe of putting Creditors to Election is but modern in Favour of Bankrupts; but if that Election is made in general Terms, and in Conſequence the Creditor is to be excluded from a Liberty of diſſenting to the Certificate, the Reſt of the Creditors are not only to take all the Reſt of the Effects, but have it in their Power by allowing the Certificate to bar the other's Debt; ſo that permitting ſuch Creditor to *aſſent* or *diſſent to the Certificate*, is not to give him a Benefit, but to prevent his being hurt. And the late *Statute* (*a*) *mentions four Fifths of Creditors who ſhall have proved their Debts*, and *not who proved*, &c. *and ſought Relief*; and it would be hard to put it in the Power of a few ſmall Creditors, by conſenting to the Certificate, to preclude the other of his Debts; and therefore as the Court by *equitable Conſtruction puts a Creditor to his Election of abiding by his Remedy at Law or coming in to have his Dividend under the Commiſſion*; ſo by the *ſame Rule of Equity*, ſuch Creditor renouncing any Benefit under the Commiſſion ſhould not be hurt. *Per* Lord Chan. *Ibid.* (*a*) 5 *Geo.* 2. c. 30. *ſect.* 10.

16. *F.* having proved his Debt of 2000 *l.* under *L.*'s Commiſſion, *and paid Contribution*, and yet had *L. in Execution for his Debt*, it was ordered by the *late* Lord C. *that* F. *ſhould either diſcharge* L. or *loſe his Dividend*; and Commiſſioners having certified that four Fifths in Number, &c. had conſented to *L.*'s Diſcharge *excluſive of* F. He now petitioned againſt Allowing of the Certificate, and that he might be admitted to come in ſo far under the Commiſſion as to have Liberty to aſſent or diſſent. *Trin. Vac.* 1734. *Ex parte Fenwick*, *Viner's Abr.* Tit. *Creditor and Bankrupt*, (S. a.) *Ca.* 20.

(R) In what Caſes a Commiſſion of Bankruptcy may be ſuperſeded (*b*).

(*b*) *Vide* the *Stat.* 5 *Geo.* 2. *cap.* 30. *ſect.* 23, 24, 45.

1. IF a Creditor by Bond *before the Day of Payment* ſues out a *Commiſſion of Bankruptcy againſt the Obligor*, it is irregular, and the *Commiſſion ought to be ſuperſeded* (*c*); for though it be *debitum in præſenti*, yet as it cannot ſo much as be put in Suit, or an Action commenced upon it, much leſs can there be a Commiſſion taken out upon it, by which all the real and perſonal Eſtate of the Bankrupt is (*as it were*) ſeized in Execution. *Reſolved per Parker* C. *Hil.* 1719. *Ex parte James*, 1 *Will. Rep.* 610.

(*c*) *Vide* the Statutes of 7 *Geo.* 1. *cap.* 3. and 5 *Geo.* 2. which have altered the Law in this Point. See *P.*

2. A Commiſſion was taken out, and *not ſat on till three Months after*; this *plainly ſhews it was done to protect the Eſtate*; the *Commiſſion* ſhall be *ſuperſeded for Example ſake*, that ſuch Things ſhould not be practiſed. *Per* Lord Chan. *King*, *Trin.* 11 *Geo.* 1. *Comb's Caſe*, *Sel. Caſes in Chan.* 46.

Until A. *had ſufficient Proof of the Bankruptcy*, (the want of which he alledged was the Reaſon he did not execute it ſooner)

3. *A.* took out a Commiſſion of Bankruptcy againſt *B.* and *kept it for ſix Months without doing any Thing upon it*, and then executed it, and *B. was found a Bankrupt.* *King* C. on a Petition *ſuperſeded* the Commiſſion. *Trin.* 1729. *Ex parte Puleſton*, 2 *Will. Rep.* 545, 546.

he *ought not to have taken out the Commiſſion*, which by having been kept ſo long in his Pocket, may have been the Means of drawing in People to give Credit to the Bankrupt, and of furniſhing him with Opportunities of defrauding many. *Per* Lord Chan.——And it being inſiſted that the *Expence of another Commiſſion would be a freſh Charge upon the Bankrupt's Eſtate*, his Lordſhip replied, he would take Care that the *former Commiſſion ſhould not be at the Charge of the Bankrupt's Eſtate*. *Ibid.*

4. Where

4. Where a Debt is due to a *Wife as Adminiſtratrix*, the Huſband alone cannot make Oath of this as a Debt due to himſelf in order for a Commiſſion of Bankruptcy; therefore the Commiſſion was *ſuperſeded*, and Reſtitution awarded. *Per Lord Chan. Mich.* 1734. *Ex parte Seaples*, *Viner's Abr.* Tit. *Creditor and Bankrupt*, (F) *Ca.* 10.

CAP. XIV.

Baron and Feme.

(A) Of what Things the Baron hath Power to diſpoſe; and what ſhall be a Diſpoſition.

(B) What Acts of the Feme before Marriage the Baron ſhall avoid as done in Fraud, or in Derogation of the Rights of Marriage, & econt'.

(C) What Acts of the Baron ſhall bind the Feme;——And in what Caſes the Feme ſhall be charged after the Death of the Baron, & econt'.

(D) Where the Acts of the Feme during the Coverture ſhall bind the Baron.

(E) For what Debts of the Wife contracted before Marriage the Baron is chargeable.

(F) How far the Baron is chargeable with the Debts of the Feme contracted during the Coverture.

(G) How far a Feme Covert ſhall be bound by the Acts in which ſhe joined with her Husband.

(H) What Contracts between Baron and Feme, tho' void in Law, yet in Equity are not diſſolved by the Marriage.

(I) What Right ſhall ſurvive to the Baron or Feme, &c. by the Diſſolution of the Marriage;——And in what Caſes the Survivor, &c. ſhall be charged or benefited.

(K) Of Suits and Proceedings by and againſt Baron and Feme;——And alſo inter ſe.

(L) In what Caſes the Baron muſt make a ſuitable Proviſion for the Wife when he ſues for her Fortune.

(M) What ſhall be ſaid the Feme's ſeparate Eſtate.——Where ſhe reſerves the Power of her own Eſtate, &c.——And here of Alimony or ſeparate Maintenance.

(N) Concerning the Wife's Pin-Money.

(O) In what Caſes a Will made by a Feme Covert is good.

(P) Divorce; Caſes in general relating thereunto.

(A) Of what Things the Baron hath Power to diſpoſe; —— And what ſhall be a Diſpoſition.

1. THE Huſband *after* Marriage purchaſed a Term for Years to *himſelf and his Wife* and *the Survivor*, and *the Executors, Adminiſtrators and Aſſigns of ſuch Survivor*, for the Reſidue of the Term. Afterwards *he* mortgaged the Term *without his Wife's joining*. Proviſo that *if the Huſband and Wife, or either of them, or the Executors or Adminiſtrators of either, ſhould pay the Mortgage Money, then the Mortgage ſhould be void*; and that *until Default of Payment the Huſband, his Executors or Adminiſtrators, ſhould quietly enjoy* The Huſband ſeven Years after contracted Debts, and then died, leaving his Wife Executrix, and the Mortgage Money unpaid. The Maſter of the Rolls held this to be a *voluntary* Conveyance, and *being only a Term for Years, that it was always in the Power of the Huſband to forfeit or alien*, and the *Mortgage is an Alienation*; for though if the *Mortgage Money* had been paid *before the Day*, the Mortgage would have been *void*, and all Things would have been *in ſtatu quo*; yet being *forfeited, the Equity of Redemption is become a Creature of Equity*; and decreed it to be *Aſſets* to pay the Huſband's Creditors. *Trin.* 1726. *Watts* and *Thomas*, 2 *Will. Rep.* 364.

2. A Term of Years was veſted in the Huſband in Right of his Wife; he made an Under-Leaſe for ten Years, and upon borrowing Money of the Leſſee, *covenanted to grant him another Leaſe after the End of the ten Years, and to continue during the Time he had any Right*, &c. but died before he made ſuch Leaſe. Decreed (*at the Rolls*) that this was a *good Diſpoſition of the Term in Equity*, becauſe the Huſband had a Power to diſpoſe it; and that the *Covenant* (*a*) *was ſuch a Lien as bound the Right in whoſe Hands ſoever it went*. *Trin.* 9 *Geo.* 1. *Steed* and *Cragh*, 2 *Mod. Ca. in Law and Eq.* 42.

(*a*) *Vide Poph.* 4. 1 *Vern.* 396.

(B) What Acts of the Feme before Marriage the Baron ſhall avoid as done in Fraud, or in Derogation of the Rights of Marriage, & cont'.

In this Caſe it was *clearly* held *per Cur'*, and *admitted by both Parties*, that if a Feme, *with the Privity of the Huſband* before Marriage, *conveys a Term for Years* in Truſt *for herſelf*, that is *clearly* out of the Huſband's Power, and he can neither diſpoſe of nor releaſe the Intereſt of the Wife; and if the Feme ſhould join in the Grant it would not amend the Caſe.——But the Court ſeemed to incline, that *if a Feme does ſecretly*, without the Knowledge of her Huſband, *before Marriage*, convey a Term for Years in *Truſt for herſelf*; that this ſhall be in the Power of the Huſband, ſo as he may either grant or releaſe the Intereſt of the Wife. *Ibid.*

1. A *Feme Sole* poſſeſſed of a Term for Years, mortgaged it to *T.* for 100 *l.* and afterwards *a Day or two before her Marriage with* D. with his Privity, *aſſigned her Intereſt to Truſtees, in Truſt for herſelf for her Life, and after for her Son by a former Huſband*, and then married *D. D. paid off the Mortgage, and took an Aſſignment from the Mortgagee, and then ſurrendred his Leaſe to the Reverſioner, and took a new Leaſe for the ſame Term*, and then died. The Court held, that though the Eſtate in Law was wholly in the Mortgagee,

Mortgagee, and the *Feme conveyed nothing but an Equity in Truſt*, yet when the *Mortgagee aſſigned over to the Huſband*, he had it under the ſame Equity as the Mortgagee had, and is juſt in his Place; and *no Act of the Huſband can bar the Truſtees for the Feme and her Children of their Equity.* Decreed that this new Leaſe ſhould be aſſigned over to the Feme or her Truſtees, paying to the Huſband's Executors the Mortgage Money. *Hil.* 1677. *Draper's Caſe*, 2 *Freem.* 29, 30.

2. If a Woman *privately* before Marriage gives *a Bond without any Conſideration to a third Perſon* for 1000 *l.* and marries one *who knows nothing of this* Bond, ſurely Equity would relieve againſt ſuch Bond. Said *per King* C. *in Caſu Cotton* and *King*, *Trin.* 1726. 2 *Will. Rep.* 360. *Vide King* and *Cotton*, *Ca.* 4. at the Bottom of this Page.

3. A Widow of a Freeman of *London*, who left Children and died inteſtate, was intitled to four Ninths of his perſonal Eſtate; and having by Deed aſſigned over the ſame to Truſtees *for her ſeparate Uſe for Life*, in Caſe of Marriage; and afterwards in Truſt *for ſuch Purpoſes as ſhe ſhould by Deed atteſted by two Witneſſes appoint*; and *for want of ſuch Appointment to her Children by the firſt Marriage*, but the *Huſband which ſhe ſhould marry, on his ſurviving her, to have* 200 l. *out of the four Ninths.* The Widow, intending to marry a ſecond Huſband, by another Deed to which the *intended Huſband was a Party*, and atteſted by two Witneſſes, recites, *that if ſhe did not diſpoſe of her four Ninths, the Huſband would be intitled thereto*; and then by this Deed aſſigns it over to Truſtees, *in Truſt for the intended Huſband during their joint Lives*, but *ſhe to have the Ordering thereof during the Coverture*, or *by any Writing* duly atteſted *to appoint it over*; and by the *ſame* Deed the intended Huſband covenanted to ſettle a Leaſehold Eſtate upon the Wife and the Iſſue of the Marriage. The Marriage was had, and the Wife dying without Iſſue by *the ſecond Huſband*, and *without making any Appointment*, the Queſtion was, to whom the four Ninths ſhould go, whether to the ſecond Huſband, or only the 200 *l.* to go to him, and the Reſidue to her Children, for want of an Appointment after the ſecond Marriage. *King* C. (*for the Reaſons in the Margin*) decreed the four Ninths to the ſecond Huſband, but at the ſame Time declared it to be *clearly* his Opinion, that if the ſecond Huſband had *no Notice of the firſt Deed* made by the Wife while ſhe was a Widow, this would have been a *void* Deed, and *fraudulent* as againſt him. *Trin.* 1729. *Poulſon* and *Wellington.* —— Decree affirmed *in Dom' Proc'*, *May* 1730. 2 *Will. Rep.* 533.

His *Lordſhip* was *in doubt for ſome Time in this Caſe*, for that *the ſecond Huſband had No-tice of the Wife's firſt Deed*; but because he was a Purchaſer of theſe four Ninths, and it being recited in the *laſt* Deed, that *in Caſe the Wife died without making an Appointment, the ſecond Huſband would be intitled thereto*, which *though but a Recital*, yet ſhewed the Intention and Agreements of the Parties, and amounted to an *informal* Appointment; and as *no ſtrict Form is requiſite to conſtitute ſuch Appointment*, and ſince the *latter* Deed *varied* the Power reſerved to the Wife, the *firſt* Deed requiring that it ſhould be by Writing *atteſted by two Witneſſes*, and yet by the *latter* Deed the *Power of Appointment being by any Writing duly atteſted*, in which Caſe a Writing would have been *duly atteſted though it had but one Witneſs*: For theſe Reaſons his Lordſhip, *yet with ſome Heſitation*, decreed as above.

4. Where a *Widow* conveyed Lands *in Truſt for herſelf until her ſecond Marriage*, and *after in Truſt for her younger Children reſpectively*, and did this in a *publick* Manner, and *before any Treaty for a ſecond Marriage was begun*, and *alſo covenanted to transfer* 1000 l. South-Sea *Stock, of which ſhe was poſſeſſed, to the like Uſes*, (*but the Stock was never transferred*) reſerving to herſelf out of theſe *voluntary* Settlements her original Jointure of 420 *l. per Ann. Rent-charge* *Vide* 2 *Will. Rep.* 358. *Cotton* and *King.*

charge, and alſo a conſiderable Sum of ready Money, and afterwards marries *J. S.* who *had no Eſtate, &c. J. S.* preferred his Bill to ſet aſide the Conveyance and Covenant to transfer as fraudulent. But *King* C. held the ſame good, and not avoidable by him; and that the Covenant to transfer the *South-Sea* Stock, though *no actual Aſſignment was made*, ſhould bind him; and diſmiſſed the Bill. (Note; *The Children not only recovered the Value of the Stock, but alſo the Dividends ſince the ſecond Marriage*). *Trin.* 1732. *King* and *Cotton*, 2 *Will. Rep.* 606.——*Vide* alſo *Ibid.* 358.

(C) What Acts of the Baron ſhall bind the Feme; —— And in what Caſes the Feme ſhall be charged after the Death of the Baron, & cont'.

Prec. in Chan. 325. *Povey* v. *Brown Amhurſt & al', Hil.* 1711. S. C. *in totidem verbis.*

1. *J. S.* by Will gave 1000 *l.* Legacy to *C. then a Feme Sole*; afterwards on a Treaty of Marriage *it was agreed by Articles that* 700 l. *of this Legacy ſhould be applied towards Payment of the intended Huſband's Debts.* After the Marriage the *Huſband without his Wife aſſigned the remaining* 300 l. *to Plaintiffs, who were Creditors likewiſe*, and they brought a Bill againſt the Huſband and his Wife, and the Executors of *J. S.* to have a Satisfaction of their Debts out of this 300 *l.* Decreed that an Account ſhould be taken, and that upon the Plaintiffs proving themſelves to be real Creditors, and that the Aſſignment was *bona fide*, they were to have a Satisfaction *accord'*, and the Reſidue, if any, of the 300 *l.* to be put out for the Wife's Benefit. *Hil.* 9 *Ann. Povey and Brown* v. *Amhurſt & al', Gilb. Eq. Rep.* 80.

2. The Plaintiff was Solicitor, imployed in a Suit by the Huſband and Wife, for (*Recovery of* *) a Term of Years in Right of the Wife; the Huſband died and left no Aſſets, and the *Bill was to have a Satisfaction out of this Term ſo recovered* and *now enjoyed by the Wife.* Lord Chan. decreed the Plaintiff a Satisfaction of his Demands out of the Profits of this Term, and he to be examined upon Interrogatories what he hath received, and Defendant to pay Coſts. *Eaſt.* 2 *Geo. Sharſton* and *Hipſley*, *Viner's Abr.* Tit. *Baron and Feme*, (Z) *Ca.* 18.

* The Words (*Recovery of*) not in the Original.

His Lordſhip ſaid, it was *ſtrong Equity* that the Plaintiff ſhould have a Satisfaction out of this Term ſo recovered by his Coſts and Pains, ſince the *Wife has the Benefit of it*, and conſented to it. *Ibid.* ——*Vide* the Caſe of *The Dutcheſs of Hamilton* and *Incledon*, *P. C.*

3. No Agreement of the Huſband to *part with the Wife's Inheritance* ſhall bind the Wife, or be carried into Execution. *February* 9, 1721. *Bryan* and *Wolley*, *Viner's Abr.* Tit. *Baron and Feme*, (J) *Ca.* 19.

4. *Baron in Right of his Wife was ſeiſed in Fee of a Share of the* New-River *Water*; they both Mortgage this Share by Leaſe for 1000 Years by Deed *without Fine*, reſerving a Pepper Corn Rent. The Baron died, upon which the *Feme received the Profits and paid the Intereſt.* The Mortgagee brought his Bill to Foreclоſe the Wife, inſiſting, that this Leaſe being not *actually void*, but only *voidable* by the Feme after the Baron's Death, and that her Payment of the Intereſt, when diſcovert, affirmed the Leaſe; or that if the Mortgage was *not* affirmed, yet a Decree of Foreclоſure would better his legal Title, and not prejudice the Feme. But the *Maſter of the Rolls* held,

held, that *this being the Inheritance of the Feme, there ought to have been a Fine* (a);—That *if it had been a Rent reſerved, the Acceptance of it by the Wife when diſcovert would have affirmed the Leaſe*; but here is *no Acceptance*, and the Leaſe is of an *incorporeal Thing out of which Rent could not well be reſerved*; wherefore the Leaſe expiring by the Huſband's Death, *the Mortgage is alſo thereby determined*, and nothing remaining to foreclose; and though the Court will not narrowly look into the Title, yet all this being admitted on both Sides, and appearing upon the Opening, his Honour diſmiſſed the Bill, but *without Coſts*. *Eaſter* 1723. *Drybutter* and *Bartholomew*, 2 *Will. Rep.* 127.

(a) *Vide P. Ca.*

5. If the Wife had recovered a Judgment at Law, and *Elegit* thereupon, the Huſband would have had a Power to aſſign that Intereſt of the Wife, for or without Conſideration, in Truſt for himſelf, or as he pleaſed; *ſo by Parity of Reaſon* the Wife having a Decree of a Court of Equity for her Demand, and to hold and enjoy till Satisfaction, *&c.* the Huſband has the ſame Right and Power to diſpoſe of this equitable Intereſt of the Wife, as he would in Caſe of a Demand recovered at Law, and though after Marriage *the Huſband is to uſe the Wife's Name in the Proceedings in Equity in this* and the like Caſes, *whereas he needed not at Law*, that makes no Difference in the Thing, or in the Right, but in the Form and Manner of Proceeding, *&c.* *Feb.* 26, 1734. in the Caſe of *Paſchall* and *Lord Carteret & al'*, *Viner's Abr.* Tit. *Baron and Feme*, (J) *Ca.* 20. cites it as taken from Lord *Hardwicke's MS. Rep.*

(D) Where the Acts of the Feme during the Coverture ſhall bind the Baron.

1. A Feme Covert trades by her Huſband's Conſent, and gives Bills for Money, and he receives the Profits of her Trade; if ſhe dies and leaves a Stock to her Huſband, he ſhall be anſwerable for Debts contracted in the Trade; and in this Caſe the Suit being againſt the Huſband after the Wife's Death for a Bill of 100 *l.* which ſhe had borrowed, an Iſſue was directed to try *whether the Money was borrowed for carrying on the Trade*; for if it was, the Huſband ſhall be decreed to pay it. *Per* the Maſter of the Rolls, *Eaſter* 1697. *Bowyer* and *Peake*, 2 *Freem. Rep.* 215.

And *per* his Honour, a Feme Covert is not under a total Diſability to contract, but if the Huſband be aſſenting it is obligatory; and cited the Caſe in *H.* 8. that if *a Woman ſeals a Bond in the Preſence of the Huſband*, and he ſtands by and *doth not gainſay*, it ſhall bind; which his Honour ſaid, he believed might be taken out of the Book of *Numbers*, where it is ſaid, *If the Huſband be preſent, and doth not gainſay, it ſhall bind. Ibid.*

(E) For what Debts of the Wife contracted before Marriage the Baron is chargeable.

1. ALTHOUGH the *Huſband by Law cannot be charged with the Debts of the Wife after her Deceaſe*, unleſs Judgment be obtained in her Life-time, yet where *ſhe brought the* Huſband *a ſufficient Eſtate*, a Court of Equity *will make him anſwerable after her Death.* So ſaid, and *ſeemed to be admitted* in the Caſe of *Ball* and *Smith*, *Mich.* 1698. 2 *Freem. Rep.* 230, 231.

2. The Huſband *during the Coverture* is anſwerable for the *whole* Debts of the Wife *though he had nothing with her*; and on the other Hand though he had a Portion in Goods, Jewels, or other perſonal Eſtate with his Wife, yet if he happens not to be ſued for her Debts during the Coverture, he will not be liable afterwards. *Per Parker* C. *Trin.* 1718. in the Caſe of *The Earl of Thomond* and *the Earl of Suffolk*, 1 *Will. Rep.* 466, 469.

3. *A.* marries a Feme Sole Trader, and ſhe dies indebted; it was inſiſted, that though the Huſband in ſuch Caſe be not liable at Law to the Debts, yet he ought to be ſo in Equity. But Lord Chan. *Parker* ſaid, that this was a Queſtion with him; for the Huſband runs a Hazard in being liable to the Debts much beyond the perſonal Eſtate of the Wife; and in Recompence for ſuch Hazard he is intitled to the Whole of the perſonal Eſtate, though exceeding the Debts, and diſcharged therefrom, and indeed is intitled to the ſame upon the very Marriage. *Ibid.*

4. A Woman entred into a Bond, and after married, *having brought her Husband a conſiderable Fortune*; the *Husband conſtantly paid the Intereſt of the Bond during the Life of the Wife*; now a Bill is brought againſt the Huſband for Payment of the Bond, and the Caſe of *Freeman* and *Goodham* (*a*) was cited; and that the Huſband having paid the Intereſt, was a taking the Debt upon himſelf (*b*). Reſolved that the Huſband is only chargeable for what is ſued for and recovered in the Life of the Wife; this is the *clear* Law of the Land, and unalterable but by Act of Parliament (*c*); and for that Reaſon no Room for Equity to interpoſe; let the Wife have brought ever ſo large a Fortune, the Huſband is not liable either in Law or Equity. Bill diſmiſſed, but with Coſts. *Per King* C. *Trin.* 11 *Geo.* 1. *Jordon* and *Foley*, *Sel. Ca. in Chan.* 19, 20.

(*a*) *Vide* 1 *Vol. Eq. Ca. Abr. P.* 160. *Ca.* 5. *4th Edit.*

(*b*) No Room for Equity to ariſe from the Huſband's having paid the Intereſt, for during the Wife's Life he was obliged to have paid both Bond and Intereſt, and his paying one will not make him chargeable with the other. *Ibid.* 20.

(*c*) The Law is ſo, and the Alteration of it is the proper Work of the Legiſlature only. *Per Talbot* C. in the ſubſequent Caſe.

As on the one Hand the Huſband is *by Law* liable to all his Wife's Debts during the Coverture, altho' he did not get one Shilling Portion with her, and that her Debts ſhould amount to 2000 *l.* or any other Sum whatſoever; ſo on the other Hand it is as certain, that if the Debt be not recovered during the Coverture, the Huſband is no longer chargeable as ſuch, let the Fortune he received with his Wife be never ſo great. *Per* Lord Chan. His Lordſhip cited the Caſe of *Freeman* and *Goodland* (not *Goodham*) (*vide* 1 *Vol. Eq. Ca. Abr. 4th Edit. P.* 60. *Ca.* 5. *and my Notes there*) and alſo the Caſe of *Powell* and *Bell*, (*vide ſaid Book, Ca.* 7, *&c.*) where the Wife was Adminiſtratrix of her firſt Huſband, and it did not appear what ſhe had in her own Right, and what as Adminiſtratrix of her Huſband; in which Caſe his Lordſhip ſaid, the *Marriage is no Gift in Law of the Goods which ſhe hath in Auter Droit*; and that upon this Reaſon only are founded all the Caſes, where a ſurviving Huſband has been charged with the Wife's Debts after her Death. *Ibid.* 174, 175. ——— 3 *Will. Rep.* 409. *Hil.* 1735. S. C. *accord'*, and ſays, the Caſe of *The Earl of Thomond* and *the Earl of Suffolk* (*above, Ca.* 2.) was cited as a Caſe in Point, where Lord Chan. *Parker* denied to relieve a Creditor of the Wife *dum ſola* againſt the Huſband who ſurvived, and on the Marriage had ſufficient perſonal Eſtate wherewith to anſwer her Debts. *Ibid.* 412. ——— 1 *Will. Rep.* 470. is a Note, that agreeable to the Reſolution in the Caſe of *The Earl of Thomond* and *the Earl of Suffolk*, and on the Authority thereof, was the Caſe of *Heard* and *Stamford* determined in *Lincolns Inn Hall March* 8, 1735.

5. A Feme Sole gave a promiſſory Note for 50 *l.* to *J. S.* and afterwards married the Defendant, who had a Fortune of 700 *l.* with her, Part whereof conſiſted of Things in Action, ſome of which he received in her Life-time, and the Reſt he took as Adminiſtrator to her. The Bill was for the Payment of this Note, upon Suggeſtion of his having received a great Fortune with her, and never having made any Settlement upon her. The Defendant inſiſted, that that Part of his Wife's Fortune which was not reduced into Poſſeſſion by him during the Coverture, and which he received as her

Adminiſtrator, was not near ſufficient to pay her Debts, and that he had already paid more than that Part amounted to. *Talbot* C. decreed an Account of what the Huſband had received ſince his Wife's Death as Adminiſtrator to her, and that he ſhould be liable for ſo much only; but as to any further Demand againſt her, he diſmiſſed the Bill. *Hil.* 1735. *Heard* and *Stanford*, *Caſes in Eq. Temp. Talbot* 173.

(F) How far the Baron is chargeable with the Debts of the Feme contracted during the Coverture.

1. IF a Tradeſman truſt a married Woman for Neceſſaries, he ſhall recover againſt the Huſband, ſo far as the Goods taken up appear to be neceſſary, according to the Degree and Quality of the Huſband; but if a Man lends a married Woman Money to buy Neceſſaries, and ſhe does ſo, he has no Remedy againſt the Huſband; and this was agreed to be a ſettled Diſtinction in *Scot* and *Manby*'s Caſe, and other Caſes; and therefore the Plaintiff, who in this Caſe had ſupplied the Woman with Money in her Neceſſities, and now brought his *Bill againſt the Husband's Executors for a Diſcovery of Aſſets*, and *a Satisfaction thereout of his Debt*, could have no Relief, *though the utmoſt unkind and cruel Uſage of the Husband was proved*, and that *the Money lent was actually laid out and applied for Neceſſaries*. But the Maſter of the Rolls ſaid, the Plaintiff ſhould *ſtand in the Place of the Tradeſmen* of whom ſuch Neceſſaries were bought. *Mich.* 1718. *Anon. MS. Rep.*——*Prec. in Chan.* 502. *Co.* 312. S. C. *accord*.

2. *J. S. had given his Wife the foul Diſtemper twice*, upon which ſhe left him, and *borrowed* 30 l. *of* A. *to pay Doctors* and *Surgeons*, and *for Neceſſaries*; afterwards Baron deviſed Lands in Truſt for Payment of his Debts, and died; *A.* brought his *Bill againſt the Truſtees in order to be paid this Money as a Debt within the Truſt.*—— Admitting the *Wife cannot at Law borrow Money, though for Neceſſaries, ſo as to bind the Husband*, yet this Money being *applied to the Uſe of the Wife for her Cure* and *for Neceſſaries*, *A.* that lent this Money muſt in *Equity* ſtand in the (*b*) Place of the Perſon who found and provided ſuch Neceſſaries for her. And therefore as ſuch Perſons would be Creditors of the Huſband, ſo *A.* ſhall ſtand in their Place, and be a Creditor alſo. *Per* the Maſter of the Rolls, who directed the Truſtees to pay *A.* his Money *and Coſts*. *Mich.* 1718. *Harris* and *Lee*, 1 *Will. Rep.* 482.

(*b*) *Vide* the Caſe of *Morlow* and *Pitfield*, *P. Ca.*

(G) How

(G) How far a Feme Covert ſhall be bound by the Acts in which ſhe joined with her Husband (*a*).

(*a*) *Vide* (C) *P.* 132. *Ca.* 2. & 4.

1. A Feme *before* her Marriage with *A.* conveyed (*with* A.'s *Privity*) Lands to Truſtees *in Truſt to pay the Rents and Profits to her ſole and ſeparate Uſe for her Life, and after her Deceaſe to ſuch Uſes as ſhe, whether* Sole *or* Covert, *ſhould by her laſt Will limit and appoint*; and *for want of ſuch Appointment, then to her own right Heirs for ever.* After the Marriage *A.* mortgaged Part of the Lands to *B.* for 1000 *l.* for 500 Years, and then a Fine is levied by Huſband and Wife, who both declared the Uſes, *as to the mortgaged Premiſſes*, to be to the Plaintiff for ſecuring the Principal and Intereſt. The Wife by Order of the Court anſwered *ſeparately*, and inſiſted, that ſhe was forced by Dureſs to join in the Fine, and that the Mortgage was fictitious and in Truſt for her Huſband in order to defraud her. That there was no Power reſerved to her in the Indenture of Bargain and Sale to diſpoſe of her real Eſtate, or any Part thereof, but by her laſt Will; that ſhe had no Eſtate in the Premiſſes, but that the Fine and Mortgage were both void; and it was argued, that the legal Eſtate being in Truſtees, the Parties to the Fine had not ſuch an Eſtate in them whereof a Fine could be levied to bar the Wife's Right, and that this being a *naked Power* without any Intereſt, could not be barred by the Fine, but remained ſtill in the Wife by Force of the Truſt Deed. But Lord Chan. *Talbot* decreed the Truſtees to convey to the Plaintiff the Mortgagee. *Mich.* 1734. *Penne* and *Peacock*, *MS. Rep.*

Ca. in Eq. Temp. Talbot 41. *Mich.* 1734, *Penne* and *Peacock* S. C. ſtates it *accord'*, and ſays, that the Suggeſtions of *Dureſs* and *Fraud* in the *Wife*'s Anſwer not appearing upon the Proofs, (*altho' it muſt be confeſſed that the reſerving the Equity of Redemption* to the Huſband and his Heirs, *without any Mention made of the Wife, looks a little ſuſpicious*) his Lordſhip ſaid, it was needleſs to determine how far ſo ſolemn an Act as a Fine might be affected by it. That it is very well known that the *Operations of Fines* and *Recoveries is the ſame upon* Truſt *Eſtates as upon* Legal *Eſtates*; and if ſo, it muſt inevitably follow, that *an Eſtate for Life limited to the Wife,* and *the Remainder limited to her own right Heirs in Default of any Appointment made by her laſt Will,* are both diſpoſed of by the Fine. And that if no ſuch Remainder had been limited by it, as the Eſtate was the Wife's own, and moved originally from her, whatever was not conveyed would have remained in her, and conſequently been barred. That this anſwers the Objection of its being a *naked* Power, or Power in Groſs, and ſo not barred by the Fine; for how can that be called a *naked* Power which is to operate and take Effect on the Party's own Eſtate? It is certainly a Power coupled with an Intereſt, and annexed to her Inheritance, and ſo deſtroyed by the Fine; ſince that a Leaſe and Releaſe, or any other Conveyance, will carry with them all Powers that are joined to the Eſtate: So Feoffment to the Uſe of her laſt Will, or the Surrender of a Copyhold to the Uſe of one's laſt Will, do ſtill leave a Power in the Feoffor or Surrenderor to diſpoſe of their Eſtate by a new Feoffment or Surrender. Decreed *as above*, but without Prejudice to any future Bill that may be brought for Diſcovery of the *Fraud* or *Force*. *Ibid.* 42, 43.——*Note*; The Caſe of *Blackwood* and *Morris* was cited *pro Defendente*, but that was in Caſe *only of a Perſonalty*. *Ibid.* 43.

Vide (C) *P.* 132. *Sharſton* and *Hipſley*, *Ca.* 2. —— *Drybutter* and *Bartholomew*, *Ibid. S. P. Ca.* 4. —— *The Dutcheſs of Hamilton* and *Incledon*, Tit. Injunction, *P. Ca.*

(H) What Contracts between Baron and Feme, tho' void in Law, yet in Equity are not diſſolved by the Marriage.

1. A *Feme Sole* being ſeiſed in *Fee* of Lands, *gave Bond* (Penalty 200 *l.*) *to her intended Husband, that in Caſe of their Marriage, ſhe would convey theſe Lands to him* and his Heirs; they married, and the Wife died without Iſſue, and then the Huſband died; the

the Bond *tho' void in Law*, yet is *good Evidence of the Agreement in Equity*, and the Huſband's Heir ſhall compel a ſpecifick Performance againſt the Heir of the Wife. *Macclesfield* (*a*) C. *Mich.* 1724. *Cannel* and *Buckler*, 2 *Will. Rep.* 249.

(*a*) His Lordſhip held it *unreaſonable* that the *Intermarriage, upon which alone the Bond is to take Effect*, ſhould itſelf be a Deſtruction of the Bond; and that the Foundation of the Notion is, that *in Law* the Huſband and Wife being one Perſon, he cannot ſue his Wife on this Agreement; whereas *in Equity* it is *conſtant Experience* that the Huſband may ſue the Wife, and the Wife the Huſband, and he might ſue her in this Caſe upon this very Agreement. *Ibid.* 244. *Vide* this Caſe, Tit. *Articles, Agreements* and *Covenants*, *P.* 23. *Ca.* 24. and the Notes there.

(I) What Right ſhall ſurvive to the Baron or Feme, &c. by the Diſſolution of the Marriage;—And in what Caſes the Survivor, &c. ſhall be charged or benefited.

1. IF a Man marries a Feme who is the *Ceſtui que Truſt* of a Term, *if ſhe dieth*, this *Truſt will not ſurvive to the Huſband*, but ſhall go to the Executor *or* Adminiſtrator *of the Wife*; and this was ſaid to be *Witham*'s (*b*) Caſe; and *that this is the Difference* where the *Wife has an Eſtate in Law in a Term*, and *where ſhe has only a Truſt*. Said *per Winnington*, and *not denied*. *Mich.* 1680. *Hunt* and *Baker*, 2 *Freem. Rep.* 62.

(*b*) 1 *Inſt.* 351.

2. Where the *Truſt of a long Term* is limited to the *Huſband and Wife for their Lives, with a Remainder to the Heirs of the Body of the Wife*; there *after the Husband's Death* the *Wife* hath the *Diſpoſition* of the Truſt of the *whole* Term, and after her Death her Executors *or* Adminiſtrators;———And where the *Remainder was limited to the Heirs of the Body of the Husband*, there the *Wife being Adminiſtratrix to the Husband*, had *Power* to diſpoſe of the Truſt of the *whole* Term. *Ibid.*

Vide the Caſe of *Peacock* and *Spooner*, 1 *Vol. Eq. Ca. Abr.* (4*th Edit.*) *P.* 362. *Ca.* 14. and *my Notes there.*

3. *J. S.* by Marriage Articles, *in Conſideration of* 1200 l. *paid by B.* his intended Wife, in Part of her Portion, and *alſo of* 1200 l. *more due to her by the Chamber of* London, ſettles a Jointure on her of 240 *l. per Ann. J. S.* and *B.* intermarry, and then he dies, *the* 1200 l. *Orphanage Money ſtill continuing in the Chamber of* London.

This being a *Choſe in Action*, it belonged to the Wife *by Law*, *but if there had been any expreſs Agreement, it would have belonged to the Husband altho' not recovered in his Life-time*; and here was no expreſs Agreement for that Purpoſe. Said *arg'*, and *Lord Keep.* was of the ſame Opinion; and his *Lordſhip* ſaid, that altho' *an Eſtate may ariſe by Implication in a Will*, becauſe the Party is ſuppoſed to be *inops conſilii*, yet *it will never ariſe by Implication in a Conveyance*; and that what is *ſaid in the Deed imports no more than what the Law implied, viz.* that the Wife had ſuch a Fortune in the Chamber of *London*, and that if the Huſband had recovered it out it was his, but if not, it remained *a Choſe in Action*, and ſhall ſurvive, &c. *Note*; The Reporter ſays, that *moſt at the Bar differed from* Lord Keep. *in Opinion. Ibid.*——*MS. Rep. Rudyard* and *Neirin & Ux'*, *Mich.* 1702. S. C. *ſtates it thus: A.* on his Son's Marriage with *H.* in Conſideration of 1200 *l.* paid or ſecured to be paid to the Father and Son, or one of them, in Part of her Portion, and of 1200 *l.* more due to *H.* by the Chamber of *London*, a Jointure was ſettled on her of 240 *l. per Ann.* That the Marriage was had, and the Son died inteſtate, and the Wife adminiſters to him, and then intermarries with *B.* The Father died, having made his Wife Executrix, *who never demanded this Debt*, but died, having made her Will, and the Plaintiff her Executrix, who now brought her Bill againſt the Defendant for this 1200 *l.* in the Chamber of *London*, for that the Settlement did amount to an Agreement that the *Father* ſhould have the Benefit of this Debt, the Settlement being made by him, and this being Part of the Conſideration, and that therefore ſhe as his Repreſentative was intitled to the Benefit of it; or if it ſhould be taken upon the Wording of the Deed that the Father and Son were jointly intitled to it, the Father would have the Whole by Survivorſhip; or if it were to go equally to the Father and Son, ſhe as Repreſentative of the Father would be intitled to a Moiety of it. But the Bill was diſmiſſed, the *Huſband having done nothing to alter the Property in his Life-time. Per* Lord Keep.———*Prec. in Chan. Rudyard* and *Neirin & Ux'*, *Mich.* 1702. S. C. and P. and ſays, The Defendant inſiſted that when he married his Wife he took this Debt to be his own; and that this did not amount to an Agreement that either Father or Son ſhould have this Debt, otherwiſe than as it did belong to the Wife; and though the Huſband might have diſpoſed of it, yet having done nothing of this Kind, it now belongs to the Wife that has ſurvived him; and Lord Keep. was of the ſame Opinion. Bill diſmiſſed.

The Husband having done nothing to alter the Property, it is *a Choſe in Action*, and ſhall ſurvive to the Wife; and a *Bill brought by the Huſband's Executor* for this 1200 *l.* was *diſmiſſed*. *Per* Lord Keep. *Mich.* 1702. *Rudyerd* and *Nerne*, 2 *Freem. Rep.* 262.

4. A *Term for* 99 *Years determinable upon three Lives* is aſſigned to *A.* and *B.* in *Truſt for* C. *who married, and died.* The Queſtion was, whether *this Truſt of a Term goes to the Huſband who ſurvived*, or to the *Wife's Adminiſtrator?* Lord Chan. held *clearly*, that the *Truſt of a Term* as *well as the Term itſelf ſurvives to the Huſband*, and that he need not take out Adminiſtration (*a*).——It appearing that the Wife always received the Money of the Truſtees; and the *Bill being to have the Benefit of the Truſt*, and *to have an Account againſt the Truſtees*, the Payments to the Wife were ordered to be allowed in the Account, *it being by the Permiſſion of the Huſband. Mich.* 8 *Ann. Pale* and *Michell*, *MS. Rep.*

(*a*) If a *Feme Covert* hath a Term for Years, and dies, the Leaſe is the Huſband's, and he may maintain an Ejectment *without taking out Letters of Adminiſtration*, and then ſurely he need not in this Caſe, for *Equity* will conſider *this Truſt as executed. Ibid.*

(*b*) This 5500 *l.* was the *Huſband's Money*, and the *Property abſolutely veſted in him by Law*; and tho' the Court thought fit to lay their Hands on it, and had Power ſo to do, it being paid into the Maſter's Hands; yet *that was only in the Nature of a Caution till the Huſband ſhould make ſome Proviſion for his Wife*; but the *Wife being now dead*, and no *Children to be provided for*, the Reaſon of the Court's keeping the Money from him is at an end; and then *Æquitas ſequitur Legem*, and muſt give it to the *Huſband's Repreſentatives*, to whom by Law it belongs. *Per* Lord Chan. *Trin.* 1715. in S. C. *Prec. in Chan.* 418.——*Gilb. Eq. Rep.* 102. S. P. in S. C. *in totidem verbis.*

5. Part of *A.*'s Fortune, *viz.* 5500 *l.* (*b*), was depoſited in the Court of Chancery, and ſhe married *B.* without Leave from the Court; firſt the Huſband, and then the Wife died *without Iſſue.* Reſolved by Lord Chan. *Cowper*, that this Money belonged to the Huſband's Repreſentatives, *for the Money being in Court, it was always in the Huſband's Poſſeſſion*, ſubject *only to the Equity of the Wife and Children for a reaſonable Proviſion for them*, who failing, the Money belongs to the *Huſband's Repreſentatives. Trin.* 1715. *Packer* and *Windham*, *MS. Rep.*

Prec. in Chan. 419. *Mich.* 1715. S. C. and P.

6. An Aſſignment by the Huſband of a *Choſe in Action* will not prevent its ſurviving to the Feme, if ſhe ſurvives, *becauſe it is a Thing not aſſignable at Law. Per* Lord Chan. *Mich.* 1 *Geo.* 1. *Packer* and *Windham*, *Gilb. Eq. Rep.* 103.

Cites *Co. Lit.* 351.

7. If a *Wife be poſſeſſed of a Term for Years*, and dies, the *Huſband* ſhall have it by *Survivorſhip*, and not the *Executor* or *Adminiſtrator* of the *Wife*, *for it is veſted in the Huſband in Right of his Wife*, and therefore it cannot be deveſted by the Death of the *Wife*. But if the *Wife* had been diſpoſſeſſed *before Marriage*, and *no Recovery during the Coverture*, the Repreſentatives of the *Wife ſhall have the Term*, and not the *Huſband*, becauſe it is there *a Choſe in Action* (*a*). *Gilb. Eq. Rep.* 234. *in tempore Geo.* 1. in the Exchequer in *Ireland*, in the Caſe of *Barnwell & al'* and *Ruſſell & al'*.

(*a*) And goes according to the Contract to the Repreſentative of the Wife.

8. Bill by the Heirs and Reſiduary Legatees of *A.* againſt his Wife and Executrix, to have an Account of Teſtator's Eſtate. It being proved that the Teſtator being very old and infirm for *ſeven Years before his Death*, did not receive Money himſelf, tho' he ſigned Receipts, and executed Leaſes, *&c.* but the Money was uſually paid to his Wife. *Cowper* C. decreed the *Wife to account for what Money ſhe received for ſeven Years before her Huſband's Death*, but that the Maſter ſhould be eaſy in taking the Account, and allow for Houſekeeping, *&c.* without Vouchers. *Mich.* 2 *Geo.* 1. *Buckle* and *Milman*, *Viner's Abr.* Tit. *Baron and Feme*, (E. a. 6.) *Ca.* 8.

9. *Baron* and *Feme* having Iſſue one Daughter (*about ten Years old*) enter into an Agreement for the *Sale of the Feme's* Lands, and *agree that* 600 l. *Part of the Purchaſe Money, ſhould be ſettled* in Manner following, *viz.* " 30 *l.* a Year, the Intereſt whereof was to " be paid the Huſband during his Life, and after his Death to his " Wife for Life, and after their Deaths the Intereſt to be paid to " ſuch Daughter or Daughters as ſhall be begotten between them till " they ſhall attain their reſpective Ages of 21, or be married, and " then the Principal Sum to ſuch Daughter or Daughters; but in " Caſe there ſhall be no Daughter, then to the Wife in Caſe ſhe ſhall " ſurvive her Huſband; but in Caſe he ſhall ſurvive her, then to the " Huſband, his Executors and Adminiſtrators." *A.* married the Daughter, *and in Conſideration of this* 600 *l.* made a Settlement on her; the *Daughter died in the Life-time of her Father and Mother*, and then the *Mother died without Iſſue.* The Daughter's Huſband is intitled to it as her Adminiſtrator; and decreed *accord'* with Coſts. *Eaſt.* 1718. *Hewitt* and *Ireland*, *Prec. in Chan.* 489.

It could never be the Intent of this Settlement to provide for Daughters which might probably be never *in eſſe*, (as was the Fact in this Caſe) and to leave a Daughter which was then ten Years old, never had diſobliged her Parents, and was wholly unprovided for, without any Proviſion at all; that tho' the Words ſeemed to have a future Relation from the Time of the Settlement, yet the Intent was only futurely, as to thoſe which ſhould be begotten at the Death of the Father and Mother; that this Daughter came within that Conſtruction; that it was like a Limitation to one and his Iſſue, *Procreatis*, or *Procreandis*; if it were *Procreatis*, it would take in thoſe born after; if it were *Procreandis*, it would let in thoſe born before; ſo here the Intention never was to exclude this Daughter. *Ibid.* 490.

10. Bond given *to Huſband and Wife during the Coverture*; the Right of the Bond is in them *both*, and *if the Husband dies without any* Diſagreement (*a*) *to his Wife's Right in it, the Bond ſhall ſurvive to the Wife.* Said *per King* C. *in Caſu Copping* and —— *Mich.* 1718. 2 *Will. Rep.* 497.

(*a*) The *Baron may* diſagree *to his Wife's Right to the Bond*, and *bring an Action* on it *in his own Name. Ibid.*

11. *J. S.* on his Marriage with *F.*'s Daughter *ſettled* 500 l. per Ann. *on her*, and after *ſurrendred Copyholds to the Uſe of his Will*, and *gave the ſame by Bill to his Wife.* Her Father, a Freeman of *London*, died, whereby ſhe became *intitled to one Fifth of one Third of his perſonal Eſtate*, and 1500 *l.* was reported due to *J. S.* in Right of his Wife, for *Payment whereof ſeveral ſpecifick Securities of Stocks were transferred to him and her jointly.* *J. S.* afterwards made a new Settlement (*a*), *increaſed her Jointure* 300 l. per Ann. but *never altered his Will.* The Stocks undoubtedly belonged to the Huſband; the only Queſtion is, whether he has not done ſome Thing to alter that; an Huſband may purchaſe to himſelf and his Wife, and here he takes to himſelf and his Wife, which is the ſame Thing; there is a conſiderable Acceſſion of Fortune to the Huſband; and as this came by her, it would be very hard by Equity to take from her what the Law gives her; *ergo* ordered ſo much of the Bill as ſought to make the Stocks in their joint Names the Eſtate of the Huſband to be diſmiſſed. *King* C. *Trin.* 11 *Geo.* 1. (1725.) *Lannoy* and *Lannoy*, *Sel. Ca. in Chan.* 48.

(*a*) The Settlement is a Revocation of the Will, for ſuch Lands as are comprized in it, but the Copyhold is not, and therefore paſſes by the Will; ſo held *per King* C. *Ibid.* 49.

12. Baron and Feme bring a Bill to redeem a Mortgage; Defendants plead to the Bill, and the Plea over-ruled, and 5 *l.* Coſts is given to the Plaintiffs by the Courſe of the Court. The Baron dies; Lord Chan. *King* for ſome Time doubted, and aſked the Regiſter; but afterwards taking it to be as a *joint Judgment for a Sum certain*, determined that it did ſurvive to the Wife, and Proceedings in the

Coſts

Croſs Cauſe to ſtay till the Defendant in the original Cauſe ſhould pay the 5 *l.* Coſts. *Mich.* 1728. *Coppin* and —— 2 *Will. Rep.* 496.

13. *A.* was Tenant for Life in Poſſeſſion, and had a Power to make a Jointure of 100 *l. per Ann.* for every 1000 *l.* which any Wife he ſhould marry ſhould bring him as a Marriage Portion, and ſo for more, *&c.* *A.* on his Marriage with *B.* with whom he received 8000 *l.* made a Jointure of 800 *l. per Ann.* and covenanted to make her an additional Jointure of 100 *l. per Ann.* for every 1000 *l.* which he ſhould receive or be intitled to by Virtue of *B.*'s Father or Mother's Will, and ſo in Proportion for any leſſer Sum than 1000 *l.* *A.* died without Iſſue, *B.* being by her Father's Will intitled to one half of a Moiety of the Surplus of his perſonal Eſtate, and alſo by her Mother's Will having Right to ſome Lands in Fee, and *A.* dying much indebted, a Bill was brought by his Creditors to ſubject *B.*'s Share of her Father and Mother's Eſtate to the Payment of their Demands; and upon a Bill by *B.* that ſhe might have an additional Jointure made to her in Proportion to ſuch Share, purſuant to *A.*'s Covenant; but in Caſe ſhe could not, then that no Part of her Eſtate ſhould be taken from her. *King* C. thought that this could not be looked upon as bringing any further Portion to *A.* and that it was not reaſonable that *A.*'s Creditors ſhould have any Benefit of the Reſidue of *B.*'s Fortune, if ever that ſhould be recovered, in regard ſhe cannot have any Recompence in Conſideration thereof, purſuant to the Articles for parting with it; *ergo* decreed that *B.* keep the Overplus of her Eſtate to herſelf, without having any additional Jointure, the *Remainder-Man not being bound* or *affected by* A.*'s Covenant any further than the original Power warrants. Mich.* 1731. *Holt* and *Holt*, and *Gibſon & al' Creditors, &c.* and *Holt*, 2 *Will. Rep.* 648.

Vide Tit. *Power, P. Ca.*

14. 7th of *October* 1704. Sir *Thomas Bromſall* by Articles (in *Conſideration of a Marriage and a Fortune with* A. *his then intended Wife*, and which Marriage was after had) covenanted with Truſtees to ſettle an *Annuity of* 500 l. *out of her Eſtate* upon *A.* but died *without executing the Articles*, leaving ſeveral large Incumbrances on his Eſtate; after his Death *A.* brought her Bill againſt the Heir to have

3 *Will. Rep.* 197. *Lord Carteret* and *Paſchal, Trin.* 1733. S. C. ſays, upon the Marriage of Sir *Thomas B.* with *M.* Arti-

cles were entered into, whereby he covenanted to ſettle 500 *l.* a Year on ſaid *M.* his intended Wife for her Life for her Jointure; that Sir *Thomas B.* ſoon after the Marriage died, and his Lady brought her Bill to recover her 500 *l. per Ann.* and the Arrears and future Payments; and that whereas the Lady *B.* had agreed to buy in a Mortgage, or Part of the real Eſtate of Sir *T. B.* her Huſband comprized in theſe Articles, on the 5th of *March ſeptimo Annæ*, it was decreed by *Cowper* C. that the Poſſeſſion of certain Lands mentioned in the Decree, Part of the real Eſtate of Sir *Thomas B.* and which was liable to a Mortgage before made thereof, ſhould be delivered to the Lady *B.* and that the Tenants ſhould pay their Arrears and future Rents to her, and that ſhe ſhould enjoy the ſame until ſhe ſhould be reimburſed what ſhe ſhould have paid towards the Mortgage on the Eſtate, with Intereſt, and alſo all Arrears of her Annuity or yearly Rent of 500 *l. with Coſts*, and the Maſter to ſee what the ſame ſhould amount to. That the Lady *B.* married Dr. *Herbert*, whereupon the Suit being revived, the Maſter reported 4527 *l.* to be due for the Arrears of this Rent at *Lady-day* 1714. which Report was confirmed. That by Indenture dated 9 *June* 1729. the Dr. *aſſigned the ſaid Arrears of* 4527 *l. and all ſubſequent Arrears, together with all Benefit of the ſaid Decree*, and *the Proceedings thereupon, to* the Lord *Carteret* and Sir *Clement Cotterell*; and alſo *demiſed the ſaid Annuity for* 90 *Years, if the Dr. and his Lady ſhould ſo long live.* And by Deed Poll dated 12th ſaid *June* it was *declared, that the* ſaid Aſſignment was intended to veſt the Property of the ſaid Debt in the ſaid Truſtees, in Truſt *that after the Lady's Death, and not before*, they ſhould pay 500 *l.* due from the Dr. and his Lady to Sir *Thomas Croſs*; and afterwards ſhould pay to Lady *Granville* 3900 *l.* in full of all Demands due to her, and in *Truſt to pay the Reſidue to ſuch Perſons and in ſuch Manner as the Dr. by his Deed* or *Will ſhould appoint.* In *October* 1729. the Dr. died, and on *April* 2, 1730. his Lady died; under this *Aſſignment* and Deed of *Truſt* Sir *Thomas Croſs* claimed his Debt of 500 *l.* upon a Bond due from the Dr. and Lady *G.* alſo claimed her 3900 *l.* as a Debt due from the Dr. and the *Aſſignment* being *voluntary* as to the Surplus, the Queſtion was, whether the Adminiſtratrix of the Dr. or the Adminiſtratrix of his Lady, (both made Defendants) was intitled to this Surplus. And *King* C. was of Opinion, that *Croſs* and Lady *Granville*, as they were *juſt* Creditors, and for a *valuable* Conſideration, and in Truſt for whom this Aſſignment was made, ſhould be firſt paid their ſaid Debts, and that the Surplus of the Arrears did belong to the Dr.'s Adminiſtratrix. Decree affirmed in the Houſe of Lords in *February* 1734. *Ibid.* 201.

have *an Execution of the Articles*, and the ſeveral Incumbrances being before the Court, it appeared the Eſtate was ſo entangled that ſhe could not have a Settlement made in Purſuance of her Marriage Agreement; and therefore it was decreed in 1712. that Land of the Value of 4000 *l.* ſhould be appropriated to the Heir of Sir *Thomas*; that *A.* if ſhe was minded to redeem the Incumbrances on her Huſband's Eſtate, ſhould be at Liberty to do it, and thereupon to hold and enjoy the Reſidue of Sir *Thomas*'s Land till ſhe ſhould be ſatisfied the Money ſhe ſhould advance in paying off the Securities and all Arrears of her Annuity, and that ſhe ſhould be let into Poſſeſſion of the ſaid Lands; and it was referred to the Maſter to take an Account of the Debts on Sir *Thomas*'s Eſtate.——Before the Maſter had made his Report, Dr. *Herbert* married *A.* and then the Suit was revived in the Name of him and his Wife, upon which and the Maſter's Report a final Decree was made, that the Doctor and his Wife ſhould hold and enjoy the Lands, *&c.* and that the Doctor ſhould be put into Poſſeſſion. The Doctor immediately entred on the Eſtate, and took the Rents, and 9 *June* 1729. the Doctor, by Indenture ſetting forth his Intention to veſt the Arrears and the Intereſt of the ſaid Annuity *abſolutely in himſelf*, aſſigned all ſuch Arrears as were then due, as alſo all ſubſequent Arrears; and the 12 *June* 1729. by Deed Poll he declared the *Truſt* of *the Aſſignment to be*, *that upon his Wife's Death*, and *not before*, the Truſtees ſhould be enabled to pay, firſt 3000 *l.* to Lord *Carteret*, then 500 *l.* to Sir *Thomas Croſs*, and in Truſt to pay the Reſidue according to his Appointment by Deed or Will. The Doctor ſoon after died *inteſtate*, without making any Proviſion for his Wife, who ſurvived him about ſix Months, and left the Defendants her Executors. Under this Aſſignment and Deed of Truſt Lord *Carteret* claimed his Debt of 3000 *l.* upon a Bond due from the Doctor; and Sir *Thomas Croſs* alſo claimed his Debt as due from the Doctor; and the Queſtion was, (the Aſſignment being voluntary as to the Surplus) whether the Doctor's Adminiſtratrix, or his Lady's Adminiſtratrix, was intitled to this Surplus. And it was argued, that the Decree to the Doctor and his Lady was in Nature of a Judgment in Right of his Wife, which the Huſband might execute by *Elegit*, and then the Land taken by the Execution would become abſolutely his, and might be aſſigned to any Body. *Co. Lit.* 351. *a.* That the Doctor having received the Rents and Profits under the Decree, was as full an Execution of the Decree as the Nature of the Thing would permit, and ſo the Arrears in Equity were become veſted in him as fully as a Term taken in Execution by an *Elegit* could. On the other Side it was ſaid, that the Demand was in Right of his Wife; that the Decree did not change the Nature of the Demand, but only the Land to the Lady till ſhe ſhould be ſatisfied the Arrears and the Money advanced by her in Diſcharge of the Incumbrances; that the Decree made after the Marriage for the Doctor and his Lady to enjoy, *&c.* in which the Huſband was only joined for Conformity, being founded on a former Decree made to her alone, would not alter the Caſe, no more than if Huſband and Wife have a Decree for Money in Right of the Wife; as 1 *Chan. Ca.* 27. or recover Judgment on a Bond made to the Wife before Marriage, where the Decree and Judgment ſhall ſurvive. So if Baron and Feme recover Land and Damages, the Feme ſhall have Execution of the Damages, and not the Baron. 48 *Ed.* 3. 13. 28 *Aſſ.* 45. For the Judgment ariſing out of the Property of the Wife, muſt follow the Nature of that from whence it ſprings, which is to ſurvive to her, unleſs reduced

into Poſſeſſion by him; and as to the Objection, that the Decree is executed by the Huſband taking Poſſeſſion of the Land, and ſo the Arrears reduced into actual Poſſeſſion, ſo far as the Thing will admit; it was anſwered, that if the Articles had been executed, the Lady would have had a legal Rent-charge, for which ſhe might have diſtrained; and though becauſe of the Incumbrances on Sir *Thomas*'s Eſtate that could not be done, yet the Intereſt which the Wife takes under the Articles and Decree ſhould be conſidered in the ſame Manner as if her Settlement had been literally executed; for the Decree was not deſigned to change the Nature of the Lady's Right, but to ſecure her in Poſſeſſion of it in the beſt Manner Sir *Thomas*'s Affairs would permit; ſo that conſidering the Arrears now due as Arrears of Rent, the Law is plain what will become of them. Before the 32 *Hen.* 3. *cap.* 32. the Huſband had no Remedy for any Arrears grown due before the Marriage although he ſurvived, ſo *favourable was the Law to the Wife*; and ſince then he hath not any Right, but only a Power over the Rents and other perſonal Chattels of his Wife that lie in Action, *viz.* he may gain Poſſeſſion of them if he can, and ſo make them his own; but if he leaves them ſtanding out at his Death, they remain over to the Wife, in whom the Property all along continued; for if the Property had ever veſted in the Huſband, the Thing would have been tranſmiſſable to his Repreſentatives. *Co. Lit.* 35. And though he ſurvives the Wife, yet he ſhall not by the Intermarriage have any Chattels real conſiſting merely in Action, unleſs he recover them in the Life of his Wife, as a Writ of Right of Ward, *&c. Co. Lit.* 351. And therefore *as Things in Action are not aſſignable*, ſuch Diſpoſition of the Huſband is void at Law. But it may be ſaid Equity will execute ſuch Aſſignments; as if the *Husband aſſigns a Truſt Term belonging to the Wife.* Anſw. That a *Truſt Term is in Equity conſidered as a legal one, over which the Husband has an equal Power*, for he may receive the Rents of the one as well as the other, and ſo may diſpoſe of it in the ſame Manner. 2 *Vern.* 270. But it will not follow from hence that Equity will oblige a Woman to become a Truſtee for another without ſome Conſideration, and againſt her Will; the Property, as was ſaid before, of a *Choſe in Action* always continues in the Wife, and the Huſband has only a *naked* Power to recover, but cannot diſpoſe of it without her Concurrence, for by Law it belongs to her, provided the Huſband does not bring it into Poſſeſſion; why therefore ſhould a Court of Equity ſtrip her of ſuch Advantage: The Doctor who made the Aſſignment gave her nothing, ſo that it cannot be intended there was an Agreement that the Huſband ſhall have the Wife's Fortune, as there might be if he had made a Settlement equivalent to her Portion. 2 *Vern.* 501.—— and 1 *Vol. Eq. Ca. Abr.* 70. *Cleland* ver. *Cleland*; and yet even in that Caſe, where Securities remained unaltered, it ſeems they are not to be taken from the Wife though in Favour of Creditors. 2 *Vern.* 68. *Liſter* ver. *Liſter*. And though the Wife agrees to ſubject her Fortune to her Huſband's Debts, ſuch Agreement will not bind. 2 *Vern.* 64. And yet the Deed of a Feme Covert is not always void; and it is unqueſtionably certain that no Aſſignment made by the Huſband ſhall prejudice the Wife without an adequate Proviſion, not even in Favour of Children. *Barnet* ver. *Kinaſton*, 2 *Vern.* 401. For ſuch Aſſignment not paſſing a legal Right to any Thing in Action, but only declaring the Party's Intention to become a Truſtee for another, (*which is agreeable to natural Equity*) hath been confirmed in Chancery againſt the Aſſignors, where the Aſſignment has been made upon

Moor 7. *pl.* 25. is not Law, admitted by all *arg*'.

Conſideration, becauſe each Perſon may bind himſelf and his own Right, but the Property of a third Perſon, as the Wife's is in a *Choſe in Action*, cannot be affected by ſuch Act without making the Party Satisfaction. If Dr. *Herbert* had come before the Court for Aſſiſtance to get in any Part of his Wife's Fortune, a previous Settlement would have been required, 2 *Vern.* 294. —— 1 *Vol. Eq. Ca. Abr.* 54. *Jacobſon* ver. *Peere Williams*; for Equity will not aid in ſtripping a Woman of her Proviſion; wherefore ſuppoſing the Caſe ſtood ſingly on the Aſſignment, that being made only to give the Doctor an abſolute Property over the Arrears, and wholly to deveſt the Wife without giving her any Recompence for them, there is no Room for this Court to interpoſe; but then it is objected, that the Aſſignment was made in Favour of the Creditors for a valuable Conſideration; and ſo it muſt be in all Caſes, or otherwiſe not to be carried into Execution. 3 *Chan. Rep.* 90. But how can this mend the Matter, are one Perſon's Debts to be paid with another's Money? and yet it is agreed on all Hands that every *Choſe in Action* continues to be the Wife's Property; beſides, admitting it to be otherwiſe, the Validity of the pretended Debts is not proved, ſo that for what appears the Declaration may be voluntary, and then not to be executed, 3 *Chan. Rep.* 90. and though it ſhould be admitted to be on Conſideration, yet how can that affect the Aſſignment, which is voluntary, and by which alone the Arrears are to paſs. *King* C. An *Aſſignment of a Truſt Term binds the Wife in* this Court as *fully* as an *Aſſignment of a legal Term*; theſe Arrears are not to be conſidered as *Choſes in Action*, but as Things of which the Huſband hath obtained Poſſeſſion, which he has done by entring into Poſſeſſion of the Lands under the Decree; from that Time this Intereſt became an equitable Chattel, as much veſted in him as if he had ſued out an *Elegit*, and taken a legal Term in Execution; ſo that here, when there is no Difference between *legal* and *equitable* Eſtates, this Aſſignment will bind the Wife as much as the Diſpoſition of any other perſonal Choſe of which he had corporal Poſſeſſion; and therefore he decreed, that after Payment of the 3000 *l. &c.* the Repreſentative of the Doctor was intitled to the Surplus of the Arrears. Affirmed, on Appeal to the Houſe of Lords, *Trin.* 1733. *Lord Carteret, Sir Thomas Croſs & al'* and *the Executors of Mrs. Herbert, MS. Rep.*

115. The Huſband upon his Marriage with *A. in Conſideration of her Fortune, computed at about* 500 *l.* gave a Bond to Truſtees *to pay her* 10 l. per Ann. *to her ſeparate Uſe*, and *that ſhe might diſpoſe of* 100 l. *by Will in his Life-time*, and *if ſhe ſurvived him he was to leave her* 200 l. and *all her wearing Apparel, Plate*, &c. Part of the Wife's Fortune was a Bond of 200 *l.* The Huſband died, (the Bond being unpaid) but before his Death he made his Will, and thereof *C.* his Reſiduary Legatee. Then the Wife dies. This Bond ſhall go to the Repreſentative of the Huſband, *he being a Purchaſer of it by the Settlement made on his Wife.* Decreed by *Talbot* C. *Hil.* 1735. *Adams* and *Cole, Ca. in Eq. Temp. Talbot* 168.

Moſt of the Caſes where *Choſes in Action* have been decreed to the *Huſband's* Repreſentatives (*he dying in the Life-time of the Wife*) have gone upon the Reaſon of *Equality*, there being a *Settlement made by the Huſband on his Wife*, whereby he became a Purchaſer of her Fortune; and therefore as ſhe was to have the Proviſion made by the Settlement, he ought to have her whole Portion: That in the principal Caſe indeed there is no Settlement of any Eſtate by the Huſband upon his Wife, only a Proviſion that in Caſe ſhe ſhould ſurvive him, then he ſhould leave her 200 *l. &c.* Tho' here is nothing moving from the Huſband, ſince the Whole that the Wife is to have will not amount to 500 *l.* yet *this is ſtill the Agreement of the Parties.* Had there been no Agreement, the Law which gives her the Chance of *Survivorſhip* muſt have taken Place, but ſhe has waived that Chance by her expreſs Agreement of having ſo much at all Events, and the Huſband's Departure from that abſolute Right which the Law gave him over the Whole, either *by reducing into Poſſeſſion*, or *releaſing* this Debt, is of itſelf a ſufficient Conſideration. The Conſequence of the Huſband's not having this 200 *l.* would be, that he ſhould be bound to leave her ſo much if ſhe ſurvived him, and ſhe not bound at all. *Per* Lord Chan. *Ibid.* 170.

16. *A.*

16. *A.* deviſed the *Reſiduum* of her perſonal Eſtate (being about 2000 *l.* Value, and moſt of it *South-Sea* Stock) to *B.* by her Maiden Name (*not knowing her to be married*); and made her Executrix. The Huſband agreed to ſettle it in Truſtees in Truſt for *himſelf and Wife* and *the Survivor*. A Transfer is made accordingly; the Wife's Truſtee drew a Declaration of Truſt, whereby this Stock was to be ſettled upon the *Huſband* and *Wife for their Lives*, and for the Life of the longeſt Liver of them, then to the *Iſſue of the Marriage*, and for *want of Iſſue to the Wife, her Executors* and Adminiſtrators. The Huſband objected to this Declaration, and by Letter directed to the ſame Truſtee, he deſired that the Truſt might be declared jointly for *himſelf and his Wife for their Lives*, and *after to their Iſſue*, and *then the Survivor to take the Whole*; but before ſuch Declaration was executed, the Huſband died *inteſtate* without Iſſue, and his Wife adminiſtred. *Talbot* C. was of Opinion, that upon her ſurviving her Huſband the Stock was become her ſole and abſolute Property, and decreed the Defendants, the Truſtees of this *South-Sea* Stock, to be Truſtees for the Wife in *her own Right*. *Hil.* 1735. *Fort* v. *Fort and Blomfield*, *Ca. in Eq. Temp. Talbot* 171.

As the Teſtatrix made the Plaintiff Executrix and Reſiduary Legatee by her Maiden Name, not knowing her to be married at that Time, it would be hard therefore to ſay this 2000 *l.* did veſt abſolutely in the Huſband, notwithſtanding the Caſe, 3 *Lev.* 403. eſpecially as by being Executrix ſhe is chargeable with Debts.—As the Huſband had it ſingly thro' his Wife, and made no Settlement upon her, it was but reaſonable it ſhould be ſettled upon her; the Agreement was compleat on both Sides, and the ſubſequent Transfer of the Stock to the Truſtees muſt be taken to be done in Purſuance of that Agreement, and not to convey away all the Wife's Right; which was ſettled by the precedent Agreement to which this Transfer relates, and is a Completion of. *Per* Lord Chan. *Ibid.* 172.

17. A Legacy of 60 *l.* was deviſed to *B.* when ſhe ſhould attain twenty-one; ſhe attained that Age, but before had married *J. S.* who died before the Legacy was payable; this Legacy is in Nature of a *Choſe in Action*, and will ſurvive to the Wife. *Eaſt.* 13 *Geo.* 2. *Brotherow* and *Hood in Scacc'*, *Comyns's Rep.* 725.

(K) Of Suits and Proceedings by and againſt Baron and Feme;——and alſo inter ſe.

1. THE *Court was of Opinion*, that though a Man could not have a Bill againſt his Wife for *Diſcovery of his own Eſtate*, yet where before Marriage ſhe enters into Articles concerning *her own Eſtate*, ſhe has made herſelf as a *ſeparate* Perſon from her Husband; and ſhe was ordered to anſwer in a Week's Time. *Eaſt.* 1691. *Sir Robert Brooks* and *Lady Brooks*, *Prec. in Chan.* 24.

2. A Feme Covert may ſue her Huſband by *prochein Amy* (*a*); this agreed to be the Courſe of the Court. *Hil.* 1708. *in Caſu Kirk* and *Clark*, *Prec. in Chan.* 275.

(*a*) Upon a Suggeſtion of ill Practice between the Huſband and the Wife's *prochein Amy*, a new one was appointed upon his giving a Recognizance to pay the full Coſts of any Award. *Halpin* and *Halpin*, * *MS. Notes*. * Q. Term and Year.

3. But none can bring a Bill in the Name of a Feme Covert as her *prochein Amy* without her Conſent, (*as may be done in the Caſe of an Infant*) and if ſuch Bill be brought, upon her Affidavit of the Matter, it will be diſmiſſed. *Mich.* 1713. *Vide* 1 *Vol. Eq. Ca. Abr. P.* 72. *Ca.* 6.

A Bill was brought by the Father of the Wife as her *prochein Amy* againſt her Huſband *without her Conſent*; and *per Harcourt* C. as the Wife diſowns the Suit, it is not reaſonable a third Perſon ſhould bring a Bill in her Name without her Conſent; and when ſhe perſonally appears in Court and diſavows the Suit, this tends to the ſowing Diviſion between Huſband and Wife, and breeding Diſputes and Quarrels in Families. Bill diſmiſſed. *Eaſt.* 13 *Ann. Anon. MS. Rep.*

4. Huſband

4. Huſband and Wife did, upon a valuable Conſideration, by Leaſe and Releaſe, convey the Wife's Land in Fee, and covenanted that the Wife ſhould levy a Fine of the ſame to the Uſe of the Purchaſer. She refuſed to levy a Fine. Plaintiff brought his Bill to have his Title perfected by a ſpecifick Performance of the Covenant, and a Precedent was cited where a ſpecifick Performance had been decreed in the like Caſe; but Lord Chan. would not decree a ſpecifick Performance in this Caſe, becauſe upon ſuch a Decree the Huſband could not compel his Wife to levy a Fine, and if ſhe would not comply, Impriſonment would fall upon the Huſband for Contempt, which was the ill Conſequence of the Decree in the cited Caſe. *Mich.* 4 *Geo.* 1. *Ortread* and *Round*, *Viner's Abr.* Tit. *Baron and Feme*, (H. b.) *Ca.* 4.

The Defendant by his Anſwer admits the Covenant, and is ready to levy a Fine himſelf, but ſays his Wife refuſes to join with him, and he cannot perſuade her to do it. *Per Cowper* C. It is a tender Point to compel the Huſband to procure his Wife to levy a Fine, tho' there have been ſome Precedents in this Court for it; and it is a *great Breach upon the Wiſdom of the Law, (which ſecures the Wife's Lands from being aliened by the Huſband without her free and voluntary Conſent)* to lay a Neceſſity upon the Wife to part with her Lands, or otherwiſe to be the Cauſe of her Huſband's laying in Priſon all his Days; and ſaid, he did not think it proper in this Caſe to decree a ſpecifick Performance of the Covenant, but the Defendant muſt refund the Purchaſe Money paid to him with Coſts. *Mich.* 4 *Geo.* 1. *Outram* and *Round* S. C. *Ibid.* (*in the Margin*) cites it as from *another* MS. Rep.

5. A *Feme Covert* anſwers *ſeparately*, but there being *no Order for that Purpoſe*, it was referred to the Maſter to ſtate, whether her Anſwer was regularly put in or not; and he reported that *ſhe did adviſe about putting in of her Anſwer, and was fully appriſed thereof, and did it with great Deliberation; and that it being put in* ſeparately, *in her Favour, and at her Deſire, and with the Conſent of her Huſband, and the Plaintiffs having replied thereto, he conceived it to be irregular.* And upon Exceptions to this Report, *King* C. and the Maſter of the Rolls, *for the Reaſons above*, reſolved, that the Anſwer was *regularly* put in; and held, that neither a *Feme Covert*, or any on her Behalf, can aſſign that which was done in her Favour, as an *Irregularity*. *Trin.* 1726. *Duke of Chandos* and *Talbot & Ux'*, 2 *Will. Rep.* 371.

Sel. Ca. in Chan. 24. S. C. *but only ſays*, that a ſeparate Anſwer put in by the Wife alone without Order of the Court for that Purpoſe is *irregular.*

6. On a Motion to ſuppreſs the Anſwer of the Defendant, for that ſhe marrying after the Bill filed, and before Anſwer put in, had put in her Anſwer without her Huſband. But *per King* C. Marrying *pendente lite* does not abate the Suit, and tho' there is no Charge in the Bill againſt the Huſband, or *Subpœna* ſerved on him, yet he muſt join in the Anſwer of the Feme for Conformity, for no married Woman can put in an Anſwer without her Huſband, by the Rules of the Court, without ſpecial Leave of the Court, and an Order for that Purpoſe. *Hil.* 4 *Geo.* 2. *Abergavenny* and *Abergavenny*, *Viner's Abr.* Tit. *Baron and Feme*, (J. a.) *Ca.* 20.

2 *Will. Rep.* 311. *Mich.* 1725. *Abergavenny* and *Abergavenny* is not S. P.

(L) In what Caſes the Baron muſt make a ſuitable Proviſion for the Wife when he ſues for her Fortune.

Prec. in Chan. 367. *Greenhill* and *Waldoe*, *Eaſter* 1713. ſeems to be S. C. but this *Point* does not appear. *Gilb. Eq. Rep.* 31. S. C. *in totidem verbis* with *Prec. in Chan.*

1. THERE was a Truſt Term in a Marriage Settlement to raiſe Portions for Daughters, payable at their reſpective Ages of 21, or Days of Marriage; proviſo that if ſuch Daughter or Daughters ſhould happen to die before 21, or Day of Marriage, then ſuch Daughter or Daughters Portion not to be raiſed, but the Truſt Term to attend the Freehold and Inheritance. The Father by his Will gives 500 *l.* a-piece to his two Daughters, payable in the ſame Manner; one of the Daughters married during her Infancy; ordered that her Portion be raiſed and brought before a Maſter, there to remain till her Huſband ſhould make a Settlement ſuitable to her Fortune. *Per Harcourt* C. *Eaſt.* 12 *Ann. Greenhill* and *Waldoe*, *Viner's Abr.* Tit. *Baron and Feme*, (G. b.) *Ca.* 4.

2. A Feme Sole is a Mortgagee in Fee for 800 *l.* and marries; if the Huſband had in Equity ſued for the Money, or prayed that the Mortgagor might be foreclоſed, Equity (probably) would not have compelled the Mortgagor to pay the Money to the Huſband without his making ſome Proviſion for his Wife (*a*), or at leaſt the Wife, by an Application to the Court againſt the Huſband and the Mortgagor, might have prevented the Payment of the Money to the Huſband, unleſs ſome Proviſion were made for her. *Per* the Maſter of the Rolls, in the Caſe of *Boſvil* and *Brander*, *Trin.* 1718. 2 *Will. Rep.* 459.

(*a*) *Vide Jacobſon* and *Williams*, 1 *Vol. Eq. Ca. Abr. P.* 54. *Ca.* 7.

3. The Court of Chancery will grant an Injunction to ſtay the Huſband's Proceedings in the Spiritual Court for a Legacy given to his Wife, becauſe that Court cannot oblige him to make an adequate Settlement on her. Cited as granted the laſt Seal, *per* Lord *Macclesfield*, *Mich.* 1720. *Prec. in Chan.* 548.

His *Lordſhip* ſaid, he thought it extraordinary that this Court ſhould interpoſe againſt the Huſband in Caſes where the Law gives him a Title to the Wife's perſonal Eſtate; and doubted Experience had ſhewn that ſuch Interpoſition, *unleſs where the Huſband appeared to be profligate or extravagant*, had been the Occaſion rather of Miſchief than good. *Ib.* 642.

4. *A.* marries an Infant intitled to a great perſonal Eſtate, *pending a Bill for an Account of ſuch Eſtate*, and applies to the Court for his Wife's Portion. The Court directed him to make his Propoſals before the Maſter as to what he would ſettle, whereupon he offered to ſettle 4000 *l.* Part of his Wife's Fortune, on him, her, and her Iſſue; and to covenant that in Caſe his eldeſt Brother, who had then no Iſſue, ſhould die without Iſſue Male in his Life-time, to ſettle 500 *l. per Ann.* of the Family Eſtate upon his ſaid Wife for her Jointure, alledging that he being a Freeman of *London*, the Cuſtom of the City was alone a Proviſion for his Iſſue. *King* C. after Examination of the Wife in Court as to her Conſent, (which ſhe gave) and whether ſhe underſtood the Propoſals, which ſhe repeated, and made it appear ſhe did, (adding that *A.* had been put to great Charge, Trouble and Loſs of Time in this Suit, for which Reaſon ſhe deſired that he might have the Remainder of her Portion, ſhe being ſatisfied he had Intention to do more for her) recommended it to *A.* to add to his Propoſals; but he anſwering that he could not conveniently do it, his Lordſhip ſaid, the Covenant to make a Jointure of 500 *l.* when in Poſſeſſion of the Family Eſtate, tho' *contingent*, was yet to be conſidered and valued; and therefore directed that *A.* entering into

into ſuch Covenant, the Reſidue of the Portion, deducting the 4000 *l.* propoſed to be inveſted in Land and ſettled as above, ſhould be paid to him. *Mich.* 1731. *Milner* and *Colmer*, 2 *Will. Rep.* 639.

5. The Lady *Shovel* had *deviſed* 4000 *l.* in Truſt for the *ſeparate Uſe of a Feme Covert*; and upon a Bill brought by Huſband and Wife againſt the Truſtees, tho' the Wife was herſelf in Court, and conſented that the Money ſhould be paid to her Huſband, yet the *Maſter of the Rolls* would not decree it, but diſmiſſed the Bill. Cited in the Caſe of *Perne* and *Peacock & Ux'*, *Mich.* 1734. as the Caſe of *Blackwood* and *Norris*, heard ſome Time ago at the Rolls. *Ca. in Eq. Temp. Talbot* 43.—— The Reporter adds, *This was the Caſe only of a Perſonalty* (*a*).

(*a*) The ſame was obſerved by Lord Chan. (*Talbot*), that it was *only of a Perſonalty*, and *ſomewhat particular*. *Viner's Abr.* (G. b.) by way of Note to *Ca.* 12.

6. *A.* by Settlement after Marriage creates a Term, in Truſt, by Mortgage or Sale, to raiſe 2000 *l.* for the Portion of each of his Daughters, *Provided they marry with their Mother's Conſent*; and directs an yearly Payment out of the Rents until they marry; and if any of them die *before* Marriage *with ſuch Conſent*, her Portion to ceaſe, and the Premiſſes to be exonerated thereof; and if it be raiſed, to be paid to ſuch Perſon to whom the Premiſſes ſhould belong; and by *Will* he creates another Truſt-Term to raiſe by Sale or Mortgage 4500 *l.* whereof 2000 *l.* to be paid to each of his Daughters in Augmentation of their Fortunes, ſubject to ſuch Condition as in the Settlement; and by a *Codicil* creates another Term for the better raiſing their Portions. *A.* dies, the Daughters marry *without Conſent*. This *Proviſo is only in Terrorem*, and *makes no Forfeiture*, and the Portions ſhall be raiſed; but the Huſbands applying to the Court for Payment of their Portions, the Maſter of the Rolls ordered Propoſals to be made before the Maſter as to the ſettling the Money. *Mich.* 10 *Geo.* 2. *Hervey* and *Aſhton*, *Ca. in Eq. Temp. Talbot* 212.

(M) What ſhall be ſaid the Feme's ſeparate Eſtate; — Where ſhe reſerves the Power of her own Eſtate, &c. And here of Alimony or ſeparate Maintenance.

(*a*) If a Woman under a *Power limits Money to her Huſband after her Deceaſe*; though he dies *firſt*, yet his Repreſentatives ſhall take it. *MS. Notes.* * * *Q.* Term and Year.

1. PLaintiff was the Widow of one *Harriſon* deceaſed, who before her Marriage was ſeiſed of an Eſtate of 100 *l. per Ann.* and poſſeſſed of ſeveral Houſhold and other Goods. *Harriſon* before Marriage entred into Articles, wherein he covenanted with his intended Wife and Truſtees, that ſhe ſhould receive the Profits of *her own Eſtate to her ſeparate Uſe*, and that *he would give Acquittances for ſuch Receipts*, and that *ſhe ſhould have the Diſpoſal of all her own by her Will* or other Writing *during the Coverture*. He alſo covenanted to leave her a Legacy of 500 *l.* and to ſettle ſome Lands upon her in Tail, with a Remainder to her right Heirs. Both Parts of the Articles were put into the Hands of an indifferent Perſon; and ſoon after the Marriage *Harriſon* demanding his Part, which was ſigned by his Wife and the Truſtees, through a Miſtake, that Part which was ſigned by himſelf was delivered to him. Then *Harriſon*

looking upon himſelf to be free from the Agreement, became a very bad Huſband; and Differences ſome Times running ſo high between them, that tho' they agreed to live in the ſame Houſe, yet they kept ſeparate Tables, and both were maintained at the Expences of the Huſband, who during the Coverture received the Profits of his Wife's Eſtate. Not long before the Huſband's Death all Matters were made ſo eaſy, that the Wife was prevailed upon to join with her Huſband in paſſing a Fine of ſome of her own Lands: Upon this Fine the Lands were mortgaged for Money which the Huſband had borrowed, and then ſettled to the Wife in Tail, with the Fee to the Huſband. The Mortgage Money was all repaid except a very ſmall Sum. *Harriſon* conveyed all the Land away that he had ſettled by the Articles upon his Wife; he made his Will, and died. The Bill was brought by the Widow againſt the Huſband's Executors, to have an Account of the Profits during Coverture, and for a Satisfaction of the Goods the Huſband conſumed. Decreed, that no Account ſhould be taken for the Eſtate of the Wife during the Coverture, nor for the Goods conſumed by the Huſband; but if the Maſter ſhall find any of the Goods claimed under the Articles, they to be delivered up to the Wife, becauſe the Huſband and Wife, notwithſtanding the Differences, cohabited together; and no Complaint was ever made by the Wife unto the Truſtees, nor any Step taken by her in order to remedy herſelf. Beſides, ſhe was maintained by her Huſband, and the Differences had their Interruptions; for at the Time when the Fine was acknowledged ſhe was well pleaſed with her Huſband, and had forgot all former Feuds; therefore no Notice is to be taken of what was before, and there is no Proof of any Difference that aroſe afterwards. The Reſidue of the Articles are to be performed to the Widow; and becauſe the Lands covenanted to be ſettled upon her are conveyed away, let Lands of equal Value be purchaſed, and the Huſband's Aſſets chargeable. The Executors Counſel prayed a Direction as to the Wife's Eſtate which was mortgaged, and hoped the Wife ſhould pay off what Mortgage Money remained undiſcharged. But the Huſband being the principal Debtor, the Executors were decreed to pay it. *Eaſt.* 8 *Ann. Harriſon* and *Conſtantine.*

2. A Widow having a Jointure, and being Executrix to her Huſband, and Reſiduary Legatee with her Son, concludes on a Marriage with the Plaintiff; and by the Marriage Settlement he jointures ſeveral Lands upon her, and alſo (by the ſame Deed) the Jointure Lands by the firſt Huſband, (which never veſted in the Truſtees) for her ſole and ſeparate Uſe and Diſpoſal, and likewiſe all the perſonal and teſtamentary Eſtate which ſhe had as Executrix to her firſt Huſband. She had before thoſe Articles laid out Part of the perſonal Eſtate of her firſt Huſband in the Purchaſe of Lands for Years in her own Name, and afterwards ſhe laid out more of the perſonal Eſtate in purchaſing the Inheritance, which Purchaſe was in her Son's Name; the Queſtion was, whether thoſe Lands purchaſed with the perſonal and teſtamentary Eſtate of the firſt Huſband, are to be accounted as a perſonal Eſtate, and ſo the Wife to have the ſole and ſeparate Uſe thereof, and exclude the Huſband therefrom? Lord Chan. I will not account thoſe Purchaſes as Part of the perſonal Eſtate within the Intent of the Marriage Articles; but if ſhe had any Part of the perſonal and teſtamentary Eſtate of her late Huſband's in her Hands at the Time of the Marriage Articles, that ſhall be reckoned Part of the perſonal Eſtate, altho' it was paid after for the Purchaſe of thoſe Lands; for it was a perſonal Eſtate at the Time of the Articles. Indeed, if a

Woman

Woman by a Marriage Agreement is to have the ſeparate Uſe of any Eſtate during the Coverture, ſhe is to have that and the Produce of it after the Marriage; and if any of it is inveſted in a Purchaſe, this Court will follow it, looking upon it as the Produce of what ſhe ought to have. *Eaſtley* and *Eaſtley*, *Mich.* 8 *Ann. MS. Rep.*

3. *A.* having a Daughter married to *B.* by Will deviſed *his perſonal Eſtate to her, to hold to her particular* and *ſeparate Uſe*, and died; afterwards *B.* (Part of this perſonal Eſtate conſiſting of a Mortgage) agreed by Writing under his Hand that the Wife ſhould enjoy it to her ſeparate Uſe; and whether the Wife (*here being no Truſtees to whom the Deviſe was made*) ſhould enjoy this perſonal Eſtate without its being intermeddled with by *B.* (*a*), was reſerved as a Caſe to be argued. But as to the Mortgage, where the Huſband has contracted or declared under his Hand that he would not intermeddle with it; *tho' ſuch Declaration may be voluntary*, yet it muſt be preſumed to proceed from a Senſe he had of the Teſtator's Intent that the Wife ſhould enjoy this Mortgage *ſeparately*; and to be founded on *natural Juſtice*, tho' not on *Contract*; for which Reaſon the Court was *clearly* of Opinion, that the Huſband ſhould be bound by this Agreement. (*d*) *Cowper* C. *Trin.* 1710. *Harvey* and *Harvey*, 1 *Will. Rep.* 125.

2 *Vern.* 659. *Trin.* 1710. S. C. *accord'*, only ſays, the Deviſe to the Daughter was of the Surplus of the Teſtator's perſonal Eſtate, and that he made her Executor.

(*a*) *Lord Chan.* ſaid, this was a great Queſtion, whether *B.* ſhall be compelled to let the Wife enjoy this perſonal Eſtate; for tho' it be objected that the Teſtator had a Power to deviſe it ſo, and that his Intent was to make uſe of ſuch Power; yet it being given to a married Woman, and no Contract precedent or ſubſequent from the Huſband that he will not intermeddle with it, the Huſband's Title to this Eſtate is ſubſequent to the Will, and the Intention being repugnant to the Rules of Law, *viz. That a married Woman ſhould have a Property in perſonal Goods* (*b*); it ſeemed to *his Lordſhip* to have ſome Difficulty in it, wherefore reſerved it, *&c.* 1 *Will. Rep.* 125. in S. C. (*d*) That if a real Eſtate were deviſed to a *Feme Covert* for her *ſeparate Uſe*, and a *Declaration that the Huſband ſhould not intermeddle with the Profits*, but that the Wife ſhould enjoy them ſeparately; his *Lordſhip* doubted this would be a *repugnant* Clauſe, and the Huſband would ſtill enjoy them (*c*). *Ibid.* 126. in S. C. (*c*) It does not appear either by Mr. *Peere Williams*'s Report of this Caſe of *Harvey* and *Harvey*, or by Mr. *Vernon*'s Report of the S. C. nor even by the Regiſter's Book, what was Lord *Cowper's final* Determination upon this Point; but the Caſe of *Bennet* and *Davis*, (*vide P. Ca.*) which was determined at the Rolls in *December* 1725. ſeems to have ſettled it. 1 *Will. Rep.* 126. *at the Bottom.* (*b*) *Vide Burton* and *Pierpoint*, 1 *P. Ca.*

4. Covenant that the Wife ſhall diſpoſe of her perſonal Eſtate, does not extend to what ſhall come to her after Marriage. 11 *May* 1711. *Pilkington* and *Cuthberton*, *Grounds and Rudiments of Law and Equity* 122. *Ca.* 23. cites it as a Caſe before the Houſe of Lords.

Vide the next Caſe, and which is the S. C. but more full.

5. Covenant *that the Wife ſhall diſpoſe of her perſonal Eſtate, does not extend to what ſhall come to her after her Marriage.* And ſhe having Power to diſpoſe of her perſonal Eſtate, *which only comprehended the perſonal Eſtate which ſhe had before Marriage*, gets into Poſſeſſion of a conſiderable perſonal Eſtate in a *private* Manner upon the Death of her Father, and conceals it from the Huſband, and afterwards by Will diſpoſes of it to *Charities*; yet decreed that what was ſo concealed from the Huſband ſhall *not* be made good to him ſo as to diſappoint the Charities. *March* 11, 1711. *Pilkington* and *Cuthbarſton*, *Viner's Abr.* Tit. *Baron and Feme*, (E. a. 7.) *Ca.* 7.

6. It being agreed before Marriage that the Huſband ſhould have only ſo much of the Wife's Eſtate, and that ſhe ſhould have Liberty *B.* ſhould have and enjoy her Eſtate to her ſole and ſeparate Uſe, and that ſhe ſhould diſpoſe of ſuch Eſtate by any Writing under her Hand, *&c.* *B.* lays up a conſiderable Sum of Money out of her *ſeparate* Eſtate, and buys Lands with it, and makes an Appointment purſuant to the Power, and diſpoſed of the purchaſed Lands to a Stranger. After *B.*'s Death *A.* prefers his Bill to have theſe Lands; and Lord *Jefferies* decreed, that he ſhould have the Lands as purchaſed with his Wife's Money; but this Decree was afterwards *reverſed in Dom' Proc'*, *becauſe bought with the Money raiſed out of the ſeparate Eſtate of the Wife*, which ſhe had a Power by the Articles to diſpoſe of. *Fowles* and *the Counteſs of Dorſet* cites it as from a MS. Rep. as a Caſe in Lord Chan. *Jefferies*'s Time, and as cited in the Caſe of *Petts* and *Lee*, *Viner's Abr.* Tit. *Baron and Feme*, (E. a. 7.) *Ca.* 5.

A. upon his Marriage with *B.* enters into Articles, that the Surplus of

to diſpoſe of all the Eſtate beſides, which ſhe ſhould be intitled to, by her laſt Will in Writing. It was reſolved that 5000 *l.* which fell to her after Marriage by the Death of her Brother ſhould not go to her Huſband or his Executors, but that ſhe ſhould have the Power of diſpoſing thereof, tho' at the Time of the Articles ſhe had not any Right or Intereſt therein, and altho' at that Time ſhe could not grant or releaſe the ſame; for *this being a Covenant, ſhall enure according to the Intent of the Parties,* and *extend to a Right in futuro,* where it is the apparent Intent of the Parties that the Huſband ſhould have no more than the Sum expreſly mentioned, whatever happened. By *Cowper* C. *Hil.* 1 *Geo.* 1. *Petts* (*alias Potts*) and *Lee, Viner's Abr.* Tit. *Baron and Feme,* (E. a, 7.) *Ca.* 8.— 1 *Vol. Eq. Ca. Abr. P.* 157. *Ca.* 4. *Pott* and *Lee* is not S. C.

7. *D.* having more than 3000 *l. per Ann.* married *M.* who had 10000 *l.* Portion, and ſettled 1000 *l. per Ann.* upon her for her Jointure, and the greateſt Part of *D.*'s Eſtate was ſettled upon the firſt and every other Son in Tail Male ſucceſſively. *D.* run greatly in Debt, and *J.* his eldeſt Son being of full Age, *D.* upon a Calculation of his Debts, and the Value of his Eſtate for Life, with Impeachment of Waſte, agreed with *J.* to convey all his Eſtate to him, and *J.* covenants to pay all *D.*'s Debts, and to allow him 500 *l. per Ann.* Rent-charge for his Life; and further (upon which the Queſtion ariſes) that *J.* ſhall indemnify *D.* from all *Debts, Charges* and *Expences for the Maintenance of* M. *being then ſeparate by Conſent. M.* brings a Bill againſt *D.* and *J.* the Son to have *an Allowance for her Maintenance*; the Son by his Covenant has taken upon *himſelf the Charge of maintaining M.* and *ſtands* in the *Huſband's Place,* who is *bound to give his Wife an Allowance* if he *voluntarily ſeparates from her*; and the Son muſt be taken to be *in Nature of a Truſtee for the Wife, ſo far as a reaſonable Allowance for her Maintenance*; and tho' the Son offered to take her to his Houſe, yet ſhe is not bound to accept that Offer; for tho' he ſtands in the Place of the Huſband as to her Maintenance, and *a Husband is not bound to allow any Thing to his Wife for Maintenance if he offers to take her Home,* yet in this Caſe here lies no ſuch Obligation upon the Wife to live with the Son; and tho' ſhe refuſes, ſhe ought to have a reaſonable Allowance. *Per Cowper* C. who ordered her to be allowed 200 *l. per Ann. Trin.* 1 *Geo.* 1. *Dutton* and *Dutton & al'; Viner's Abr.* Tit. *Baron and Feme,* (X. a.) *Ca.* 18.

Mr. *Vizer* ſays, *note,* Lord Chan. allowed her to keep the Plate, *&c.* which ſhe bought, or was given to her by her Friends during the Separation. *Ibid.*

Prec. in Chan. 496. *Angier* and *Angier* S. C. *in totidem verbis.* 8. A Bill was brought by the Wife's *prochein Amy* againſt her Huſband for a ſpecial Execution of Articles, whereby the Huſband was to allow her 52 *l. per Ann. ſeparate Maintenance. Trin.* 1718. *Angier* and *Angier, Gilb. Eq. Rep.* 152, 153.

Ibid. S. C. and P. *in totidem verbis.* 9. Where a *Husband makes a ſeparate Proviſion for his Wife,* he is not chargeable by Law for her Debts, *per Cowper* C. —— But to avoid the Expence he might be put to in defending ſuch Suits, his *Lordſhip* ſent it to a Maſter to ſettle a Security to indemnify the Huſband againſt the Wife's Debts. *Ibid.*

Prec. in Chan. 496. 10. An Agreement between Huſband and Wife to live ſeparate, and that ſhe ſhall have a ſeparate Maintenance, ſhall bind them both till they agree to cohabit again. See the above Caſe of *Angier* and *Angier. Ibid.* 152, 153.

11. The Wife before her Marriage (*by her intended Huſband's Conſent*) *conveyed her real Eſtate to Truſtees, to ſuch Uſes as ſhe notwithſtanding her Coverture ſhould appoint*, and *aſſigned all her Mortgages* and *Bonds to her ſeparate Uſe*; but *after the Marriage* ſhe conſtantly *permitted her Huſband to receive the Intereſt* of theſe Securities, *without making any Complaint* either to the Debtors or her Truſtees. The Wife alſo conſented to ſell 10 *l.* a Year, *Part of her Land of Inheritance*, (*ſo ſettled by her as above*) for 200 *l. which the Huſband having received*, he *therewith founded a Charity for poor Widows*, and *gave a Bond for it to the Wife's Truſtees, to be paid to them within three Months after the Wife's Death for the Benefit of her Executors*; about ten Years after the Marriage the Wife died. *Macclesfield* C. decreed the Huſband's Executors (*out of the Aſſets*) to make good any Part of the Principal Money due upon any of the Securities, with Intereſt from the Huſband's Death; but as to the Intereſt received by him during the Coverture, as *it was againſt common Right that the Wife ſhould have a ſeparate Property from the Huſband* (they being both in Law but as one Perſon), ſo all reaſonable *Intendments* and *Preſumptions are to be admitted againſt the Wife* in this Caſe; and ſhe having for ten Years together permitted the Huſband to receive this Intereſt without making any Complaint, *&c. her Conſent ſhall be intended* (*a*).——As to the Wife's accepting the Bond for Payment of 200 *l. &c.* his *Lordſhip* held that this ſhould bind her, and *was a waiving of the Intereſt of the* 200 l. *during her Life*; that if ſhe would avoid this Bond (*b*), ſhe muſt prove that ſome *Fraud* was made uſe of in gaining her Acceptance thereof; that this being her *ſeparate* Eſtate, ſhe muſt *primâ facie* be *looked upon as a Feme Sole*, and that it was as *if a Feme Sole had accepted ſuch Bond, which would have bound her*; that it was reaſonable to ſuppoſe the Wife contributed to this Charity, it being to her own Sex. *Mich.* 1722. *Powell* and *Hankey and Cox*, 2 *Will. Rep.* 82, 83, 84.

Vide the Caſe of *Thomas* and *Bennet*, *P. Ca.*

(*a*) That any other Conſtruction might have been a Hardſhip to the Huſband, who (probably) depended on his Wife's permitting him to receive the Intereſt as a Gift, and on ſuch a Preſumption might have lived in a more plentiful Manner, the Comfort whereof ſhe muſt have ſhared in. That was ſhe allowed to make her Huſband a Debtor for this Money, (*which ſhe might do by the ſame Reaſon as now after his Death to charge his Executors*) it might ruin him, or in Caſe of his Death prove equally prejudicial to his Children. That tho' it was pretended ſhe was hindered from making her Demand by Reaſon of the Huſband's paſſionate Temper, (*which was not proved*) yet ſtill ſhe might have complained to her Truſtees, whom ſhe muſt be ſuppoſed to have had a Confidence in. *Per* Lord Chan. *Ibid.* 83. (*b*) It was impoſſible to miſapprehend ſo plain and expreſs Words as were in the Condition of the Bond, *viz. the* 200 l. *to be paid within three Months after the Wife's Death. Per* Lord Chan. *Macclesfield. Ibid.* 85.

12. Where there is a Proviſion for the Wife's ſeparate Uſe for *Clothes*, if the *Huſband finds thoſe Clothes*, the Wife's Claim will be thereby barred; that in the Caſe of a Wife's ſeparate Maintenance, *if it be not demanded by her*, ſhe will be concluded, even where ſhe has no other Perſon to demand it of but her *Huſband*; nor is it material whether the Allowance-Money be provided out of the Eſtate, which was originally the Huſband's, or (as in the principal Caſe) out of what was the Wife's own Eſtate, for in both Caſes her *not having demanded it for ſeveral Years together*, ſhall be conſtrued a *Conſent from her that the Huſband ſhould receive it* (*c*). *Per Macclesfield* C. *Mich.* 1722. *Powell* and *Hankey*, 2 *Will. Rep.* 82, 84.

In Caſe of ſeparate Maintenance if *the Huſband maintains the Wife*, it *bars her Claim* in Reſpect thereof. *Per* Lord Chan. *Ibid.* 84.

(*c*) As to the Point of the Arrears of ſeparate Maintenance not being demanded in the Huſband's Life-time, his *Lordſhip* cited the Caſe of Judge *Dormer* and *the Biſhop of Saliſbury*, *Hil.* 1712. *Ibid.* 85.

13. The Wife cannot have a *ſeparate* (*d*) *Property* in a *perſonal Thing* without a *Truſtee*. *Per Macclesfield* C. *Trin.* 1722. *in Caſu Burton*

(*d*) *Vide* the Caſe of *Bennet* and *Davis*, *P. Ca.*

Burton and *Pierpoint*, *which was in Caſe of Dowery Money claimed by the Widow as given to herſelf.*——*Vide* this Caſe, *P. Ca.*

14. *A.* before her Marriage, *with the Conſent of* B. *her then intended Huſband*, conveyed an Eſtate to her ſeparate Uſe, and after Marriage borrowed 25*l.* upon her Bond; ten Years afterwards ſhe made her Will, and thereby gave *ſeveral ſpecifick Legacies*, and made *C.* and *D.* Executors; on *A.*'s Death *B.* her Huſband poſſeſſed himſelf of 24*l.* of her Money, and then the Obligee brought a Bill againſt the Executors and *B.*—— *C. confeſſed Aſſets* (*a*), but *B.* inſiſted upon the Statute of Limitations; tho' a Bond given by a *Feme Covert* is merely void, and in that Reſpect differs from a Bond given by an Infant, which is only *voidable*; yet in this Caſe all the ſeparate Eſtate of the Feme Covert was a Truſt Eſtate for Payment of Debts, and a *Truſt is not within this Statute* (*b*), from whence it ſeems that the Plaintiff ought to be at Liberty to proſecute all the Defendants, in order to be paid out of the ſeparate Eſtate left by the Feme Covert; to which Purpoſe ſuch thereof as is undiſpoſed of by the Will ought to be firſt applied; and if that not ſufficient, then the Creditors to be paid out of the Money-Legacies given by the Feme; and ſuppoſing there is ſtill a Deficiency, all the ſpecifick Legatees ought to contribute in Proportion, and *all* the Executors to account for the Feme's perſonal Eſtate, *Coſts reſerved. Per the Maſter of the Rolls*, *Trin.* 1723. *Norton* and *Turvill*, 2 *Will. Rep.* 144.

(*a*) Several Executors, and ſome admit Aſſets, yet an Account ſhall be decreed againſt the Reſt;—for *per* his Honour, it cannot be material, ſo as to excuſe the other Defendants, that one of the Executors of the Feme Covert has admitted Aſſets, for *he might admit Aſſets, and yet have none*, nor *any Eſtate of his own*; and it would not be reaſonable that this ſhould prevent a Creditor from proſecuting the other Executor, or the Huſband, who may have poſſeſſed themſelves of Part of the ſeparate Eſtate, and ought to be reſponſible. *Ibid.* 145.

(*b*) *Vide* the Caſe of *Blakeway* and *Earl of Stafford.*

15. The Wife has a ſeparate Maintenance, with Power to diſpoſe of it by Will; ſhe accordingly makes a Will, and thereby gives away more than ſhe had to diſpoſe of. Decreed that the Huſband's Eſtate *in the Hands of another* (he being now dead) is *ſubject by Law to pay the Funeral Charges of his Wife. Cor'* the *Maſter* of the Rolls. *Trin.* 9 *Geo.* 1. *Bertie* and *Lord Cheſterfield*, 2 *Mod. Ca. in Law and Eq.* 31.

16. *A.* having *Lands* and a *perſonal* Eſtate *before* her Marriage, conveys *all her Eſtate to her ſeparate Uſe*, to which the *intended Huſband* was a Party; and he *covenanted that he would not interfere with it.* On this Eſtate there was a *Mortgage* for 300*l.* *which before theſe Conveyances* (executed *) *he verbally promiſed to diſcharge.* During the Coverture the Mortgage was aſſigned over, and *he covenanted* thus: *That I or my Wife ſhall pay it.* The Huſband and Wife lived with great Affection together, and *he conſtantly received all* the Profits of this ſeparate Eſtate. He died, having never paid off the Mortgage, leaving Children which he had by a former *Venter* Fortunes: Theſe the Wife maintained after his Deceaſe; ſhe brings her Bill, 1*ſt*, That her Huſband's Effects ſhould be applied to the Redemption of the Mortgage. 2*dly*, To have an Account of the Profits of her ſeparate Eſtate received by the Baron. 3*dly*, To have an Allowance for the Maintenance of his Children after his Deceaſe. It was decreed, that the Huſband's Effects ſhould not be charged to redeem the Mortgage, nor be accountable for the Profits of her ſeparate Eſtate received by him; and that the Maintenance ſhould be counter-balanced by the Intereſt of their Fortunes.——On a Rehearing, *King* C. ſaid, that there is no *Foundation to charge the Husband with the Payment of the Mortgage*, for by the *Statute of Frauds* it is *not a Charge, unleſs reduced into Writing*: All is at an End when there

* (Executed) not in the Original.

there is an Agreement in Writing; all the Converſation was only a previous Step. This is the ultimate Settlement of the whole Affair, on mature Conſideration of every Thing; *as between him and the Mortgagee he might be charged*, but *not by the Wife*.——As to *the Receipt of the ſeparate Maintenance*, if they lived together amicably, *it ſhall be looked upon as done by the Wife's Conſent*; as to the *Maintenance* ſhe has taken it upon herſelf, and it doth not appear but the Intereſt is ſufficient for that Purpoſe. Decree affirmed, *Trin.* 11 *Geo.* 1. *Chriſtmas* and *Chriſtmas*, *Sel. Ca. in Chan.* 20.

17. The Plaintiff's Wife had by cruel Treatment been forced to leave her Huſband, and carry away with her two young Children, which by her Labour, and Aſſiſtance of Friends, ſhe maintained without any Help from the Plaintiff. They lived thirty Years, or thereabouts, ſeparate; one of the ſaid Children being a Son and grown up, and ſettled in the World, became poſſeſſed of ſome perſonal Eſtate, and particularly of two ſeveral Bonds of 100 *l.* each, one on the *Eaſt-India* Company, and the other on one *L.* The Son being thus poſſeſſed made his Will, and thereby deviſed *L.*'s Bond to his Father (the *Plaintiff*) and gave the *Eaſt-India* Bond to his Mother to *her own Uſe, and ſo as his Father ſhould have nothing to do with it*, and made his Mother ſole Executrix and Reſiduary Legatee, and died. The Executrix proved the Will, and delivered *L.*'s Bond to the Plaintiff, who releaſed her as Executrix to her Son; after the Executrix growing old and infirm, offered the *Eaſt-India* Bond to Defendant, (with whom and in whoſe Family ſhe had lived as a Servant all or the greateſt Part of the Time ſhe was parted from her Huſband) and deſired he would take the ſame to maintain her for her Life, which the Defendant refuſed, whereupon ſhe applied herſelf to ſeveral others for the ſame Purpoſe, but ſuch Application proving fruitleſs, ſhe addreſſed herſelf again to the Defendant, who at laſt, in *Conſideration of her long and faithful Service*, and *long Continuance in his Family*, was prevailed with to come to ſuch Agreement with her, *but the ſame was only by* Parol, and not reduced into Writing; yet in Execution thereof the Defendant told and ſtrictly charged his Wife and only Son, in Caſe of his Death before them and the ſaid Executrix, to keep and maintain her as long as ſhe ſhould live, on the Conſideration aforeſaid, which they both promiſed to do. And the Executrix, in Execution of her Part of the Agreement went, with the Defendant, to the *Eaſt-India* Houſe, and ſhe received all the Dividends and Intereſt due on the ſaid Bond, and then cancelled the ſame, and directed a new one to be made in the Defendant's Name, and which was accordingly done. The Executrix dying in a Year's Time, or thereabouts, Plaintiff brought his Bill againſt the Defendant, and charged his ſaid Wife the Executrix with having eloped from him, and carrying this Bond away with her, and which he charged to be his Property. The Defendant by Anſwer inſiſted that ſhe did not elope, but was forced from the Plaintiff as aforeſaid: That ſhe was an honeſt, ſober and induſtrious Woman; that ſhe had maintained herſelf and Children as aforeſaid; that ſhe lived with the Defendant and in his Family the greateſt Part of the Time ſhe was from the Plaintiff; that ſhe always behaved herſelf very well, and that to the Plaintiff's Knowledge, who came ſeveral Times to ſee her at the Defendant's Houſe. The Anſwer alſo ſet forth the Bond in Queſtion ſo to have been the Plaintiff's Son's, and ſo deviſed to the Mother, and after veſted in the Defendant as aforeſaid, with all the Circumſtances above mentioned. On reading the Proofs, the Anſwer was well ſupported,

Grounds and Rudiments of Law and Eq. 120. *Ca.* 16. S. C. *in totidem verbis.*

ported, and particulary it appeared from the Evidence of the *Scrivener*, who drew the Will, that it was the *true Intention of the Teſtator that the* Eaſt-India *Bond ſhould be to the ſeparate Uſe of his Mother, free from all Controul* and *Interpoſition* of the Plaintiff. Bill diſmiſſed. The *Court declaring that the Meaning of the Teſtator was plain that this Bond ſhould be for the ſeparate Uſe of his Mother*, and *that he did but his Duty therein*; and *that the Agreement having been ſo executed as aforeſaid on both Sides, was of ſuch Sort as ought to be eſtabliſhed in a Court of Equity. Hil.* 11 *Geo.* 1. *Relſe* and *Budden, MS. Rep.*

In this Caſe the Plaintiff would have read *parol* Evidence to prove that the Teſtator did not intend theſe Lands ſhould be liable to the *Huſband*'s Debts. But the Court would not permit ſuch Evidence to be read, *it being in the Caſe of a Deviſe of Lands*, which by the Statute *muſt be all of it in Writing. Ibid.* 318.

18. *J. S.* deviſed Lands in *Fee* to his Daughter the Wife of *B.* *for her ſeparate* and peculiar Uſe, *excluſive of her Huſband*, to hold the ſame *to her* and *her Heirs*, and that her *Huſband ſhould not be Tenant by the Curteſy*, nor have theſe Lands *for his Life*, in Caſe *he ſurvived his Wife*, but that they ſhould upon the *Wife's Death* go to *her Heirs.* The Teſtator dies, and *B.* the Huſband becomes a Bankrupt; the Commiſſioners aſſign theſe Lands to *C.* in Truſt for the Creditors, and upon *C.*'s bringing an Ejectment, the Wife *by her next Friend* prefers her Bill againſt *C.* the Aſſignee and her Huſband, to compel them to aſſign over this Eſtate to her ſeparate Uſe. Sir *Joſeph Jekyll*, Maſter of the Rolls, took it to be a *clear* Caſe, that it was a Truſt in the Huſband, and that there was *no Difference* where the *Truſt was created by the Act of the Party*, and *where by the Act of Law.* As in Caſe of a Deviſe charging Lands with *Debts* or *Legacies*, the *Heir taking ſuch Lands by Deſcent* would be but a Truſtee, and no Remedy for theſe *Debts* or Legacies but in Equity; ſo in the *principal* Caſe there being an *apparent Intention* and *expreſs Declaration* that the *Wife ſhould enjoy theſe Lands to her ſeparate Uſe*, by that Means the *Husband*, who *would otherwiſe be intitled to take the Profits to his own Uſe during the Coverture*, is now *barred* and made *a Truſtee for his Wife:* And that if the *Bankrupt had been a Truſtee for J. S.* his *Bankruptcy ſhould not* in Equity *affect the Truſt Eſtate*; and that in the *principal* Caſe, tho' the *Huſband* might be *Tenant by the Curteſy*, yet he ſhould be but *a Truſtee for the Heirs of the Wife*; and that where the *Teſtator* had *a Power* to *deviſe the Premiſſes to Truſtees for the ſeparate Uſe of the Wife*, this Court, in Compliance with his declared Intention, will *ſupply the want of them*, and make the Huſband Truſtee; and the Aſſignee, who claiming under the Huſband, can have no better Right than the Huſband, muſt join in a Conveyance for the ſeparate Uſe of the Wife. Decreed *accord'*, *Mich.* 1725. *Bennet* and *Davis*, 2 *Will. Rep.* 316.

Viner's Abr. Tit. *Baron and Feme*, (E. a. 7.) *Ca.* 12. *Mich.* 1734. *Halſey* and *Badham* S. C. *accord'.*

19. *A.* by his Will gave two Legacies to his Daughter *B.* of 500 *l.* each, one of them for *her ſole and ſeparate Uſe, ſhe being married without a Settlement.* A Decree was obtained for placing out *theſe Legacies for* B.'s *Benefit.* *B.*'s Huſband, upon Petition to Lord Chan. *Macclefield*, obtained an Order (*his Wife conſenting*) for *one* 500 *l.* and the other 500 *l. by Conſent*, to be *laid out for the ſeparate Uſe of the Wife*; the Huſband and Wife (ſhe being 19) *join in an Aſſignment of the laſt* 500 l. *to ſecure a Debt to* D. and the *Husband becomes a Bankrupt. D.* brought a Bill againſt the Aſſignees under the Commiſſion, and alſo againſt the Huſband and Wife; and *King* Lord Chan. decreed the *Aſſignment good*, and the *Reſidue to be paid to the Aſſignees.* The Wife rehears, alledging that ſhe was poor, and not able to produce the Order of Lord *Macclesfield.* Objected, that the Order was voluntary, and did not bind Creditors. Objected alſo, that the Aſſignment was good, it being of her ſeparate Eſtate, tho' under twenty-

twenty-one; and that *Infants may execute a Power by an Attorney.* Lord Chan. As to the Objection, that the Order was voluntary, and did not bind Creditors, he ſaid, that is a hard Cenſure on the Proceedings of this Court, and ſuch Settlements are uſual Practice, and this preſent one is according to the Will. ——Where the Huſband makes a *voluntary* Proviſion for the Wife to take Place after his Death, it has been adjudged fraudulent, but *here it is ſet apart immediately.* As to the Aſſignment itſelf, he admitted that *if the Feme had been Sole it had not been good*; but the Caſe is ſtronger, *becauſe ſhe was a Feme Covert*; and though in Caſes of *meer Powers* or *Authorities Infants may execute, becauſe nothing moves from them*, yet this is *an Intereſt*, and *can no more be departed with* in Equity *by an Infant*, than by an *Infant's Aſſignment of a legal Eſtate* at Law. Decree varied, *Trin.* 1734. *Halſey* and *Badham*, *MS. Rep.*

(N) Concerning the Wife's Pin-Money (*b*).

(*b*) And Paraphernalia.

1. *J. S.* died, *having his Daughter's Portion left by her Grandfather in his Hands.* *J. S.*'s Wife had ſeveral Jewels, ſome whereof ſhe had before Marriage, others were bought by her during the Coverture, *J. S. allowing her a yearly Sum for her own Expences*, out of which ſhe ſaved Money to purchaſe thoſe Jewels; the Queſtion was, whether thoſe Jewels ſhould be liable to make good the Daughter's Portion, or whether the Wife ſhould have them as *Paraphernalia?* Ruled *per Finch* Lord Keep. That if there was not ſufficient for Payment of Debts, the Wife ſhould have no *Paraphernalia*; for it is not fit ſhe ſhould ſhine in Jewels, and the Creditors in the mean Time to ſtarve; and he ſaid, if the Wife ſhould have the Jewels, and her Daughter want Bread, this would be to turn the Childrens Bread into Stones. *Trin.* 1674. *Lady Tirrell's Caſe*, *MS. Rep.*

1 *Freem. Rep.* 304. *Trin.* 1674. *Lady Tyrrell's Caſe* S. C. *in totidem verbis.* As to the Wife's buying the Jewels with her own Money *during the Cohabitation*, that will make no Difference, for if the Wife out of her good Houſewifry ſaves any Thing out of her yearly Allowance, this will be the Huſband's Eſtate, and he ſhall reap the Benefit of his Wife's Frugality, *becauſe when he agrees to allow her a certain Sum yearly*, the *End of the Agreement is*, that *ſhe may be provided with Clothes and other Neceſſaries*, and *whatever is ſaved out of this redounds to the Huſband.* *Per* Lord Keep. *Ibid.*——But if there be a *Separation*, and the *Wife hath a ſeparate Maintenance*, there whatſoever ſhe ſaves ſhall be for her own particular Uſe; and ſo it was ruled *per* Lord *Coventry* in Sir *A. Gorge*'s Caſe; and the Reaſon there is, *becauſe when the Wife lives from her Huſband*, he is not liable to her Debts. *Per* Lord Keep. in S. C. who ſaid, he never *knew any* Paraphernalia *allowed but where the Party was Noble either by Birth* or *Marriage.* *MS. Rep.* and alſo 1 *Freem.* 304. in S. C.

2. *Paraphernalia* being only *Superfluities* and *Ornaments* to the Wife, is the *Reaſon the Law hath ſubjected them to the Husband's Debts*, rather than that his Creditors ſhould ſtarve; but where the Wife has a *ſeparate* Allowance *made before Marriage*, and *buys Jewels with the Money* ariſing thereout, *they will not be Aſſets liable to the Husband's Debts.* *Per* Lord Chan. *Trin.* 1710. *Willſon* and *Pack*, *Prec. in Chan.* 295, 297.

3. Upon a Marriage-Settlement *Pin-Money was reſerved for the Wife*, (viz.) 50 l. per Ann. *for her Apparel and private Expences*, ſecured by a Term for Years; the Huſband died, and ſoon after the Wife died, upon which her Executors demanded 500 *l.* for ten Years Arrears of this Pin-Money; but it *appearing* that the *Huſband maintained her*, and *no Proof that ſhe had ever demanded it*, this Claim was diſallowed. *King* C. *Hil.* 1725. *Thomas* and *Bennet*, 2 *Will. Rep.* 341.

Vide the Caſe of *Powell* and *Hankey*, *P.* 151. *Ca.* 11.

Courts of Equity have taken Notice of and allowed *Feme Coverts* to have *ſeparate Intereſts by their Huſband's Agreement*, and this 100 *l.* being the Wife's Savings, and here being Evidence that the Huſband agreed thereto, it ſeems but a reaſonable Encouragement to the Wife's Frugality, and ſuch Agreement would be of little Avail were it to determine by the Huſband's Death; that it was the ſtrongeſt Proof of the Huſband's Conſent that the Wife ſhould have a ſeparate Property in the Money ariſing by theſe Savings, in that he had prevailed with her to lend him this Sum, in which Caſe he did not lay Claim to it as his own, but ſubmitted to borrow it as her Money. *Per* Lord Chan. *Ibid.* 338.

4. An Huſband *voluntarily* and *after Marriage* allows his Wife for her *ſeparate Uſe* (calling it her Pin-Money) to make Profit of all Butter, Eggs, Pigs, Poultry and Fruit, beyond what is uſed in the Family, out of which the Wife ſaves 100 *l. which the Husband borrows*, and dies; the Wife was decreed to come in as a Creditor for this 100 *l.* before the Maſter, *eſpecially there being no Creditor of the Husband to contend with* (*a*). *Talbot* C. *Mich.* 1734. *Slanning & al'* and *Style & econt'*, 3 *Will. Rep.* 334, 337, 338, 339.

(*a*) The Court cited the Caſe of *Calmady* and *Calmady*, where there was the like Agreement made betwixt Huſband and Wife, that upon every Renewal of a Leaſe by the Huſband *two Guineas ſhould be paid by the Tenant to the Wife*, and this was *allowed to be her ſeparate Money*. *Ibid.* 339.——*MS. Rep. Stanway & al'* and *Styles & econt'*, *Mich.* 8 *Geo.* 2. S. C. ſtated thus: The *Huſband's Executors brought a Bill againſt the Wife for a Diſcovery of his perſonal Eſtate*, and the *Wife brought a Croſs Bill*, and (*inter al'*) *inſiſted upon being admitted a Creditor for* 100 l. *lent her Huſband, which ſhe had acquired by her Frugality*; for the Huſband allowing a certain Sum for Houſe-keeping, *agreed by* parol *that what ſhe could ſave out of that ſhe might apply to her own Uſe*; and the Agreement being proved, and alſo the Lending the Money, Lord Chan. decreed that ſhe was a Creditor, and intitled to the Money; and cited *Calmady* and *Calmady*, where the Wife had ſeveral Hundred Pounds on ſuch a parol Agreement, and the Money allowed to her by this Court; and *Fazakerly*, Counſel with the Woman, cited *Bains* and *Ballat*, where the Huſband gave the Wife ſeveral broad Pieces, and decreed that ſhe ſhould retain them after his Death; and in *Mangey* and *Hungerford*, where the Wife had ſaved a conſiderable Sum of Money out of Houſe-keeping, and a Bill being brought againſt her for a Diſcovery of what ſhe had ſaved, ſhe inſiſted ſhe was not bound to a Diſcovery; and on Exceptions the Anſwer was held ſufficient. By Lord *King*. In the principal Caſe the Widow claimed her Gold Watch, and ſeveral Gold Rings, given at the Burial of Relations, as her *Paraphernalia*. And the ſame was decreed her by *Talbot* C. *Ibid.*

5. An Huſband on Marriage and in Conſideration of a conſiderable Portion, ſettled 100 *l. per Ann.* Pin-Money, in Truſt for his Wife for her ſeparate Uſe, which becomes in Arrear; and then the Huſband by Will gives the Wife a Legacy of 500 *l.* after which there is a farther Arrear of the Pin-Money, and then the Huſband dies; the Legacy being greater than the Debt, ſhall be a Satisfaction of the Arrears of the Pin-Money due before the making of the Will. *Talbot* C. *Eaſt.* 1735. *Fowler* and *Fowler*, 3 *Will. Rep.* 353.

6. Where *Pin-Money* is ſecured to the Wife, and the *Huſband provides her with Clothes* and *Neceſſaries*, this during ſuch Time as ſhe is ſo provided will be a *Bar* (*b*) *to any Demand for her Arrears of Pin-Money*. *Per Talbot* C. in the *above* Caſe, *Ibid.* 355.

(*b*) *Vide* the Caſe of *Powell* and *Hankey* and *Cox*, *P.* 151. *Ca.* 11. and *Thomas* and *Bennet*, *P.* 155. *Ca.* 3.

7. If a Lady has *Pin-Money ſecured by a Term*, and *runs away* and *lives in Adultery*, and the *Truſtees proceed at Law to recover the Term*, it ſeems they will be reſtrained; for *Pin-Money was never deſigned to make Women independant of their Husbands*, and *ſupport them in Vice*. But if *ſhe left him by ill Uſage*, or other reaſonable Grounds, or the *Husband acquieſced in her Departure*, Equity won't interpoſe. *Sir R. More* and *Earl of Scarborough* (*c*), *MS. Rep.*

(*c*) Q. What *Term* and *Char.*

(O) In what Cases a Will made by a Feme Covert is good.

1. IN this Case it was declared *per* Lord Chan. That if the Wife do make a Will and give Legacies, *&c.* altho' the Husband did promise her to perform it, and gave her Leave to make it, nay altho' he did after the Death of the Wife assent to it, *yet he is not bound by it*, and the *Performance of it in him is only honorary*, unless *he did agree before Marriage that she should do it*, and *then he will be bound by his Agreement*; but *all Promises after*, nay if *the Wife makes him Executor*, and *he proves the* Will, yet *he is bound no farther than in Honour*, for the *Will of a Wife is a void Thing*, and it is in Strictness no Will; —— And if a *Bond be given to perform the Will of a married Woman*, and *she makes a Will, it hath the Import of a Writing*, and *nothing else*. *Trin.* 1681. *Chiswell* and *Blackwell, MS. Rep.*

2 *Freem. Rep.* 70. S. C. *in totidem verbis.* —— A Feme Covert cannot make a Will *even as Executrix* without her Husband's Consent. *Per Holt* C. J. *Mich.* 11 *W.* 3. *Richardson* and *Seise, Ca. in B. R. Temp. W.* 3. Where a Woman is *Executrix* and *marries*, there she may make a Will *with Consent of her Husband*. *Per Holt* C. J. *Hil.* 1 *Ann. B. R.* 1 *Salk.* 313. *Ca.* 20. —— *Went. Off. Exec.* 201. says, she may make a Will of such Goods which *she has as Executrix*; and if she make a Will of Goods which she has as *Executrix*, and *of Debts otherwise due to her*, the Will is good as to the first, and void as to the last; and in such Case her Executor shall take the first, and the Husband as Administrator the last, so that in such Sense she dies testate and intestate, and having both an Executor and Administrator. —— But in *Cases in B. R. Temp. Ann. P.* 221. *Ca.* 14. *Easter.* 8 *Ann.* it is said, that a Feme Covert *cannot devise what she has as Executrix* without her Baron's Assent; and therefore a Prohibition was granted to the Spiritual Court to hinder the Proving such Will.

2. A *Feme Covert* has Power given by her Husband to make a Will; Probate of such Will *per Testes* is sufficient Proof, because as to that Purpose the Husband has made her a *Feme Sole*, and no Prohibition will lie. *Mich.* 1697. *Balch* and *Wilson, Prec. in Chan.* 84.

3. Though in *Strictness a Feme Covert cannot make a Will*, yet being *impowered to make a Writing in Nature of a Will*, the Writing will operate as a Will. *Per King* C. *Trin.* 1723. 2 *Will. Rep.* 624.

4. Where a Power is given to a Woman to dispose by Will, and she afterwards marries, it was decreed that the Marriage is a Suspension of her Power; but *if she survives her Husband, the Power revives.* But *quære inde*; for the *Lords sent to have the Opinion of the Judges upon it. February* 9, 1727. *Rich* and *Beaumond*, *Viner's Abr.* Tit. *Baron and Feme*, (R. a.) *Ca.* 26.

• 5. A Woman's Marriage is a Revocation of her Will. *Per King* C. *Trin.* 1731. *in Casu Cotton* and *Layer*, 2 *Will. Rep.* 624. *Vide* 4 *Rep.* 61.

(P) Divorce; Cases in general relating thereunto.

1. THE Bill was brought by a Widow to have *Dower of her Husband's real Estate*, and *a Share of his personal Estate, for herself and Child by him*; he dying intestate, and *Administration granted to another*, because there was a Divorce between them *à Mensâ & Thoro.* The *Master of the Rolls* said, she must go to Law to try if she was intitled to Dower, there being no Impediment; and as to that he dismissed the Bill. The *granting Administration is in the Ecclesiastical Court*, but the *Distribution* does *more properly*

Prec. in Chan. 111. S. C. *accord.*

belong to this Court; but ſince in the *Eccleſiaſtical Court ſhe is not ſuch a Wife as is intitled to Adminiſtration*, his Honour would decree *no Diſtribution*, but diſmiſſed the Bill as to that too; and ſaid, if *ſhe could repeal that Sentence ſhe would then be intitled to Diſtribution. Eaſt.* 1700. *Shute* and *Shute*, *MS. Rep.*

2. A Feme Sole being poſſeſſed of a Term for Years, married *J. S.* who was afterwards divorced *à Menſâ & Thoro*, and *ſhe had Alimony allowed her*; and the Huſband intending to ſell the Term, an Injunction was moved for, which the Court denied at firſt to grant, *becauſe the Divorce did not deſtroy the Marriage*; but that the *Merits of the Cauſe might come before the Court*, and on Conſideration of the Hardſhip of the Caſe, and that the Wife could have no Remedy if this Term was ſold, an Injunction was granted; for though the *Marriage continues notwithſtanding the Divorce*, yet *the Huſband does nothing as Huſband*, nor *the Wife as Wife. Trin.* 9 *Geo.* 1. *Anon. MS. Rep.*

2 *Mod. Ca. in Law and Eq.* 43. S. C. and P. ſays, the Injunction was at firſt denied; for *per Cur'*, ſuppoſing the Huſband had been intitled to this Term in his own Right before Marriage, and afterwards had been divorced from his Wife, and ſhe had Alimony allowed, this Court would never have granted an Injunction to hinder him from ſelling; and certainly *whilſt the Marriage continues*, (as it does notwithſtanding the Divorce) he hath the ſame Power to diſpoſe the Term which he hath in Right of his Wife as if it had been in his own Right; but at laſt an Injunction was granted for the Reaſons in the *MS. Rep.*

3. In Caſe of a Divorce *à Menſâ & Thoro*, Baron and Feme live ſeparately, and the Feme has a Child; this is a Baſtard, for the Court will intend Obedience has been paid to the Sentence. *Eaſt.* 1734. *in Caſu Sidney* and *Sidney*, *Talbot* C. 3 *Will. Rep.* 275.

CAP. XV.

Bills.

(A) In what Cases a Bill will lie, & econt'; —— And by whom it may be brought.
(B) Who are to be Parties to a Bill.
(C) Bills of Diſcovery.
(D) Bills of Peace.
(E) Supplemental and amended Bills.
(F) Bills of Interpleader.
(G) Bills of Review.
(H) Bills Original after a Decree.
(I) Bills taken pro Confeſſo.
(K) Bills of Revivor.
(L) Bills to examine Witneſſes in perpetuam rei memoriam (*a*).

(*a*) *Vide* alſo Tit. *Evidence*, *P.*

(A) In what Caſes a Bill will lie (*b*), & econt'; —— And by whom it may be brought.

(*b*) *Vide* (A) *P.* 15.

1. A. Recovered a Judgment againſt the Defendant's Father, and Plaintiff (*the Sheriff's Officer*) levied 20 *l.* of Goods in the Father's Poſſeſſion; the Defendant brought Trover againſt the Plaintiff, pretending the Goods were ſold to him by a Bill of Sale, but on Evidence the Sale was proved fraudulent; whereupon a Verdict was directed to be given for the Defendant, but *for want of his proving a Copy of the Judgment*, as *it was held he ought*, the Jury, *for that Reaſon only*, found for the Plaintiff. On a Bill brought for Relief, the Defendant by his Anſwer inſiſted on his Property under the *Bill of Sale* and *Recovery at Law*, where the Matter is properly triable, and relied on that without going to Proofs; but the Plaintiff fully proved his Caſe, and that the *Judge altered his Directions only for want of Proof of the Judgment*, and diſproved the Anſwer in ſome Particulars. A perpetual Injunction was granted againſt the Judgment, and the Defendant to pay Coſts; for *though it was examinable at Law, ſo it was in Equity too*; and Plaintiff having ſet out the whole Matter, and proved it to be true, if it were not ſo, the Defendant might have diſproved it. *Trin.* 1704. *Kent* and *Bridgman*, *MS. Rep.*

Prec. in Chan. 233. *Trin.* 1704. *Kent* and *Bridgman* S. C. and P. almoſt *in totidem verbis* ſays, the Defendant in Equity demurred to the Bill, which on arguing was overruled, and then Defendant anſwered, inſiſting on his Property, *&c.*

2. Bill lies to perpetuate Teſtimony, *&c. before Trial*, on *Affidavit* annexed that the *Plaintiff's Witneſſes are infirm* and *unable to travel*. *Hil.* 1709. *Philips* and *Carew*, 1 *Will. Rep.* 117.

3. A Bill does *not lie for an Owner of a Quit-Rent*, in order to *ſettle what Proportion his Quit-Rent ſhall pay to the Land-Tax*, and *ſuch a Bill was diſmiſſed with Coſts*. *Per Cowper* C. *Mich.* 1716. *Brockman* and *Honywood*, 1 *Will. Rep.* 328.

4. Bill to ſet aſide Leaſes made purſuant to a Power *diſmiſſed*, becauſe a *Matter purely determinable at Law*, *i. e.* whether the Power was well executed or not.——And *per Jekyll*, Maſter of the Rolls, if a Bill is brought for a Matter properly determinable at Law, Defendant ought to demur, and not ſuffer the Cauſe to go on to a Hearing; and if the Bill be diſmiſſed upon Hearing, Defendant ſhall not have Coſts; and where the Title is purely Matter of Law, though the legal Eſtate is veſted in Truſtees, the *Ceſtuy que Truſt* ought firſt to apply to the Truſtees to make Uſe of their Names at Law before he brings a Bill in Equity; for a Bill in ſuch a Caſe is only neceſſary where the Truſtees refuſe their Names to be made Uſe of in an Action to determine the Right. *Eaſt.* 4 *Geo.* 1. *Tichburn* and *Leigh*, *Viner's Abr.* Tit. *Coſts*, (Q.) *Ca.* 14.

5. Bill for Diſcovery of the Conſideration of a promiſſory Note for 275 *l.* ſuggeſting that it was given *ex turpi cauſa* to ſmother and make up a Felony, *&c.* Defendant by his Anſwer ſays, that he loſt ſuch a Sum, and verily believes that it came to Plaintiff's Hands, and that was the real Conſideration of giving the Note. *Cowper* C. diſmiſſed the Bill with Coſts; for what the Defendant has ſworn, (not being diſproved) is a ſufficient Conſideration to ſupport the Note. *Mich.* 4 *Geo. Guiborn* and *Fellows*, *Ibid.* Tit. *Conſideration*, (B) *Ca.* 20.

6. In Caſe of a Bargain for Corn, to be delivered upon a Day certain at ſuch a Market, at ſuch a Price, and the Corn is not delivered according to the Contract, the Buyer ſhall not by a Bill in Equity compel the Seller to a ſpecifick Performance of this Agreement, but is left to his Remedy at Law for Breach of the Agreement to recover Damage, (*i. e.*) the Difference between the Price agreed on by the Parties, and the Price of Corn upon the Market Day. Said by Lord Chan. *Parker* in *Cuddee* and *Rutter*, *Trin.* 6 *Geo.* 1. *Ibid.* Tit. *Contract and Agreement*, (M) *Ca.* 21.

7. Defendant agreed with Plaintiff to transfer to him 1000 *l. South-Sea* Stock, upon 20 *November*, at the Rate of 104 *l. per Cent.* and gave him a promiſſory Note for ſo doing, and received two Guineas of Plaintiff in Part of Conſideration Money; but Defendant in drawing the Note had put in the uſual Words, (or pay the Difference) which Plaintiff ſtruck out, and then Defendant ſigned the Note. Afterwards, and before the Time of delivering the Stock, the *South-Sea* Stocks roſe in Value, and Defendant did not deliver the Stock at the Day, but a few Days after offered to pay the Difference, and ſubmits ſo to do by his Anſwer; but Plaintiff inſiſts to have the Stock actually transferred to him. *Jekyll*, Maſter of the Rolls, decreed a ſpecifick Performance of the Contract, and that Defendant do transfer the Stock, and pay the Dividends ſince 20 *November*; Plaintiff to pay Intereſt of the Money to that Time, and to have his Coſts. But on an Appeal *Parker* C. reverſed the Decree, declaring that he would always diſcourage Bills of this Kind; but ſince the Defendant did ſhuffle with Plaintiff, and not offer to pay him the Difference till two Months after the Day, he would not diſmiſs the Bill; but the Maſter to inquire what the Difference was at the Day, and Defendant to pay it to Plaintiff with Intereſt, but no Coſts. *Trin.* 6 *Geo.* 1. *Cuddee* and *Rutter*. *Ibid.*

8. Bill for a ſpecifick Performance of a Contract for 1000 *l. York Buildings* Stock, at 105 *l. per Cent.* diſmiſſed, for that this Court will not carry theſe Sorts of Contracts into Execution, but leave the Parties to their Remedy at Law for the Difference, but no Coſts, becauſe the Defendant's Anſwer was falſified in ſeveral Particulars. *Per Macclesfield* C. *Trin.* 8 *Geo. Doriſon* and *Weſtbrook, Viner's Abr.* Tit. *Contract and Agreement*, (M) *Ca.* 22.

9. Where Papiſts are not diſabled by the *Stat.* 11 & 12 *W.* 3. to bring a Bill, *vide* the Caſe of *Carrick* and *Errington* (*a*), *Trin.* 9 *Geo.* 1. 2 *Mod. Caſes in Law and Eq.* 33.

(*a*) *Vide* this Caſe, *P. Ca.*

10. An Ejectment was brought by *A.* upon a Leaſe for Years made to *B.* rendring Rent, with a *Clauſe of Re-entry for Non-payment of the Rent*, and *for Non-performance of the Covenants*, and the *Breach was aſſigned generally* for Non-performance of the Covenants in the Leaſe, and *A.* proved a Breach of Covenant for *not keeping of a Barn well thatched*; thereupon *A.* had a Verdict, and *B.* was turned out of Poſſeſſion, and then *A.* dies. The Bill was exhibited againſt *A.*'s Adminiſtrator to be *relieved againſt the Verdict*, and to *have a new Leaſe granted for ſo much of the Term of the firſt Leaſe which was not expired.* Lord Chan. ſaid, he could not apprehend what Damages the *Adminiſtrator* could ſuſtain if the *Leſſee* ſuffered the Buildings to be out of Repair, ſo as he kept the main Timber from being rotten, and left all in good Repair before the End of the Term; therefore it was referred to a Maſter to ſee what Damage was done (if any) for Non-performance of Covenants, and at what Time. *Hil.* 10 *Geo.* 1. *Hack* and *Leonard*, 2 *Mod. Ca. in Law and Eq.* 90.

MS. Rep. Hil. 10 *Geo.* 1. S. C. *accord.*

11. A *Bill to compel Truſtees to enter to preſerve contingent Remainders*, is of the firſt Impreſſion, for *their Title is merely at Law. Per* Lord Chan. *Hil.* 11 *Geo.* 1. *in Caſu Neeves* and *Neeves* (*b*), 2 *Mod. Ca. in Law and Eq.* 132.

But every *Remainder-man* hath a Right to come into a Court of Equity and pray the Aid thereof, to compel Perſons to bring in the Deeds and Evidences relating to the Eſtate. Said *per* Lord Chan. *Ibid.*

(*b*) *Vide P. Ca.*

12. A Bill in Equity lies to have a Trial at Law for the Bounds of a Manor. *October* 27, 1726. *Lethulier* and *Caſtlemain*, *Sel. Ca. in Chan.* 60.

On ſuch a Bill each Side muſt give Notes of the Bounds they claim; and if the Jury find Bounds different from the Notes given by either Side, thoſe different Boundaries to be indorſed on the *Poſtea*. The Biſhop of *Durham*'s Caſe;—And ſo it was ordered in the preſent Caſe; only it being a Trial at Bar, it was ordered to be indorſed on the *Habeas Corpus*. — Same Order made *November* 4, 1726. *Hughes* and *Grames. Ibid.* 61.

13. Equity *will never countenance Demands of an unfair Nature* (*c*); as in the particular Caſe it was for attending at Auctions as a Puff to enhance the Price of Goods; nor will Equity ſuffer them to be ſet up againſt juſt and fair Demands. In an Account a Croſs Bill for ſuch Purpoſe diſmiſſed with Coſts. Before the Houſe of Lords, 6 *March* 1726. *Walker* and *Gaſcoigne*, *Grounds and Rudiments in Law and Eq.* 89.

Viner's Abr. Tit. *Fraud*, (A. a.) *Ca.* 12. S. C. cited as from a *MS. Rep.* ſaid to be Lord *Harcourt*'s.

(*c*) Rule; *Equity will prevent* or *redreſs Wrongs and Miſchiefs*, and *relieve againſt Fraud.*

14. Bill to be relieved againſt a Forfeiture for Non-payment of Rent, by a Tenant at a Rack-Rent, after a Recovery in Ejectment. Decreed, that upon Payment of the Rent and Coſts at Law and in Equity, Defendant make a new Leaſe for the Remainder of the Term to *Plaintiff*, but a Covenant to be inſerted for the Tenant to repair during the Term, *tho' no ſuch Covenant was in the former Leaſe. King* C. *Mich.* 12 *Geo. Taylor* and *Knight*, *Viner's Abr.* Tit. *Chancery*, (Y) *Ca.* 31.

His Lordſhip ſaid, he did not like giving Relief in theſe Caſes after a Judgment at Law, but that the Precedents were too ſtrong for him. *Ibid.*

15. *In ſome Caſes a Bill in Equity lies to be relieved after a Verdict at Law*; for *per* the Maſter of the Rolls, though the Court ought to be very tender how they help any Defendant after a Trial at Law *in a Matter where ſuch Defendant had an Opportunity to defend himſelf* (*a*); yet in ſome Caſes Equity will relieve; as if the *Plaintiff at Law recovers a Debt*, and *the Defendant afterwards finds a Receipt under the Plaintiff's own Hand for the Money in Queſtion.* Here the Plaintiff recovered by Verdict againſt Conſcience, and though the Receipt were in the Defendant's own Cuſtody, yet not being then appriſed of it, he ſeems intitled to the Aid of Equity, it being *againſt Conſcience that the Plaintiff ſhould be paid twice.* —— So if the *Plaintiff's own Book appeared to be croſſed, and the Money paid before the Action brought. Mich.* 1727. *in Caſu Gainſborough* (*Counteſs of*) and *Gifford*, 2 *Will. Rep.* 425, 426.

(*a*) Where one *recovered in Trover againſt a Servant of the* African *Company*, on a Bill brought againſt the Plaintiff at Law, *Equity would not relieve*, becauſe the *Plaintiff in Equity might at Law have defended himſelf. Trin.* 1703. *Langdon* and *the African Company, Prec. in Chan.* 221.

16. A Bill in Equity will not lie to redeem a Mortgage of Chambers in an Inn of Court, (*where the Students are to enjoy Quiet without Diſturbance*) but the Plaintiff muſt apply to the Bench, and if not redreſſed there, then to the Judges of the Society, and the Courts at *Weſtminſter* have always declined meddling therein; and in the preſent Caſe the Maſter of the Rolls ſaid, he would not meddle with it; but the Benchers themſelves having recommended it to Plaintiffs to come hither, and left them at Liberty to make this Application, his Honour was of Opinion that the Bill was proper, and decreed a Redemption. *Hil.* 1728. *Rakeſtraw & al'* and *Brewer*, 2 *Will. Rep.* 511. —— Decree *affirmed* by *Lord King* (*b*) upon an Appeal, 12 *July* 1729.

(*b*) *Sel. Ca. in Chan. Trin.* 11 *Geo.* 1. S. C. ſays, his Lordſhip obliged them to ſhew that the Benchers of *Gray's Inn* would not determine the Matter, but had given Leave to go to Law; and ſaid, this Regard was to be had to all the Societies of Law, that all their Diſputes may be terminated among themſelves; and that Lord Keep. *Wright* refuſed to hear a Cauſe of this Nature, and ſent it back to the Benchers. In the preſent Caſe the Court determined the Right, and ordered that the Benchers ſhould ſettle what was due for Principal, Intereſt and Coſts, and to take an Account of the ſeveral Receipts and Allowances.

17. *One Tenant of a Manor* cannot bring a Bill *to quiet him in a cuſtomary Right which is common to all the other Tenants.* 3 *July* 1729. *Baker* and *Rogers* (*c*), *Sel. Ca. in Chan.* 74.

(*c*) *Vide* this Caſe, (D) *P. Ca.*

18. Aſſignee under a Commiſſion of Bankruptcy died very much indebted by Bond, *&c.* and the Bankrupt's Creditors *petitioned that the Adminiſtrator of the Aſſignee might account before the Commiſſioners, he having ſome of the Bankrupt's Effects* in Specie *in his Hands*; but the *Adminiſtrator denying this upon Oath*, and *ſwearing that there were Debts by Specialty beyond the Aſſets*, the Court thought this proper for a Bill, *and not for a ſummary Way of accounting before the Commiſſioners. Trin.* 1729. *Ex parte Markland* (*d*), 2 *Will. Rep.* 546.

(*d*) *Vide* Tit. *Bankrupt*, *P.* 101. *Ca.* 6.

19. A Tenant having a Right to deduct for the Land-Tax, does not deduct, but pays his full Rent; a *Bill will not lie to recover back the Tax which ought to have been allowed* (*e*); for the *Tenant might, if*

(*e*) So held by the *Lord Harcourt*, in the Caſe of *Wildey* and *the Coopers Company, Mich.* 1713. where the *Bill was brought by a Tenant to be relieved out of the Arrears of Rent for the Taxes he had actually paid, on Account of Rent reſerved to a Charity that appeared to be exempted from Taxes*; and the *Bill was diſmiſſed with Coſts.*—But more particularly in the Caſe of *Atwood* and *Lamprey*, at the Rolls, before Sir *J. Jekyll, Mich.* 1719. where the Caſe was, *One in* 1683. *in Satisfaction of a Widow's Dower, mortgaged Lands on Condition to pay her* 20 *l. per Ann.* whereupon the Court held, that this being *an annual Payment ſecured by Land*, ſhould anſwer Taxes in Proportion as the Land paid; but *refuſed to make the Annuitant refund in Reſpect of the Payments ſhe had received Tax free*, and *for which the Party paying had omitted to deduct.* 3 *Will. Rep.* 128. *in a Note.*

if he pleaſed, waive deducting the Tax. Said *arg' in Caſu Eaſt & Ux'* and *Thornbury, Hil.* 1731. 3 *Will. Rep.* 126, 127.

20. Bill was brought againſt three of the Truſtees of the *Sun-Fire Office* to make good a Loſs by Fire, *&c.* Plaintiff had a Policy, upon which he uſually paid 2 *s. per* Quarter, and which by the Propoſals was to be paid on the Quarter-Day, or within 15 Days after; and the Method of collecting the Money was by the Agents of the Office calling at the Perſons Houſes, which they ſometimes did within the 15 Days, and ſometimes a few Days after; Plaintiff's Policy expired at *Michaelmas* 1727. and the 15 Days were out, and 14 *October* the Agent of the Office did not call for the 2 *s.* and on the 15th of *November* following Plaintiff's Houſe was burnt. *A.* the Agent of the Office, examined for Plaintiff, ſwore, that if the Fire had not happened he ſhould have called on Plaintiff for his Quarterage the 6th or 7th of ſame *November.* Lord Chan. *King:* In Law this Policy is an Agreement to inſure Quarterly as long as the Parties pleaſe. This Inſurance was on Books, and the Party to pay Quarterly; the Continuance, or not, depends on the Act of the Party inſured, (*viz.*) on his paying 2 *s. per* Quarter; and upon his paying at the Quarter, or within 15 Days after, the Inſurers covenant to pay, *&c.* the Loſs. And in a Declaration at Law the Payment within the 15 Days muſt be averred. If the Office had diſpenſed with the Time, and taken the Premium after, this Court would have held them to it. But here it was neither paid nor tendred; the Officer is appointed a Collector for the Benefit and Eaſe of the Perſons paying, *&c.* and to prevent any Miſunderſtanding, there is a Memorandum on the very Receipts; that the Payment after the 15 Days was not to diſpence with the Term, and the Agent had no Authority after the 15 Days to take the Money. The Premium is the Conſideration, and is to precede; and if the 15 Days be not the Time, what ſhall be the Time within which it ſhall be neceſſary to pay? Bill diſmiſſed. *Mich.* 4 *Geo.* 2. *Fiſher* and *Brocas, Viner's Abr.* Tit. *Contract and Agreement,* (F) *Ca.* 17.

21. If a Man *claims Lands in Equity, but knows not the Bounds,* Equity will grant a *Commiſſion* to aſcertain them *when the Right is eſtabliſhed*; but *if the Right be not ſettled,* the Party will be left to his Remedy at Law. *Chapman* and *Spencer, Mich.* 5 *Geo.* 2. *MS. Rep.*

22. A *Bill cannot be brought by a ſingle Copyholder to be relieved againſt an exceſſive Fine* (*a*), becauſe this ought to be tried by a Jury; but a *Bill may be brought in order to ſettle a general Fine to be paid by all the Copyhold Tenants of a Manor,* to prevent a Multiplicity of Suits; and that with this Diverſity were the Caſes of *Middleton* and *Jackſon,* 1 *Chan. Rep.* (8*vo.*) 33. and *Popham* and *Lancaſter, Ibid.* 96. to be underſtood. Said *per King* C. *Mich.* 1732. *in Caſu Cowper* and *Clerk,* 3 *Will. Rep.* 157.

(*a*) Such a Bill diſmiſſed *with Coſts, Mich.* 1732. *Cowper* and *Clerk, per King* C. *Ibid.* 155.

23. A Bill in Equity *lies not for a Satisfaction where the Thing ſounds in Damages,* though it does to confirm a Cuſtom. *Bovey* and *Tracey in Scacc', Trin.* 6 *Geo.* 2. *MS. Rep.*

24. Bill *lies to compel a ſpecifick Performance of an Award,* where the Party ſubmitting has received the Money, in Conſideration whereof he is to convey the Eſtate ſued for. Decreed *per* Sir *Joſeph Jekyll,* Maſter of the Rolls, *Trin.* 1733. *Hall* and *Hardis,* 3 *Will. Rep.* 187.

Vide Tit. *Agreements, &c.* S. C. *P.* 28. *Ca.* 35. and the *Notes there.*

25. Lord of a Manor brings a Bill againſt a Tenant, *to hold a large Down belonging to the Manor, diſcharged of the Tenant's Claim of*

a Right of Common thereon; this is an *improper* Bill, and ſuch a Bill was diſmiſſed with Coſts *per Talbot* C. (*a*), *Eaſt.* 1734. *Holder* and *Chambury* (*b*), 3 *Will. Rep.* 256.

(*a*) For by the ſame Reaſon the Lord may bring a ſeparate Bill againſt every Tenant of this Manor who ſhall ſet up the like Claim. Said *per* Lord Chan. *Ibid.* 257. (*b*) *Vide P. Ca.*

26. But a *Bill to recover a Quit-Rent may be proper in ſome Circumſtances*; as *where the Lands out of which it is claimed are wholly uncertain* (*c*); and *where the Days on which the ſame is paid are alſo uncertain*: But *then theſe Things ought to be laid in the Bill*, elſe a Landlord may be very vexatious to a Tenant, and make him ſpend in his own neceſſary Defence more than three Times the Value of the Rent. Said *per* Lord Chan. *Talbot*, in the Caſe of *Holder* and *Chambury* (*d*), *ibid.* 257.

(*c*) *Vide* the Caſe of *North* and *the Earl and Counteſs of Strafford*, *P. Ca.* Alſo that of *the Duke of Bridgwater* and *Sir Francis Edwards*, *Bart.* upon an Appeal in Parliament from a Decree of the Court of Exchequer, *February* 1733. 3 *Will. Rep.* 257, cites it as taken from the Reporter's MS. (*d*) *Vide P. Ca.*

27. A Bill in Equity lies not to compel the Performance of an Agreement to pay Money in Conſideration of having ſtifled a Proſecution for Felony; *ſecus* if to ſtop a Proſecution at Law for a *Fraud* (*e*). *Eaſt.* 1734. *in Caſu Johnſon* and *Ogilby & al'*, 3 *Will. Rep.* 277.

(*e*) Rule; *Matters of Fraud are cognizable in Equity as well as at Law.* 2 *Will. Rep.* 156, 220. 3 *Will. Rep.* 279.

28. A Bill lies in Equity to compel the Delivery of an Altar-piece *undefaced*. *Talbot* C. *Mich.* 1735. *Duke of Somerſet* and *Cookſon*, 3 *Will. Rep.* 390.

29. Creditors may have a Bill for Relief againſt Executors. *Vide* the Caſe of *Morrice* and *the Bank of England* (*f*), *Mich.* 1736. *Caſes in Eq. Temp. Talbot* 217.

(*f*) *Vide* this Caſe, *P. Ca.*

30. A Bill *lies not to aſcertain the Bounds of a Manor in Part*, unleſs Plaintiff eſtabliſh by Proof what Shares he claims. *Sir John Webb* and *Banks*, *Eaſt.* 12 *Geo.* 2. *MS. Rep.*

31. Bill was to *compel an Account of an Oyſter Fiſhery*, and *for an Injunction to prevent Defendant's taking any more Oyſters*, and to *eſtabliſh Plaintiff's Title*, which was ſet forth under a Grant from *Jac.* 1. under which Plaintiff's Anceſtors had been poſſeſſed until 1709. when Defendant, under Pretence of a Grant from K. *Charles* the Firſt, got into Poſſeſſion. Defendant *demurred* to every Thing *but the Diſcovery of his Title*, becauſe *Plaintiff's Right was triable at Law*, and not to be aſcertained here. Demurrer allowed, for that a *Bill lies not againſt a ſingle Perſon to eſtabliſh a Title before a Trial at Law* (*g*);— And though a Lord of a Manor may come into Equity before his Title at Law aſcertained;—— Or where ſeveral Perſons claim the ſame Right, to prevent *Multiplicity of Suits* (*h*), (becauſe a Trial of one Perſon's Right cannot bind the others) the Court will entertain the Bill as a *Bill of Peace*, and *direct one Iſſue*, *which may bind all*; yet *where one Trial at Law would aſcertain the Plaintiff's whole Right* and Title, *ſuch Trial ought firſt to be had.*——And as to the Account of Oyſters taken, that is a *mere Action for meſne Profits*, *which Plaintiff might ſupport after a Recovery in Ejectment*. *Lord Teynham* and *Herbert*, 18 *December* 1742. *Cor'* Lord *Hardwick* at *Lincolns-Inn Hall*, *MS. Rep.*

(*g*) Note this.

(*h*) Rule; *Equity is to prevent Multiplicity of Suits*, or *Circuity of Actions.*

I

(B) Who are to be Parties to a Bill (a).

(a) *Vide* P. 78. *Ca.* 8. and the Note there.

1. BILL for Payment of Money upon a Bond muſt be *againſt all the Obligors* (b), or elſe there can be no Decree. *Trin.* 1667. *Anon. Ca.* 150. 2 *Freem. Rep.* 127.

(b) In this, *Æquitas non ſequitur legem. Ibid.*——*Vide P.* 168. *Ca.* 19. and the Notes there.

2. On a Bill againſt the Heir of a Mortgagee to redeem, and the *Executor* or *Adminiſtrator* not being made a Party, on this Exception taken at the Hearing the Court would not proceed (c). *Eaſt.* 1680. *Anon.* 2 *Freem. Rep.* 52. *Ca.* 57.

(c) For *per Lord Chan.* if it ſhould fall out upon the Account that Money ſhould be paid by the Mortgagor, that is to be paid to the *Executor* or *Adminiſtrator*, and *not to the Heir*; and ſo the Account ought not to be controverted without their Privity. *Ibid.*

3. *A.* being *Reſiduary* Legatee, brought his Bill againſt *J. S. who was one of the Executors*, (without his Co-Executor) *to have an Account of his own Receipts and Payments. J. S.* inſiſted at the Hearing, that his Co-Executor ought to be made a Party; and that tho' in Caſe of two Factors a Bill might be brought *againſt one* without the other, *if he were beyond Sea*; yet that had been allowed only for Neceſſity, and that it was otherwiſe in Caſe of Executors. *But the Objection was diſallowed*; for *per* Lord Chan. The Cauſe ſhall go on, and if upon the Account any Thing appear difficult, the Court will take Care of it. *Mich.* 1698. *Cowſlad* and *Cely*, *MS. Rep.*

Prec. in Chan. 83. S. C. *accord*; and *per* Lord Chan. the Reaſon is the ſame here as in Caſe of *joint* Factors; and the running out of Proceſs in this Caſe is purely Matter of Form; and he doubted *whether a Foreigner could be ſerved with a* Subpœna *in a foreign Country.*

4. A. *binds himſelf and his Heirs in a Bond*, and *deviſes his Lands to* J. S. *in Fee*, and dies; on a Bill brought by the *Obligee* in the Bond upon the *Stat.* 3 & 4 *W. & M. cap.* 14. *to affect the real Eſtate in the Hands of the Deviſee*, the Deviſor's Heir muſt be made a Party. *Per Cowper* C. *Mich.* 1707. *Gawler* and *Wade*, 1 *Will. Rep.* 99.

It is the Act of Parliament which makes this Aſſets in the Deviſee's Hands, and *that requiring the Heir to be made a Defendant*, the Plaintiff muſt follow the Remedy therein preſcribed; and *this Bill in Equity is as an Action at Law*; *ſecus if there were no Heir*; and perhaps it might be otherwiſe too, if *the Bill had charged* that the Plaintiff had made Inquiry, and could find or diſcover no Heir. *Per* Lord Chan. *Ibid.* 100.

5. A Bill was brought by a *Truſtee to compel the ſpecifick Performance of Marriage Articles*, and the *Ceſtui que Truſt* was not made a Party; *ergo* it was prayed, that the Cauſe might not go on *after opening the Bill and Anſwer*, becauſe *if the Bill ſhould be diſmiſſed, the* Ceſtui que Truſt *would not at all be bound by it*, and ſo *Defendant liable to another Suit for the ſame Cauſe.* Plaintiff to pay the Coſts of the Day, and to make the *Ceſtui que Truſt* a Party, and the *former Bill*, *Anſwer* and *Depoſitions to ſtand. Hil.* 1708. *Kirk* and *Clark & al'*, *Prec. in Chan.* 275.

MS. Rep. Hil. 1708. *Kirk* and *Clark & al'* S. C. and P. *ordered accord'*.

6. *A.* being ſeiſed of Houſes in *London*, *leaſed them for* 30 *Years* to *B.* who *covenanted to repair*, and *build* and *keep them* in *good Repair. B.* built, and *deviſed the Term to his Wife*, and died. The *Wife married C.* and *C. being indebted to D. D.* ſued him, and upon a *Sci. Fa.* the *Sheriff aſſigned the Term to E. in Truſt for D.* the *Aſſignee aſſigns it to a Pauper*; the Houſes being out of *Repair*, and not know in what ruinous Condition the Houſes are; in that Caſe he may drop the Term as where he receives the Houſes *in good Order*, and *after they do become ruinous, he aſſigns them to a Pauper. Per* Lord Chan. *Ibid.*——Rule; *Where a Man can have his Remedy at Law, a Court of Equity will not aſſiſt him*; and the Law is the ſame, whether the Leſſor aſſigns over the Term, or it is ſold by the Sheriff, for thoſe that claim under the Leſſee are bound by the Covenants. *Per* Lord Chan. *Ibid.*

If a *Leaſe of Houſes much out of Repair* is aſſigned to a Man, and the *Aſſignee* at the Time he takes the Aſſignment does he can; *ſecus*

the Rent in Arrear, for Execution of the Articles for Repairs, and an Account for the Arrears of Rent, the Bill was brought. Objected, that the *Executors of the Leſſee were not made Parties.* Lord Chan. ſaid, he believed that *B.* the Leſſee died inſolvent; but to make the Proceedings *unexceptionable*, it would be very proper to have them before the Court, for that it did not appear to him but that the Plaintiff hath had a Satisfaction at Law againſt the Executors; and if ſo, the *Plaintiff's Equity will be their Equity.* Bill to be amended, and Executors to be made Parties. *Eaſt.* 8 *Ann. Sainſtry* and *Grammer, MS. Rep.*

7. A Man propoſed to raiſe a Bank, and to procure an Act of Parliament to eſtabliſh and ſettle it. About 50 joined with him, and were at equal Expences. This Project being likely to take Effect, 250 *more ſubſcribed to raiſe a Fund*; but in effecting the Project about 6000 *l.* were loſt, and ſo it dropped. Then the Perſons who were this 6000 *l.* out of Pocket exhibited their Bill *againſt* 16 *of the* 250 *Subſcribers to bear their Proportion of the Loſs.* Moved that the Bill ſhould *abate* for want of Parties; but over-ruled, for the *Plaintiffs only pray that Defendants may bear their Proportion of the Loſs, which will appear before the Maſter, as well as if all the* 250 *Subſcribers were there*; and *ſo it can be no Prejudice to thoſe Defendants*; and *if there ſhould happen to be any Diſproportion in the Accounts*, the *Party grieved may have his Remedy by Bill. Eaſt.* 8 *Ann. Anon. MS. Rep.*

8. An Exception was taken to a Bill for want of Parties, *becauſe the Remainder-man expectant upon an Eſtate-tail* was not a Party, and one End of the *Bill was to impeach a Settlement.* The Exception was over-ruled, becauſe ſuch *Remainder-man is not regarded in Equity, neither can he be bound. Eaſt.* 8 *Ann. Anon. MS. Rep.*

1 *Will. Rep.* 428. S. C. and ſtates it *accord*' ſays, the Rent was 700 *l. per Ann.* that upon the Cauſe coming on the Defendants (*in Equity*) inſiſted upon want of proper Parties, (*viz.*) that *C.* was living, and not a Party to the Bill, and that *C.* was a neceſſary Party, as he was a *joint* Leſſee, and *equally concerned with A.* and *B.* and if the Allowances (to be) made to *A.* and *B.* were not ſatisfactory to *C.* he might draw the Account all over again;——that *C.* could not be bound by the Account, unleſs made a Party; and *bringing him before the Maſter would not be enough, where it appeared he was* eſſentially and equally *concerned with any of the other Plaintiffs*; *Quod Curia conceſſit*, (ſays the Reporter) *Ibid.* 428.—Then the Queſtion was, whether the Court would give Leave to amend, paying the Coſts of the Day, or diſmiſs the Bill? And *per Cur'*, this is a very Trick to ſuppoſe *C.* dead by the Bill, when the Plaintiffs (perhaps) could not get him to join, and yet to *ſwear him living upon the Plea in Abatement*; and it being *diſcretionary in the Court either to diſmiſs the Bill*, or *to give Leave for an Amendment on Payment of the Coſts of the Day*, let this Bill be diſmiſſed, but without Prejudice to another Bill. *Ibid.* 429.—— *MS. Rep. accord'.*

9. The Bill was brought by *A.* and *B. to be relieved againſt the City of* London, in Regard that they, together with *C.* (*who in the Bill was ſaid to be dead*) were *joint* Leſſees from the City of divers Water-Springs, at 600 *l. per Ann.* Rent; and the Bill was alſo *to have ſeveral Allowances out of the ſaid Rent, by Reaſon that the Leſſees were evicted as to ſome of the ſaid Waters*, and *diſturbed in the Enjoyment of others by the City themſelves, and other Perſons.* The City anſwered, and pending the Suit brought an Action of Debt againſt *A.* and *B.* for the Rent, *ſuppoſing* C. *to be dead*; and *A.* and *B. plead that* C. *was living*, and ought to be made a Defendant to the Action; and this being a Plea in Abatement, they made an Affidavit of the Truth, *&c.*—And now the City inſiſted that *C. who was living*, ought to be a Party to this Bill; and ſo he ought. *Per Parker* C. *Eaſt.* 1718. *Stafford* and *the City of London, MS. Rep.*

10. *A.* having *outlawed B.* for a *Debt due on Bond*, brought his Bill againſt *B.* and *C.* a *Truſtee for* B. *with Reſpect to an Annuity of* 20 l. per Ann. *deviſed to* B. in order *to ſubject this Annuity to* A.'s *Debt.*——And *per* Lord Chan. *Parker*, for as much as by the Outlawry *all B.'s Intereſt*, as well *equitable* as *legal*, was *forfeited to the Crown*; and tho' *A. was intitled to a Grant thereof from the Crown*, (which upon Application to the Court of Exchequer he would have of Courſe) yet *ſince this Truſt continued in the Crown until taken out*, his Lordſhip directed *A.* to get ſuch Grant, and to *make the Attorney General a Party*, and then to come again. *Trin.* 1718. *Ball* and *Waſtall*, 1 *Will. Rep.* 445.

And agreeable hereto after in *Eaſter* Term 1721. in the Caſe of *Hayward* and *Fry*, where *J. S.* owing the Plaintiff 100 *l.* and the Defendant *Fry* owing *J. S.* 100 *l.* on Note, and the Plaintiff *Hayward* outlawed *J. S.* and brought a Bill againſt *J. S.* and *Fry to have this* 100 l. *paid him*; the *Maſter of the Rolls* declared the *Plaintiff could have no Title but by Grant under the Exchequer Seal, all the* perſonal *Eſtate of* J. S. *being veſted in the Crown by the Outlawry*, and put off the Cauſe in order that the *Plaintiff might get ſuch Grant*, and *make the Attorney General a Party*. *Ibid.* 446.

11. In a Suit on Behalf of a *Charity*, for the Arrears of a Rent-charge, it is *not* neceſſary to make all the *Tertenants* of the Land, out of which the Rent iſſues, Parties. *Per Parker* C. *Hil.* 1719. *Attorney General* and *Wyburgh & al'*, 1 *Will. Rep.* 599.

Vide Tit. *Charity.*

12. They only are Parties to a Bill againſt whom Proceſs is prayed. *Per Parker* C. *Mich.* 1719. *Hawkes* and *Pratt*, 1 *Will. Rep.* 593.

13. Bill to eſtabliſh a Will, and to perform ſeveral Truſts, ſome of them relating to Charities; the Bill was brought by ſome of the Truſtees againſt other Truſtees, and ſeveral *Ceſtuy que Truſts*. The *Attorney General* need not be made a Defendant, for ſome of the Truſtees of the Charity are made Defendants; and there may be a Decree to compel an Execution of the Truſts in the Will relating to theſe Charities; and if there ſhould be any Colluſion between the Parties in Relation to the Charity, the *Attorney General* notwithſtanding a Decree may bring an Information to eſtabliſh the Charity, and ſet aſide the Decree; ſo if he is made a Defendant in Caſe of Colluſion between the Parties. Objected, that *one of the Truſtees was not brought to Hearing*. Anſwered, that he is *named a Defendant* in the Bill; *but being beyond Seas, is not ameſnable by the Proceſs of the Court*; and *therefore Plaintiff may proceed without him*, otherwiſe there would be a Failure of Juſtice; beſides, the Truſtee is one of the Plaintiffs in the Croſs Cauſe, and ſo is before the Court; *Quod fuit conceſſum. Per Parker* C. *Trin.* 5 *Geo.* 1. *Monill* and *Lawſon*, *Viner's Abr.* Tit. *Charitable Uſes*, (H) *Ca.* 11.

His Lordſhip ſaid, where a *Bill is brought on Behalf of ſuch a Charity to eſtabliſh it*, it muſt be in the Name of the *Attorney General ex Neceſſitate rei*, becauſe there are no certain Perſons intitled to it who can ſue in their own Names, but in the principal Caſe there is no Neceſſity; and ſeemed to admit that *where an Eſtate is deviſed to Truſtees for Charities to Perſons certain* who are capable to ſue or be ſued, *ſuch Perſons ought to be made Defendants as well as other Ceſtuy que Truſts. Ibid.*——In the Margin of this Caſe of *Monill* and *Lawſon*, Mr. *Viner* ſays, "Note, *Parker* C. ſeemed to take a *Difference where Truſtees of the Charity* "*are appointed by the Donor*, and *where no Truſtees are appointed, but the Lands deviſed immediately to charitable* "*Uſes*; in the *latter* Caſe there can be no Decree, unleſs the *Attorney General* be made a Party; but otherwiſe "where Truſtees are appointed by the Donor. This proceeded to Hearing, and Objections over-ruled. *Per* "*Parker* C." *Ibid.*

14. Where an *Executor in Truſt was outlawed*, and a *Witneſs proved he had inquired after, but could not find him*; this was thought to be a full Anſwer to an Objection that ſuch Executor was not made a Party to the Suit. *Parker* C. *Mich.* 1720. *Heath* and *Percival*, 1 *Will. Rep.* 682, 684.

15. Where a *Bill is brought for Surrender of a Copyhold Eſtate held for Lives*, the Lord muſt be made a Party, becauſe when the Surrender is made, the Eſtate is in the Lord, and he is under no Obligation

tion to new grant it; *contra* in Caſe of *Copyholds of Inheritance*, for there the Lord needs *not* be a Party. *Mich. Vac.* 1720. *Anon. Viner's Abr.* Tit. *Copyhold*, (X. e.) *Ca.* 5.

MS. Rep. S. C. *accord'.*

16. The Bill was brought by the *Treaſurer* and *Manager* of the Temple Mills Braſs Work, *in Behalf of themſelves and all others, Proprietors and Partners in the ſame Undertaking*, (except the Defendants, *who were the late Treaſurer* and *Manager*) to call them *to an Account touching the Partnerſhip.* Defendants *demurred*, for that *all the Reſt of the Proprietors were not made Parties.* Demurrer diſallowed, becauſe the Bill being *in Behalf of themſelves*, &c. except the Defendants, *all the Reſt were in Effect Parties*; and alſo for that it would be *impracticable to make them all Parties by Name*, for then there would be *continual Abatements by Death*, and *otherwiſe*, and no coming at Juſtice. *Trin.* 1722. *Anon. Prec. in Chan.* 592.

17. *A.* cannot *ſue as a Creditor one Co-Executor* without the other;——*nor as Reſiduary Legatee. Per Cur', Hil.* 10 *Geo.* 1. *Scurry & Ux'* and *Morſe*, 2 *Mod. Ca. in Law and Eq.* 89.

18. *A.* is *indebted* to *B. B. outlaws A.* and *C. having Goods in his Hands*, B. *brings a Bill againſt* C. *to diſcover what Goods of* A. *he has in his Hands*; the Attorney General ought to be a Party to ſuch Bill (*a*). *Per* Lord Commiſſioner *Gilbert*, *Eaſt.* 1725.——and *Bromley* (*b*), 2 *Will. Rep.* 269.

(*a*) *Vide Balch* and *Maſtal*, *P. Ca.*
(*b*) *Vide P. Ca.*

This appears to have been a Bond as well *joint* as *ſeveral*; and as the Obligee may ſue it *ſeverally* at *Law*, ſo he may alſo in

19. *A. B.* and *C.* were bound *jointly* and *ſeverally* in a Bond to *J. S.*——*C.* dies, *J. S. brings a Bill againſt* C.'s *Executors for a Diſcovery of his perſonal Eſtate*, and *for an Account thereof*, and *to be paid out of Aſſets.*——*C.*'s Executors may be ſued in Equity for the Debt, without making the *ſurviving* Obligors Parties. Ruled on Demurrer with *great Clearneſs*, *per King* C. *Mich.* 1725. *Collins* and *Griffith*, 2 *Will. Rep.* 313.

Equity; if it were not ſo, there would be no Difference in *Equity* betwixt a *joint* Bond and one *joint* and *ſeveral*; and if *any* of the *Obligors* have paid *all* or *part*, the *Obligor who is ſued, or his Repreſentative*, muſt bring a Bill, and have it allowed; and it muſt alſo lie upon *him* to compel the *other* Obligors to contribute towards Payment of the Debt. The Creditor lent his Money upon Terms to have a Security *upon which he might ſue the Obligors ſeverally*, and if it were otherwiſe, that which was intended to ſtrengthen the Security would tend to hurt it, for the *Obligee* might not be able to find all the Obligors out; and by the ſame Reaſon *that all the other Obligors* (*c*) *are to be ſued*, if any are dead, their *Heirs* as well as *Executors* are to be made Parties; and then as it would be difficult to commence the Suit, ſo the Suit when commenced would be ſubject to continual *Abatements*, which would be a great Difficulty on an *honeſt* Creditor. *Per* Lord Chan. *Ibid.* (*c*) It was inſiſted *that the other Obligors ought to have been Parties to the Suit. Ibid.*

20. *A. deviſes that his Executors ſhould ſell his Lands in D.* The *Executors renouncing*, Adminiſtration was granted to *B.* who brings *a Bill againſt the Heir to compel a Sale*, and for him to join. Objected, *that the Executors ought to have been made Defendants*, for notwithſtanding they had renounced, yet the *Power of Sale continued in them*, and *was altogether collateral to their Executorſhip.* But *there being* only *a Power, and no Eſtate deviſed to the Executors*, this Objection was over-ruled (*d*). *Per King* C. *Mich.* 1725. *Yates* and *Compton*, 2 *Will. Rep.* 308.

(*d*) The Reporter ſays *tamen Q. Ibid.*

21. *A.* leaves a *perſonal Eſtate to her Executor in Truſt for her Baſtard.* The *Baſtard dies intéſtate, without Wife* or *Iſſue.* The Executor brings a Bill againſt *B.* who has in her Hands the Portion belonging to the Baſtard, praying an Account of the ſame. *B.* demurs, becauſe the *Attorney General* and the *Baſtard*'s Adminiſtrator are not Parties. *Demurrer* diſallowed, for that the *Executor is legally*

Vide Tit. *Executors and Adminiſtrators, P. Ca.*

intitled to the perſonal Eſtate of his Teſtatrix; and though this is *in Truſt* for the *Baſtard*, yet as the *Executor has the legal Title*, he can *give a good Diſcharge* to the Defendant. *Hil. Vac.* 1729. *Jones* and *Goodchild*, *MS. Rep.*

22. In a *Deviſe of Lands to pay Debts*, if the *Creditors* bring a Bill to compel a Sale, the *Heir muſt be a Party*; for *per* Sir *Joſeph Jekyll*, Maſter of the Rolls, ſince the Sale of the Eſtate muſt affect all the Deviſees in Proportion, and as the Eſtate would not, *without the Heir being a Party to the Decree*, ſell for near the Value, this might be a Wrong to all the Deviſees, and occaſion more of their Lands to be ſold than would (perhaps) be otherwiſe neceſſary. *Hil.* 1730. *in Caſu Harris* and *Ingledew*, 3 *Will. Rep.* 91, 93.

23. *A.* is Tenant for Years, Remainder to *B.* for Life, Remainder to *C.* in Fee; *A.* is doing Waſte; *B.* though he cannot bring Waſte, *as not having the Inheritance*, yet he is intitled to an *Injunction*, but not unleſs the Reverſioner *or* Remainder-man in Fee be made a Party, *who poſſibly may approve of the Waſte*. *Per* Lord Chan. *King in Caſu Mollineux* and *Powell*, *Eaſt.* 1730. 3 *Will. Rep.* 268. *in a Note.* *Vide P. C.*

24. *A.* made a Mortgage (for 500 Years) to *B.* for 250 *l.* who in 1705. aſſigned the Term to *C.* for 300 *l.* *B.* died; *C.* brought a Bill againſt *A.* to foreclose, and tho' but a *derivative* Mortgagee, yet he did not make *B.*'s Repreſentatives Parties, *which he ought to have done*, for *B.* had a Right to redeem *C.* and to prevent another Account, as to what is due upon the original Mortgage, his Repreſentatives ought to be before the Court. *Per King* C. *Mich.* 1731. *Hobart* and *Abbot*, 2 *Will. Rep.* 643.

25. The Bill was brought by the Widow of *J. S.* againſt his Heir *to compel him to rebuild* and *finiſh her Jointure Houſe*, and *to make Satisfaction for what ſhe had ſuſtained for want of the Uſe thereof*; J. S. *having covenanted for himſelf* and *his Heirs*, that this Houſe ſhould remain to the Uſes in the Settlement (*a*), made upon his Marriage with the Plaintiff.——*J. S.* died, leaving *real* Aſſets of great Value, which deſcended to Defendant.——As to ſuch Part of the Bill as prayed that he ſhould rebuild, or repair ſo much of the Jointure Houſe as his Father had pulled down, or which ſought to be repaired in Damages for want of the Uſe thereof, and in reſpect of the Plaintiff's being forced to hire another Houſe in its Stead, (*all which were ſuggeſted in the Bill*) the Defendant demurred, for that the *Executor* or *Adminiſtrator* of *J. S.* ought to be a Party.—— Reſolved *per Talbot* C. that though at *Law* the Creditors may ſue the Heir *only*, where *he is expreſly bound*, yet in *Equity* they may ſue both the *Heir* and the *Executor* (*b*). That the *natural Fund for the Payment of Debts* is the *perſonal* Eſtate, and *this ought to go in Eaſe of the Land*. That as the *Executor* (*c*) *may make it appear that he has made Satisfaction to the Plaintiff for Breach of this Covenant*, he muſt be made a Party (*d*). *Mich.* 1734. *Knight* and *Knight*, 3 *Will. Rep.* 331.

(*a*) By which *J. S.* was (*inter al'*) Tenant for Life of this Houſe, *Remainder to the Plaintiff for Life*, Remainder to the firſt, *&c.* Son of the Marriage in Tail Male ſucceſſively, with Remainders over.

(*b*) Here, *Æquitas non ſequitur legem.*

(*d*) The Court delights to do compleat Juſtice, and not by Halves: As firſt to decree the *Heir to perform this Covenant*, and *then to put the Heir upon another Bill againſt the Executor* to reimburſe himſelf out of the *perſonal* Aſſets, which may be more ſufficient to anſwer the Covenant; and where they are both brought before the Court, compleat Juſtice may be done by decreeing the *Executor to perform this Covenant as far as the* perſonal *Aſſets will extend*; the *Reſt to be made good by the Heir out of the* real *Aſſets*. And here appears no Difficulty or Inconvenience in bringing the Executor before the Court; on the contrary it would prevent *Multiplicity of Suits*, which this Court ought to do. *Per* Lord Chan. in S. C. *Ibid.* 334. (*c*) In a Bill brought by a Mortgagee againſt the Heir of a Mortgagor to foreclose, it was objected that the Executor of the Obligor ought to be a Party, *becauſe it did not appear but that he might have paid the Debt*. But by the Maſter of the Rolls, (in the Abſence of the Lord Chan.) and *Goldſborough* the Regiſter, there is no Neceſſity for making the Executor of the Mortgagor a Party, becauſe the Bill being only *to foreclose the Equity*, the Plaintiff need only make him a Party that has the Equity, (*viz.*) the

Heir, and *the Courſe is ſo.* Neither is the Plaintiff the Mortgagee any ways bound to intermeddle with the *perſonal* Eſtate, or to run into any Account thereof; and if the *Heir would have the Benefit of any Payment made by the Mortgagor or his Executor, he muſt prove it. Eaſter* 1720. *Duncomb* and *Hanſley*.——So *Note* the *Diverſity* of the Caſe of *Knight* and *Knight* (*on the other Side*), and this laſt; for there the *Bill was to recover a Satisfaction in Damages, &c.* and the *perſonal Eſtate is the natural Fund for that Purpoſe:* But in *Duncomb* and *Hanſley*, the *Bill was not to recover the Debt*, but *only to bar the Equity of Redemption.* 3 *Will. Rep.* 333. in a Note by the *Editor.*

Vide Prec. in Chan. 63, 64. *Mich.* 1696. *Cleland* and *Cleland*, where an Objection was made for want of Parties, for that

26. In a Bill for an Account of the *perſonal* Eſtate of *J. S. tho' the Perſon who has a Right to adminiſter to* J. S. be a Party, yet this is not ſufficient without Adminiſtration *actually* taken out, for if any Account ſhould be taken, it may be all overhaled again when Adminiſtration ſhall be taken out. *Per Talbot* C. *Hil.* 1734. *Humphreys & Ux'* and *Humphreys*, 3 *Will. Rep.* 349.

the *Adminiſtrator of the Huſband was not made a Party*; but the Wife being called Adminiſtratrix in the Bill, and having by her Anſwer confeſſed that ſhe had poſſeſſed the *perſonal* Eſtate, and diſpoſed of it, *(and being the Perſon by Law intitled to Adminiſtration)* tho' ſhe denied by Anſwer that ſhe had taken Adminiſtration, the Court over-ruled the Objection.——1 *Vol. Eq. Ca. Abr. P.* 70. *Ca.* 14. *Cleland* and *Cleland* is not S. P.

27. If a *Bill is brought to eſtabliſh a general* Modus *thro' a whole Pariſh*, all the Land-Owners muſt be either *Plaintiffs* or *Defendants*; *but* if *the Perſon ſues for Tithes in Kind*, Defendant may inſiſt upon ſuch a *Modus*, *tho' the Reſt of the Pariſhioners are not made Parties.* *Q.* Term and Year. *Rudge* and *Hopkins*, *MS. Rep.*

28. To a *Bill for Relief*, all Parties neceſſary to the Relief muſt be made Parties, or Defendant may plead to ſuch a Bill; *ſecus* where a *Diſcovery only is wanted.* *Sangoſa* and *the Eaſt-India Company*, *MS. Rep.*

Q. Term and Year.

Barnard. Eq. Rep. 371. *Hil.* 1740. *Lamplugh* and *Hebden* S. C. ſtates it *accord'*.

29. *J. S.* by his Marriage Settlement reſerves to himſelf a Power to diſpoſe of the Lands therein mentioned (and which are ſettled in *ſtrict* Settlement) as he ſhould think proper, in Caſe he ſettled other Lands of the Value of 100 *l. per Ann.* to the ſame Uſes. There is Iſſue of this Marriage a Daughter; *B. without Notice of this Settlement*, articled with *J. S.* for the Purchaſe of theſe Lands, but before the Time for compleating the Payment of the Purchaſe Money, *B. had Notice of the Settlement*, and thereupon he refuſed to pay the Reſidue. *J. S.* brought his Bill in order to compel *B.* to compleat his Contract, ſuggeſting that at the Time this Contract was entered into, he (*J. S.*) had ſettled other Lands of the Value of 100 *l. per Ann.* to the Uſes in the original Settlement. At the Hearing it was held by Lord Chan. that the Wife and Daughter ought to be made Parties (*a*). *Hil.* 1740. *Anon. MS. Rep.*

(*a*) For in order to have a Decree for Performance of the Contract, it will be incumbent on the Plaintiff to make out that he has effectually ſettled other Lands of the Value of 100 *l. per Ann.* to the ſame Uſes as in the original Settlement; now the Proof that the Plaintiff may make of this might be ſufficient to intitle him to ſuch Decree in Caſe that the *Wife* and *Child* were *not* made Parties, and yet it might not be ſufficient in Caſe that *they* were; and were *they* not to be Parties, *they* might bring a new Bill, and overturn the Defendant's Title. And notwithſtanding *they* ſhould be brought before the Maſter, (for it was inſiſted that it would be ſufficient to bring *them* before the Maſter, in order that they might lay before him any Objections to ſhew that the Eſtate in the ſecond Settlement was not of the Value of 100 *l. per Ann.*) *nothing that is there done will conclude them*, and the Plaintiff cannot (in this Caſe) make out a good Title unleſs *they* are made Parties. It *is not proper to make Perſons Parties to a Bill, merely to the End that they may litigate their own Title*; but *here* is another End of making the *Wife* and *Daughter* Parties. The Bill may be amended by praying that *they* may join in the Conveyance to the Purchaſer, and a Decree may be made accordingly. *Per* Lord Chan. *Barnard. Eq. Rep.* 372. in S. C.—— *MS. Rep.* to the ſame Effect.

30. In a Bill againſt the Treaſurer under the Commiſſion relating to the Building of the 50 new Churches, the Commiſſioners muſt be Parties. *Per* Lord Chan. *Hil.* 1740. *Vernon* and *Blakerby*, *Barnard. Eq. Rep.* 377, 378, 383, 384.

(C) Bills of Diſcovery (*a*).

(*a*) Vide *Treatiſe of Eq.* Cap. 3. P. 128.

1. THOUGH no Bill of Diſcovery will lie on *penal* Statutes *without waving the Penalty*, yet the Advantage of Pleading it ſeems waved by *Partners in clandeſtine Trade. Hil.* 12 *Geo.* 1. *Gaſcoyne* and *Sidwell & al'* (*b*) *in Canc'*, *Gilb. Eq. Rep.* 186, 187.

(*b*) Vide *P.* 72. *Ca.* 19.

S. C. *more fully abridg'd.*—The *chief* Diſtinction upon the Rule, *that a Diſcovery ſhould draw with it Relief*, ſeems to be, that *where a Diſcovery is prayed*, and *a liquidated Debt admitted by the Anſwer*, the Court might then proceed to give Relief;—but *where the Debt was unliquidated, being uncertain*, and *ſounding in Damages*, it was proper for a Jury to aſcertain it, there being nothing for a Court of Equity to found a Determination on. *Per Gilbert* C. B. *Ibid.*—The Caſe of *Dupins* and *the Duke of Kingſton* was cited for the Plaintiff, which was a *Bill brought by a Millener againſt the Duke, as Adminiſtrator of his Son, for a Diſcovery of Aſſets*, and to *have a Debt which was due to her from the Son diſcharged*; in which Caſe it was laid down as a Rule, that *Diſcovery ſhould draw with it Relief*; to which *Hale* B. ſaid, he thought this *cited* Caſe ſhould have gone no further than a Diſcovery, and after that ſhould have proceeded at Law. *Ibid.*

2. *J. S.* who had furniſhed neceſſary Tackling for a Ship, which was afterwards ſold, by Bill *prays a Diſcovery of the perſonal Eſtate of one of the Part-Owners*, who was dead, and *to have Relief againſt his Executor, and the ſurviving Part-Owners. Per Gilbert* C. B. Though this Caſe is within the *Mercantile* Law, yet it being admitted by the Anſwer, that the Charge was for Tackling, *&c.* this Court muſt grant the ſame Redreſs as a Court of *Admiralty* would, (*viz.*) *upon the Bottom of the Ship*, and it would be very hard to ſend the Plaintiff back again, *there* to obtain Relief; that all the Part-Owners ought to make Satisfaction, having received the Profits of the Voyage, which the Ship was enabled to perform, by the Plaintiff's furniſhing the Tackling, *&c.* And *Hale* B. ſaid, in the preſent Caſe the Proceedings *here* were very proper; *for in the Court of Admiralty Seamens Wages are recoverable*, and *they are alſo chargeable upon the Bottom of the Ship*, and *yet Chancery retains Bills for them* (*c*). *Eaſt.* 12 *Geo.* 1. *Allport* and *Thomas in Scacc'*, *Gilb. Eq. Rep.* 227, 228.

(*c*) Rule; *Equity has a concurrent Juriſdiction with the Admiralty.*

(D) Bills of Peace.

1. WHERE the *ſame* Plaintiff has brought ſeveral Ejectments againſt the *ſame* Defendant for the *ſame* Lands, and five Verdicts have been given for the Defendant, a Bill of Peace is not ſo proper in this Caſe, *one Man being able to contend with another. Per* Lord Keep. *Hil.* 5 *Ann. Earl of Bath* and *Sherwin*, *Prec. in Chan.* 261.——*Gilb. Eq. Rep.* 2. S. C.

Vide *Lucas's Rep. Anon.* which ſeems to be the ſame Caſe.

2. Bill to be *quieted in the Poſſeſſion of an antient Ferry uſed with* a *Rope over the River* Ware, was brought againſt twenty Defendants, (*who had cut the Rope*) to avoid the Multiplicity of Actions. *Per Parker* C. Plaintiff may have Treſpaſs for cutting the Rope; a Ferry is in Nature of a Highway, and a Bill does not lie to be quieted in Poſſeſſion of an Highway.——A Bill *lies to be quieted in the Poſſeſſion of Common* (*d*), but that is of a different Nature; *this is a navigable River*, and the *Rope to the Ferry is an Obſtruction to the Navigation*; if Plaintiff has any ſuch Right, there is a proper Remedy for him at *Law.* Bill diſmiſſed with Coſts. *Eaſt.* 13 *Ann. Hilton* and *Lord Scarborough & al'*, *Viner's Abr.* Tit. *Chancery*, (D. a.) *Ca.* 35.

(*d*) *Vide* next Caſe.

3. A Bill was brought to be *quieted in the Poſſeſſion of a Right of Common*, and *to prevent Diſtreſſes*; and though the Plaintiff produced Affidavits of above fifty Years quiet Poſſeſſion, and Evidence of their Right of Commonage in the Time of Q. *Eliz.* yet the Court refuſed to interpoſe till one or more Verdicts at Law; and diſſolved Plaintiff's Injunction obtained for want of an Anſwer. Ruled on Motion *per King* C. *Hil.* 12 *Geo.* 1. *Anon. Gilb. Eq. Rep.* 183.

Mr. Attorney General admitted the Rule, but ſaid, the Plaintiff was the only Perſon interrupted, and therefore the others cannot be made Plaintiffs; and to make them Defendants would be only bringing them into Court to pay their Coſts; but *per* Lord Chan. this is not ſuggeſted in the Bill. *Ibid.*

4. Bill brought by *one Tenant of a Manor*, ſuggeſting a *Cuſtom for the Tenants of the Manor of* A. (of which he was one) *to cut Turfs in the Manor of* B. To quiet him, and to have an Iſſue directed as to the Right, was the End of the Bill. This *Bill is improper*, and *inconſiſtent with the Nature* and *End of ſuch Bills*, which is, that where *ſeveral* Perſons having the ſame Right are diſturbed, on Application to the Court to *prevent Expence, and* (to which each of them are intitled to on their ſeveral Rights) *Multiplicity of Suits*, Iſſues will be directed, and one or two Determinations will eſtabliſh the Right of all Parties concerned on the Foot of one common Intereſt; but in all thoſe Bills either all Parties join, or a determinate Number in the Name of themſelves, and the Reſt prefer a Bill; but in this Caſe one only brings the Bill *on the general Right*, and *not on the Foot of any particular diſtinct Right*. Bill diſmiſſed with Coſts. *Per King* C. *Trin.* 2 *Geo.* 2. *Baker* and *Rogers*, *Sel. Ca. in Chan.* 74, 75.

5. Bill to eſtabliſh a Cuſtom *in the Caſe of a common Perſon* muſt *regularly be founded on a Trial at Law*, for when the *Right is ſettled* it becomes a Bill of Peace. *Nottingham Town* and *Ward* (*a*).—— So where the City of *London* brought a *Bill for a cuſtomary Toll* (*b*) *for going through one of their Gates with a Carriage.* Defendant demurred, *becauſe the Toll was not eſtabliſhed at Law*, and Demurrer allowed. *City of London* and *Torn*, *Trin.* 10 *Geo.* 2. *Cor' Talbot*, *MS. Notes.*

(*a*) *Q. Term* and *Year.*

(*b*) But where the Bill is *founded on an expreſs Grant of the Toll*, tho' the Riſe of the Toll cannot be known, yet the Suit being brought *on the Grant of the Crown*, it is in the *Nature* of a Bill of Peace. *Ibid.*

(E) Supplemental and amended Bills.

1. NO Proceedings upon an *amended* Bill till the *Coſts* of the former Proceedings are diſcharged. *December* 6, 1705. *Gage* and *Liſter*, *Viner's Abr.* Tit. *Chancery*, (E. b.) *Ca.* 9.

2. Whenever there is new Matter in *amended* or *ſupplemental* Bills, there can be no Proceedings againſt the Defendant without a new Service *Ad faciend' Attorn'*; and a Cauſe cannot be brought to a Hearing without it, for Defendant ought to have an Opportunity to defend himſelf againſt the new Matter. *Mar.* 6, 1720. *Cheevers* and *Geoghegan*, *Viner's Abr.* Tit. *Chancery*, (E. b.) *Ca.* 10.

Vide P. C.

3. The Bill charged, by way of Amendment, *Matters which aroſe after the filing of the Bill*, and therefore proper for a *ſupplemental* Bill; and though this was pleaded to the Bill, yet the Plea was over-ruled; for ſuch Matters may be charged, either by way of *ſupplemental* or *amended* Bill. *Talbot* C. *Hil.* 1734. *Humphreys & Ux'* and *Sir W. Humphreys*, *Bart.* 3 *Will. Rep.* 349, 351.

4. Where a *ſupplemental* Bill is brought *after Publication*, it is irregular to examine *Witneſſes to a Matter that was in Iſſue*, and *not proved in the original Cauſe*; and ſuch Proofs not to be read.——

If

If there be *no Proof to the new Matter in* the *ſupplemental* Bill, it muſt be diſmiſſed. *Mar.* 31, 1735. *Bagnal* and *Bagnal*, *Viner's Abr.* Tit. *Chancery*, (R. a.) *Ca.* 8 & 9.

5. *A.* brings a *ſupplemental* Bill, containing new Matter diſcovered ſince the filing of his *original* Bill, and a Decree pronounced thereupon, (*but not ſigned and inrolled*) and at the ſame Time a Petition of Rehearing in the *Nature of a Bill of Review*, praying that the *former Decree may be rectified in the Particulars complained of by the ſupplemental Bill.* Tho' this Method is not of very long ſtanding, yet there have been ſome Precedents of it, (*i. e. one* in Lord *Talbot*'s Time, and *two* in the *preſent* Chancellor's) and it is of itſelf a reaſonable Thing that this Method ſhould be allowed of *where a Decree is not ſigned* and *inrolled.* It is founded upon *Reaſon*, becauſe if *A.* ſhould be forced to ſign and inrol a Decree which he thinks himſelf aggrieved by, and then to bring a ſtrict Bill of Review, it would only tend to increaſe Expence and Vexation; whereas the Method which *A.* has taken, attains the Juſtice of the Caſe as fully as the other would. Indeed this Method ſhould be put under ſome Reſtriction as well as the other; and as in the other Method, *viz.* of a Bill of Review, *A.* muſt annex an Affidavit to ſuch Bill, ſetting forth *that the Matter on which he founds his Relief has come to his Knowledge ſince the Time of the Decree*; ſo it is fit that an Affidavit of this Sort ſhould be annexed to the *ſupplemental* Bill, but according to the former Precedents, that has not hitherto been required, and therefore it cannot be inſiſted on in this Caſe. *Per Lord Chan. Eaſt.* 1740. *Standiſh* and *Radley*, *Barnard. Eq. Rep.* 463, 468.

MS. Rep. S.C. to the ſame Effect.

(F) Bills of Interpleader.

1. WHERE Money ſhall be brought into Court, and there remain till the *Heir* and *Executor* interplead, *vide* the Caſe of the *Earl of Carliſle* and *Globe & Ux' & al'*, *Executors of Andrews*, *P. Ca.*

2. Where a Bill *in Nature of a Bill* of Interpleader was brought to redeem a mortgaged Eſtate, praying that the Defendants might ſettle the Right between themſelves, that Plaintiff might not pay his Money to a wrong Hand, *vide* the Caſe of *Shotbolt* and *Biſcow*, *P. Ca.*

(G) Bills of Review.

1. THERE can be no Bill of Review *for any Matter which might have been made Uſe of in the firſt Cauſe, or for any Matter ſubſequent to the Decree*, as the Plaintiff's *Confeſſion.* Said *per Cur' in Caſu Curtis* and *Smallridge*, 26 *Jan.* 1 *Car.* 2. 2 *Freem. Rep.* 178.

Chan. Ca. 43. *Hil.* 15 & 16 *Car.* 2. S. C. and P.—1 *Vol. Eq. Ca. Abr.* 337. *Ca.* 2. S. C. *but not* S. P.

2. A Bill of *Review will not lie* but *againſt thoſe who were Parties to the original Bill*; as where *J. S.* mortgaged Lands to *A.* in Fee for 1000 *l.* and covenanted and gave Bond to pay the Money, but

3 *Chan. Rep.* 94. *Hil.* 1659. *The Earl of Carliſle* and *Globe & Ux' & al', Executors of Andrews*, S. C. ſtates it *accord'*, and ſays, *J. S.* brought his Bill againſt *G.* and his Wife *before the Time ordered for Payment of the Money by the Decree*, ſetting forth the whole Matter, and *praying Directions to whom he ſhould pay the Money*, and *to have the Bond delivered up*; this was by an *original* Bill; and the Court held that in this Caſe a Bill of *Review* would not lie, *becauſe the Executor was not a Party to the former Bill.*——*Nelſ. Chan. Rep.* 52. S. C. *in totidem verbis* with *Chan. Rep.*

forfeited. *A.* died, leaving *G.*'s Wife his Heir at Law. *G.* and his Wife brought a Bill againſt *J. S.* for Payment of the Money, or elſe *J. S.* to be foreclоſed; and it was decreed accordingly, but *J. S.* did not pay the Money according to the Decree; but upon diſcovering that *A.* had made a Will, and had given this Money to his Executor, *J. S.* brought a Bill deſiring that he might be admitted to pay the Money to the Executor, he having the Right, and no Party to the former Decree; this was by original Bill, and not by Bill of Review; and in this Caſe a Bill of Review would not lie, becauſe the Executor was no Party to the former *Decree*. *Per Cur', Eaſt.* 15 *Car.* 2. 1663. *Earl of Carliſle* and *Globe & Ux' & al', Executors of Andrews, Cor'* Lords Commiſſioners *Widdrington, Tyrrell* and *Fountain*, 2 *Freem. Rep.* 148, 149.

In the principal Caſe the Bill was a Bill of Review, and in drawing up the Decretal Order, the Matter upon which the Decree was made was declared to be proved, and the Caſe ſtated far different from the Fact.

3. Upon Debate it was declared, that on a Bill of Review the Cauſe of Review muſt ariſe and appear upon the Caſe, as ſtated in the Decree, and that the Fact muſt be admitted as it is there ſtated; and that tho' the Fact whereon the Court gave Judgment was miſtaken, yet there is no Ground for a Bill of Review, (*after a Decree inrolled* *), but the Fact in this Caſe muſt be admitted true, and the Decree (*inrolled*) is Matter of Record, and can be tried only by the Record; but in miſtaking the Fact, the proper Courſe had been to have gotten the Cauſe reheard before the Decree had been ſigned and inrolled. *Per* Lord Chan. and *Rainsford* B. 16 *June* 16 *Car.* 2. *Combes* and *Proud*, 2 *Freem. Rep.* 182.

The *Errors* aſſigned by the Bill of Review were, that the Decree was grounded on Matters not proved, and inſtanced in Particulars, and that the Matters mentioned in the Decree to be proved were not proved; the Demurrer to the Bill was general, that the Decree contained no Error in Law, and that the Matters alledged for Error were but Misjudgments; and on Debate it was declared as above. *Ibid.*——*Can. Ca.* 54. S. C. ſtates it to the ſame Effect, and adds, the *Reaſon why the Review did not lie was*, becauſe *as the Decree was drawn up, there was no Error appeared in it.* *Ibid.* 55.

* Theſe Words in *Italick* are taken from the Report of the Caſe in *Chan. Ca. Ibid.*

4. The Defendant anſwered the Bill of Review, but ſo as that ſome Matter in his Anſwer would bring into Examination ſome Part of the Decree, as it was ſigned and inrolled; on which Anſwer as to that Part there was a Demurrer, becauſe that would tend to *Perjury* and *Infiniteneſs* to re-examine Things executed and decreed; and *Cur'* of the ſame Opinion;——But *per* Defendant's Counſel and Court, there can be *no* Demurrer *upon an Anſwer in Equity*. *Glyn*, Serjeant, ſaid he had known it. The Court ordered that there ſhould be no Examination of that which had been executed. 23 *June* 16 *Car.* 2. *Williams* and *Owen*, 2 *Freem. Rep.* 181.

3 *Chan. Rep.* 15. S. C. *ſays*, Directions were given to ſearch for Precedents, whether *Damages*

5. The Defendant had a Decree for Money. The Plaintiff by Bill of Review reverſed this Decree, and the Money decreed to the Plaintiff. *Per Cur': On ſearching of Precedents*, the Defendant ſhall *not* pay *Damage* for this Money. 23 *May* 16 *Car.* 2. *Jackſon* and *Eyre*, 2 *Freem. Rep.* 181.

had been given on a Bill of Review, and no Precedents were produced; and it was *confidently affirmed that there was no Precedent of any Coſts* or *Damages given on a Bill of Review*; and compared it to a Judgment in a Writ of Error, where the Judgment is, that the Party ſhall recover *quicquid amiſit per judicium prædictum*, but *no Damages* or *Coſts*; and in this Caſe it was ruled that there ſhould be none.—*Nelſ. Rep. in Chan.* 83. *Jackſon* and *Digry* S. P. and ſeems to be S. C.

Chan. Ca. 51. S. C. and P. ſays, it was ſo ruled on *Demurrer* after long Debate. *Trin.* 1665. *Cor'* Lord Chan. and B. *Rainsford.*

6. Reſolved on *Demurrer*, that if a Man have leſs decreed him than he would have, he ſhall not bring a Bill of Review, for a Bill of Review *lies only for him againſt whom the Decree* or *Diſmiſſion is.* 14 *May* 16 *Car.* 2. *Glover* and *Portington*, 2 *Freem. Rep.* 182, 183.

7. This

7. This Difference was taken by the *Chancellor*, where a *Matter in Fact was particularly in Iſſue before the former Hearing*, though *you have new Proof of the Matter*, upon that you ſhall never have a Bill of Review; but where a *new Fact is alledged that was not at the* former *Hearing*, there it may be a Ground for a Bill of Review. 1677. *Anon.* 2 *Freem. Rep.* 31. *Ca.* 35.

8. In a Bill of Review all Things are to be performed according to the former Decree that do not extinguiſh the Right, otherwiſe the Non-performance is a good Plea in Bar; as if Writings are to be brought into Court, or Coſts paid, but not to releaſe the Right, or make a Conveyance, becauſe that would deſtroy the Right. *Mich.* 1683. *Fitton* and *Lord Maxfield*, 2 *Freem.* 88.

Not bringing in Writings according to the Decree ſought to be reverſed, nor giving Security for the Coſts in the Bill of Review, was pleaded in the Caſe of *Okeover* and *Poole*. *Ibid.*—1 *Vol. Eq. Ca. Abr. P.* 82. *Ca.* 11. S. C. but not S. P.

9. Though there is *no Limitation of Time for bringing a Bill of Review*, yet after a *long Acquieſcence under a Decree* Chancery will not reverſe it, but upon *apparent Errors*. *Per North* Lord Keep. *Hil.* 1684. *in Caſu Fitton* and *Earl of Macclesfield*, 1 *Vern. Rep.* 287.

1 *Vol. Eq. Ca. Abr. P.* 82. *Ca.* 11. is not S. P.

10. It was agreed by the *Court* and *Bar*, that the Courſe of the Court is, before any Bill of Review is granted, the former Decree ought to be executed, if the Cauſe of ſuch Bill be not ſuch as extinguiſhes the whole Right and Foundation of the Decree, *as a Releaſe*;——And it is a good Plea in Bar of a Bill of Review, that the former Decree is not executed;——And it was ſaid, that tho' Bills of Review be in Nature of a Writ of Error, yet it is not favoured in Equity; for upon a Writ of Error (*and that only in ſome particular Caſes*) one need only to give Bail to pay Principal and Coſts; but in Bills of Review the Decree ought to be actually complied with; and beſides, there ought to be Security for Coſts.——But a Caſe of *Palmer* and *Denby* was cited, where in the Caſe of an Executor it was granted without Examination of the Decree. *Mich.* 11 *W.* 3. in *Chan. Ca. in B. R. Temp. W.* 3. 343.

11. A Bill of Review was brought and *demurred to*; and afterwards the *Plaintiff in the Bill of Review moved to diſmiſs the Bill, as not being regularly filed, upon Payment of Coſts out of the* 50 l. *depoſited* upon the filing thereof, and the ſame was granted. *Per* Lord Chan. *Cowper*, *Mich.* 4 *Geo.* 1. *The Biſhop of Durham* and *Sir Henry Lyddal*, *Viner's Abr.* Tit. *Chancery*, (Z. 6.) *Ca.* 2.

12. *No Objection* is to be made on a Bill of Review *that is not aſſigned for Error*. *Jan.* 8, 1717. *Watkins* and *Price*, *Ibid.* (Z. 5.) *Ca.* 5.

Objection to a Maſter's Report cannot be aſſigned for Error *upon a Bill of Review*. *Ibid.* in S. C.

13. The Plaintiff's original Bill was to *ſettle the Boundaries of his Manor*; upon the firſt Hearing an *Iſſue was directed*, and *a Verdict found for the Plaintiff*; and afterwards the Cauſe coming on, upon the Equity reſerved there was *a final Decree for quieting Plaintiff in Poſſeſſion*, &c. and *Defendant was to pay Coſts*. Then Defendant *moved for Leave to file a Bill of Review, upon his Solicitor's Affidavit*, "*that certain new Evidence was diſcovered in Favour of Defendant* "*ſince the Verdict and Decree.*" The Queſtion was, if the *Defendant*

Viner's Abr. Tit. *Chancery*, (Z. 3.) 7 *Dec.* 4 *Geo.* S. C. and P. ſays, on Plaintiff's Behalf a Book of Rules printed in 1623. was produced, wherein there was a Rule *Temp. Bacon* Chan. and another in 1656. to the Effect following, *viz.* "*That no Bill of Review ſhall be allowed till after* "*the Decree performed in* all *Parts*, *unleſs ſuch Performance would extinguiſh the Party's Right* or *Title at Law*," (as a Conveyance of Land, Releaſe, &c.) And *per* Lord Chan. Theſe old Orders are *reaſonable* and *juſt*, and ought to be obſerved to prevent Delays by Bills of Review, which would be brought in all Cauſes of Value, if

any

they might be filed without Leave of the Court, and *before the Decree performed*; and *Payment of Coſts ought to be performed*, &c.

dant ſhould have *Leave to file the Bill without firſt paying the Coſts, decreed?* And *per Cowper* C. *He ſhall not*, for *Payment of Coſts ought to be performed rather than any other Part of the Decree.* And his *Lordſhip* held, that *Bills of Review could not be filed without Leave of the Court, in order to prevent unconſcionable Delays by ſuch Bills* which would be brought in all Cauſes of Conſequence. *Mich. Vac.* 4 *Geo. Sir Henry Lyddal* and *the Biſhop of Durham, MS. Rep.*

eſpecially in this Caſe, where the new Matter diſcovered was in the Power of the Party, and it was his Neglect it was not diſcovered ſooner; and let the Event of the Bill be what it will, the Plaintiff ought to have Coſts, as *in Caſe of a new Trial granted upon the like Grounds.* Where *Money is decreed, it muſt be paid before a Bill of Review is filed, tho' it muſt be refunded if the Decree be reverſed upon the Bill of Review*; but here *if the Decree ſhould be reverſed*, yet *the Coſts ought not to be refunded.* And his *Lordſhip* thought the *Party himſelf ſhould make an Affidavit that this new Matter was diſcovered ſince the Decree*, and that the *Affidavit of a Solicitor is not ſufficient*; for Defendant himſelf, or ſome *other* Agent of his, might be informed of this Matter before, at leaſt if Defendant by reaſon of his *Age, high Station* and *Quality*, may be excuſed from making an Affidavit of the particular Matters and Facts, yet at leaſt *he ſhould have an Affidavit to corroborate that of his Solicitor*; but this *Affidavit of the Solicitor is not a ſufficient Ground for a Bill of Review*, and therefore the Defendant muſt take nothing by the Motion. *Ibid.*

Matters already ſettled, or which might have been put in iſſue in the original Cauſe, ſhall never be drawn into Examination *upon a Bill of Review. Ibid.* in S. C.

14. *Forgetfulneſs* or *Negligence* of Parties *under no Incapacity*, is no Foundation for a Bill of Review. *Jan.* 13, 1719. *Ludlow* and *Macartney*, *Viner's Abr.* Tit. *Chancery*, (Z) *Ca.* 18.

15. Upon every Bill of Review to reverſe a Decree, the Plaintiff muſt (*a*) depoſit 50 *l.* with the Regiſter to anſwer Coſts of Suit to the Defendant.——If a Bill of Review be brought upon new Matter, *as upon a Deed diſcovered by the Plaintiff ſince the former Decree*, the Plaintiff muſt have *Leave* for filing ſuch Bill, tho' *Leave is not neceſſary* if the Bill be brought to reverſe a Decree for *Error* appearing on the Face thereof.——But in the principal Caſe, the Plaintiff having depoſited the 50 *l.* and annexed an Affidavit to the Bill, that the *Deed on which the Bill of Review was founded, came firſt to his Knowledge after the pronouncing the Decree*; the Bill was allowed upon his *paying the Coſts of Defendant's Motion to diſmiſs it*, for that it was *filed without Leave. King* C. *Trin.* 1725. *Anon.* 2 *Will. Rep.* 283, 284.

(*a*) *Vide* Lord *Bacon's Ordinances, Ord.* 1.

16. Bills of *Review* are allowed only *on Errors apparent in the Record, or on new Matter diſcovered ſince the Decree.* Ruled on Motion, *per King* C. *Hil.* 12 *Geo.* 1. *Gilb. Eq. Rep.* 184.

17. A Bill of Review ought not to be brought but for manifeſt Errors appearing on the Face of the Decree, or for new Matters ariſing ſince the Decree, of which no Advantage could have been taken without Leave of the Court to bring ſuch Bill upon new Matters diſcovered. *Mar.* 1, 1726. *Aſhton* and *Smith*, *Viner's Abr.* Tit. *Chancery*, (Z) *Ca.* 19.——And no Bill of Review lies *without paying the Duty. Decreed* (*b*) in S. C. *Ibid.* (Z. 3.) *Ca.* 10.

(*b*) *Jan.* 21, 1717. *Biſhop of Durham* and *Lyddell* S. P. *Ibid.* (Z. 3.) *Ca.* 10.

18. Bills of Review are uſually upon *Diſcovery of new Evidence. Hil. Vac.* 15 *Mar.* 1734. *South-Sea Company* and *Bumſtead*, *Ibid.* (Z. 5.) *Ca.* 8.

19. If

19. If a Decree be obtained and *inrolled*, ſo that the Cauſe cannot be *reheard*, then there is *no Remedy but by Bill of Review* (*a*), which muſt be *either for Error appearing upon the Face of the Decree*, or *upon ſome new Matter* (*b*), *as a Releaſe, Receipt*, &c. *proved to have been diſcovered ſince.* Laid down as a Rule for Lord Chan. *Talbot*, *Trin.* 1735. *Taylor* and *Sharp*, 3 *Will. Rep.* 371.

(*b*) For unleſs *Relief* were confined to *ſuch new Matter*, it might be made Uſe of as a Method for a vexatious Perſon to be oppreſſive to the other Side, and for the Cauſe never to be at Reſt. *Per* Lord Chan. *Ibid.*

(*a*) For if an *original* Bill were to be allowed, the Decrees of the Court would be oppoſite and contrary one to the other, which would breed the utmoſt Confuſion. *Per* Lord Chan. *Ibid.*

(H) Bills original after a Decree (*c*).

(*c*) Vide *Lloyd* and *Manſell*, *P.* 71. *Ca.* 10: —*Floyd* and *Manſell*, *P. Ca.* ——*Read* and *Hanby*, *P.* 77. *Ca.* 1.——*The Mayor and Burgeſſes of Coventry* and *Lord Craven & al'*, 2 *Mod. Ca. in Law and Eq.* 6.

1. BILL to redeem *after a Decree of Foreclоſure ſigned* and *inrolled* in 1697. ſuggeſting Fraud and Surprize in obtaining the Decree, and a parol Declaration before and after the Decree, that the Mortgagee was willing to take his Principal, Intereſt and Coſts, and quit the Eſtate. Defendant pleads the Decree, and denies the Fraud, &c. The Depoſitions of ſeveral Witneſſes were read to prove ſuch a parol Declaration by the Mortgagee, and that Plaintiff and Defendant in the former Cauſe had the ſame Clerk in Court, &c. Bill diſmiſt with Coſts by *Harcourt* C. *Eaſt.* 12 *Ann. Whiſhall* and *Short.*—— Decree affirmed *in Dom' Proc'.*——*Viner's Abr.* Tit. *Decree*, (D) *Ca.* 15.

Lord Chan. ſaid, Plaintiff came too late; that he knew no Inſtance where a Man was let in to *redeem* by a *new Bill after a Decree of Foreclоſure ſigned* and *inrolled* upon any *parol Agreement* or *Declaration*, or *by Reaſon of Over-value of the Eſtate*, ſuch a Thing would be of dangerous Conſequence, and ſhake Abundance of Titles; perhaps there may be an Inſtance of Relief upon a Bill to redeem after a Decree of Foreclоſure, *but then the Bill was brought in a very ſhort Time after the Decree*, and *there muſt be ſome extraordinary Circumſtances in the Caſe*; but ſaid, he did *not remember any ſuch Caſe of Relief. Ibid.* in S. C.—A *Court of Equity is cautious to make a Decree without a Precedent.* Laid down as a *Rule* in a MS. Caſe, which I have ſeen.

2. Defendant *C.* in 1712. brought a Bill againſt the now Plaintiff and *M.* his Wife, who was the Widow and Executrix of *B.* for an Account of *B.*'s Eſtate, and obtained a Decree; then *M.* died, and *before the Decree was inrolled*, the now Plaintiff petitioned for a Rehearing, and at the ſame Time preferred an original Bill, *ſuggeſting new Matter come to his Knowledge ſince the Decree*, and obtained an Order to rehear the former Cauſe. At the Hearing of this Cauſe, &c. Plaintiff's Counſel admitted that the Decree in the former Cauſe was juſt upon the Pleadings and Proof in that Cauſe, but inſiſted, that upon the Pleadings in this Cauſe the Merits appeared otherwiſe, and therefore prayed a new Decree in Favour of the now Plaintiff, and to ſet aſide the former Decree. *Cowper* C. diſmiſſed the Bill, and affirmed the former Decree. *Trin.* 2 *Geo.* 1. *Hickes* and *Conyers*, *Viner's Abr.* Tit. *Decree*, (D) *Ca.* 16.

It is *irregular* to bring a new Bill to vary a Decree already pronounced.—A Defendant in this Court may bring a Croſs Bill, *before any Decree pronounced in the original Cauſe*, and if the original Cauſe is heard before the Croſs Cauſe, the Decree in the original Cauſe may afterwards be varied by the Decree in the Croſs Cauſe, but in that Caſe the Croſs Bill muſt be brought before any Decree made in the original Cauſe. By the Courſe of the Court, if the original Decree had been inrolled, the now Plaintiff, *upon Affidavit of new Matter come to his Knowledge ſince the former Decree*, might have a Bill of *Review*, but he cannot now be relieved againſt the former Decree by this *new* Bill and *Rehearing* the former Cauſe; for the Decree is right upon the Pleadings and Proof, and therefore cannot be varied upon a Rehearing; and it is contrary to the Courſe of the Court to alter a Decree upon an *original* Bill exhibited *after the Decree pronounced. Per* Lord Chan. in S. C. *Ibid.*

3. If an *original Bill be brought for Matters, Part of which are contained in a former Bill* and *Decree*, and *Part new* or *by way of*

ſupplemental Bill, the Court will, *on a Demurrer to ſo much as was contained in the former Decree*, ſend it to a Maſter, to ſee what was and what was not in the firſt Bill, and allow the Demurrer accordingly. Ruled on Motion by *King* C. *Hil.* 12 *Geo.* 1. *Gilb. Eq. Rep.* 184.

Vide P. 177. *C.* 19.

4. After a Decree *inrolled* the Party can have no Relief by an original Bill. Laid down *as a Rule per Talbot* C. *in Caſu Taylor* and *Sharp. Trin.* 1735. 3 *Will. Rep.* 371.

(I) Bills taken pro Confeſſo.

1. IN *original* Bills, or Bills of *Reviver*, if the Defendant *does not appear*, but ſtands out all Proceſs of Contempt, the Bill ſhall *not* be taken *pro Confeſſo*; but *if he appears*, and then ſtands out for want of an Anſwer, *it ſhall. Trin.* 1667. *Anon.* 2 *Freem.* 127.

2. A Bill being preferred againſt a *Quaker* for *Tithes*, who *refuſed to anſwer upon Oath*, he was brought to the *Bar*, and having been brought *three Times before*, the Bill was taken *pro Confeſſo. Mich.* 1677. *Anon.* 2 *Freem.* 27. *Ca.* 29.

3. Defendant *refuſing to anſwer*, and *ſtanding out all Contempts* till an *Order* was made for a *Sequeſtration*, Plaintiff prayed that the Bill might be taken *pro Confeſſo*. Objected, that this could not be done, becauſe the *Sequeſtration was neither under Seal* nor *executed*; and alſo becauſe the *Plaintiff did not produce the Original*, but *only a Copy of it*; and *Parker* C. held the *laſt* Objection good; but as to the other there ſeemed to him to be no Reaſon for it; for the *putting the Seal to the Sequeſtration*, and *actually executed it*, ſeems to be *only* neceſſary when the Plaintiff is not ripe for a Decree upon his own Bill, but wants ſome Diſcovery from the Defendant's Anſwer, upon which the Decree may be founded; and therefore the actual executing a Sequeſtration to extort an Anſwer, of which the Plaintiff has no Occaſion, ſeemed to him to be unneceſſary. *Eaſt.* 5 *Geo.* 1. *Anon. Lucas's Rep.* 431.

4. The Defendant *appeared*, and *ſtood out to a Sequeſtration*, whereupon Plaintiff had an Order to ſet down the Cauſe, to the Intent that the Bill might be taken *pro Confeſſo*; but Defendant, on getting it put off, put in an Anſwer, which was reported *inſufficient*, and then *Plaintiff ſerved him with a* Subpœna *to put in a better Anſwer*, which was alſo reported *inſufficient*; then Defendant on *Saturday* put in a third Anſwer; and on the *Monday* following the Cauſe came on, *upon the Order for taking the Bill* pro Confeſſo, when Defendant moved for further Time to anſwer. But the *Maſter of the Rolls* decreed for the Plaintiff, (*though no Precedent was cited*) *Mich.* 1729.— But Lord Chan. *King* (*on Appeal*) ſaid, that *tho' there was an Order for a Sequeſtration before any Anſwer put in*, yet he would conſider how Matters ſtood *when the ſaid Decree was made*; and *held*, that it was *ſufficient there was at that Time an Anſwer*, and which the *Plaintiff had admitted by ſuing out Proceſs for a better Anſwer*; and ſaid, that *here* was a ſecond Anſwer, which muſt be admitted to be a full one, *becauſe not referred for Inſufficiency*. That it is againſt *Reaſon* and *common Senſe* to ſay, *Defendant had confeſſed the whole Bill to be true*, when it appeared by the Maſter's Reports, (*which*

Note; It appears by the Report of this Caſe, that the Defendant was willing and deſirous to put in a full Anſwer.

were

Ibid. *Vide* S. C. cited in the Caſe of *Lady Abergavenny* and *Lady Abergavenny*, *P.* *Ca.*

were Orders of the ſame Court), *that he had anſwered the greateſt Part of it*, and *when the Plaintiff himſelf had taken the firſt Anſwer to be an Anſwer in Part by ſerving Defendant with Proceſs to put in a better*; wherefore reverſed the Decree for taking the Bill *pro Confeſſo*. *July* 1730. *Hawkins* and *Crook*, 2 *Will. Rep.* 556 *to* 560.

5. *Plaintiff* brought her Bill *for an Account of Profits*, &c. and after *Defendant had fully anſwered*, Plaintiff *amended her Bill three Times*, to which *Defendant put in three ſeveral Pleas* and *Demurrers*, which had been *all over-ruled*, and *Defendant ſtood in Contempt to a Sequeſtration for not anſwering the amended Bill. Plaintiff* now moved for Liberty to ſet down the Cauſe on the *Sequeſtration*, in order that the Bill might be taken *pro Confeſſo*. Objected, that there being an *Anſwer to Part*, viz. the *original Bill*, the Bill could not be taken *pro Confeſſo*, becauſe Part was fully anſwered and denied; and the Caſe of *Hawkins* and *Crook* (*above*) was cited. But for Plaintiff it was urged, that if Defendant by *anſwering Part*, and *refuſing to anſwer the moſt material Point of all*, ſhould prevent the Bill being taken *pro Confeſſo*, that would put the Plaintiff in a much worſe Condition than not anſwering at all, and would encourage Defendants by this Method to elude the Juſtice of the Court; and as to *Hawkins* and *Crook*, Defendant *there was willing and deſirous to put in a full Anſwer*, and *which was at length the Liberty given him by the Court* (*a*). Lord Chancellor (*King*) ſaid, that this is an untrodden Path, as there are no Precedents to direct, we muſt go upon the Reaſon of the Thing at Law, after the Party has appeared, and is in Court; if he makes Default (*b*) Judgment is given for the whole Demand; and if in Treſpaſs, *&c.* Defendant pleads only to Part, or ſays nothing to the Reſidue, the *Plaintiff* may take his Judgment immediately for what is not anſwered; and *Courts of Equity form their Proceſs upon the ſame Plan when the Party is in Court*, &c. and it is a *Juriſdiction which ſeems abſolutely neceſſary*, and *exerciſed by all Courts*; when *they have the Parties once before them, they ſhould have it in their Power to determine upon the Right*, &c. and therefore ſeemed ſtrongly to incline that the Bill ſhould be taken *pro Confeſſo*, *quoad* the *Particulars not anſwered*. But *Defendant offering to anſwer by the next Term, except as to Matter of Account*, no Order was made upon the main Queſtion. *Mich.* 4 *Geo.* 2. *Lady Abergavenny* and *Lady Abergavenny*, *Viner's Abr.* Tit. *Chancery*, (D. b.) *Ca.* 1.

MS. Rep. S. C. ſtates it thus: *J. S.* filed a Bill againſt *B.* to which *B. put in an Anſwer*; the *Bill was twice amended, and Diſcovery of new Matter required*; *B.* pleaded and demurred in Bar of ſuch Diſcovery, which being over-ruled, *B.* was in Contempt to a *Sequeſtration* for want of an *Anſwer*; the Sequeſtration had been executed a Year ago, and now Plaintiff moved that the Bill might be taken *pro Confeſſo*, alledging that by the Practice of the Court whenever a *Defendant has appeared*, and the *Proceſs of Contempt is carried to the End of the Line*, the Bill may be taken *pro Confeſſo*, or otherwiſe there would be a Failure of Juſtice *when a Matter is enquired of which lies within the Knowledge of the Defendant*, and *of which the Plaintiff can have no other Diſcovery but by his Oath*. Objected, here was a ſufficient Anſwer to the *original* Bill; and no Precedent could be produced that where *any Part of a Bill was anſwered, the Reſidue might be taken* pro Confeſſo. But *per King* C. If an Action at Law be brought for *ſeveral Treſpaſſes*, and the Defendant's *Plea goes only to Part*, Plaintiff may ſign Judgment as to *all the Reſt*; and here *pro tanto* of the *amended Bill that is not anſwered*, it may be taken *pro Confeſſo*. But adjourned.——*Rep. of Sel. Ca. in Chan. &c.* S. C. *in totidem verbis* with *MS. Rep.*——A Caſe was mentioned *in Scacc'* of the *Corporation of Helſton* and *Robinſon*, where *after an Anſwer reported inſufficient*, and *Defendant refuſing to put in any further Anſwer*, the *whole* Bill was taken *pro Confeſſo* by the *Opinion of the whole Court delivered ſeriatim*; and this was the Opinion of the *Maſter of the Rolls* in *Hawkins* and *Crook*, for that an inſufficient Anſwer is no Anſwer; and it is the Party's own Obſtinacy to ſtand out and refuſe making a Diſcovery; and the Opinion of taking a Bill *pro Confeſſo quoad* ſome Particulars, and joining Iſſue, *&c.* as to the Reſt, ſeems new, and introductory of great Confuſion in the Proceedings. *Viner's Abr. Ibid. Ca.* 2. in S. C.——*Another MS. Rep.* S. C. *accord'*. (*a*) *For the Decree to take the Bill* pro Confeſſo *was reverſed.* (*b*) The Method in Equity of taking a Bill *pro Confeſſo* is conſonant to the Rule and Practice of Courts at Law, where if the Defendant makes Default by *Nil dicit*, Judgment is immediately given in Debt, or in all Caſes where the Thing demanded is certain; but where the Matter ſued for conſiſts in Damages, a Judgment Interlocutory is given, after which a Writ of Inquiry goes to aſcertain the Damages, and then final Judgment follows. Said *arg'* in *Hawkins* and *Crook*, 2 *Will. Rep.* 559.—2 *Will. Rep.* 311. *Lady Abergavenny* and *Lady Abergavenny* is not S. P.

6. The Opinion of Lord Chan. upon the *Stat.* 5 *Geo.* 2. *cap.* 25. *ſect.* 1. was, that it was not ſufficient to make an Affidavit *that the Party*

Party making it was informed, *and* believes *that the Defendants withdrew themſelves into* Ireland *in order to avoid being ſerved with the Proceſs of this Court; but it muſt likewiſe be ſworn by whom the Party depoſing received ſuch Information* (*a*). *Hil.* 1740. *in Caſu Burton* and *Maloon*, *Barnard. Chan. Rep.* 401, 403.

(*a*) For was it once allowed that *it ſhould be ſufficient to make an Affidavit in ſuch a general Manner as above*, the Act would be of the *moſt* dangerous Conſequence that is poſſible. *Per* Lord Chan. *Ibid.* 403.

(K) Bills of Revivor.

2 *Freem.* S. C. ſays, it was on a Plea and Demurrer.—*Chan. Ca.* 37. S. C. ſays, it was on Plea and Demurrer.

1. A Decretal Order was pronounced in 1657. and three Years after a final Decree was drawn up, reciting the Decretal Order, but *Part of the Matter thereby decreed was omitted in the Decretal Part of the Decree itſelf*; the final Decree was ſigned and inrolled, and ſoon after the Defendant died. A *Sci. Fa. was ſued to revive*, but Plaintiff diſcovering the Omiſſion, and that he could not have Remedy that Way, *or could mend the Decree as defective by Surpriſe*, (the Defendant being dead) upon Motion he exhibits his *Bill of Revivor* to *revive ſo much as was omitted*; and in Truth the Words of the Bill extended ſo far as to revive the whole Decree. It was *pleaded that the Decree being inrolled, a Bill of Revivor did not lie*, but a *Sci. Fa.* Plea over-ruled. *Mich.* 15 *Car.* 2. *Williams* and *Arthur*, *MS. Rep.*

2. *A.* brings his Bill againſt *B.* and *C.* who put in an inſufficient Anſwer, and prefer their Croſs Bill againſt *A.* *B.* becomes a Bankrupt, his Aſſignees bring their Bill in *Nature of a Bill of Revivor* againſt *A.* they ſhall not go on till *C.* has anſwered *A.*'s Bill. *Mich.* 1714. *Child & al'*, *Aſſignees of Evans*, and *Frederick*, 2 *Will. Rep.* 266.

In arguing the Demurrer it was inſiſted, that tho' the *conſtant Rule be*, that where

3. Bill was *diſmiſſed with Coſts, which were taxed*; a Bill of *Revivor was brought ſingly for* (theſe) *Coſts*, but on *Demurrer* it was held that the Bill would not lie. *Per King* C. *Hil.* 1725. *Thorn* and *Pitt*, *Sel. Ca. in Chan.* 54.

a Bill is diſmiſſed with Coſts, the Party intitled to them cannot revive for that, that *muſt be taken to be where they are* not *taxed* and *liquitated to a Sum certain*, for *then it becomes a Duty*; and tho' the Bill be diſmiſſed, it is not ſo much out of the Court, but the Party in Conſequence of ſuch Diſmiſſal is liable to the Proceſs of the Court by *Subpœna*, *Attachment*, &c. But *per* Lord Chan. it is a *Rule, that unleſs in Account, where both Parties are Actors, they cannot revive*; ſaid he knew no Inſtance of Revivor in ſuch a Caſe as this; that *it was very odd*, but the *Rules of the Court muſt be obſerved. Ibid.*

For more of *Revivor*, *vide* (B) *P.* 2.——Alſo *P.* 72. *Ca.* 18.

(L) Bills to examine Witneſſes in perpetuam rei memoriam (*a*).

(*a*) *Vide* alſo Tit. *Evidence*, *P.*

His Lordſhip admitted, that *without ſuch an Affidavit* the *Demurrer would have been good*, it being a common Suggeſtion in a Bill;

1. ON a Bill to *diſcover a Title to Land*, and *for an Account of the Profits*, and *to perpetuate Teſtimony*, &c. Defendant *anſwered as to the Title*, and *demurred as to the perpetuating Evidence, in Regard the Plaintiff might bring his Ejectment*, and *examine his Witneſſes at the Trial*; and upon *Affidavit that the Plaintiff's Witneſſes were infirm* and *unable to travel*, the *Demurrer was over-ruled* by

but *when ſworn*, if *ſuch Demurrer ſhould be allowed*, it would introduce *great Inconvenience* and *Hardſhips*, and *a Failure of Juſtice. Ibid.*

by the Maſter of the Rolls, and afterwards by *Cowper* Lord Chan. on a Rehearing. *Hil.* 1709. *Philips* and *Carew*, 1 *Will. Rep.* 117.

2. *J. S.* brought his Bill for a Commiſſion to examine his Witneſſes *in perpetuam rei memoriam* to *eſtabliſh his* ſole *Right of Fiſhery*, ſuggeſting that the *Defendant pretended a ſole Right of Fiſhery*, and *threatned to bring Actions*, and *diſturb Plaintiff when all his Witneſſes* ſhould be dead. Defendant demurred, for that *J. S. had not verified his Title at Law*, and *therefore had no Right to bring his Bill* in the firſt Inſtance. Demurrer *over-ruled* (*a*). *Trin.* 1720. *Duke of Dorſet* and *Serjeant Girdler*, *Prec. in Chan.* 531.

(*a*) And this Difference was taken and agreed to by the Court, that if one *that is out of Poſſeſſion brings ſuch Bill*, a Demurrer will be good, becauſe he ought *firſt to eſtabliſh his Title at Law*. But where the Plaintiff ſuggeſted that the Defendant threatned to diſturb him, &c. *when his Witneſſes ſhould be dead*, if the Defendant not only threatned but actually did diſturb him by fiſhing, &c. daily; in ſuch Caſe the *Defendant ſhould plead that he did daily diſturb Plaintiff*, and *therefore the Plaintiff ſhould ſeek Remedy at Law*;—Or if the *Plaintiff had ſhewn in his Bill* (*a*) *that Defendant had actually diſturbed him, then the Demurrer had been proper*, but *not for barely threatning. Ibid.*——*Wynn* and *Hatty*, before *Wright* Lord Keep. was cited, where *a Bill of the ſame Nature was brought touching a Common*, and *the Demurrer allowed*, becauſe *there it appeared by the Plaintiff's own ſhewing that he was interrupted* and *diſpoſſeſſed*, and *therefore had his Remedy at Law. Ibid.* 532.

Books and Authors. Vide Tit. *Injunction*, *P.*

CAP. XVI.

Bonds or Obligations.

(A) Of voluntary Bonds.
(B) Of Bonds of Reſignation and criminal Converſation.
(C) Bonds relieved againſt, & econt'.
(D) Of Marriage Brokage Bonds.
(E) Concerning Co-Obligors and Sureties.
(F) In what Caſe a Defect in a Bond will be ſupplied.
(G) Bottomry Bonds.

(A) Of voluntary Bonds.

1. *J. S.* executes a *voluntary* Bond for 5000 *l.* to one of his Daughters, *without any Condition*, and payable immediately (*b*), but *always kept it by him*; and there was ſome Proof in the Cauſe that this Bond was entered into to *protect him from paying Taxes for his Money*, and *ſo underſtood by this Daughter*; and by Will he *gives Portions to all his Daughters*, and dies. This Bond decreed to be ſet aſide, *this Daughter being equal* (*c*) *to the Reſt without* the Bond. *Per* Lord Keep. *Hil.* 1701. *Ward* and *Lant*, *Prec. in Chan.* 182.

(*b*) Though there was no Fraud or Circumvention in obtaining the Bond, yet it appears to be *J. S.*'s Intention that no Uſe ſhould be made of it, and therefore if the Daughter had got it from him, and put it in Suit againſt him in his Life-time, Equity would have relieved him againſt it. *Per* Lord Keeper's Opinion. *Ibid.* 183.——(*c*) *J. S.* always declared that he intended his Daughters equal, and *Equality is the higheſt Equity*; and the Bond being voluntary, and *only done to protect*, &c. it is a Truſt for himſelf. *Per* Lord Keep. *Ibid.*

2. A Son in plentiful Circumſtances gives his Father a Bond to pay him 120 *l.* Annuity for Life; if done freely and without Coertion, good. So decreed by *Parker* C. *Hil.* 1719. *Blackborn* and *Edgley & econtra*, 1 *Will. Rep.* 600, 607.

So a *Covenant to pay a Sum of Money when there ſhould be Failure of Iſſue of the Body of* B. would ſurely be good.

3. A *Bond to pay a Sum of Money upon the Death of* A. B. *without Iſſue of his Body*, will be good. Said *per* Lord Chan. *Macclesfield*, *Mich.* 1721. 1 *Will. Rep.* 750.

Said *per* Lord *Parker*, *Trin.* 1719. *Ibid.* 566.

4. Where a *voluntary Bond is given by the Huſband to Truſtees for his Wife's Benefit*, Equity will poſtpone ſuch Bond *even to Debts on ſimple Contract*, but will *admit it to be paid before Legacies.* Decreed by Sir *Joſeph Jekyll*, Maſter of the Rolls, *November* 17, 1730. *Williams* and *Sawyer & al'*, *Rep. of Sel. Ca. in Chan. &c.* 6.

5. Any *voluntary* Bond is good againſt an Executor or *Adminiſtrator*, unleſs *ſome Creditor be thereby deprived of his Debt*; but *a real Debt*, tho' by *ſimple Contract only*, ſhall have the Preference. *Per* Sir *Joſeph Jekyll*, Maſter of the Rolls, *Mich.* 1733. *in Caſu Lechmere* and *Earl of Carliſle & al'*, 3 *Will. Rep.* 211, 222.

His Honour admitted, that if the Bond had been given to the ſecond Wife *upon the firſt Diſcovery of a former then living, as a Recompence for the Injury done her*, and *thereupon ſhe had left* J. S. this had been a *juſt Bond*, and *for* a *meritorious Conſideration* (*a*).

6. *J. S.* having a *Wife who lived ſeparate from*, afterwards *married another Woman, who had no Notice of the former Wife's being alive*, but *it being diſcovered to the ſecond Wife that the former was alive*, J. S. in *order to prevail with the ſecond Wife to ſtay with him* (about *five* or *ſix Years after ſuch Diſcovery*) gave a Bond to a Truſtee of the ſecond Wife, to leave her 1000 *l.* at his Death, and then died, *not leaving Aſſets to pay his ſimple Contract Debts.* On a Bill brought by the ſecond Wife for this 1000 *l.* Sir *Joſeph Jekyll*, Maſter of the Rolls, (*on Time taken to conſider*) decreed that this Bond ſhould be poſtponed to all *ſimple Contract* Debts of *J. S. Mich.* 1734. *The Lady Cox's Caſe*, 3 *Will. Rep.* 339.

But here the Bond was not given until five or ſix Years after Diſcovery, &c. which made it reaſonable to think it was given by *J. S.* to this Lady *rather to induce her to live with him, than upon any other Motive*, in which Caſe *the Bond would be worſe than a voluntary one*; for then it would be given for a wicked Conſideration, that of living in Adultery with *J. S.* and ſhe ought to have left *J. S.* after ſhe had fully diſcovered he had a former Wife living;——If ſuch a Bond had been given to a *lawful Wife after Marriage*, this had been a *voluntary* Bond, and *void againſt Creditors* (*b*), much more when given to one who was *no Wife*, and *upon ſuch an* illicit *Conſideration. Per* his Honour, *Ibid.* 340, 341.

(*a*) And *therefore to be paid before any ſimple Contract Debts.* (*b*) *Vide P. Ca. Lechmere, &c.*

Vide the Caſe of *Jones* and *Powell*, 1 *Vol. Eq. Ca. Abr. P.* 84. *Ca.* 2. 4*th Edition*, and my Notes there.

7. A *Bond given to a kept Miſtreſs for the Payment of an Annuity for the Maintenance of herſelf*, and *Proviſion for a Child ſhe had by the Obligor*, ſhall not be ſet aſide in Favour of *his legitimate Children* or *Heir*, if *not obtained by Fraud.* But the Annuity was decreed *per* the Maſter of the Rolls to be paid after *ſimple Contracts*, this *being a voluntary Bond*; but his *Honour* having given no Direction whether the *real* Eſtate ſhould be chargeable *in Caſe of a Defect of the perſonal Aſſets*, on Appeal Lord Chan. *Talbot* held the real Eſtate liable in Caſe of a Deficiency in the perſonal Eſtate, and decreed, *that if the ſame ſhould fall ſhort*, upon Payment of the Arrears and growing Payments by Plaintiff (the Heir *), and that upon his ſecuring

* Altho' this be a *voluntary* Bond, and poſtponed in Point of Payment even to *ſimple Contract Creditors*, yet it muſt not be in a worſe Condition than they are; its being *voluntary* gives the Heir no Right to ſet it aſide: For as the Anceſtor might have granted the Eſtate away *intirely* from his Heirs, ſo when he thinks proper to *charge himſelf* and *his Heirs*, the *Heir ſhall be bound in Reſpect of the Aſſets deſcended upon him from his Anceſtor. Per* Lord Chan. *Ibid.* 156.—His Lordſhip added, that leaving the Obligee to ſue the Bond at Law where ſhe can recover but the Penalty, *and where the* Parol *muſt demur until the Heir* (now three Years old) *comes to his full Age*, would be delaying her much too long; and ſince even after *Advantage taken of the Infancy* at Law, and the *Penalty recovered againſt the Heir*, he may reſort again to this Court to have the whole Thing reconſidered, which is now as proper for the Judgment of the Court as it would be then; wherefore he decreed, &c. *Ibid.*

curing the Annuity out of a ſufficient Part (*of the real Eſtate* *) when of Age, the Obligee be reſtrained from proceeding upon the Bond at Law. 11 *December* 1735. *Cary* and *Rook*, *Ca. in Eq. Temp. Talbot* 153.

* *Not in the Original.*

(B) Of Bonds of Reſignation and criminal Converſation.

1. *A.* Preſented *B.* to a Vicarage, and took a *Bond* of 500 *l. conditioned to reſign after ten Years, upon Requeſt.* The Vicarage was 50 *l. per Ann.* The *ten Years expired*, and the *Requeſt was made. B. prepared a Reſignation*, and *tendered it to the Biſhop*, who *refuſed to accept it*, ſaying, theſe Bonds were againſt Conſcience, and void; and *becauſe this in an Action now brought upon the Bond would be no Plea*, B. (*he having undertaken for a third Perſon, who, as was ſuggeſted, was a Man of good Converſation*) exhibited his *Bill to be relieved againſt this Bond*, and *to have an Injunction.* But the Court would *not relieve* unleſs the Patron had made ſome ill Uſe of the Bond, *for the Law allows theſe Bonds to be good* (*a*). But *Price* B. was not ſo very clear as to any *judicial Act to be done by a third Perſon*;——The *Party having done his Endeavour*, the *Parſon had three Months Time given him to reſign*, which if he did, the Court would grant a *ſpecial* Injunction. *Trin.* 7 *Ann. Steeper* and *Carver*, *MS. Rep.*

Note; It was *proved that* the *Parſon was of a good Character*, but *had not reſided upon the Vicarage*; but the Court did not regard this, the *Reaſon they went upon was, becauſe generally, are be on good and Non-reſidence*; in the Caſe of

the Patron had not made any bad Uſe of the Bond. Ibid. (*a*) *Theſe Bonds, tho' to reſign good*, and have been ſo allowed conſtantly; and there are many Caſes of it, becauſe *they may valuable Conſideration*, and *not ſimoniacal*; as in Caſe the *Party takes a ſecond Benefice*, or *for* and a Court of Equity will inſiſt on theſe Bonds where made *on good Conſideration. Per Cur'* *Turner* and *Hawkins*, *Trin.* 4 *Geo.* 1. in *B. R. Forteſ. Rep.* 351, 352.

2. Plaintiff and Defendant having been at a Fair together, about 10 of the Clock in the Morning came to Defendant's Houſe; Defendant went out, and his Wife went with Plaintiff up Stairs in order to put him to Bed, *he being* (as was ſuggeſted in the Bill) *very drunk.* Defendant when he returned found *Plaintiff in his Shirt ſitting on the Bed*, and *his Wife lying upon it crying.* The Bill alſo ſuggeſted, that the *Defendant took up an Axe, and ſwore that he would kill the Plaintiff* (*a*), upon which the Plaintiff (*being under Terror*) told the Defendant he would give him any Satisfaction; whereupon it was agreed that he ſhould give Defendant *all the Money he had in his Pocket*,

(*a*) But upon the Defendant's *Anſwer* and the *Proofs* this *did not appear*, but only

that the *Defendant took the Plaintiff's Clothes, and threatned to throw them out of Doors if he did not go away. Ibid* ——*Gilb. Eq. Rep.* 9. *Mich.* 7 *Ann. Woodman* and *Skuſe* S. C. ſtates it thus: Defendant coming home finds the Plaintiff naked, and juſt going to Bed to his Wife; he thereupon gets a Note from him for 500 *l.* which was in *June*, and in *Auguſt* the Plaintiff gives him a Judgment, and in *October* following ſurrenders Copyhold Lands to him by way of further Security. The Plaintiff brought his *Bill to have the ſeveral Securities delivered up, alledging a Contrivance to catch him in that Manner*; that *he was drunk, and did not know what he did*; and *that Defendant with an Axe threatned to cut him in Pieces, ſo that he was under Terror*; and that *Defendant himſelf had ſaid in Company, that the Securities were for Money lent.* Lord Chan. obſerved, there was no Proof of a Plot to catch the *Plaintiff* in this Manner, nor that he appeared to be ſo diſordered or frighted; for *he continued in the ſame Mind* when he was in cool Blood, *at the ſeveral Times of giving the three different Securities*; and it was proved that *he joined with the Defendant in giving out that the Note was for a Bargain of Graſs*, ſo that he knew what he was about, and had a Mind to conceal it; and that the *Defendant's ſaying in Company it was for a Bargain of Graſs*, made the Plaintiff's Equity the worſe, for it was a ſign the Defendant was ſo juſt as to keep it a Secret, which was certainly the Intent of the Bargain it ſhould be. If a Jury in this Caſe had given Damages, this Court would not relieve; and why ſhould it when *the Plaintiff himſelf has three Times given and aſcertained Damages againſt himſelf*; ſo diſmiſſed the Bill, *but without Coſts*, becauſe the *Defendant had bragged of his Bargain*, which was a ſign he thought himſelf rather over-paid, and *therefore* Lord Chan. *ſaid, he would relieve againſt the Penalties.* Another *MS. Rep.* S. C. almoſt *in totidem verbis* with *Gilb. Eq. Rep.*

Pocket, which was 16 *s.* and a *Note for* 500 *l. payable by* 50 *l. a Year.* A Witneſs was called in to ſee the Note ſigned, and the *Plaintiff told him it was a Bargain for Graſs.* Defendant *about three Days after* told Plaintiff, that if he did not give him a better Security, he would put the Note in Suit; whereupon the Plaintiff gave *a Bond for the Payment of* 500 l. *with a Warrant of Attorney to confeſs Judgment*, and which was *accordingly confeſſed.* Afterwards the Plaintiff *fearing Execution upon the Judgment, ſurrendered a Copyhold for a further Security.* Plaintiff was taken in Execution upon the Judgment, and to be relieved he brought his Bill. Lord Chan. This was a *voluntary* Act of the Plaintiff, and done, *being conſcious to himſelf that he had done amiſs.* And it ſeems *he was ſober when he gave the Note*; for *he told the Witneſs, it was a Bargain for Graſs*; ſo that he was willing to conceal the Truth, which Excuſe he had not been capable of making if he had been ſo drunk as the Bill ſuggeſts. If a Jury had given Damages in this Caſe in an Action at Law for entring his Houſe, *&c.* this Court would not have relieved againſt the Damages; and his giving ſo many repeated Aſſurances upon Deliberation makes it ſtronger than any Verdict; for it is ſo many Confeſſions that the Defendant was injured to that Damages; and *nothing is ſo ſtrong an Evidence againſt a Man as his own Acts.* His Lordſhip diſmiſſed the Bill, but *without Coſts*, ſaying Plaintiff had made himſelf a hard Bargain. *Trin.* 7 *Ann. Goodman* and *Scuſe, MS. Rep.*

(C) Bonds relieved againſt, & cont'.

1. *J. S.* in *Conſideration of* 100 l. *given him in his Father's Life-time*, gave a *Bond for* 600 l. *to be paid within a Year after the Death of his Father, (to whom he was Heir).* This Bond being ſued, *J. S.* was relieved *per* Lord Chan. he *repaying the* 100 *l.* and *Intereſt. Hil.* 1680. *Varnees*'s Caſe, 2 *Freem.* 63.

2 *Freem.* 223. *Mich.* 1698. *Humphries* and *Rigbey* S. C. *accord'.*

2. The Bill was to be relieved againſt a Bond given for Money won at *All Fours.* Plaintiff was a Diſtiller, and Defendant a Tapſter at a Bowling Green; and it appearing that the *Defendant laid the Cards*, and *turned up the Knave of Clubs* (which was Jack) *ſeveral Times together*, and *being an unreaſonable Sum for ſuch Perſons to venter*, Plaintiff was *relieved*, and the Bond ordered to be delivered up, *altho' this Caſe was not within the Statute, the Bond being for leſs than* 100 *l.* (*a*). *Mich.* 1698. *Humphries* and *Rigbey, MS. Rep.*

(*a*) For Equity *always relieved before the Statute, where any Fraud appeared. MS. Rep.* in S. C.——2 *Freem. Ibid. accord'.*

2 *Freem.* 223. S. C. *accord'*, and adds, that altho' there was no Son living at *A.*'s Deceaſe, ſo that it was *not recoverable at Law*, yet that it could not be preſumed to be *A.*'s Intention, that if a Son was born after his Deceaſe, the Daughter ſhould run away with the Eſtate; and that in this Caſe it appeared that the Mother was Quick at *A.*'s Death; and by the *Civil* Law, *Poſthumus pro nato habetur; per Cur'*; and ſo decreed that the *Plaintiff ſhould be relieved againſt the Bond. Ibid.* 224.

3. A. *gives a Bond to pay* 900 l. *to his Daughter in Caſe ſhe ſhould have no Son living at his Deceaſe*; *A.* died, *his Wife being* enſeint *of a Son*; the Queſtion was, whether the Daughter ſhould have this 900 *l.* And *per Cur'*, ſhe ſhall not; and Plaintiff *the Son* was relieved. *Mich.* 1698. *Gibſon* and *Gibſon, MS. Rep.*

4. Upon an Appeal from the Rolls the Caſe appeared thus: *J. S.* had an extravagant Wife, who had run 250 *l.* in Debt *without his Privity* to a Seamſtreſs, Part for Goods, and Part for Money lent. The Wife wrote a Letter to the Seamſtreſs, *deſiring her not to acquaint the Huſband with the whole Debt*, but *only with Part*; and *that ſhe would take Care to get her Security for the Reſt*; and *ſhe incloſed a Note under her own Hand for ſo much as the Seamſtreſs was to diſcover to the Huſband*, and *another Note for the Payment of the Reſidue*; *but this was to be concealed from the Huſband.* The Seamſtreſs comes to the Huſband, and ſhews him the firſt Note, and *demanded only Part of her Debt*, *which he paid*, and *ſhe gave him* a *full Receipt*; and *then the Huſband charged the Seamſtreſs never to truſt his Wife more.* After this the *Wife perſwaded the Huſband's Niece*, who was but *lately come of Age*, to be bound with her for the *Payment of the Reſidue*, pretending that it was a juſt Debt; and accordingly ſhe entred into a Bond for the Payment of 125 *l.* and the Niece came to be relieved againſt this Bond. For the Niece it was argued, That this was a plain Contrivance between the Wife and the Seamſtreſs to defraud the Niece of ſo much Money; for the Wife having got as much as ſhe could from her Huſband, could no longer ſupport her Extravagancies that way; but makes uſe of this Shift, to procure her Niece to be bound with her to the Seamſtreſs, ſo that by that Means the Wife might have further Credit to the Value of the Bond; and this was moſt certainly the End of the Contrivance; for it appears by the Receipt from the Seamſtreſs, that there was nothing due. Lord Chan. No Doubt but Traders do very often truſt without the Huſband's Conſent; but here the Seamſtreſs did not only truſt the Wife in the Way of her Trade, but did lend her Money; ſo that ſhe was aſſiſting to the Wife to get what ſhe could from her Huſband; and the Niece, who was but juſt come of Age, was drawn in to execute this Bond, when there was no Conſideration; for there was nothing owing to the Seamſtreſs, ſhe having given the Huſband a Receipt in full, which is good Evidence in Law that nothing is owing. Now to account for this, they ſay, that the Reaſon of giving this Receipt was to keep Peace between the Huſband and Wife; and for this Purpoſe have produced two Letters. But I muſt go upon the better Evidence, *viz.* the Receipt, which is a very good Evidence at Law that there is not any Thing due; ſo the Bond muſt be ſet aſide, and the Decree by the Maſter of the Rolls affirmed. *Hil.* 6 *Ann. Fowler* and *Ayliffe*, *MS. Rep.*

5. A Creditor petitions againſt the Allowance of a Bankrupt's Certificate, upon which the Bankrupt gives him a *Bond for Payment of his whole Debt*, *in Conſideration of withdrawing his Petition*; Equity will not relieve againſt this Bond. Decreed *per Parker* C. *Eaſt.* 1720. *Lewis* and *Chaſe*, 1 *Will. Rep.* 620. *Vide* (Q.) *P.* 124. *Ca.* 5. and the Notes there.

6. *A.* agreed for the Purchaſe of Timber; and *A.* and *B.* both entred into a Bond that *A.* his Executors and Adminiſtrators, ſhall not cut down under ſuch Size; it comes out that *A.*'s Name was only made Uſe of for *B.* in the Agreement; *B.* cuts down Timber under Size; there can be no Remedy at *Law* upon this Bond; but it is a Fraud on the Seller, and relievable in *Equity.* 12 *Mar.* 1720. *Butler* and *Pendergraſs*, *Viner's Abr.* Tit. *Fraud*, (C. a.) *Ca.* 13. *cites it as a MS. Rep. ſaid to be Lord* Harcourt's.

7. In the Settlement made on the Marriage of *B.* *A.*'s Son, there is a Power reſerved to *A.* the Father to ſettle 200 *l. per Ann.* upon any Wife which he ſhould marry, he paying 1000 *l.* to *B.* The

Father treating about a ſecond Marriage, *B.* the Son, agrees with the ſecond Wife's Relations to releaſe the 1000 *l.* and accordingly does ſo, (but it did not appear that the Son's Wife, or any of her Relations, were conſenting to ſuch Releaſe) and takes a private Bond from his Father for the Payment of this 1000 *l.* but this Bond was entred into by the Father without the Privity of the ſecond Wife, or any of her Relations. Sir *Joſeph Jekyll*, Maſter of the Rolls, would not decree againſt this Bond, becauſe it would be injurious to the *firſt* Marriage, which being *prior in Time, is to be preferred* (*a*); and his Honour ſaid, the only Relief he could give the Father would be to award a *perpetual* Injunction, upon Payment of Principal, Intereſt and Coſts. *Trin.* 1730. *Roberts & Ux'* and *Roberts*, 3 *Will. Rep.* 66.

(*a*) Rule; *Qui prior eſt in Tempore, potior eſt in Jure.*

Where a *weak Man gives a Bond*, if there be no *Fraud* or *Breach of Truſt* in the obtaining it, *Equity will not ſet aſide the Bond only for the Weakneſs of the Obligor* (*b*), if he be *Compos Mentis*; neither *will Equity meaſure the Size of People's Underſtandings* or *Capacities*, there being *no ſuch Thing as an* equitable *Incapacity, where there is a* legal *Capacity*.——But *if a Bond be given for a Conſideration*, where it *appears there was none*, or *not near ſo much as is pretended*, Equity *will relieve againſt it*.—But in the principal Caſe there appears to have been a Truſt repoſed in a Servant to *take Care of an Heir*, and *prevent his being impoſed upon*; and the Servant, inſtead of acting agreeably to his Truſt *himſelf, impoſes upon him*; the Truſt continued ſo long as *B.* remained in the Service; and it is *remarkable* that during the Infancy of the Heir the *Law* took Care of him, who for that Reaſon did not want ſo much the Care of another: But when he was *out of the Protection of the Law, by being of Age*, then he ſtood moſt in need of the Care of the Servant. A *Breach of Truſt is of itſelf Evidence of the greateſt Fraud*, becauſe even a careful Man is apt to be off his Guard when dealing with one in whom he repoſes a Confidence.—A 1000 *l.* was an exorbitant Gift from one who had no Means of paying it. The ſecreting the Bond from the Parents is alſo a further Evidence of Fraud; and *young Heirs even when of Age are under the Care of this Court. Per* his Honour, *Ibid.* 130, 131. (*b*). The having been in *drink* is not any Reaſon to relieve a Man againſt any (*Bond* or) Deed or Agreement gained from him when in thoſe Circumſtances, for this *were to incourage Drunkenneſs* (*c*); *ſecus* if thro' the *Management* or *Contrivance* of him who gained the Deed, *&c.* the Party from whom it was gained was drawn in to drink. By Sir *Joſeph Jekyll* at the Rolls, *Johnſon* v. *Medlicott*, *May* 29, 1734. 3 *Will. Rep.* 130. *in a Note by the Editor*.—(*c*) Rule; *Omne crimen ebrietas & incendit & detegit.* A Drunkard, who by his own vicious Act depriveth himſelf of his *Memory* and *Undertaking*, ſhall have no *Benefit* or *Privilege*, as being *Non Compos Mentis* either to him or his Heirs; a Drunkard who is *voluntarius dæmon* hath no *Benefit* or Privilege thereby, but what hurt or ill ſoever he doth, his Drunkenneſs aggravateth it. *Co. Lit.* 247. *a. Vide* 4 *Co. Beverly's* Caſe. Rule; *One may not ſtultify himſelf.*

8. *J. S.* and his Wife intruſted *A.* their *eldeſt Son* (then an Infant) to the Care of *B.* to attend him in his Travels, and *to prevent his being impoſed upon*, as it was *admitted by* B.'s *Anſwer*. *A.* when 27 Years of Age was prevailed on by *B.* (*then in the Service*) to give him a Bond for 1000 *l.* which was prepared by *B.* and kept ſecret from the Parents. There were *Proofs of the weak Capacity of* A. and *that at that Time he was unable to raiſe Money to pay off the Bond.* The original Bill was to recover the Money on the Bond, *which was alledged to be miſlaid*, and *the Croſs Bill was to be relieved againſt the Bond*. Sir *Joſeph Jekyll*, Maſter of the Rolls, (*tho' a new Caſe*) ſet aſide the Bond as *obtained by Fraud*, and *a Breach of Truſt*; and *B.* in his Anſwer to the Croſs Bill having ſet forth that the Bond was *miſlaid*, his Honour decreed him to releaſe it. *Mich.* 1731. *Oſmond* and *Fitzroy & Duke of Cleveland & econt'*.——22 *June* 1734. Decree affirmed by *Talbot* C. and the 5 *l.* Depoſit ordered to be paid to the Duke. 3 *Will. Rep.* 129, 131.

9. Plaintiff, a poor Man and illiteral, ſuing for an Eſtate, *gives a Bond for a* 1000 *l.*) *to the Defendant*, who *aſſiſted him with ſmall Sums*, and *took ſome Pains in the Affair*; and the *Bond was obtained by preſſing the Plaintiff for Payment of what was expended*, and *taking Advantage of his Inſolvency*. Lord Chan. decreed the Bond to ſtand as a Security only for ſo much as had been actually laid out *with Intereſt*, and left the Defendant at Liberty to bring his *Quantum Meruit* for what he deſerved for his Pains and Trouble. *Trin.* 1735. *Proof* and *Hines*, *Caſes in Eq. Temp. Talbot* 111.

10. *E.* had for many Years been a Supervisor of Excise by the Procurement of *R.* and *R.* had promised to procure him to be made Collector, upon Condition that *E.* should pay *R.* 10 *l. per Annum* so long as he (*E.*) should continue Supervisor, and 20 *l. per Annum* so long as he should be Collector, and the Condition of the Bond was *accord'*. *E.* paid one 10 *l.* and died intestate, and then *R.* sued the Bond against *E.*'s Widow and Administratrix, who brought a Bill to set aside the Bond, *and to have the* 10 *l. refunded* (*a*). Lord Chancellor decreed the Bond to be cancelled, and a *perpetual* Injunction. *Mich.* 1735. *Law* and *Law, Cases in Eq. Temp. Talbot* 140.

This is but one Agreement altho' respecting two Periods, *viz.* that *of having obtained the Office of Supervisor*, and that *of procuring the Collectorship*; and then the Condition is to pay two several Sums; the Office is *certainly* within the *Stat.* 5 & 6 *Ed.* 6. (*b*), for it concerns the King's Revenue, *and cannot be executed by Deputy*; and *the Sale of Offices within that Statute is a publick Mischief*. And altho' this be *not directly a Sale within the Statute*, yet *it is in Effect the same*; there being *little* or *no Difference between a Commissioner's taking a Sum of Money*, and *another Person's taking it to influence the Commissioner*. The Inconveniences are the same, since *thereby the Persons appointing are deceived*, and *so is the Publick*; and there is a very strong Presumption that the Person so giving is not duly qualified for the Execution of the Office; and *here* it appeared that the *Obligor* was suspended.——Tho' *penal Laws are not to be extended in Equity as to Penalties* and *Punishments*, yet if there be a publick Mischief, and a Court of Equity sees *private Contracts made to elude Laws enacted for the publick Good*, it ought to interpose.—Marriage Brokage Bonds fall directly within the Reason of this Case. *Per* Lord Chan. *Ibid.* 141, 142.——3 *Will. Rep.* 391. S. C. states it, that *A.* procured for *B.* a Supervisor's Place in the Excise, and in Consideration thereof *B.* gave a Bond to pay him 10 *l. per Ann.* as long as he should continue in the Office. Lord Chan. decreed that the Bond be delivered up, and an Injunction, *&c.* and tho' this was a new Case, the Defendant was ordered to pay Costs. *Ibid.* 394. (*a*) *Note*; It does not appear by the Reporter *Temp. Talbot*, whether *this Matter was decreed or not*. And Mr. *Peere Williams* takes no Notice of it. (*b*) Tho' the Excise was no Part of the Revenue at the Time of making this Statute, yet there may be good Ground to construe it *within the* (*c*) *Reason* and *Mischief of that Law*, which is rather *remedial* than a *penal* one. *Per* Lord Chan. in S. C. 3 *Will. Rep.* 393. ——— (*c*) It is no new Thing, but usual that *an Interest raised by a subsequent Statute should be under the same Remedy* and *Advantage as an Interest existing before*. 3 *Will. Rep.* 394. *in a Note.*

(D) Of Marriage Brokage Bonds (*d*).

(*d*) *Vide P. C.*

1. *J. S.* by Will gives his Niece 1200 *l.* she marries, but antecedent to the Marriage her Father takes a Bond from the then intended Husband to pay him 200 *l.* in Case the Daughter should die without Issue Male in the Life-time of her Husband; the Daughter did die without Issue Male, living her Husband, the Father sued the Husband at Law upon the Bond, and the Husband on a Bill was relieved against this Bond; for it appearing that no Money was paid, nor any Consideration for entring into it, the Court took it to be *in Nature of a Marriage Brokage Bond*, and therefore ordered it to be delivered up. *Mich.* 1708. *Anon. MS. Rep.*

Prec. in Chan. Mich. 1708. *Anon.* S. C. *accord'*.—— 1 *Vol. Eq. Ca. Abr. P.* 90. *Ca.* 5. *Mich.* 1707. *Keat* and *Allen* S. P. and perhaps S. C.

2. *Marriage Brokage Agreements have been often condemned in Equity*; (*e*) ——and a Bond to *give Money if such a Marriage could be obtained* is ill; —— and so is a Bond to *forgive* a Sum of Money. *Per Cowper* C. *Easter* 1710. 1 *Will. Rep.* 120.

(*e*) *Vide* 1 *Salk.* 156.—2 *Vern.* 392, 588, 652. —and 1 *Vol. Eq. Ca. Abr.*

P. 90 *Ca.* 6.—— A Court of Equity doth not interpose in Case of Marriage Brokage Bond from any particular Damage done to the Party *only*, but *also* from a *publick Consideration*, Marriage greatly concerning the Publick; and the *Point* as to relieving against such Bonds has been *settled upon very great Consideration*; and there are now many Precedents of it. *Per Talbot* C. *Mich.* 1735. *in Casu Law* and *Law, Cases in Eq. Temp. Talbot*, 1741, 1742.——These Bonds *tho' good at Law*, yet are justly condemned in Equity, as introductive of infinite Mischief, and *their having been much litigated* and *contested*, fortified the Opinion that prevailed at last, for it shews what was the Sense of the *Supreme* Court of Judicature, after the *Inconveniencies of such Bonds had been fully weighed* and *experienced*. *Per ditto* in S. C. 3 *Will. Rep.* 394.

(E) Concerning Co-Obligors and Sureties.

1. *A.* Gave a Bond to *B.* in 1000 *l.* for Payment of 480 *l.* afterwards *A.* and *C.* as his Surety, gave a Bond to *B.* of 200 *l.* for Payment of 100 *l.* and Intereſt, as a further Security for ſo much of the 480 *l.* Then *A.* aſſigns to *B.* a Judgment of 540 *l.* towards Satisfaction of the Debt, and *B.* received ſeveral Sums on this Judgment, and 80 *l.* Part of the Judgment, was paid to *A.* by *B.*'s Conſent; and *if this ſhould be reckoned as paid to* B. *at leaſt ſo as to exonerate* C. *pro tanto*, was the Queſtion; and Lord Keep. held that it *ſhould not*, becauſe that this Aſſignment was but of the Judgment as a further Security for the Money due on the 1000 *l.* Bond; and as the *Obligee* had got it, ſo he might *releaſe* or *diſcharge* it, as he thought fit, and the Surety is not hurt by it; otherwiſe it would be if the Money had been once actually paid to *B.* and after lent again to *A.* So decreed an Account to be taken of what was *due on the* 1000 l. *Bond*, and *what on the* 200 l. *Bond*, for Principal, Intereſt and Coſts, or ſo much leſs as remained due on the 1000 *l.* Bond, and the 200 *l.* Bond to be delivered up. *Mich.* 1700. *Halford* and *Byron*, *Prec. in Chan.* 178.

Vide P. C. and the Notes there.

2. Two Obligors in a Bond bound *jointly* and *ſeverally*, and *one dies*, the Executors of the deceaſed Obligor may be ſued in Equity for the Debt, without making the ſurviving Obligor a Party. Decreed *per* Lord Chan. *King*. *Mich.* 1725. *Collins* and *Griffith*, 2 *Will. Rep.* 313.

(F) In what Caſe a Defect in a Bond will be ſupplied.

1. A Bond for 500 *l.* was *ſealed* and *delivered* by Defendant and *B. for whom Defendant was to be bound*, but *C.* who drew the Bond left out Defendant's Name; the Obligee (having firſt folded down the Bond) ſhewed Defendant the Condition with his Hand and Seal, and *demanded the Money* or *freſh Security*, *which he agreed to*, but afterwards finding the Miſtake, he refuſed. The Bill was to be *relieved againſt the Fraud in C.* and *to have a Performance of the Defendant's laſt Agreement*. And *per* Lord Keep. Defendant's Hand and Seal is ſufficient Evidence for Equity to relieve; and decreed againſt the Defendant upon the *firſt* Agreement; but ſince *forty-nine* (*a*) *Years is not a ſufficient Time to ground a Preſumption in Equity*, as Defendant would have it, his Lordſhip ſaid, Defendant might take an Iſſue, and try Payment or Non-payment. *Hil.* 1710. *Croſby* and *Middleton*, *Colliſon & al'*, *Prec. in Chan.* 309, 310.

(*a*) The Plaintiff had not proved any *Demand* to have been made or *Intereſt* paid on this Bond *for forty-nine Years paſt*, and therefore Defendant inſiſted that that would be a ſufficient Time to *ground a Preſumption of Payment* even at *Niſi prius*. *Ibid.* 310.

(G) Bottomry

(G) Bottomry Bonds.

1. BILL to be relieved againſt a Bottomry Bond, with Condition that if the Ship *S.* bound to the *Eaſt-Indies*, ſhall return to *L.* within 36 Months, or if ſhe does not return within 36 Months, not being taken or loſt by inevitable Accidents within that Time, then the Money to be paid, *&c.* The Ship was detained in Port *Surat* in *India* by Embargo by the *Great Mogul*, ſo that ſhe could not ſail from *Surat* till after the 36 Months were elapſed, and in her Return home was taken by the *French*; but being after the 36 Months, the Bond was forfeited; but there being no Fault in the Maſter, and the Voyage delayed by inevitable Accident, *viz.* by the ſaid Embargo, the Bill *prayed to be relieved againſt the Penalty of the Bond. Harcourt* C. diſmiſſed the Bill, *but without Coſts*, ſaying, he *could not relieve againſt the expreſs Agreement of the Parties*; but *if the Defendant had inſured this Money upon the Ship*, the *Plaintiff ſhall have the Benefit of the Inſurance, upon allowing Defendant the Charges of the Inſurance*, if the *Plaintiff pays the Money within three Months. Eaſt.* 12 *Ann. Ingledew* and *Foſter*, *Viner's Abr.* Tit. *Bottomry Bonds*, (A) *Ca.* 9.

2. Bill to be *relieved againſt the Condition of a Bottomry Bond*, &c. it *being not performed in ſome ſmall Circumſtances*; but denied by *Cowper* C. it *being a voluntary Undertaking of the Obligor*, and *no Contract* or *Conſideration that might incline the Court to interpoſe. Mich.* 3 *Geo.* 1. *Anon. Viner's Abr.* Tit. *Condition*, (Z. d.) *Ca.* 39.

3. *Formerly* an Obligee on a Bottomry Bond could not before the Return of the Ship come in under a Commiſſion of Bankruptcy. *Vide* 2 *Will. Rep.* 497.

But *now* the Law is *altered* by an Act of Parliament. See Tit. *Bankrupt*, *P.* 106. *Ca.* 9. and the Notes there.

CAP. XVII.

Charity.

(A) What ſhall be a good charitable Uſe and Appointment, and how favoured; —— And where a Defect, &c. ſhall be ſupplied in Favour of a Charity.

(B) What ſhall be a Breach or Miſimployment of a Charity; — Of a Commiſſion to inquire into the ſame; —— And here concerning Truſtees of a Charity.

(C) Of the Right of Nomination to a Charity.

(D) Concerning Commiſſioners of charitable Uſes; —— And here of Proceedings and Exceptions to Decrees, &c.

(A) What ſhall be a good charitable Uſe and Appointment, and how favoured; —— And where a Defect, &c. ſhall be ſupplied in Favour of a Charity.

MS. Rep. S. C. *accord*.

1. IT was ſaid, *and not denied*, that if a Man *deviſes a Sum of Money to ſuch charitable Uſes as he ſhall direct by a Codicil to be annexed to his Will*, or *by a Note in Writing*, and *afterwards leaves no Directions either by Note* nor *Codicil*, a Court of Equity *hath Power to diſpoſe of it to ſuch charitable Uſes as they ſhall think fit:* And ſo it was held in the Caſe of Mr. *Sidrofen*'s Will, and the Caſe of one *Jones*; but *if the Will points at any particular Charity*, as *for Maintenance of a School-Maſter*, or *poor Widows*, then the Court *ought not to direct it to any other Purpoſe but ſuch as is pointed at by the Will* (*a*); as if the *Deviſe ſhould be for ſuch School as he ſhould appoint*, and *he appoints none*, the Court *may apply it for what School they pleaſe*, but *for no other Purpoſe than a School. Mich.* 1702. *Anon.* 2 *Freem. Rep.* 261, 262.

(*a*) Rule; *Charity to purſue the Intent of the Founder.*

2. *Tenant* in Tail, *Remainder to a Charity*, Tenant in Tail docks the Tail by a *Recovery*, and *dies without Iſſue.* The Attorney General brought a Bill to eſtabliſh the Charity; *Harriſon* who claimed under the Recovery pleaded it. *Eaſt.* 8 *Ann. Attorney General* and *Harriſon*, *MS. Rep.*

3. *J. S.* by his Will *gave his Executors* 2000 l. *to be diſpoſed of by them to his poor Relations*, (for whom he had not provided by his Will) *according to their Diſcretion* and *Conſcience*, *within ſix Months after his Death.* It was prayed that the Statute of Diſtributions might be the Rule and Meaſure of diſpoſing of this Charity. Lord Chan. ſaid, he would not reſtrain it to the next Relations, but poor

Relations,

Relations, which are ſecond Couſins, muſt be included; not that he would confine it to this Degree; for there may a deplorable Caſe happen that may be an Inducement to a Court of Equity to go beyond the *ſecond* Degree; there may be other Relations intitled to this Charity, as well as thoſe before the Court; therefore let the Parties come before the Maſter, and other Relations within the Deſcription of the Will, and put in their Claims. He ſaid, he did not mean by this Decree to take the diſcretionary Power from the Executors, which was given them by the Teſtator; and therefore ordered the Executors to appoint the Perſons and Proportions of their Dividends, according to their Diſcretion and Conſcience; and if they refuſed any Relations, as not within the Deſcription, the Maſter to take the Reaſons of ſuch Refuſal; for although this Court *will not deprive the Executors of their Power*, yet *it will ſuperintend them*, and *ſee that there is no Abuſe of the Charity*. All the Relations to be examined upon Oath, whether they do know any Relations that are fit Objects of this Charity.——A Diſpute ariſing concerning Coſts, Lord Chan. ſaid, *What Charges the Parties have already been at muſt go out of the Eſtate at large*, but the *other Coſts out of the* 2000 *l.* *Eaſt.* 8 *Ann.* *Anon. MS. Rep.*

4. A Wife having Power to diſpoſe of her perſonal Eſtate, (which only comprehended the perſonal Eſtate ſhe had before Marriage) and getting into Poſſeſſion in a ſecret Manner after Marriage of a great perſonal Eſtate at her Father's Death, conceals it from her Huſband, and afterwards by *Will diſpoſes of it to Charities*; yet decreed that what was ſo concealed ſhall not be made good to the Huſband ſo as to *diſappoint the Charities*. *Mar.* 11, 1711. *Pilkington* and *Cuthberſon*, *Viner's Abr.* Tit. *Charitable Uſes*, (B) *Ca.* 23.

5. A *parol* Deviſe of 20 *l.* *per Ann.* out of Lands to a Charity, *tho' before the Statute of Frauds*, is not good as an Appointment (*a*) by 43 *Eliz.* Decreed by Lord Chan. *Harcourt*, *Trin.* 1714. *Jennor* and *Harper*, *Prec. in Chan.* 389. *Gilb. Eq. Rep.* 44. S. C. *in totidem verbis* with *Prec. in Chan.*—— 1 *Will. Rep.* 247. S. C. ſays, the *Deviſor was Tenant in Tail.* 1 *Salk.* 163. *Trin.* 1714. *Jennor* and *Harper* S. C. ſays, a Deviſe of Lands *not in Writing*, to Charitable Uſes, or *without three Witneſſes*, is void; and the *Stat.* 43 *Eliz.* which *favoured Appointments to Charities*, is now repealed *pro tanto*, *viz.* as to the want of *four Witneſſes*, by the Statute of Frauds, which requires *three* Witneſſes.—(*a*) For at *Common* Law *Lands* or *a real Eſtate were not deviſable*; and the Statute of 32 *H.* 8. as much requires that a *Will of Lands ſhould be in Writing*, as by the Statute of Frauds and Perjuries it is required that ſuch a Will ſhould have three Witneſſes; and as in *Johnſon's* Caſe, (2 *Vern.* 507. *Prec. in Chan.* 270.) decreed by Lord Chan. *Cowper*, a Deviſe of Lands in Writing to a Charity, ſince the Statute of Frauds, *but not atteſted by three Witneſſes*, was held to be void; ſo a Deviſe of Lands *without Writing* ſhould be void alſo, eſpecially in the Caſe of *Jenner* and *Harper*, *it being a Deviſe by Tenant in Tail*, and *of a Rent which cannot paſs but by Deed*; and it would be very dangerous to allow of *Nuncupative* Wills of Land. *Per* Lord Chan. 1 *Will. Rep.* 248.——The Reporter ſays, *ſed Quære*; and cites *Duke's Charitable Uſes* 81. *Stoddard's* Caſe; where one *before* the Statute of Frauds, *deviſed a Rent of* 10 *l.* *per Ann. out of Lands to a charitable Uſe*, and willed that the Scrivener ſhould put it in Writing, which he did; and decreed that this *Nuncupative* Will was good; "For *tho' a Rent cannot be created without Deed*, yet *by the Words* "*of* 43 Eliz. *it may be appointed without Deed*; and *tho' the Nuncupative Will be void as a Will, it is good as an Appointment.*" And the Reporter adds, it ſeems that the Statute of 43 *Eliz.* *which makes theſe Appointments to Charities good*, being *ſubſequent* to 32 *H.* 8. of Wills, ſuperſedes and repeals that Statute; but that it is true, that the Statute of Frauds being ſubſequent to the 43 *Eliz.* does repeal that Statute; and therefore ſince the Statute of Frauds, an Appointment of Lands to a Charity by Will *not* atteſted by three Witneſſes is void. *Ibid.* 248, 249.

6. *A.* made a Settlement of Lands, *with Power of Revocation* by Writing to be executed under Hand and Seal in the Preſence of three Witneſſes, not being menial Servants; and in her Illneſs by Letter deſired a Deed of Revocation to be prepared, but died before it was done, having by *Will given Part of theſe Lands to charitable Uſes*; and decreed at the Rolls to be good as an Appointment upon the Act of Parliament, tho' there was no Revocation. *Eaſter* 1717. *Piggot* and *Penrice*, *Gilb. Eq. Rep.* 137, 138. *Prec. in Chan.* 473. S. C. *in totidem verbis.*—1 *Vol. Eq.* *Ca. Abr.* 209. *Ca.* 13. S. C. but not S. P.

7. *J. S.*

7. *J. S.* by Will gives 5 *l. per Ann. to all and every the Hoſpitals*, (without ſaying where the Hoſpitals were) and it was proved the *Teſtatrix lived in a Place where there were two Hoſpitals*; it ſhall be taken to be *theſe* Hoſpitals, and not to extend to another Hoſpital about a Mile from thence, *tho' founded by the ſame Perſon.* Decreed (*a*) *per* Maſter of the Rolls, *Eaſt.* 1718. *Maſters* and *Maſters*, 1 *Will. Rep.* 421, 425.

(*a*) Notwithſtanding it was objected, that the Court ought not to go out of the Words of the Will, and confine the general Words (*all* Hoſpitals) to thoſe in *C.* the Place where the Teſtatrix lived; and the Court did this the rather, becauſe theſe Charities, if they prevailed, would be Perpetuities of 5 *l. per Ann.* and by that Means create a Deficiency, and conſequently in a great Part defeat the Reſt of the Will, as to plain Legacies, in Favour of thoſe that were doubtful. In ſome Part of the Will it was writ *Hoſpitals*, and in ſome *Spittals*. *Per Cur'*, It is the ſame Thing; for *Spittal* is the Abbreviation of *Hoſpital*, and from thence came the *Spittal* Sermons. *Ibid.* 426.

8. *J. S.* charges all his Lands in *Chigwell* in *Eſſex*, and in *Enfield* in *Middleſex*, with 20 *l. per Ann.* to the Poor of *Enfield*; and an Information being brought to *make divers Lands in* Enfield *liable to the Charity, leaving out the* Chigwell *Lands*; it was objected that the *Chigwell* Lands *ought to contribute, and the Owners thereof be made Parties.* Lord Chan. *Parker* ſaid, This was in Nature of a Plea in Abatement, and that unleſs it be inſiſted on in the Anſwer, and the particular Owners ſhewn, he would put the Owners of the *Enfield* Lands to take the labouring Oar on themſelves to find out the *Chigwell* Lands, and to bring their Bill for that Purpoſe, for at this Diſtance of Time (the Charity being in 1651.) the *Lands may be loſt*, or *not diſtinguiſhable* or *purchaſed without Notice*; and if the Charity has loſt the *Chigwell* Lands, it would be ſtrange to make Uſe of this as a Reaſon why it ſhould loſe the *Enfield* Lands alſo. *Hil.* 1719. *Attorney General* and *Wyburgh & al'*, *MS. Rep.*

1 *Will. Rep.* 599. S. C. *in totidem verbis* ſo far, *but adds*, that Part of this Charity being for the Cloathing of ſix poor Perſons of the Pariſh of *Enfield*, Lord Chan. would not ſuffer any of the Inhabitants of *Enfield* to be Witneſſes, *becauſe they were intereſted* (*b*), *as being eaſed in the Poors Rates*; and tho' it was urged that they might be Lodgers there, or Perſons not contributing to the Rate, and that it was incumbent on thoſe who took the Exception to make out the contrary; and *per Cur'*, The Witneſs being deſcribed to be of the Pariſh of *Enfield*, Yeoman, muſt be intended an Houſekeeper, and one liable to pay Pariſh Rates, unleſs the contrary be made appear; wherefore it was ſent to the Maſter to inquire whether the Lands were liable to the Charity. *Ibid.* 600. (*b*) Rule; *A Party intereſted may not be a Witneſs. Co. Lit.* 6. *b.* 7. *a.*

9. *J. S. and others ſubſcribed to a Charity-School at* W. *for Boys and Girls*, which *Subſcription was only during the Pleaſure of the Benefactors.* J. S. *delighted with ſeeing theſe Charity Children, declared he would leave them ſomething at his Death.* There was alſo a *Free School in W.* —— *J. S.* by Will gave 500 *l. to the Charity School, and ſeveral pecuniary Legacies to his poor Relations. Parker* C. ſaid, that tho' the *Free School* be a *Charity School*, yet the *Charity School for Boys* and *Girls* went more commonly by that Name; and as the Teſtator was fond of the *latter*, and declared he would leave them a Legacy; therefore *that*, and not the Free-School, is intitled thereto. *Mich.* 1720. *Attorney General* and *Hudſon*, 1 *Will. Rep.* 674.

And his Lordſhip ordered that this Legacy ſhould be brought into Court, *with Intereſt from the End of the Year after the Teſtator's Death*; and in Caſe of a Deficiency of Aſſets, all the pecuniary Legacies, as well that to the *Charity* (*c*) as others, were to abate in Proportion; for tho' the *Romans* preferred a pious or charitable Legacy to others, yet our Law does not: 'They being all but Legacies, and equally intended by the Teſtator to be paid, it would be hard that one of them by being preferred ſhould fruſtrate all the Reſt; beſides, the other Legacies being given to ſeveral of the Teſtator's poor Relations, they are Charities alſo.—And it being objected, that on the Failing of the *Charity School* the Charity ought to revert to the Founder, his Lordſhip gave Liberty to the Parties in ſuch Caſe to apply again to the Court. *Ibid.* 675. (*c*) *Legacies to a Charity*, (on a Deficiency of Aſſets) *tho' preferred by the Civil Law, are to abate in Proportion as well as* other *pecuniary Legacies*, for they are but Legacies. *Vide Tate* and *Auſtin*, *Mich.* 1714. 1 *Will. Rep.* 264. and *Maſters* and *Maſters*, *Eaſt.* 1718. *Ibid.* 421, 422. — But the *Spiritual* Court gives the Preference to Charity Legacies; and in ſuch Caſe Lord Keep. *North* would not injoin them. *Vide* 1 *Vern.* 230. *Fielding* and *Bond.*

10. The Reverſion in Fee of divers Lands, on which 70 *l. per Ann.* Rent was reſerved, was given to the Corporation of *Coventry*, and the

the *Whole* 70 l. *appointed to particular Charities*; afterwards the Leaſe expired, and the Rents were greatly increaſed; the Overplus ſhall be applied to the Augmentation of the Charities, and not for the Benefit of the Corporation. *Mar.* 8, 1720. *The Mayor of Coventry* and *the Attorney General*, *Viner's Abr.* Tit. *Charitable Uſes*, (E) *Ca.* 28.

11. Urged *that in Caſe of a Charity, where the moſt ſpeedy* and *leaſt expenſive Method ought to be purſued*, Iſſue ought not to be directed, *but the Court ought to decree upon the Proof.* *Mar.* 25, 1721. *Biſhop of Rocheſter* and *Attorney General*, *Viner's Abr.* Tit. *Charitable Uſes*, (H) *Ca.* 12.

12. Information to eſtabliſh a Charity of Lands given by Will againſt the Heir at Law of the Deviſor. Defendant by his Anſwer did not inſiſt upon his Title, nor did he expreſly diſclaim; but his Counſel at the Hearing had no Inſtructions to inſiſt on Defendant's Title, or to pray a Trial at Law; and thereupon the Court decreed the Lands to the Charity. Upon a Rehearing, Defendant inſiſted upon his Title as Heir at Law, and that the Deviſe was void. But *Macclesfield* C. would not now allow Defendant to inſiſt upon his Title, ſince he had waived it at the Hearing; but ſaid, he was concluded by it; and tho' it was admitted to be a doubtful Caſe, he would not ſuffer Counſel to argue it, but affirmed the Decree. *Mich.* 9 *Geo. Attorney General* and *Ardern*, *Viner's Abr.* Tit. *Charitable Uſes*, (E) *Ca.* 29.

13. *A.* by Will deviſed an Annuity of 50 *l. per Ann.* and alſo 100 *l.* in Money, to *B. and his Heirs*, and *if* B. *died without Heirs, then to a Charity.* B. *died without Iſſue in the Life-time of* A. and *then* A. *died*; the Will void as to the Whole, and the Charity cannot take. *King* Chan. *Trin.* 1726. *Attorney General* and *Gill*, 2 *Will. Rep.* 369.

It was agreed that the *Remainder ought to be ſupported as given to a Charity*; but *per* Lord Chan. ſuppoſing it void if given to a *common Perſon*, ſo ſhall it be alſo when *given to a Charity.* That the Deviſe being to *B.* and his Heirs, and if *B.* die without Heirs, to a Charity; *ſuch Deviſe over is void*, and the Word *Heirs* ſhall not be conſtrued to ſignify *Heirs of the Body*, where the *Deviſee over is not inheritable*; and the *Death of the firſt Deviſee* (B.) *in the Life-time of* A. *can make no Alteration if the Will be void at the making.* *Ibid.* 370.

14. *J. S.* by Will *duly* executed *gave his Eſtate to* B. his *Heirs, Executors* and *Adminiſtrators*, and *by a Codicil written by himſelf*, but not atteſted by three Witneſſes, *declared the Uſe to which he would have his Eſtate applied* in the Words following: *I would have the ſame employed for the encouraging ſuch Nonconformiſts Miniſters as preach God's Word in Places where the People are not able to allow them a*

Another *MS. Rep. Trin.* 5 *Geo.* 2. S. C. ſays, an Information was exhibited by the Attorney General for the Performance of a Charity given by a Codicil annexed to the Teſtator's Will, by which he deviſed that what ſhould remain and be the Reſidue of his Eſtate and Effects, be given for incouraging ſuch Nonconforming Miniſters as preach God's Word in Places where the People are not able to allow them ſufficient and ſuitable Maintenance, and for the incouraging ſuch as are deſigned to Labour in God's Vineyard as Diſſenters, and appoints two Perſons to have the Diſpoſal and Appointment of the ſaid Charity, both which Perſons died in the Life-time of the Teſtator. Two Queſtions aroſe, 1*ſt*, whether both the Truſtees, to whom the Diſpoſal and Appointment of the ſaid Charity was given, dying in the Life-time of the Teſtator, this Charity was not gone, and in the Nature of a lapſed Legacy. But *per King* C. The Subſtance of the Charity remains notwithſtanding the Death of the Truſtees before the Teſtator; and *tho' at Law it is a lapſed Legacy*, yet in Equity it is ſubſiſting; and here is a ſufficient Certainty of the Teſtator's Intention to revive it, the Intention therefore of the Party is ſufficiently manifeſted that this Charity ſhould continue within 43 *Eliz. c.* 4. It has been held, that *if the Tenant in Tail deviſe a Charity, tho' no Recovery is ſuffered*, yet that it ſhall take Place, and be effectual as an Appointment under 43 *Eliz.* and cited 2 *Vern.* 453. *Attorney General* v. *Rye & al'.* 2 *Vern.* 755. *ditto* v. *Burdett & al'.*— The ſecond Point, whether this be a ſuperſtitious Uſe within 1 *Ed.* 6. *c.* 14. *Non-conforming Miniſters* and *Diſſenters* being ſuch general Words as that they comprehend any Perſons however oppoſite to the Church of *England.* But *per* Lord Chan. This cannot be a ſuperſtitious Uſe within the Statute; but the Diſſenters here meant are Proteſtant Diſſenters acting under the Toleration Act, 1 *W. & M. c.* 18. and decreed the *Reſiduum* to be diſpoſed of *in præſenti*, and *not in a perpetual Charity*; and ordered a Scheme to be laid before him for that Purpoſe.——*Rep. of Sel. Caſes in Chan.* 34. S. C. *in totidem verbis* with this *MS. Rep.*

ſufficient and ſuitable Maintenance, and for encouraging the bringing up ſome to the Work of the Miniſtry, who are deſigned to labour in God's Vineyard, among the Diſſenters; the particular Method how to diſpoſe of it I preſcribe not, but leave it to their Diſcretion, deſigning you (*meaning* B.) *to take Advice of* C. *and* D. *J. S. after making his Will* and *Codicil*, bought a *real* Eſtate; *B. C.* and *D.* died before the Teſtator; and upon a Bill filed againſt *J. S.*'s Heir at Law, and the Adminiſtrator of *J. S. to have an Account of* J. S.'*s Eſtate*, and *to have the ſame diſpoſed of in Charity according to the Will*, it was *objected*, that the *real Eſtate bought after the making of the Will*, and even *if it had been bought before*, B. *dying before* J. S. and *the Codicil not being duly executed in* the Preſence of three Witneſſes, *the Lands muſt deſcend to the Defendant* as Heir at Law to *J. S.* and cited Dr. *Johnſon*'s Caſe, where the Dr. by his Will *charged his real Eſtate with the Payment of a Charity*, but the *Will not being duly witneſſed*, the Deviſe was held void; to which the *Court agreed*. *N. B.* There was Land *ſold* (*a*) in *Holland*, but it not appearing what was the Nature of the *Dutch* Eſtate, whether *Leaſe* or *Freehold*, it was left to the Maſter to inquire into that Matter, and to *certify what Ceremonies a Will to paſs Freehold Lands in that Country required*. Alſo objected, that as *B.* the Legatee died before the Teſtator, the Legacy was lapſed; for *Lutwych* obſerved, that a *Legacy was a voluntary Gift, which ought to be attended with all legal Ceremonies*; and therefore as to *B.* if the Codicil had been out of the Queſtion, tho' it had been given to him, his Executors, *&c.* yet by his dying before the Teſtator the Legacy had dropt, and as it now ſtands with the Codicil, ſince by *B.*'s Death the legal Eſtate of the Legacy is gone, how can a Truſt be raiſed without ſomething to ſupport it. To this it was anſwered, that in every common Caſe of a Legacy given on Truſt, tho' the Truſtee die before the Teſtator, yet being intended only as an Inſtrument to convey the Legacy to him for whoſe Benefit the Legacy was given, this Court always decrees the Legacies to be paid. Beſides, it is obſervable that the Advice of *C.* and *D. was perſonal*, and therefore *the Charity could not be ſpecifically performed*. But *per* Lord Chan. *B. was only a Truſtee*, and *to whom* C. *and* D. *were recommended as fit Perſons to aſſiſt him in the Execution of the Truſt*; and *though by the Death of* B. C. *and* D. *the legal Eſtate of the Legacy is gone*, and the *Charity cannot be diſpoſed of by the very Hands which the Teſtator deſigned ſhould have done it*, yet the *Charity itſelf, which is the Subſtance* and *Reaſon of the Deviſe, is ſtill ſubſiſting*, and may be anſwered as fully by the Aid and Directions of this Court as if the Legatee and his Counſellors were now alive. —— It was objected, 3*dly*, That admitting a Bequeſt to Preſbyterians or Anabaptiſts, or any other Proteſtant Diſſenters, may be good, *ſince the Act of Toleration*, yet the *preſent* Bequeſt being to *all Sorts of Diſſenters* and *Nonconformiſts*, may as well be extended to Papiſts, Jews, *&c.* as to the Proteſtancy, and therefore muſt be neceſſarily void. But *per Cur'*, All Perſons know who are meant by Diſſenters, *to whom any Uſe may now be raiſed*. An Account of the *perſonal* Eſtate was decreed, and the *ſame to be diſtributed immediately*, and *not made a perpetual Charity*. 5 *Geo.* 2. *Attorney General* and *Hickman*, *MS. Rep.*

(*a*) *Q.* If it ſhould not be *unſold*.

15. *J. S.* by Will dated 22 *Mar.* 1714. *gave all his real* and *perſonal Eſtate to Truſtees, their Heirs*, &c. in Truſt *to pay the Produce thereof to his Niece* A. *for her Life*, and *after her Death he gave the ſaid Eſtates to the Son* and *Sons which* A. *ſhould leave behind her ſeverally*

ſeverally and *ſucceſſively, according to Seniority*, and *the Heirs of the Body of ſuch Son* and *Sons iſſuing, the Elder to be preferred*, &c. and for want of ſuch Iſſue, that is, *in Caſe all ſuch Sons died without Iſſue before any of them attained* 21 Years, he gave the ſame *to the Daughter* and *Daughters which* A. *ſhould leave behind her at her Death, and the Heirs of their reſpective Bodies iſſuing*; and *for want of ſuch Iſſue*, that is (*as he expreſſed himſelf*) in Caſe *all ſuch Daughters died without Iſſue before any of them attained* 21, then the Truſtees and the Survivor, *&c.* and the Heirs, *&c.* of ſuch Survivor, were to diſpoſe of his *real* and *perſonal* Eſtates *to ſuch of his Relations of his Mother's Side who were more deſerving*, and *in ſuch Manner as they ſhould think fit*, and *for ſuch charitable Uſes* and *Purpoſes as they ſhould alſo think moſt proper* and *convenient*. One of the Truſtees declining to act, *A.* brought her Bill in *Mich.* 1715. to compel him to act, or to transfer the Truſt as the Court ſhould direct; and he refuſing to act, the Court decreed him to *aſſign the Truſt* as the Maſter ſhould direct, and accordingly he by Leaſe and Releaſe aſſigned and conveyed the Premiſſes, with the Maſter's Approbation, to another Perſon in Truſt for the Uſes of the ſaid Will. *A. the Niece died without Iſſue in* 1732. and on a *Bill brought by the Teſtator's Relations on the Mother's Side to have their Share of the ſaid Eſtate, and* on a *Croſs Bill brought by the Attorney General to have the ſame applied to ſuch charitable Uſes*, as the Court ſhould direct, the *Maſter of the Rolls* held *clearly*, that the Limitation over of the perſonal Eſtate was good, and that the Power given by the Will to the Truſtees of diſtributing the Teſtator's Eſtate as they thought fit was at an end, and could not be aſſigned over; and that therefore the Power of diſtributing the ſame devolved on the Court; and he *directed that one Half of the ſaid Eſtate ſhould go to Teſtator's Relations on the Mother's Side*, and *the other Half to charitable Uſes*; the known Rule that Equity (*a*) is Equity, being (as he ſaid) the beſt Meaſure to go by. He ſaid, he had no Rule of judging of the Merits of the Teſtator's Relations, and could not enter into Spirits, and therefore could not prefer one to the other; but that all ſhould come in without Diſtinction (*b*), excluding only thoſe that were *beyond* the third Degree. He held, that as to the *perſonal* Eſtate there could be *no Repreſentation of thoſe Relations who died in the Niece's Life-time*; for before her Death no Part thereof veſted in any of the Relations, and it was contingent whether they would be intitled thereto or not; and decreed *accord'*, *Nov.* 30, 1735. *Doyley & al'* and *Attorney General & al'*, *& econtra*, *Viner's Abr.* Tit. *Charitable Uſes*, (C) *Ca.* 16.

(*a*) Q. If it ſhould *not* be *Equality*.

(*b*) His Honour cited a Caſe determined by Lord *Cowper*, which was, where one *gave his perſonal Eſtate to his Relations, fearing God and walking humbly before him*; and decreed that it ſhould *go equally among his Relations*. *Ibid.*

16. Said by Lord Chan. *Talbot*, upon arguing the Plea of a Purchaſer of Land for a valuable Conſideration, ſuppoſed to belong to a Charity, that a Charity is intitled to no Favour againſt ſuch a Purchaſer; that equal Juſtice was to be done to a Charity, and the Eſtate of every private Man; and that whatever did belong to a Charity ought to be decreed to it. But that if any Man for a valuable Conſideration, and without Notice or Fraud, obtained ſuch an Eſtate, there was no Reaſon to take it away: That he ſat there to do Juſtice to all, and not to oppreſs any Man for the Sake of a Charity; and that to take an Eſtate out of the Hands of ſuch a Purchaſer, was juſt as honeſt as to rob in Favour of a Charity; perhaps ſuch a Man might

be

be called a good Man, but he could never eſteem him an honeſt Man. *Attorney General* and *Lord Gower*, *Nov.* 13, 1736. *MS. Notes.*

17. Doctor *Radcliff* by his Will deviſed to Truſtees an Eſtate in *Y.* upon *Truſt to receive the Rents* and *Profits*, and *to pay to* two *Perſons upon the Phyſick Line*, that were Members of Univerſity College, *Oxford*, *the ſeveral annual Sums of* 300 l. *for their Maintenance for the Space of ten Years*, five *of which Years at leaſt it was the Teſtator's Will that his Fellows ſhould travel abroad for their better Improvement*; and *this Charity was to continue for ever*, and the Archbiſhop of *Canterbury* for the Time Being, and ſeveral others, were to be Truſtees, and to manage it, and to chuſe ſuch Fellows upon a Vacancy. The Doctor by his *Will alſo gave a Sum of Money for building his Fellows Chambers in Univerſity-College*, and *deviſed the Reſt of his Eſtate to the ſame College.* About the Year 1725. Doctor *Stephens* was elected to be a travelling Fellow, and *after he had continued a Fellow five Years*, and *had received the Stipend without ever going abroad*, *upon Pretence of bad Health*; in 1730. *he aſſigned his Fellowſhip* to the Archbiſhop of *Canterbury* and another Truſtee, who *accepted his Reſignation.* In 1735. an Information was filed againſt him, *ſuggeſting a Fraud upon the Will of the Teſtator*, and *praying that he might repay to the College the Sum of* 1500 l. *which he had unjuſtly received, having never deſigned to travel*; and alſo *ſuggeſting that the Teſtator intended his Fellows ſhould live in their Chambers*, and *keep them in repair*, whereas Doctor *Kidby*, *another of the Teſtator's Fellows*, *lived altogether out of the College*, and *ſuffered the Chambers to go out of order.* The Information therefore alſo prayed that Doctor *Kidby might be injoined from letting his Chambers*, and *that he might be obliged to put them in repair.* There was Proof that Doctor *Stephens* was in a languiſhing Way, and had often ſpoke of going abroad according to the Teſtator's Will; that he had ſtudied very hard in *England*, and made a great Proficiency in the Study of Phyſick, and there was *no Evidence for the Relators to the contrary.* Lord Chan. *Hardwicke:* I would by no Means do any Thing to invalidate ſo noble an Inſtitution as this founded by Doctor *Radcliff*; it is undoubtedly admirably contrived to the End it was deſigned for, and deſerves all the Encouragement that a Court of Juſtice can give to it; but in this as well as other Caſes I muſt govern my Judgment by the eſtabliſhed Rule of Law and Equity. There are three Things proper to be conſidered in this Caſe; 1*ſt*, What Doctor *Radcliff*'s Intention was; 2*dly*, If Doctor *Stephens* has complied with it, and if he has not; *Laſtly*, Whether the Relators are intitled to recover back the Money paid to him. It muſt be admitted, if Doctor *Stephens* has forfeited his Annuity, the Relators (who are intitled to the Reſidue of the Teſtator's Eſtate) are intitled to it.——That by the Will of Doctor *Radcliff* his Fellows were to travel five Years, is very plain, but the Time when is not fixed; and as their Travels were to be for their better Improvement, *i. e. after they had laid a Foundation of Learning at home*, it is moſt natural to ſuppoſe that he deſigned they ſhould

Grounds and Rudiments of Law and Eq. P. 30. *Ca.* 5. S. C. ſtates it thus: Dr. *R.* by Will deviſed 300 *l. per Ann.* to two Perſons, to be choſen by the Archbiſhop of *Canterbury*, and certain other Truſtees, out of Univerſity College in *Oxon*, which Sum he directed to be paid them for ten Years for their Maintenance, five Years whereof they were to ſpend in *England* in the Study of Phyſick, and the other five abroad; the Defendant was one ſo choſen, and ſtudied *here* according to the Directions of the Will, and for that Time received his Salary, but after he did not go abroad on Account of his ill State of Health, and thereupon in 1730. he reſigned to the Truſtees, who accepted his Reſignation, and in 1735. choſe another in his Room; the Information was exhibited againſt the Defendant, that he might account for five Years Salary, by him thus received.

Mr. *Fazakerly* for Defendant argued, that in a late Caſe, which came before the Houſe of Lords upon an Appeal, their Lordſhips were of Opinion, that the Word *Maintenance* included *Education*, and therefore though that Word was uſed in the preſent Will, Education muſt be intended by it as implied; he alſo argued, that when the Defendant had ſpent half his Time in his Education *here* in *England*, and was prevented by ill Health from going abroad, and thereupon had reſigned, and his Reſignation accepted, and another choſen in his Room, he ſubmitted it, that the preſent Bill muſt be thought an unreaſonable one. Lord Chan. was of the ſame Opinion, and ſaid, the Name of the Caſe cited was *Gandy* and *Anſtis*, ſo diſmiſſed the Information. *Grounds and Rudiments* cites 2 *Ju. Eccl.* 157, 158.—Rule; *Charity to purſue the Intent of the Founder.*

ſhould travel in the latter Part of their Time; and tho' they were to travel ſome Part of their Time, yet I cannot think they were to travel at all Events, upon the Penalty of forfeiting whatever they had received from this Charity; to make this neceſſary, we muſt ſuppoſe that their travelling was the only Thing that Doctor *R.* had in View, which is impoſſible, for it was to be for their better Improvement. Beſides, this Benefaction is for their Maintenance, and if, as it may happen, a Fellow ſhould be diſabled from travelling, and he ſhould without any Fault in him be obliged to refund what he had conſumed in his Maintenance, that would be exceeding hard.——It cannot be ſaid that the Doctor has complied with Doctor *Radcliff*'s Intention, for he has not been abroad; but then it comes to this Queſtion, whether he has given a reaſonable Excuſe; the Loſs of Sight, Underſtanding, and ſuch like Viſitations, would be undoubtedly good Excuſes; but it is urged, that Doctor *Stephens*'s Intention was originally fraudulent; that he deſigned from the firſt to put five Years Salary in his Pocket, and then to throw up his Fellowſhip without going abroad; and if ſuch a Caſe had appeared, as it might have been made out by Circumſtances, I ſhould have made no Scruple of decreeing him to account; on the contrary, Doctor *Stephens*'s Deſign of going abroad is proved by him, and that it was fruſtrated by a bad State of Health and a Decay of Nature; how unfit he was to go abroad does not appear, but as the Relators have not examined at all to this Point, nor endeavoured to ſhew him in a Capacity to take a Voyage, I muſt rely on the Evidence that is given for him; beſides, in that Will the *Words are not conditional*, but *only directory*; and if at Law *A. ſhould promiſe to pay* B. 300 l. *a Year for ten Years*, and *B. ſhould engage to go abroad for five Years of the ten*, *tho'* B. *ſhould not travel*, *yet* A. *without Payment of the whole Salary*, *could not upon ſuch executory Contract recover againſt* B. *for not going abroad.*—— In this Caſe it is very material, and a very ſtrong Argument with me, that the Truſtees of this Charity, as *now ſtanding in the Place of Doctor* R. *have accepted the Defendant's Reſignation*, which I muſt ſuppoſe to be *done upon ſome reaſonable Foundation.* I *conſider their Act as the Judgment and Act of Doctor* R. *himſelf*; *ſuppoſe a Patron upon preſenting to a Church ſhould take a Bond from the Parſon to reſide there for* 23 *Years*, *if he ſhould ſo long live*, and *he ſhould afterwards aſſent to the Parſon's Reſignation*, would not this Act of his diſpence with the Conſideration? In the ſame Manner I ſhould think the Truſtees have diſpenced with the Obligation that Doctor *Stephens* lay under to go abroad, ſo that as to him the Information muſt be diſmiſſed, but *without* Coſts. As to Doctor *Kidby*, as a Fellow, he is Proprietor of his Chambers, and may uſe them as other Fellows do; he is a Member of the College, and I have no Buſineſs to give any Directions how he ſhall employ his Chambers there. So the Information as to Doctor *Kidby* was likewiſe diſmiſſed (*a*). 11 *May* 1737. *The Attorney General, at the Relation of Univerſity College, Oxford,* and *Doctor Stephens and Kidby, MS. Rep.*

(*a*) 2. If not *with* Coſts.

(B) What ſhall be a Breach or Miſimployment of a Charity;—Of a Commiſſion to inquire into the ſame;——And here concerning Truſtees of a Charity.

1. *J. S.* conveys a Meſſuage, *&c.* then in Leaſe at 8 *l. per Ann.* to ſeveral Perſons in Fee, in *Truſt for charitable Uſes.* After, by building, *&c.* the Rent of the Premiſſes was increaſed to 450 *l. per Ann.* and employed in Augmentation of the Charity; and the Truſtees by Order of Veſtry, for 1000 *l.* paid for the Uſe of the Pariſh, make this Eſtate a Security for 100 *l. per Ann.* Annuity; and now a Bill was brought to ſet aſide this Deed of Annuity, *as being in Breach of the Charity*; and ſo decreed *by the Commiſſioners of charitable Uſes.* Lord Keeper ſeemed clear to diſmiſs the Bill; but after the Plaintiffs (the Pariſhioners) ſubmitting to *pay the Arrears*, and *growing Payments*, it was ſo decreed, and Coſts ſpared. *Trin.* 1703. *Attorney General* and *the Pariſhioners of St. Clements Danes and Lady Hart, & al', Prec. in Chan.* 225.

2. A College ſeiſed in Fee was *reſtrained* by its *Conſtitution* from making any Leaſes *except for* 21 *Years*, and *at the Rack Rents.* The College made a Leaſe accordingly to *A.* who having much improved the Premiſſes by Building, *&c.* an Entry was made thereof in the Audit Book, and a *Recommendation ſigned by the Maſter-Warden* and *moſt of the Fellows*, to *grant* A. *a new Leaſe at the Expiration of the End of the old Leaſe, at the ſame Rent*, and *under the ſame Covenants*; and when the Term was near expiring, an Order was made at another Audit for ſuch new Leaſe. The Bill was brought by *B.* *A.*'s Adminiſtratrix, to compel the College to make a new Leaſe, and the *Maſter-Warden was B.'s principal Witneſs.* And *per Parker* C. the Maſter-Warden who appears as a Witneſs, *&c.* has betrayed his Truſt in Relation to the College, and has acted inconſiſtently with the Oath he has taken as Warden. His Lordſhip alſo diſapproved of the Recommendation, *&c.* it being to wrong the College and break the Statutes; and that the *Signing of a Contract for leaſing* by *private Perſons*, i. e. *the Maſter and Fellows, was not binding to the College, it not being under the College Seal* (*a*). That there would have been ſome Equity if the Inteſtate had *after* this Order for a new Leaſe laid out Money in Improvements, in Confidence and Reliance on ſuch Order; but even in that Caſe he ſhould have had his Reparation only from the *private Perſons ſigning ſuch Order*, and *not from the College*; and as to Repairs done by the Leſſee *ſince* the ſaid Order, they are no more than what by his old Leaſe he was obliged to do, for which Reaſons the Bill was diſmiſſed *with Coſts. Mich.* 1720. *Taylor* and *Dullidge Hoſpital*, 1 *Will. Rep.* 655.

(*a*) And a Contract to bind *any* Corporation as to its *Revenue*, muſt be under its common Seal. *Per* Lord Chan. *Ibid.* 656.

3. In Caſe of *Miſbehaviour* of Truſtees *or* Miſapplication of a Charity, Chancery will oblige them to *aſſign* (*b*). *Mar.* 8, 1720. *Mayor of Coventry* and *Attorney General*, *Viner's Abr.* Tit. *Charitable Uſes*, (F) *Ca.* 16.

(*b*) *Vide Doyley* and *Attorney General, &c. P. Ca.*

4. *J. S.* founded a Lectureſhip with a Salary of 50 *l. per Ann.* charged upon his Lands to the Lecturer, *ſo long as he ſhould attend the Charge of diligent Preaching there once every* Sunday, unleſs *hindred by Neceſſity*; and *when the Lectureſhip ſhould be void by Death, Removal,*

Removal, Departure, or *otherwiſe*, then the *Truſtees were to appoint a new Lecturer*. The Plaintiff in 1701. was appointed Lecturer by the Truſtees *expreſly for the Term of his natural Life*, but being much in Debt, about a Year and an Half afterwards *he went away, and was Chaplain to a Regiment in* Spain, *and continued many Years abroad.* In 1710. the *Truſtees appointed* G. *Lecturer*, and *in the Deed of Appointment they recite that the Lectureſhip was vacant by Plaintiff's Departure*, and thereupon they appoint G. Lecturer. Plaintiff's *Bill was* to *have an Account of the Profits* and *Salary of Lecturer*, &c. Firſt Point was, If the *Truſtees could remove the Plaintiff from the Lectureſhip for going abroad*, and *not perſonally Preaching there every* Sunday, and *appoint a new Lecturer in his Room?* Second Point, admitting they had a Power to remove him for Abſence, *if* J. S. *ought to account to the Plaintiff for the Profits of Lecturer to the Time that the new Lecturer was appointed?* And *Parker* C. was of Opinion, that *J. S.* employing another Perſon to preach in Plaintiff's Abſence, *acted therein as his Agent*, and *not as a Truſtee of the Charity*, and ought to account for the Profits of the Lectureſhip, deducting what was paid by him for ſupplying the Plaintiff's Place in his Abſence; but whether the Appointment of the new Lecturer was good or not, yet *J. S.* having paid the whole Salary to *G.* will diſcharge him againſt the Plaintiff as his *Agent* in procuring a proper Perſon to preach, and to do the Duty for the Plaintiff. Upon taking Time to conſider if the *Appointment* of the new Lecturer was good, (which he at firſt doubted) his Lordſhip held it was, and ſaid, the Lectureſhip was not void by the 13 & 14 *Car.* 2. *cap.* 4. for not reading the Common Prayer (*a*); for that Act *inflicts a Penalty*, but *does not make the Lectureſhip void*; but the *Lectureſhip was void by Plaintiff's Abſence*; and *the Neceſſity of abſenting himſelf by Reaſon of his Debts was not the Neceſſity intended by the Founder to be an Excuſe for his Abſence*; and though he was *declared Lecturer expreſly for Life*, yet *he is ſubject to the Terms impoſed by the Founder*; for the Truſtees cannot alter the Terms and Nature of the Truſt, and the firſt Appointment is ſuperſeded by the ſecond without any other Act. *Eaſt.* 6 *Geo.* 1. *Phillips* and *Sir John Walters*, *Viner's Abr.* Tit. *Charitable Uſes*, (F) *Ca.* 14.

(*a*) It was proved that Plaintiff did not read the Common Prayer the firſt Time he preached, according to the ſaid Act of Uniformity. *S.* 19. *Ibid.*

5. The *King founds a School*, and *endows it*, and *appoints Governors, who have the legal Eſtate of the Endowments veſted in them*, and there are *no expreſs Words appointing them Viſitors*; reſolved, that a Commiſſion may iſſue to viſit and call to an Account theſe Governors. *Per King* C. *Eyre* C. J. and *Gilbert* C. B. *Hil.* 1725. *Eden* and *Foſter*, 2 *Will. Rep.* 325.

Gilb. Eq. Rep. 178. S. C.— *Sel. Caſ. in Chan.* 36. S.C. ——*Sed vide* Tit. *Viſitor*, *P.*

6. Upon Exceptions to a *Decree made by Commiſſioners of charitable Uſes*, where the Governors of a Free School joined in making a long Leaſe for Years of Houſes belonging to the School, at 5 *l. per Ann.* though worth 50 *l. per Ann.* The Lords Commiſſioners decreed the Aſſignee of this Leaſe to ſurrender it back, and the *Leſſee* and *the Governors* to pay 70 *l.* Coſts; and *King* C. affirmed the Decree as to the Surrendring the Leaſe, but mitigated the Coſts to 50 *l.* (*b*). *Trin.* 1725. *Eaſt* and *Ryal*, 2 *Will. Rep.* 284.

(*b*) Saying, there was no Reaſon that the *Charity* ſhould pay the Coſts; that it was juſt that the Owner of the Leaſe, who was to have the Benefit of the Breach of Truſt, ſhould pay Coſts; and as to the Governors, tho' they were to gain nothing by this, and were not guilty of any Corruption, yet they had been extremely negligent in their Truſt, for which they ought to be puniſhed with ſome Coſts. *Ibid.*

7. *A Commiſſion may be directed to inquire for a Town* as a County, *and a Jury may come out of the Town* only *and inquire of Lands lying out, if annexed to a Charity founded in the Town*, as appears by the following Caſe:

A Commiſſion iſſued to inquire into the Miſemployment of ſeveral Charities within the Borough of *Ilcheſter*, and the Commiſſion directed the Commiſſioners to inquire by *twelve lawful Men of the ſaid Borough in the County of* Somerſet, or other lawful Means, concerning any Appointments to or Abuſes of any Charities within the ſaid Borough; and the firſt Exception to the Commiſſion was, that it was to inquire for this Borough only, and not for the whole County.—2*dly*, That if ſuch a Commiſſion was proper, yet the Authority to ſummon a Jury was not legal; but that eſpecially ſince 4 & 5 *Ann. c.* 16. of the Body of the County. Lord Chan. *Hardwicke*, The firſt Objection is grounded on the Words of the ſaid Act, which ſays, *Inquiry ſhall be made by twelve lawful Men of the County*; and the Objection ſuppoſes that it is *abſolutely neceſſary that every ſuch Commiſſion ſhould be for the whole County*; but I can ſee no Foundation for it, *the Statute does not fix the Extent*, but *only the Objects of every ſuch Commiſſion.* Had the Legiſlature defined the Bounds of thoſe Authorities, they muſt have purſued the Directions of the Act; but as it has not, I do not ſee any Reaſon to find Fault with ſuch a limited Commiſſion as this is. As to Precedents, there are ſome produced, *viz.* eight Inſtances of ſuch Commiſſions between 1 *Jac.* and 7 *Car.* for ſeparate Places; and if the Words of the Act had been ſtronger, *after ſuch a Series of Precedents*, I think it ought not now to be made a Queſtion, whether thoſe were called Commiſſions. *A Series of Precedents againſt the plain Words of an Act of Parliament have made a Law*, as in the Caſe of *Bewdely*, 13 *Ann.* which was a *Sci. Fa.* to repeal Letters Patent, the *Venire Fa.* was awarded *de Vicineto*, and there was no Doubt but that (it being a private Suit of the Crown to repeal its own Grant) the Caſe came within the Statute; and the King was bound by the Act, as being a remedial Law. But upon producing Precedents in the Exchequer in Civil Suits of the Crown, where the *Venire* had been ſo awarded, after the 4 & 5 *Ann. c.* 16. though they had paſſed *ſub ſilentio*, yet all the Judges at *Serjeants Inn Hall* were of Opinion, that ſuch a Series of Precedents had cured the Miſtake. As to the other Objection, that the Authority to ſummon the Jury is too confined, and ſhould have been from the Body of the County, what is ſaid relating to 4 & 5 *Ann. c.* 16. can have no Weight; That *Statute concerning Iſſues only to be tried in Actions out of the Courts of Record at* Weſtminſter; this is only *an Inqueſt awaked by Act of Parliament*, and what ariſes from the 43 *Eliz. that the Inqueſt ſhall be by Men of the County*, is anſwered by the Commiſſion itſelf, *viz.* Twelve Men of the ſaid Borough in the Court of *S.* and this Objection, as well as the former, is anſwered by the Precedents in all ſuch limited Commiſſions. But it is ſaid, that it appears by the Return this Jury which came out of the Town hath *inquired about Lands lying out of the Town in the County at large*; the Anſwer is, that *ſuch Lands concerned ſuch Charities founded within the Town*, and the Jury ſummoned under this Commiſſion might as well *inquire into Lands out of the Town*, as *Juries in general Commiſſions* for Counties *inquire about Lands lying in different Counties that are annexed to Charities founded within the Limits of thoſe Counties through which their Commiſſions extended*; and this is done

daily, ſo I think their Commiſſion is good, and properly executed, and the Exceptions muſt be over-ruled. *Mich.* 11 *Geo.* 2. In the Caſe of the *Borough of Ilcheſter in the County of S. MS. Rep.*

(C) Of the Right of Nomination to a Charity.

1. A Man founds a Charity for Almſhouſes: The *Founder* and his Heirs have a Right of *Nomination* of theſe Alms-People; but may forfeit it by a corrupt or improper *Nomination* of ſuch as are not fit Objects of the Charity, or by making no Nomination at all; but this Neglect of *Nomination* muſt be after ſuch Time as the Founder, *&c. have had Notice of the Vacancy*, and without *Proof* of ſuch Notice it is no Fault. By Lord Chan. *Parker*, Attorney General and *Leigh*, *Trin.* 1721. 2 *Will. Rep.* 146. *in a Note* (A).

2. *J. S.* ſeiſed in Fee of a Manor, grants a Rent-charge in Fee thereout of 20 *l. per Ann.* for a Charity, towards the Support of ſeveral poor Men, and afterwards *grants the Manor to* J. S. *in Fee.* Lord Chan. *King* decreed that the Heir of the *Grantor* ſhould have the *Nomination* of the poor Perſons. *Mich.* 1732. *Attorney General* and *Rigby*, 3 *Will. Rep.* 145.

The *Nomination* being incident to the *Founder* and his Heirs, or to thoſe whom he ſhould appoint, when the Lands were granted away, the *Rent-charge*, a Thing *independent* and *collateral* did *not paſs therewith, like a Rent-ſervice*, which is incident to the Reverſion; whereas this being a *Rent-charge*, and *in Fee*, had no Reverſion. *Per* Lord Chan. But as the *Grantees* and Owners of the Land had for upwards of 60 Years enjoyed the *Nomination* of the Perſons who had partaken of the Charity, the Court allowed to them all the Payments they had made to any of the Poor though *nominated by themſelves*, and would not diſturb any Thing that had been already done. *Ibid.*

(D) Concerning Commiſſioners of charitable Uſes (*a*); —— And here of Proceedings and Exceptions.

(*a*) *Vide* Tit. *Viſitor*, *P.*

1. UPON an Order of Reference out of Chancery to Lord C. J. *Keeling*, and all the other Judges, of Exceptions there taken to a Decree made by the Commiſſioners of charitable Uſes, in *Mich.* 1668. the Judges certified that they found that by *Inquiſition taken before ſome of the Commiſſioners for charitable Uſes, in the Abſence of the Exceptants*, it was *found that ſeveral Houſes* and *Lands therein mentioned were given by ſeveral Perſons, ſome in the Time of* E. 3. ſome in the Time of Queen *Eliz. and ſince, to ſeveral Uſes within the ſaid Pariſh.* viz. *ſome to the Poor, ſome to the Repairs of the Church*, and *ſome for preaching Sermons*; and that ſince the Year 1646. the *Rents* and *Profits had been received by thirteen ſeveral Perſons, and* not *imployed to the aforeſaid Uſes*; and that the *Commiſſioners thereupon cauſed a Charge to be drawn up of thoſe Rents* and *Profits, amounting to* 3847 l. 10 s. *and becauſe the Exceptants did not diſcharge themſelves of that Sum, they have decreed the Exceptants, and every of them, being five of the ſaid thirteen Perſons, to pay the ſaid* 3847 l. 10 s. and *to alter the Feoffees*, which Decree they (*i. e.* Judges) conceived to be altogether erroneous, and ought to be reverſed; 1*ſt*, Becauſe the *Exceptants* were by Order of ſome of the Commiſſioners *debarred from being heard before the Jury till after the Inquiſition was found.* 2*dly*, For that *it did not appear to them* (*i. e.* Judges) *but that as much or more has been yearly paid to* and

for ſeveral charitable Uſes, directed by the Donors, as is required by their reſpective Wills and *Gifts*, though *the ſame has not been mentioned to be paid out of the Rents of the reſpective Houſes* and *Lands by them given.* 3*dly*, Becauſe they (*i. e.* Judges) *found that all the Pariſh Rents* and *Monies within the Time mentioned in the ſaid Decree have been by the Exceptants, and the preceding* and *ſucceeding Churchwardens, paid* and *accounted for*, and *thoſe Accounts audited* and *allowed according to the antient Uſage of that Pariſh*; and *they* (*i. e.* Judges) *conceived that the Way uſed by the Exceptants* and *other Churchwardens of that Pariſh touching leaſing out the Premiſſes, receiving the Rents*, and *accounting for the ſame, is fit to be continued*; and for an *Expedient to prevent the Fruſtrations of Commiſſions upon the Statute* for charitable Uſes *by the Wilfulneſs of any Perſon*, they (the Judges) conceived it is *requiſite that the Perſons who are complained of for diverting the Charity be heard before the Jury*, and *have Liberty to anſwer for themſelves before the Inquiſition be found*, and thereby they will have leſs (if any Cauſe at all) to put in Exceptions to Decrees made againſt them. *Mich.* 1668. *Tattle* and *Bradſhaw*, *Viner's Abr.* Tit. *Charitable Uſes*, (H) *Ca.* 3. (*a*).

(*a*) *Note*; Mr. *Viner* ſays, *this Rep. was taken from a MS. Rep. of Lord C. J.* Keeling.

2. Urged, that in Caſe of a Charity, where the moſt ſpeedy and leaſt expenſive Method ought to be purſued, Iſſue ought not to be directed, but the Court ought to decree upon the Proofs. *Mar.* 25, 1721. *Biſhop of Rocheſter* and *Attorney General*, *Ibid. Ca.* 12.

3. Where Commiſſioners for charitable Uſes intend to oppreſs, the Court will puniſh them. *Per Cur'*, 10 *Geo.* 1. *in Caſu Wright* and *Hobert*, 2 *Mod. Ca. in Law and Eq.* 65.

4. A Power may be given to *Commiſſioners* to make By-Laws to regulate the Charity, but where ſuch Power is too extenſive, it will be void only *pro tanto*. *Per King* C. aſſiſted by *Eyre* C. J. and *Gilb.* B. *Hil.* 1725. *Eden* and *Foſter*, 2 *Will. Rep.* 325.

Sel. Caſes in Chan. 42. *Trin.* 1725. *Rawſon* and *Turner* S.C. *in totidem verbis.*

5. *A.* was ſummoned to appear before the Commiſſioners of charitable Uſes, but *never did appear*; and now he takes Exceptions to the Decree of the Commiſſioners. Lord Chan. The Act ſays, any Perſon concerned in Intereſt may except. *Trin.* 11 *Geo.* 1. *Anon. MS. Rep.*

CAP.

CAP. XVIII.

Churchwardens.

(A) Cases in general relating to them.

1. THE Bill was brought by the late Churchwardens againſt the ſucceeding Churchwardens to oblige them to make a Rate, according to an Order of Veſtry, to reimburſe them ſeveral Sums of Money laid out by Order of Veſtry for *Repairs of the Church*, and *Building two new Galleries*; and their Accounts having, at their going out of their Office, been taken by *Auditors*, and paſſed and allowed by the *Veſtry*, but the *ſucceeding Churchwardens being out of their Office*, and new ones choſe, but the Court would give them no Relief, but they muſt take their Remedy againſt ſuch particular *Pariſhioners* as employed them, or elſe in the *Spiritual* Court, the *Money for the Repairs being all paid*, and the Remainder due being for the *Galleries*. *Eaſt.* 1692. *Battily* and *Cook*, *Prec. in Chan.* 42.——2 *Vern.* 226. S. C.

Birch and *Barſton & al' Churchwardens of Lambeth, Trin.* 2 *W. & M.* in this Court was cited, where the Court decreed the Plaintiff, who was *late* Churchwarden, to be *paid the Money he had laid out for the Uſe of the Pariſh* with *Coſts*;

and then the Decree goes on and ſays, for which Purpoſe the Veſtry of the ſaid Pariſh are to take Notice hereof, (*viz.* of the Decree) and ſet a Rate accordingly; and what the *Churchwardens* ſhall pay in Obedience to this Decree, the ſame is to be brought into their Accounts, and to be allowed them by the Pariſh when they paſs their Accounts. The Reporter in a Note ſays, That there are the like Words in a former Decree, *February* 36 *Car.* 2. *James* and *Rich & al'*, which Decree is cited in the above Decree of 2 *W. & M.* and was read at the Hearing of the Cauſe. *Ibid.* 43.

2. Bill againſt 90 Pariſhioners *by Executrix of one of the Churchwardens of* W. *to be reimburſed Money laid out by the Teſtator as Churchwarden, for rebuilding the Steeple of the Church.* Objected, that this Matter was proper for the *Eccleſiaſtical* Court only. But by *Harcourt* C. The Plaintiff is proper for Relief here, and *there are many Precedents of the like Nature*; one in the Time of *Cowper* C. againſt the Pariſhioners of *St. Clements*, for the Organ in the Church, and *many more before*; and decreed that the Pariſhioners ſhould reimburſe Plaintiff the Money laid out by her Teſtator with Coſts, and the ſame to be raiſed by a Pariſh-Rate. *Eaſt.* 13 *Ann. Nicholſon* and *Maſters & al'*, *Pariſhioners of Woodford in Com' Eſſex*, *Viner's Abr.* Tit. *Churchwardens*, (C) *Ca.* 9.

3. Churchwardens, as *being a Corporation for the Goods of the Pariſh*, commence a Suit by and with the Conſent, and by the Order of the Pariſh, concerning a Charity for the Poor, in which they *miſcarried*; and then they *brought a Bill againſt the ſubſequent Churchwardens to be repaid the Coſts by them expended*, and had a Decree for it. But *it was proved that from Time to Time the Pariſh was made acquainted with what they did*; and though there was *no*

Veſtry by Preſcription, yet a *Veſtry Book, kept for the Pariſh Acts, was allowed as Evidence* of their Conſent; they are the *Truſtees* of the Pariſh for all Matters, and therefore the *Ceſtuy que Truſt ill.* Pariſhioners ought to contribute, and not lay the Burthen upon the Churchwardens. The *annual ſucceſſive Churchwardens need not be made Parties*, as they are renewed. *Per* the Maſter of the Rolls, *Trin.* 1718. *Radnor Pariſh in Wales*, *Viner's Abr.* Tit. *Churchwardens*, (C) *Ca.* 10.

His Honour took Notice, that *Money* or *Charities* given for repairing a Church is one of the Charities *mentioned, preſerved* and *eſtabliſhed* by *Stat.* 43 *Eliz. c.* 4.

4. *A.* deviſes 500 *l. to his Wife for Life*, Remainder *to the Pariſh Church of St. Helen's*, which is an Impropriation; this 500 *l.* ſhall not go to the *Vicar* or *Stipendiary* of the Church, but to the *Churchwardens* for the Reparations and Adorning the Church. Decreed by the Maſter of the Rolls, on Time taken to conſider, *&c.* *Hil.* 1722. *Attorney General* and *Ruper*, 2 *Will. Rep.* 125.

That as on the one Hand the *Parſon* of the Church *is a Corporation for the taking of Land* for the Uſe and Benefit of the Church, and not capable of taking Goods or any Perſonalty on that Behalf; ſo the *Churchwardens are a Corporation to take Money*, or *Goods*, or *other perſonal Things*, for the Uſe of the Church, but *are not enabled to take Lands.*—Goods given or bought for the Uſe of the Church are all *Bona Eccleſiæ*, for the taking whereof the *Churchwardens* may bring *Treſpaſs*, (cites *F. N. B.* 91. K.) and they may bring *Treſpaſs for taking theſe Goods, as well in the Time of their Predeceſſors as in their own Time.* *Per* his Honour. *Ibid.* 126.

5. It is ſaid in the Books, that the Churchwardens are a Corporation, but very *improperly*; for all the Pariſhioners are the Body, and the Churchwardens are only a Name to ſue by in Perſonal Actions; but the Property is in the Pariſhioners; and in all Actions brought by Churchwardens, it muſt be laid *Ad damnum Parochianorum.* *Per Macclesfield* C. *Hil.* 9 *Geo.* 1. *Whitmore* and *Bridges*, *Viner's Abr.* Tit. *Churchwardens*, (A) *in a Note under Ca.* 1.

CAP.

CAP. XIX.

Commiſſions and Commiſſioners.

(A) Of Commiſſions.
(B) Of Commiſſioners.

(A) Of Commiſſions.

1. A Commiſſion of Rebellion by the Courſe of the Court iſſues only to the Sheriff of *Middleſex*. 2 *Will. Rep.* 657. *in a Note by the* Editor.

2. After the *Defendant* has been examined on Interrogatories, and Publication paſſed, the Plaintiff ought not to have a Commiſſion to examine Witneſſes in order to *falſify* the *Defendant*'s Examination, this tending to *multiply* Cauſes, and make them *endleſs*. So ordered by *King* C. *Hil.* 1735. *Smith* and *Tanner*, 3 *Will. Rep.* 413.

3. An Affidavit made by a Solicitor, "*That a Commiſſion to examine Witneſſes beyond Sea was neceſſary*," is not ſufficient to intitle the Party to ſuch Commiſſion (*a*), for the Solicitor by this Means takes upon himſelf to judge of a Matter which does not belong to him. *Per* Lord Chan. *Hardwicke*, *Mich.* 1740. *Jeſſup* and *Duport*, *Barnard. Chan. Rep.* 192, 193, 194.

(*a*) For the Ground for granting ſuch Commiſſions muſt depend upon the ſpecial Circumſtances of the Caſe, and *thoſe Circumſtances muſt be diſcovered upon Affidavit*, or *they may ariſe from the Nature of the Caſe itſelf*, as in the preſent Caſe; for as on the one Hand it muſt *not* be laid down that the Granting ſuch a Commiſſion is a *Motion of Courſe*, ſo on the other Hand it muſt *not* be laid down that the Party applying for ſuch Commiſſion *muſt ſhew, that there is an abſolute Neceſſity for it*; was that the Caſe, on Motions of this Sort the Court muſt be obliged to determine the Merits of the Cauſe, whereas in ſuch Caſe it is ſufficient to ſhew, that there is a *probable* Cauſe for the granting ſuch Commiſſion. *Per* Lord Chan. *Ibid.*

4. The Courſe of the Court is, that where an Account muſt neceſſarily be directed at the Hearing, a *Commiſſion* before the Hearing ſhall never be granted to *examine Witneſſes beyond Sea*, *when* the Granting ſuch Commiſſion *will delay the directing the Account*; and the proper Time to apply for ſuch Commiſſion is *after the Account is directed*. *Per* Lord Chan. *Hardwicke*, *Hil.* 1740 *Adams* and *Bohun*, *Ibid.* 270, 271.

(B) Of Commiſſioners.

2 *Mod. Ca. in Law and Eq.* 94. *Eaſt.* 10 *Geo. Bow* and *Smith* S. C. *in totidem verbis* ſays, that the Defendant inſiſted that the *Commiſſioners* had no Power to tax him, for that there was an *old Sluice* near the Place where the new one was intended to be built, which was ſufficient to ſecure all the *Level*, and that the new Sluice when built would be of no Manner of Advantage to him, and conſequently he ought not to be contributory to the Charge of building it, and therefore that both he and his Tenants had good Right to bring Actions for the Money extorted from them. *Ibid.*

1. THE *Commiſſioners* of Sewers aſſeſſed all the Lands from ſuch a Place to ſuch a Place in the *Level* to raiſe Money to build a *new Sluice*, and by Warrant appointed the Plaintiff to collect the Money, *&c.* who by Virtue thereof made ſeveral Diſtreſſes, and levied Money on the Defendant's Tenants, (the Occupiers of the Lands) for which he brought ſeveral Actions againſt the Plaintiff in their Names; and the ſaid Aſſeſſment being not ſtrictly *legal*, becauſe *it ſhould be aſſeſſed on every particular Tenant proportionable to the Damage he might ſuſtain*, therefore the Warrant and Diſtreſſes were not good, and ſo the Plaintiff could not defend himſelf at Law, but a Verdict paſſed againſt him, and thereupon he exhibited this Bill to ſuperſede thoſe Actions, ſuggeſting this Matter, and that the ſaid Actions were vexatious. But Lord Chan. would not help in this Caſe, for if he did, then the Order of *Commiſſioners* of Sewers and of the Seſſions would be made in this Court; and *per* his *Lordſhip*, *here the Aſſeſſment was wrong*, and *Money was levied by Virtue of ſuch Aſſeſſment*, *which ought to be refunded*, and a *new* Aſſeſſment made, and the *right way of making it is to aſſeſs the particular Lands according to the Damage they lie in*; and that it is not neceſſary to name the *Owners* or *Occupiers* of ſuch Lands, for the *Commiſſioners* may not know them; for if not naming the Owners ſhould make the Aſſeſſment void, there would be an End of all Aſſeſſments by *ſuch Commiſſioners*; therefore if that was the Fact, it might be proper for the Court to interpoſe. *Eaſt.* 10 *Geo.* 1. *Anon. MS. Rep.*

2. A *Witneſs* examined on a Commiſſion (*the Commiſſioners on both Sides attending*) ſwears reflecting Words upon —— yet he ought not to pay Coſts, it being the *Commiſſioners* Fault to take down ſuch Deſition (*a*). *Per King* C. *Hil.* 1726. *Anon.* 2 *Will. Rep.* 406.

(*a*) Q. If the Interrogatories had led to it? for it ſeems in the principal Caſe it did not, it being the laſt general Interrogatory. *Ibid.*

(*b*) The *Intention* of the Statute ſeems to have been the ſame in this Reſpect as it is in the Acts relating to the *Turnpikes*. *Per* Lord Chan. *Ibid.* 379.

3. Diſputes which relate to the Building the fifty new Churches are by the Intention of the ſeveral Statutes to be determined *by* the *Commiſſioners* (*b*) only, and not by the *ordinary* Courts of Juſtice. But if the *Commiſſioners* do not do their Duty, the proper Court to apply to is the King's Bench for a *Mandamus*, and not to the Court of Chancery. *Per* Lord Chan. *Hardwicke*, *Hil.* 1740. *Vernon* and *Blackerby*, *Barnard. Rep. in Chan.* 377, 9, 10.

Vide P. 170. *Ca.* 30.

CAP. XX.

Of a Common (a).

(a) *Vide* 163, *Ca.* 25.

1. A Bill was brought to *quiet Poſſeſſion of a Right of Commonage* in a Common, Part of the Manor of *Moreton* in *Surry*, and *to prevent Diſtreſſes*, an Anſwer and Demurrer were put in, and then Plaintiffs amend their Bill, and obtain an *Injunction* till Anſwer and further Orders. The Defendants now moved to diſſolve it, and the Plaintiffs produced *Affidavits of above* 50 *Years quiet Poſſeſſion* and *Evidence of their Right in Queen* Elizabeth's *Time*; yet the *Court refuſed to interpoſe till one or more Verdicts at Law*, and diſſolved the *Injunction* that it might be tried immediately. So ruled by *King* C. *Hil.* 12 *Geo.* 1. *Gilb. Eq. Rep.* 183.

2. Agreement between Lord and Tenants for incloſing a Common, that the Tenants ſhould quit their Right of Common, and the Lord ſhould releaſe them all Quit-Rents: The Incloſure was prevented by pulling down the Fence, and the Tenants continued to uſe the Common, and ſome of them to pay their Quit-Rents; this is a *Waiver* of the Agreement. *Jan.* 2, 1719. *Lady Laneſbury* and *Ockſhoth*, *Viner's Abr.* Tit. *Common*, (A. a.) *Ca.* 31.

3. Owner of Lands bound by Agreement of his Bailiff for incloſing of a Common *having acquieſced* 30 *Years*. *Mar.* 1720. *Tufton* and *Wentworth*. *Ibid. Ca.* 32.

4. Bills brought by Plaintiffs as *Tenants of a Manor to eſtabliſh their Right of Common of Paſture*, and *Turbary in the Waſte of the ſaid Manor*, and *for Injunction againſt Defendant*, *Leſſee of the Manor for Years under the Crown*, *to ſtay his digging of Brick Earth*, and *making Brick*, and *incloſing Part of the Common*, *&c.* *The* Motion upon the Bill filed, and Affidavits of making Brick and incloſing Part of the Common (*was for an Injunction* *) till Anſwer and further Order. *King* C. aſſiſted by *Jekyll*, Maſter of the Rolls, denied the Motion (*b*). *Eaſt.* 2 *Geo.* 1. —— and *Palmer & al'*, *Ibid.* (A. a.) *Ca.* 33.

* *Not in the Original.*

(*b*) For that the Lord of common Right was intitled to the Soil of the Waſte, and the Tenants had only a Right to take the Herbage by the Mouth of their Cattle; and by the Statute of *Merton*, the Lord might incloſe Part of the Waſte, leaving ſufficient Common; that at Common Law in an Action brought againſt the Lord, the Tenant muſt alledge in the Declaration, that there is not ſufficient Common left, or he cannot maintain the Action; and if that ſhould be the preſent Caſe, (tho' no ſuch Matter is made out by the Affidavit) the Tenants may have their Remedy at Law;——That the Lord *has a Right to open Mines in the Waſte of the Manor*, and why not to dig Brick Earth, eſpecially in the preſent Caſe, where the Bricks are made for a Tenant of the Manor, and to be employed in building upon the Manor.——As to the *Incloſure*, his Honour ſaid, it was too ſoon for an Injunction before Anſwer. *Ibid.*

CAP.

CAP. XXI.

Conditions (a).

(a) Rules; *Conditions againſt Law,* and *ſuch as are repugnant* or *impoſſible, are void.* —— *Conditions which go to the Defeaſance of an Eſtate ought to be taken ſtrictly.* —— *None but Parties* or Privies may take Advantage of a Condition. —— *Condition diſpenced with,* or *extinct in Part, is wholly gone. Hob.* 313. —— A Condition is *only ſuch as may be performed by the Party himſelf,* from whom it *moves,* or *his Heirs,* and not where a Thing is to be performed by a third Perſon. Said *per* the Maſter of the Rolls, *Eaſt.* 1718. *in Caſu Markes* and *Markes, Prec. in Chan.* 488. —— *Vide* 1 *Vol. Eq. Ca. Abr. P.* 106. *Ca.* 6. S. C.

(A) Who may take Advantage of a Condition.
(B) Of Conditions precedent and ſubſequent.
(C) In what Caſes the Breach of a Condition precedent or ſubſequent will be relieved againſt, & econt'.
(D) Where a Gift or Deviſe upon Condition not to marry without Conſent ſhall be good and binding, or void, being only in Terrorem.
(E) What Act ſhall be ſaid to be a Performance or Satisfaction of a Condition, &c.
(F) At what Place a Condition muſt be performed where a Place is limited.

(A) Who may take Advantage of a Condition.

1. J. S. deviſes Lands to his Wife for Life, and after her Death to his Son in Fee, upon Condition *to pay his Daughter* 1000 l. *within a Year after the Death of* A. *with a Proviſo, that if the Money be not paid, the Daughter may enter and receive the Profits till Payment. A.* dies, *living the Wife,* the Daughter ſhall have the 1000 *l.* during the Life of the Mother, and in Default of Payment, Equity will decree a Sale of the *Reverſion* (*b*). Decreed at the Rolls, *Mich.* 1718. and afterwards affirmed by Lord Chan. *Parker, Bacon* and *Clerk,* 1 *Will. Rep.* 478.

(*b*) A *Reverſion* is an Eſtate, and a beneficial one too, and may as well as any other Eſtate be deviſed upon Condition. Decreed at the Rolls in S. C. *Ibid.* 479.

(B) Of Conditions precedent and ſubſequent (*c*).

(*c*) Rule; *Conditions precedent muſt be literally performed; not ſo if ſubſequent Conditions,* where the Court can make Compenſation.

Prec. in Chan. 387. S. C. *in totidem verbis.*

1. J. S. on the Marriage of *A.* his Son with *B.* conveys Lands to Truſtees to the Uſe of *A.* and the Iſſue of the intended Marriage, *Proviſo that if the Marriage did not take Effect,* and *B. ſhould not when ſhe came of Age join in charging her Eſtate with* 2000 *l.* then the Deeds of Conveyance to be abſolutely void to all Intents.

And *per* Lord Chan. This is a Condition ſubſequent. *Eaſter* 1714. *Hunt* and *Hunt*, *Gilb. Eq. Rep.* 43.

2. *A.* gave a Legacy of 6000 *l.* to *B.* (the only Child of *C.* his Siſter) *payable at* 21 *or Marriage*, *which ſhould firſt happen*, and died, leaving *C.* his Heir at Law, *but he deviſed all his real Eſtate to* D. The *Legacy to* B. *was to be in Lieu* and *Satisfaction of all ſhe might claim out of his real* or *perſonal Eſtate*, and *upon Condition that ſhe ſhould releaſe all her Right* and *Title thereunto unto the Teſtator's Executors* and *Truſtees*. It was inſiſted, that *B.* had no Right during her Mother's Life-time; that ſhe might *marry while an Infant*, and *ſo her Legacy become due*, and *ſhe not capable of releaſing*; or might intermarry with an *Infant*, and *ſo neither ſhe nor her Huſband be capable of releaſing*, and yet the Legacy due; wherefore ſuppoſing it to be a Condition, it could be no more than a Condition *ſubſequent*. *Quod Curia conceſſit*. *Trin.* 1722. (*Macclesfield* Lord Chan.) *Acherley* and *Wheeler and Vernon*, 1 *Will. Rep.* 783, 785.

Comyns's Rep. 513, 522. *Eaſt.* 9 *Geo.* 2. *in C. B.* S. C. in an Action of Debt, where it is ſaid, that *Reeve* C. J. thought it a Condition *ſubſequent*, but the other Judges doubting, it was adjourned; and afterwards, *Eaſt.* 12 *Geo.* 2. *Willes* C. J. and the whole Court inclined to think it a Condition *precedent*, but held, that ſuppoſing it to be a Condition *ſubſequent*, yet not being performed, the Plaintiff was not intitled to the Arrear of the Annuity, and therefore the Verdict was ſet aſide, and the Plaintiff to pay the Coſts of a Nonſuit.——*Forteſ. Rep.* 189, 194. S. C. adjudged; and Lord C. J. *Willes*, who delivered the Opinion of the Court, ſaid, that his Brothers were of Opinion that it is a Condition *precedent*; but his Lordſhip ſaid, that the *ſame Words will make it a Condition* ſubſequent *as well as* precedent, and cites ſeveral Caſes.

3. Defendant agreed by his Note under Hand to pay *B.* 200 *l.* within two Years, and give him a Reek of Wheat, on Condition he married his Daughter, and ſettled 600 *l.* upon her for a Jointure. The Marriage took Effect, and there was Iſſue a Daughter, but both Mother and Daughter died before the two Years expired. Plaintiff inſiſted it was an Agreement proper for a Court of Equity to execute, and that he had married the Defendant's Daughter, and had been looking out for ſeveral Purchaſes to lay out the 600 *l.* and was only prevented by the Act of God. Defendant inſiſted it was a Condition precedent, and to be performed at all Adventures before Plaintiff could be intitled to the 200 *l.* and if any Damages, he might have his Action at Law; that the Plaintiff was not bound to lay out the 600 *l.* and therefore there were no (*a*) *mutual Remedies*. But the Court diſmiſſed the Bill, but without Coſts; for it was in Plaintiff's Power to have intitled himſelf to the 200 *l.* when he pleaſed, by laying out the 600 *l.* which not being done, he is not intitled to any Relief. *Hil.* 12 *Geo.* 1. *Powell* and *Pellett*, *MS. Rep.*

(*a*) Rule; *Remedies ought to be reciprocal.*

4. *A.* deviſes to his Niece, then about 17, the Surplus of his perſonal Eſtate, payable at 21, and if ſhe ſhould die before 21, or Marriage, then *A.* deviſed it over; the Niece ſhall have the Intereſt paid her in the mean Time tho' the Surplus be deviſed over, *if the Niece die before* 21, *or Marriage*, the Deviſe over being but a Condition ſubſequent. *Trin.* 1727. *Nicholls* and *Oſborn*, 2 *Will. Rep.* 419.

5. *J. S.* in Conſideration of 500 *l.* which he was to have with his Wife in Money and Goods, and of the *Marriage*, made a Settlement before Marriage, and gave her a Power to diſpoſe of 200 *l.* by Will, which ſhe accordingly did about 15 Years after. On a Bill by the Legatees, *J. S.* inſiſted that he never received more than 300 *l.* as a Marriage Portion with his Wife, and that his having 500 *l.* was as a Condition *precedent*. But the Maſter of the Rolls held otherwiſe, and that the *Quantum* of the Portion ſeemed rather a Compenſation than otherwiſe, and that it was not to be imagined but that the Huſband did look into ſuch *Quantum* before the Marriage, and was ſatiſ-

fied therewith. The 200 *l.* was decreed to be raiſed with Intereſt from the End of the Year after the Wife's Death, and with Coſts. *Trin.* 1731. *North* and *Anſell*, 2 *Will. Rep.* 618.

(C) In what Caſes the Breach of a Condition precedent or ſubſequent will be relieved againſt, & econt'

1. PLaintiff married *G. S.*'s Daughter, and upon the Marriage it was agreed by Articles that the Plaintiff ſhould ſettle 500 *l. per Ann.* for ſeparate Maintenance, and ſhould do ſeveral other Things, and likewiſe ſhould purchaſe 800 *l. per Ann.* within 20 Miles of *London*, and ſettle it upon himſelf for Life, Remainder to his intended Wife for Life, with Remainders over; and *G. S.* did article, ſo ſoon as the Plaintiff ſhould perform the Premiſſes, that he would ſettle 3000 *l. per Ann.* upon the Plaintiff for Life, Remainder to his Wife for Life, and ſo to the firſt and tenth Son. The Plaintiff did perform all that was to be done on his Part, except the Purchaſing of the 800 *l. per Ann.* and before that was done his Wife died without Iſſue. Plaintiff preferred his Bill againſt *B.* who married another Daughter and Heir of *G. S.* to have the Eſtate of 3000 *l. per Ann.* executed to him for Life, according to the Articles, having performed all on his Part, but the ſettling of the 800 *l. per Ann.* and in that he was prevented by the Death of his Wife. It was proved that *G. S.* in his Life-time ſaid, that altho' the Plaintiff had not as yet purchaſed the 800 *l. per Ann.* it ſhould be no Prejudice to him, but he ſhould take his own Time for doing it; and a great many Expreſſions of this Kind from *G. S.* were proved, and were inſiſted upon by Plaintiff's Counſel to be in the Nature of Diſpenſations with the Performance of that Part of the Agreement. But Lord Chan. aſſiſted by *North* C. J. and *Montague* C. B. delivered their Opinions *ſeriatim* againſt the Plaintiff, becauſe what was done by the Plaintiff was in Nature of a Condition precedent, and ought to have been wholly done before Defendant was obliged to do what was to be done on his Part (*a*). *Eaſt.* 1678. *The Earl of Feverſham* and *Watſon*, 2 *Freem. Rep.* 35.

(*a*) And as here the Plaintiff could not bring his Action of Covenant at Law without Averment of the Performance of the Condition precedent, ſo neither ſhall he in Equity have an Execution of the Eſtate without doing that which by the Agreement of the Parties ought firſt to be done; and the Plaintiff ought at his Peril to have performed what he was to do in the Life-time of the Wife. And this Caſe is the more ſtrong, becauſe all the Acts that the Plaintiff hath done are no Prejudice to him; for altho' he intailed his Eſtate upon the Iſſue of his Wife, yet ſhe being now dead without Iſſue, he is abſolute Owner of the Eſtate again; but if Plaintiff had paid a great Sum of Money, or ſuch like, tho' he had not fully performed every Thing, yet it may be he might have been relieved ſo as to have had the Eſtate executed, or a Compenſation for his Money. *Ibid.* 36.—(*MS. Rep. accord'*). And *per* Lord Chan. if the Wife had left Iſſue, the Iſſue might have had Relief here, for there was no Default in the Iſſue that the Condition was not performed; but here it muſt be intended that if *G. S.* had been living, he would not have agreed to have had the Eſtate ſo ſettled, his Daughter being dead without Iſſue. And the Caſe of *Cheeke* and *Lord Liſle* was cited to be a ſtronger Caſe than this, for there the Party had four Years Time to make a Settlement, and the Wife died in the four Years Time, and yet the Settlement not being made, the Party could not be relieved. And *per North*, The Chancery will never force the Execution of an Eſtate, but either where the Agreement is in Writing, or elſe where a valuable Conſideration is paid or performed on one Part; and it muſt not be a trifling Conſideration, as the Payment of 20*s.* or ſuch like; for this Court will not compel the Execution of an Eſtate thereupon where the Agreement is not in Writing. *MS. Rep.* in S. C. 2 *Freem.* 26. *accord'.* —— *Fin. Rep.* 445. *Eaſt.* 32 *Car.* 2. *Lord Feverſham* and *Watſon and Sands* S. C. ſtates it thus: *F.* on his Marriage of *M.* Daughter to Sir *G. S.* by Marriage Articles was to ſettle 2000 *l.* a Year, *i. e.* 1200 *l.* a Year of which he was then ſeiſed, and to purchaſe and ſettle 800 *l. per Ann.* more; but it was expreſly agreed in the Articles, that before Sir *G. S.* ſhould make the Settlement agreed to be made by him, which was 1000 *l. per Ann.* now, and 3000 *l. per Ann.* at his Death, the Plaintiff the Huſband ſhould purchaſe and ſettle 800 *l. per Ann.* Part of the intended 2000 *l.* on the ſaid *M.* for Life, &c. The Marriage was had, Sir *G. S.* died before any Settlement

ment of the 800 *l. per Ann.* but the 1200 *l. per Ann.* was ſettled as agreed ſoon after. The Wife died without Iſſue, *F.* brought his Bill for the 300 *l. per Ann.* Lord Chan. ſaid, it appeared that there was no Deſign, Surprize, or unwary wording the Articles, and that *F.* was to do the precedent Act; and the Article was penned in a different Manner from the other Articles, becauſe the other Things therein mentioned had a Time prefixed for doing them; but there was no determinate or fixed Time for ſettling this 3000 *l. per Ann.* for that was to be after the Purchaſe and Settlement of 800 *l. per Ann.* and it was uncertain when that would be; and it does not appear that the Parties came to a new Agreement, or diſpenſed with the Performance of the Articles on the Part of the Plaintiff, but it was a *Condition precedent*, which *cannot be diſpenſed with in Equity*. If the Articles had been ſo penned that each had depended on the mutual Covenants of each other, there might be ſome Colour to relieve the Plaintiff, becauſe in ſuch Caſe the Father might have recovered Damages at Law, without averring the Performance on his Part; but otherwiſe where the Covenant is penned by way of Condition precedent, ſo as no Action lies at Common Law without averring Performance. It is true, if the Plaintiff had ſuch a legal Advantage by the Penning this Covenant, perhaps this Court would not have reſtrained him. Had the Wife been living, or left Iſſue, there might have been ſome Ground for Relief, *becauſe the Equity of the Contract had been ſtill ſubſiſting*; but as it is, the whole Reaſon of the Contract is diſſolved, and the Plaintiff ſuffers not any Loſs, but only the Diſappointment of his reaſonable Hopes and Expectancy. Bill diſmiſſed.——*Skin. Rep.* 287. S. C. cited by *Hutchins* Commiſſioner thus: That upon the Marriage of a Daughter of Sir *G. S.* the late Earl of *Feverſham* was to have by Agreement 3000 *l. per Ann.* when the preſent Lord *Feverſham* ſettled 2000 *l. per Ann.* for a Jointure, the Eſtate in Poſſeſſion of Lord *Feverſham* was only about 800 *l. per Ann.* but he had Penſions in *Ireland* to commence *in futuro*, which being ſold, would amount to what would purchaſe 2000 *l. per Ann.* The Marriage took Effect, and afterwards the Lord *Feverſham* was upon Treaty to ſell his Penſions in order to the Purchaſing and Settling the 2000 *l. per Ann.* The then Lord *Feverſham* hearing of it, told him that theſe Penſions not being in Poſſeſſion, they would not ſell for ſo much as when they came into Poſſeſſion, and ſo adviſed him not to part with them yet, and he accordingly forbore; then his Wife dies, and the then Lord *Feverſham* dies, and the preſent Lord *Feverſham* prefers his Bill againſt Mr. *W.* who married the other Siſter, and was the Daughter and Heir of Sir *G. S.* And it was decreed, and afterwards affirmed in the Houſe of Lords, that the Lord *Feverſham* ſhould have an Execution of the firſt Agreement, and that this was a *Diſpenſation* in Sir *G. S.* of the Agreement for the preſent, which ſhould not prejudice the Lord *Feverſham*.

2. *A.* ſeiſed in Fee having three Daughters, *deviſed to Truſtees to convey to the Eldeſt, if ſhe ſhall pay* 6000 l. *to her two Siſters in ſix Months*; and if ſhe ſhall not, then gives the *like Pre-emption for the ſame Time to the ſecond*; and if ſhe ſhall not, to the third: The Money muſt be paid punctually at the Time, and Equity will not enlarge it. *Feb.* 7, 1705. *Maſton* and *Willoughby*, *Viner's Abr.* Tit. *Condition*, (T. 3.) *Ca.* 12.

3. An Infant Feme marries *A.* having Lands of Inheritance; Articles are entred into, whereby ſhe was during the Coverture to ſettle and convey over theſe Lands, and then ſhe was to have a Rent-charge of 450 *l. per Ann.* for her Jointure, whereas before ſhe had but 250 *l. per Ann.* *A.* dies, ſhe marries *B.* *B.* and his Wife bring a Bill for to have the 450 *l. per Ann. &c.* *Harcourt* Lord Keeper decreed, that here was a Condition precedent to her having her Jointure augmented, which was to have been done during the Coverture; and a Court of Equity will not relieve in ſuch a Caſe where Omiſſion of it was but a meer Neglect in the Party, (and cited Lady *Bertie*'s Caſe). But upon Appeal this Matter was in a Manner compromized by the Lords; and Lord Keeper here diſmiſſed the Bill; for if he ſhould relieve her, ſhe would have both the Lands and the 450 *l. per Ann. Mich.* 9 *Ann. Wood* and *Ingram*, *Ibid.* (T) *Ca.* 65.

4. I give and bequeath to *E.* 100 *l.* to be paid him within ſix Months after he ſhall have ſerved his Apprenticeſhip; he ran away from his Apprenticeſhip, and died. Decreed that the ſerving the Apprenticeſhip is not the Condition annexed to the Legacy, but only an Appointment when it ſhall be paid, and the rather, for if *E.* had died before Expiration of his Apprenticeſhip, his Repreſentative would have been intitled to the Legacy. *July* 26, 1712. *Sidney* and *Vaughan*, *Ibid.* (T. 3.) *Ca.* 13.

5. Equity will not relieve againſt the Breach of a Condition precedent where the Damages accrued are contingent, and cannot be eſtimated. 1723. *Sweet* and *Anderſon*, *Ibid.* (T. 3.) *Ca.* 15.

6. If

6. If there be a *Condition ſubſequent* which becomes *impoſſible* by the Act of God, this excuſes and diſcharges the Condition. *Per* the Maſter of the Rolls, *Trin.* 1731. and he ſaid, it is a Rule in Law; for *Lex non cogit ad impoſſibilia. Viner's Abr.* Tit. *Condition*, by way of Note to *Ca.* 13. *P.* 233.

(D) Where a Gift or Deviſe upon Condition not to marry without Conſent ſhall be good and binding, or void, being only in Terrorem.

2 *Freem. Rep.* 41. S. C. *in totidem verbis.*

1. FIVE Hundred Pounds was deviſed to the Plaintiff's Wife, if ſhe married with the Conſent of Truſtees, and in Caſe ſhe did not, then 20 *l. per Ann.* for her Life; ſhe married Plaintiff without the Truſtees Conſent, and he preferred his Bill for the 500 *l.* and it was argued for Defendant, that this did differ from the common Caſe of a Deviſe upon Condition *in Terrorem*; for it has always been held, that where there is a Deviſe over to a third Perſon for Non-performance of the Condition, there if the Party marry without Conſent, *&c.* all ſhall go to the third Perſon, becauſe he hath a conditional Intereſt by the Will; and if there be no Deviſe over, then it is eſteemed only *in Terrorem*, and the Party ſhall have the Legacy notwithſtanding the Breach of the Covenant; but here this is tantamount, or as ſtrong as a Deviſe over, when the Party himſelf ſaith, that if ſhe marry without Conſent ſhe ſhall have but 20 *l. per Ann.* But to that it was anſwered by Lord Chan. that this differed not from the Reaſon of the common Caſe of a Deviſe *in Terrorem*; and the Reaſon he ſaid he had from Lord C. J. *Hale*, who (when it was objected in another Caſe here that this Court will not make Mens Wills for them, and give their Eſtates quite contrary to their Intentions) anſwered, that this Court holds Pleas of Legacies, and judges of them by the Rules of the *Civil* Law, and by that Law, any Condition added to reſtrain Marriage is void; ſo that where an Intereſt doth not accrue to a third Perſon by the Breach of the Condition, ſuch a Condition is void, and only *in Terrorem*; and ſo the 500 *l.* was decreed to the Plaintiff. But if it had appeared that any Surprize, Bribes, *&c.* had been uſed in obtaining a young Maid to marry unſuitably, perhaps this Court would order it otherwiſe. *Mich.* 1678. *Hicks* and *Pendarris*, *MS. Rep.*

Prec. in Chan. Trin. 1703. *Aſhton* and *Aſhton* S. C. *in totidem verbis.* — 1 *Vol. Eq. Abr. P.* 41. *Ca.* 11. *Aſhton* and *Aſhton is not S. P.*

2. *J. S.* deviſes his real and perſonal Eſtate, to make up the Portions provided for his Daughters by his Marriage Settlement 3000 *l.* a-piece, *provided they marry with the Conſent of their Mother* and *Brother*; and if without ſuch Conſent, then to be applied to other Purpoſes. Lord Keeper *Wright*, and the Maſter of the Rolls, held this to be a Condition ſubſequent; and that the additional Portions are payable at the ſame Time with the Portions provided by the Settlement, which was 18, or Marriage; and decreed the Lands to be ſold, and the Money to be brought before the Maſter, and Intereſt paid the Daughters from their reſpective Ages of 18, and the Principal at 21, if they were then married without ſuch Conſent; and if not then married, they to give their own Recognizance to repay for the Purpoſes in the Will, if they after marry without ſuch Conſent; and the Court declared they would not diſpence with the Forfeiture, nor alter the Will. *Trin.* 1703. *Anon. MS. Rep.*

3. *J. S.*

3. *J. S.* by Will leaves an Annuity of 10 *l. per Ann.* to *A.* for Life, and afterwards by a Codicil declares, that " if *A.* ſhall marry " with the good Liking of his Truſtees, then ſhe ſhall have 150 *l.* in " *Lieu* of the Annuity, and her Annuity to ceaſe." She marries *ſans* Conſent a Man worth nothing; objected by Serjeant *Hooper*, that the Reſtraint of Marriage was only *in Terrorem*, and that *A.* notwithſtanding her having married as above, ought to have the 150 *l.* But Lord Chan. *Cowper* decreed *cont'*, ſaying, here was a Proviſion made either way, and where the Proviſion for the Child is in the Alternative, and there is a *Condition precedent* to the Gift of the Portion, (*viz.*) If *ſhe marries with Conſent, &c.* and that is not performed, and the Child is ſtill provided for, tho' not with the greater Portion, Equity in that Caſe does not relieve. *Mich.* 1715. *Gillet* and *Wray*, 1 *Will. Rep.* 284.

4. *J. S.* having Daughters *A. B. C.* and *D.* in 1705. deviſed ſeveral Parcels of his Eſtate ſeverally to his four Daughters, *& inter al'* deviſed to Truſtees his Lands in *E.* and *F.* in Truſt for *A.* till her Marriage or Death, and in Caſe ſhe marries with the Conſent of her Truſtees, then to her and her Heirs; but in Caſe ſhe ſhould marry without their Conſent, then to her other Siſters equally between them, *&c.* In 1708. *A.* married *W.* with the Conſent and Approbation of her Father, who ſettled upon this Marriage Part of thoſe Lands deviſed to her, and alſo 7 *l. per Ann.* Fee Farm Rent. In 1709. *J. S.* dies without altering his Will. *Cowper* C. decreed that by the Marriage with the Father's Conſent, the Condition was diſpenſed with, and the Deviſe became abſolute; for Conditions of this Kind, whether precedent or ſubſequent, were in Nature of Penalties and Forfeitures; and if the ſubſtantial Part and Intent be performed, Equity will ſupply ſome ſmall Defects and Circumſtances, and favour the Deviſee. Here is no Forfeiture, and it was never the Intent of the Teſtator that the Eſtate ſhould be taken from the firſt Deviſee when it cannot go to the Deviſee over, and be let to deſcend to the Heir at Law. *Mich.* 3 *Geo. Clark & Ux'* and *Lucy & al'*, *Viner's Abr.* Tit. *Condition*, (T. 2.) *Ca.* 6.

5. But where the Party cannot be compenſated in Damages, it is againſt Conſcience to relieve; and in *Fry* and *Porter*'s Caſe, the Condition could not be compenſated in Damages, being a Marriage without Conſent. Precedent Conditions muſt be literally performed, and Equity will never veſt an Eſtate when by Means of a Condition precedent it will not veſt at Law; but as Conditions ſubſequent are to deveſt an Eſtate, there it is otherwiſe where there can be a Compenſation in Damages, as above, but in any other Caſe, even in Caſe of Condition ſubſequent, it is otherwiſe. *Ibid.*

6. *A.* having Iſſue three Daughters *B. C.* and *D.* deviſes 1000 *l.* to *B.* to be paid her at 21, *or* Marriage, upon *Condition that ſhe married with the Conſent of his Executors*, and likewiſe deviſed to her ſeveral Meſſuages, *&c.* and after ſeveral other Legacies, he deviſed the Reſidue of his Eſtate to the Executors for the Benefit of his Children; tho' *B.* married a Perſon who made his Addreſſes to her in her Father's Life-time, which the Father knew and was diſſatisfied at, and after the Father's Death the Executors expreſſed their Diſlike thereof, and gave *B.* Notice of her Father's Will, yet there *being no Limitation over* (*a*), this will not amount to a Forfeiture, being only

(*a*) There being no Limitation over, ſuch a Condition as this is only *in Terrorem*; *ſecus* if there had been a Limitation over, for in ſuch Caſe a Court of Equity cannot interpoſe. *Vide* 2 *Freem.* 10, 119.

in Terrorem. Eaſt. 1721. *Semphill & Ux'* and *Bayly & Ux'*, in the Dutchy Court, *Cor' Lechmere* Chan. *King* C. J. and *Dormer* J. *Prec. in Chan.* 562.

7. *A.* deviſed a Legacy to *B.* to be paid at 21 *or* Marriage, which ſhould firſt happen, ſo as ſuch Marriage be with Conſent of *C.* and if not, then he deviſed the ſame to his other Daughters. *B.* marries *without* (*a*) Conſent, and dies before 21, leaving Iſſue, and her Repreſentatives bring a Bill for this Legacy. Lord Chan. ſaid, that this is not to be conſidered under the Notion of a Forfeiture; that it is merely a Legacy given, and two Days of Payment appointed with a Deviſe over, and *B.* dies before the Legacy grew due, and ſo decreed that *B.* dying before Marriage *with* (*b*) Conſent, or 21, an Account ſhould be taken of her Part, and that that, and the Improvements of it, be paid to the ſurviving Siſters. *Trin.* 11 *Geo.* 1. *Piggot* and *Morris*, *Sel. Caſes in Chan.* 26.

(*a*) *So in the Original.*

(*b*) *So in the Original.*

His Honour ſaid, Surnames are not of very great Antiquity; for in antient Times the Appellations of Perſons were by their Chriſtian Names and the Places of their Habitation, as *Thomas* of *Dale*, (*viz.*) the Place where he lived, and

8. *J. S.* deviſes a Legacy of 1000 *l.* to his Daughter, *upon Condition that ſhe marry a Man who bore the Name and Arms of* Barlow, *and if ſhe married one that ſhould not bear ſuch Name and Arms*, then he deviſed the 1000 *l.* to *B.* She married Defendant *Bateman*, *but about three Weeks before the Marriage he called himſelf* Barlow. On a Bill brought by *B.* for the 1000 *l.* as forfeited to him, Sir *Joſeph Jekyll*, Maſter of the Rolls, was of Opinion, that the Condition was complied with by the taking the Name of *Barlow*; and tho' it was inſiſted for the Plaintiff that the Defendant when he had received the Legacy would probably reſume the Name of *Bateman*, and therefore prayed that he might be decreed to retain the Name of *Barlow* ever after; yet his Honour refuſed to make any ſuch Decree. *Trin.* 1730. *Barlow* and *Bateman*, 3 *Will. Rep.* 65.

that he was ſatisfied that the Uſage of paſſing Acts of Parliament for the taking upon one a Surname is but modern, and that any one may take upon him what Surname, and as many Surnames as he pleaſes, without any Act of Parliament. *Ibid.*

It is very clear that the Plaintiff, the Deviſee over, has no Title to the *Reſiduum*; 1*ſt*, in the Nature of the Thing, and according to the Intention of the Teſtator, this could *not be a Condition precedent*, for at that Rate the Right to the *Reſiduum* might not have veſted in any Perſon whatever for twenty or thirty Years after the Teſtator's Death, ſince both the Executors might have lived, and *J. S.* continued ſo long unmarried, during all which Time the Right to the *Reſiduum* could not be ſaid to be in the Executors, they being expreſly mentioned to be but Executors in Truſt; beſides, the Bequeſt of the *Reſiduum* is firſt to *J. S.* which if the Will had ſtopped there would have been an abſolute Deviſe, ſo that the following Condition annexed muſt be a ſubſequent not a precedent one. Now the Rule (*c*) of Law is, that if there be a *ſubſequent Condition, which becomes impoſſible by the Act of God*, this *excuſes* and *diſcharges* the Grantee from the Condition; *Lex non cogit ad impoſſibilia*; which Conſtruction ought the rather to prevail with Regard to a Condition ſo odious as that in the preſent Caſe is, which reſtrains the Freedom of Marriage, and *is void by the Civil Law* (*d*), when annexed to a *perſonal* Legacy. The Plaintiff comes to eſtabliſh a Forfeiture, and would have the Court add theſe Words to the Will, which the Teſtator might, but did not, *viz.* that *J. S.* ſhould not marry without the Executors Conſent, or *the Survivor of them*, and which the Teſtator might omit upon good Reaſon, as intending that both the Executors ſhould confer together about the Marriage of *J. S.* in order that one by Arguments might convince the other touching the Suitableneſs of a Match, which cannot now be done when only one is left. *Per his Honour, Ibid.* 627, 628.—Where there is a Condition that

9. *A.* by Will deviſed the Reſidue of his perſonal Eſtate to *J. S.* provided ſhe married with the Conſent of *B.* and *C.* his Executors, and if ſhe ſhould marry otherwiſe, then he deviſed over the ſame to *J. N.* one of the Executors dies, after which *J. S.* without the Conſent of the ſurviving Executor, married, whereupon *J. N.* brought his Bill for the *Reſiduum*. She may marry without the Conſent of the Survivor; and the Maſter of the Rolls thinking this a frivolous Bill, diſmiſſed it with Coſts. *Trin.* 1731. *Peyton* and *Bury*, 2 *Will. Rep.* 626.

(*c*) *Vide* 1 *Inſt.* 206. (*d*) A Deviſe of a Legacy to a Child upon Condition that ſhe married with the Conſent of the Executor, but if ſhe ſhould not marry with ſuch Conſent, then the Legacy to go over; tho' this is againſt the Rule of the *Civil* Law, according to which, *Maritagium debet eſſe liberum*, yet it is a good Condition by our Law, and when the Legacy is once veſted in the Deviſee over, Equity cannot fetch it back again. Said *per* the Maſter of the Rolls, *Trin.* 1729. in the Caſe of *Cleaver* and *Spurling*, 2 *Will. Rep.* 528. *Vide Ibid.* 531. S. P. *arg'*.

a Feme ſhall marry with the Conſent of two Executors, and one without Reaſon is againſt the Match, the Court will diſpence with his Conſent. *Per his Honour*, who ſaid he had known ſuch a Caſe to have happened, that this Caſe of *Peyton* and *Bury* was not like the Caſe put out of *Litt.* of the Feoffment, which ought to be made *cy pres*, *&c.* becauſe there the firſt Feoffee was not intended to keep the Eſtate to his own Uſe, but only as an Inſtrument for conveying it back to the Feoffor and his Family, of which whilſt any were left the Reinfeoffment ought to be made as near the Intent of the Condition as might be; but in the preſent Caſe *J. S.* was to take the Deviſe of the Surplus to her own Uſe; moreover, this Conſent directed to be had being like a bare Authority, and ſo different from that which is coupled with an Intereſt, could not ſurvive without expreſs Words for that Purpoſe. *Per* his Honour in the Caſe of *Peyton* and *Bury*, *Ibid.* 628.

10. *J. S.* charged his real Eſtate with 500 *l.* to be paid his Siſter *A.* within one Month after her Marriage, if ſhe married with his Brother *J.*'s Approbation, (if living) elſe the 500 *l.* was not to be raiſed. *A.* married in *J.*'s Life-time, and without Conſent. The Maſter of the Rolls held, that this Caſe is to be governed by the ſame Rule as in Caſe of a Deviſe of Lands, (there Conditions precedent and ſubſequent take Place, *&c.* and this was *Fry* and *Porter*'s Caſe of an Infant bound by Condition relating to her Marriage being a Condition precedent) and is to be conſidered as Land, the Will muſt be atteſted in the ſame Manner; and this being plainly a Condition precedent, and nothing veſted, (as is in Caſe of a Truſt Term where the Term is veſted, and the Truſt only left open) it is too hard for this Court to charge the Land contrary to the expreſs Will of the Teſtator, and to ſay the Money ſhould be raiſed when the Teſtator has ſaid it ſhall not; and held, that the Charge on the Land cannot ariſe otherwiſe than as a Deviſe of the Land itſelf; *ergo* diſmiſſed the Bill as to this Point. *Mich.* 4 *Geo.* 2. *Reves* and *Herne*, *Viner's Abr.* Tit. *Condition*, (Z. d.) *Ca.* 41.

His Honour ſaid, that the *Civil Law makes no Diſtinction in perſonal Legacies, between Conditions precedent and ſubſequent*;—— Neither does this Court as to mere perſonal Legacies given upon Condition of marrying, *&c.* with Conſent, *&c.* But differs from the Civil Law in this, that whereas by that Law all Conditions in Reſtraint of Marriage are void; but this Court ſays they are not void where the Legacy is given over, and another Perſon particularly ſubſtituted by the Teſtator to have the Benefit of it in Caſe the Condition be not complied with. But this muſt be a ſpecial Nomination as a Legatee, and therefore a Reſiduary Legatee or Executor ſhould not have the Benefit of ſuch Non-performance; and remembred a Caſe, that where a Legacy given upon ſuch Condition of marrying with Conſent, and if not, that it ſhould ſink into the Reſidue of the Teſtator's Eſtate, which he gave to *J. S.* It was held, that tho' the Marriage was without the Conſent, yet the Legacy was not loſt, becauſe it would have been the ſame if Teſtator had ſaid nothing about its ſinking, and therefore was conſtrued *in Terrorem*. So it is in Caſe of a Truſt of a Term limited of Lands for raiſing Portions with ſuch Reſtriction, this Court governing itſelf by the ſame Rules as in Caſe of a Deviſe of a Legacy with ſuch Condition, becauſe tho' the Term be a legal Eſtate and Intereſt, yet the Truſt of the Term is a Creature of Equity only. *Ibid.*

11. *J. S.* by Will *deviſed all his Lands unto* C. *and his Heirs*, in Truſt to pay Debts, and *afterwards in Truſt for his Grandaughter* M. (the Plaintiff's late Wife) *and the Heirs of her Body*, Remainder *to* C. *and his Heirs*, upon Condition that he marry *M.* and gave *C.* his perſonal Eſtate in Truſt for *M.* until ſhe attain 21, and made *C.* Executor, and died. M. *refuſed to marry* C. and *married* D. (the Defendant) and afterwards at her Age of 21. *C.* and *D.* made a Bargain and Sale to *E.* to make him Tenant to the *Præcipe* in order to ſuffer a Common Recovery, in which *C.* and *D.* were vouched, and the Uſes thereof to the Iſſue of the Marriage, Remainder to her own right Heirs; one Queſtion was, whether the Condition annexed to the Defendant's Remainder be a Condition precedent *or* ſubſequent? And Lord Chan. was inclined to think it a Condition ſubſequent, ſaying there are no *technical* Words to *diſtinguiſh Conditions precedent* (*a*) and *ſubſequent*; but the ſame Words may indifferently make either according to the Intent of the Perſon who creates it: That in this Caſe the precedent Limitation was an Eſtate-tail in Poſſeſſion, and therefore why ſhould we not ſay, that as to this Remainder likewiſe it was the Teſtator's Intent to have it veſt immediately in the Defendant. The Limitation is immediate, altho' the Condition upon which

(*a*) *Vide P. Ca.*

it

it depends is ſubſequent. *Hil.* 1735. *Sir John Robinſon* and *Comyns, Caſes in Eq. Temp. Talbot* 164, 166.

12. *A.* by Settlement after Marriage creates a Term of 1000 Years, *in Truſt by Mortgage or Sale to raiſe* 2000 l. *for the Portion of each of his Daughters, provided they marry with their Mother's Conſent*; *and if any ſhould die before Marriage with ſuch Conſent*, her *Portion to ceaſe*, and *the Premiſſes to be exonerated thereof*; and *if raiſed in Whole* or *in Part, then to be paid to the Perſon to whom the Premiſſes ſhould belong*; and afterwards by Will he creates another Truſt-Term to raiſe 4500 *l.* whereout 2000 *l.* to be paid to each of the Daughters in *Augmentation* of their Fortunes, but ſubject to ſuch Conditions as in the Settlement; and by a Codicil he creates another Truſt-Term for the better raiſing of his Daughters Portions. *A.* died, leaving two Daughters *B.* and *C.* *B. after* twenty-one married *D.* and *C. before* twenty-one married *E.* and both without the Mother's Conſent. The Daughters and their Huſbands brought a Bill againſt their Mother and Brother to have their Portions and additional Fortunes, and to have the real Eſtate applied towards Payment of the ſame, alledging that upon their reſpective Marriages their Portions became payable. *E. C.*'s Huſband died, whereupon they brought a Bill of Revivor, and a Decree was made by Conſent, with Liberty to apply, *&c.* And now *D.* and his Wife and *C.* preferred their Petition for Payment of their Portions, *D.* offering therein to ſettle his Wife's Fortune, and they inſiſting that the Lands were ſufficient to anſwer the Daughters *additional* Portions. The Maſter of the Rolls (on Time taken to conſider, *&c.*) obſerved, that by the Clauſe in the Settlement, declaring that if any ſhould die before Marriage *with ſuch Conſent*, that her Portion ſhould ceaſe, which was inſiſted upon to be a good Diſpoſition of it: But his Honour ſaid, that this was not a ſufficient Diſpoſition within the Meaning of thoſe Caſes that allow a Limitation over to be good, for this is not to take Place upon *marrying without Conſent*, but upon *dying before Marriage with ſuch Conſent*, and is no more than *providing for Daughters dying unmarried*, he taking it all along, that if they married they would do it with Conſent. That here does not appear to be any Perſon in the Teſtator's View to whom theſe Fortunes ſhould go over, as there does in all the Caſes where thoſe Limitations over are allowed, the Intent being as clear in thoſe Caſes to give it over upon Breach of the Condition, as that upon Performance of it the firſt Taker ſhould retain it; that tho' theſe Portions are charged upon Land, yet there being no Diſtinction between *Conditions annexed to Money charged upon Land*,

Comyns's Rep. 726. *Eaſt.* 13 *Geo.* 2. S. C. ſays, that on an Appeal from this Decree it was held, that *A.*'s Daughters were not intitled to their Portions by this Settlement, unleſs on their Marriage with their Mother's Conſent; and Lord C. B. *Comyns*, who was called in to aſſiſt the Lord Chan. in his Argument, ſaid, That Marriage with Conſent of Mother or Truſtees is a *Condition precedent* that muſt be performed before the Daughters can be perfectly intitled to the 2000 *l.* to be raiſed by the Truſt of this Settlement.—— And ſaid, that the Reaſons on which he grounded his Opinion are, 1ſt, That it is the Right and Liberty of the Subject, who makes a voluntary Diſpoſition of his own Property, to diſpoſe of it in what Manner and upon what Terms and Conditions he pleaſed; this he believed would be univerſally allowed. 2dly, That it is a fixed and ſettled *Maxim* of Law, *That if an Eſtate in Land, or Intereſt out of the Land, is limited to commence upon a Condition precedent, nothing can veſt or take Effect till the Condition performed*; and this is ſo ſtrong and ſo ſettled a Point, that it holds altho' the previous Act was at firſt impoſſible, *or* after becomes impoſſible by the Act of God, or other Accident, the Eſtate can never veſt. This is in *Co. Lit.* 206, 219. and he ſaid this is a Rule ſo well known, that he needed not cite Caſes to prove it.—— And his Lordſhip ſaid, a third Reaſon which influenced him to this Opinion is, that it is moſt agreeable to the Rules of Equity to direct the Execution of the Truſt according to the Intent of him who placed the Truſt in him; *it is ſaid a Truſt is conſtrued favourably*; and it is true, it is *conſtrued with as much Advantage as may be to make good* and *anſwer the Intent and Deſign of the Party*, but *it is conſtrued ſtrictly with Regard to the Execution of the Truſt*; and therefore it would be a ſtrange Thing, when the Truſt directs the Truſtees to pay the Money at the Time of the Daughter's Marriage with her Mother's Conſent, that the Court ſhould direct them to pay the Money *before* that Time. 4thly, But that it is an Argument of no ſmall Weight in his Lordſhip's Opinion, that the *Reſtraint* in the preſent Caſe is not only lawful, but prudent and reaſonable, and no Conſequence more likely to enſue from it than the Hindrance of an inconſiderate or imprudent Marriage. The Lords C. J. *Lee* and *Willes*, who aſſiſted the Lord Chan. *Hardwicke* upon this Appeal, being of the ſame Opinion, his Lordſhip was pleaſed to concur, and thereupon the Decree at the Rolls was reverſed. *Ibid.* 733, 744, 748, 757.

and

and *Conditions annexed to Portions ariſing out of the perſonal Eſtate*, and *Portions by Will being due by the Eccleſiaſtical Law, notwithſtanding ſuch Condition as this annexed to them*, Portions by Settlement (tho' under the like Conditions) are likewiſe due by the Law and Rules of this Court; and therefore his Honour thought the Daughters well intitled to their Portions, and ordered *D.* to make Propoſals before the Maſter as to the ſettling his Wife's Fortune, and that the Fortune of *C.* ſhould be paid to her, *E.* her Huſband being dead. *Mich.* 10 *Geo.* 2. *Harvey* and *Aſhton*, *Ca. in Eq. Temp. Talbot* 212, 217.

13. In the Caſe of *Limitation over* it is admitted, that a *perſonal Legacy* given on a Condition *precedent* not to marry *without* Conſent, ſhould be loſt if the Condition be broken. Said *per* Lord C. B. *Comyns*, in the Caſe of *Harvey* and *Aſhton*, *Comyns's Rep.* 755.

(E) What Act ſhall be ſaid to be a Performance or Satisfaction of a Condition, &c.

1. *J. S.* deviſed 10 *l. per Ann.* to *A.* for Life, chargeable on a Leaſehold Eſtate, and made his Wife ſole Executrix, and died. Afterwards ſhe made her Will, and *B.* Executor, and thereby alſo deviſed 10 *l.* a Year to *A.* for Life. *B.* being afterwards ſeiſed in *Fee* of other Lands, ſettled his Eſtate on himſelf for Life, Remainder over, *&c.* Remainder to Truſtees for 99 Years, to pay his Debts and Legacies; and afterwards that *A.* ſhould have and receive 20 *l.* a Year for Life, and afterwards died without Iſſue, whereby the Term veſted in the Truſtees to execute the Truſt. Lord Chan. agreed the Gifts by the Will good; and that where a Man is Debtor in 10 *l.* and gives 20 *l.* it ſhall be a Satisfaction, and not a Legacy; and that he believed, *in his own private Opinion*, that the 20 *l.* a Year Annuity was intended for a Satisfaction, and that there was no Caſe like this in Point; yet it was agreed the Coſts ſhould be decreed againſt *A.* the Plaintiff, becauſe he knew in his Conſcience that *B.* intended Satisfaction. *Eaſt.* 7 *Ann. Daviſon* and *Goddard*, *Gilb. Eq. Rep.* 65.

2. *J. S.* had an Eſtate in *S.* by his firſt Lady, which was to her in Tail; they levy a Fine, and declare the Uſes *to them* and *the Iſſue of their Bodies*, *Remainder to* J. S. *and his Heirs*; they have a Daughter *M.* and the *Feme dies*. On this Marriage there were Articles, that *J. S.* ſhould leave his Daughter 2500 *l. if the Truſtees demanded it within one Year after his Death.* *A.* the Father of *J. S.* was then living; *J. S.* marries a ſecond Wife, and by her has Iſſue (*a*) *ſeveral* Daughters. By Deed executed in his Life-time he gives the Eſtate in *S.* to *M.* and her Heirs; and by Deed alſo charges his Lands in *D. which he had purchaſed*, with 5000 *l.* a-piece to the three Daughters, and dies. *M.* demands the 2500 *l.* and Intereſt; and *Harcourt* Lord Keep. decreed that *M.* ſhould have the 2500 *l.* with Intereſt from *J. S.*'s Death at 5 *l. per Cent.* That *the* S. *Eſtate could not be an Equivalent, becauſe it moved from her Mother, and was the Condition of the Agreement for the* 2500 *l.* That the Reverſion of the Lands in *D.* could not be ſo, becauſe *J. S.*'s Father was then living, and there was no Reſpect had to theſe Reverſions, neither were they then in Being, and to *make it an Equivalent it ought to be in Being* and *in View at the Time of giving the Equivalent.* *Mich.* 9 *Ann. Anon. Viner's Abr.* Tit. *Condition*, (E. d.) *Ca.* 38.

(*a*) Q. If it ſhould not be *two.*

3. Bill to have a Performance of a Marriage Agreement contained in a Condition of a Bond, *viz. That the Huſband ſhould purchaſe Lands of the Value of* 800 l. *to be ſettled upon himſelf for Life*, Remainder *to his Wife for Life*, Remainder *to the Heirs Male of the Huſband begotten on the Body of the Wife*, Remainder *to the right Heirs of the Huſband*, &c. The Eldeſt Son of the Marriage brings his Bill againſt his Father's Executors to have the Benefit of this Agreement. The Defendant inſiſts, that the Father in his Life-time purchaſed a Copyhold Eſtate, which deſcended to the Plaintiff, and likewiſe by his Will deviſed 100 *l.* Legacy, to be raiſed out of Land to the Plaintiff, and that this Copyhold and Legacy ſhall be taken as a Satisfaction of the Marriage Agreement, eſpecially in this Caſe where the Huſband and Wife were Tenants in Tail, and might bar the Iſſue. *Harcourt* C. decreed the Plaintiff muſt have a Satisfaction of the Agreement in the Bond, and 4 *l. per Cent.* allowed him for Intereſt of the 800 *l.* from the Death of his Father; that the Copyhold Eſtate deſcended to him from his Father, muſt be taken as a Satisfaction *pro tanto* of the Agreement, according to the Value of the Land, and the Purchaſe-Money; but the Legacy of 100 *l.* being deviſed out of Land, is not to be taken in Part of the Satisfaction; and as to a Conveyance made of ſix Acres, ſaid to be made by the Father to the Plaintiff in his Life-time, to inquire whether it was a voluntary Conveyance, and then to go *pro tanto* in Satisfaction of the Agreement; but if the Purchaſe-Money was paid to the Father, then to be no Part of the Satisfaction. *Trin.* 12 *Ann. Wilks* and *Wilks*, *Viner's Abr.* Tit. *Condition*, (E. d.) *Ca.* 39.

4. *H.* being ſeiſed in Tail of ſome Lands with Remainder over, and alſo ſeiſed for Life of other Lands, with a Power to make a Jointure in Bar of Dower, with Remainder over, *&c.* during his Minority, in Conſideration of a Marriage he had with *U.*'s Daughter, and 1000 *l.* paid down, and 3000 *l.* more to be paid by *U.* to *H.* at his Age of 21. doth covenant *by his Guardian* to ſettle a Jointure of 500 *l. per Ann.* when he comes of Age, upon his intended Wife. The Marriage took Effect, and afterwards *U.* the Plaintiff's Father, pays *H.* the 3000 *l.* Reſidue of the Portion, when he came of full Age, and then *H.* in Purſuance of the Covenant entred into by his Guardian, doth ſettle a Jointure of 500 *l. per Ann.* upon his Wife the Plaintiff. Some Years after *H.* makes his Wife an additional Jointure of 250 *l. per Ann.* upon her Father's dying and leaving her the Value of 5000 *l.* and at the ſame Time perſwades his Wife to join with him in a Fine of all the Reſidue of his Eſtate. Afterwards *H.* dies, and by Will deviſes an Houſe and Lands to his Wife for her Life to the Value of 270 *l. per Ann.* and gives her a Legacy of 4000 *l.* and his Plate and Jewels to the Value of 2000 *l.* more, and makes her Executrix, and gives her the Moiety of the Reſidue of his perſonal Eſtate. It happened that the Jointure made purſuant to the Marriage Articles proved defective both in Title and Value, and thereupon ſhe brought a Bill againſt the Remainder-man to have a Satisfaction out of the real Eſtate for the Deficiency of her Jointure. There were two principal Points in this Caſe; 1ſt, If the additional Jointure, being a *voluntary* Settlement after Marriage, ſhould go in Satisfaction *pro tanto* of the Jointure made purſuant to the Marriage Articles. 2dly, If the 270 *l. per Ann.* deviſed to her for Life, ſhould go in Satisfaction of the Marriage Articles; or if the Legacies left her by the Will ſhould be deemed a full Satisfaction. *Harcourt* C. was of Opinion, that the additional Jointure of 250 *l. per Ann.* ſhall not go in Part of Satisfaction of the Marriage Agreement, *which though made by the Guardian did bind*

H. *as ſtrongly as if he had been of full Age and had ſigned the Articles himſelf*, eſpecially ſince *H.* at his full Age did receive the 3000 *l.* Reſidue of his Wife's Portion, and did actually make a Jointure of 500 *l. per Ann.* on his Wife in Purſuance of thoſe Articles. Now when he ſettled the additional Jointure of 250 *l. per Ann.* upon his Wife, he could not intend it in Satisfaction *pro tanto* of 500 *l. per Ann.* becauſe before that Time he had made her a Jointure of 500 *l. per Ann.* purſuant to the Marriage Articles, which he then thought to be a good Settlement, and therefore there is no room left for the Preſumption in Equity, *that a voluntary Settlement ſhall be intended in Satisfaction of a precedent Covenant* or *Agreement though not made in Purſuance of it*; and ſo as to the Deviſe of 270 *l. per Ann.* for Life, and the 4000 *l.* Legacy, *&c.* they cannot be intended by *H.* in Satisfaction of the Jointure by the Marriage Articles, but given her as a Bounty by her Huſband, becauſe at that Time he thought his Wife's Jointure was well ſettled and ſecured; beſides, *Money or perſonal Eſtate ſhall never be deemed in Equity a Satisfaction for a Freehold*: And decreed that the *Remainder-man* do ſettle 500 *l. per Ann.* upon the Plaintiff for Life out of the Lands which came to him upon the Death of *H.* and that the Lands contained in the additional Jointure, or deviſed to the Plaintiff, ſhall not come in Aid of the other Lands *pro rata* to make a Satisfaction for the Marriage Articles, but the Whole 500 *l. per Ann.* ſhall intirely come out of the other Lands in Remainder notwithſtanding the Fine levied by *H.* and his Wife, the now Plaintiff, of theſe Lands, tho' that be a Bar and Eſtoppel of her Dower at Common Law; and that the Plaintiff have a Satisfaction for the ſaid 500 *l. per Ann.* from the Time of her Huſband's Death; and directed the Defendant to account for the Rents and Profits of the additional Jointure of 250 *l. per Ann.* from the Death of *H.* But Defendant's Counſel moved that the additional Jointure was made out of the Lands of which *H.* was only Tenant for Life, with a Power to make a Jointure, *&c.* and that the Power was not well executed at Law, and being a *voluntary* Settlement, if the Power was not well executed, it ought not to be aided in Equity. To which his Lordſhip ſaid, he ſaw no Reaſon why a *defective Execution of a Power for the Benefit of the Wife, tho' otherwiſe provided for, ſhould not be aided in Equity* as *well as want of a Surrender of a Copyhold in Caſe of a Deviſe to a Child, who had another Proviſion by the Will*; but ſince it was inſiſted on, that there is no Precedent in this Court *of ſupplying a defective Execution of a Power in Caſe of a voluntary Settlement*, he gave Leave to try the Validity of the Execution of the Power at Common Law, and retained the Bill *quoad* that Part until it be determined at Law. Decree affirmed *in Dom' Proc'*, *Mich.* 12 *Ann.* *Lady Hooke* and *Grove & al'*, *Viner's Abr.* Tit. *Condition*, (E. d.) *Ca.* 40.

5. *A.* had Iſſue two Sons *B.* and *C.*——*B.* married *D.*'s Daughter, *C.* having made his Addreſſes to a Lady, and all Things concluded upon for the Wedding; *D.* took *C.* aſide, ſhewed him a Bond ready

Viner's Abr. Tit. *Condition*, (E. d.) *Ca.* 43. S. C. ſtates it thus: *A.* having two Sons *E.* and *H.* has a Deſign to diſinherit the Eldeſt, and to that Purpoſe gives an Eſtate to the Youngeſt, but the Eldeſt contrives (*by inſinuating as if the Father had commanded it*) that he ſhould give a Bond to leave 3000 *l.* to one of *E.*'s Children. The Bond was dated in 1668. *H.* makes his Will, and takes Notice of this Bond, and declares that he would never pay it as a Debt, but gives an Eſtate in Lands to theſe Children, *&c.* The Queſtions were, 1ſt, Whether the Court would not damn this Bond. 2dly, Whether conſidering the Length of Time, and here being a Deviſe, this ſhall not be taken as a Satisfaction; and Lord Chan. choſe rather to make his Decree on the latter, and the Maſter was directed to inquire into the Value of this Eſtate ſo given.—An Eſtate for Life is no Compenſation for a Sum, becauſe of the Uncertainty of its Duration. The Satisfaction ariſes according to the Party's Declaration, the Preſumption is always in Favour of the Satisfaction, unleſs the Party's Intent appear to be otherwiſe, which muſt come on that Party who would not have it to be a Satisfaction.

drawn,

drawn, which he ſaid was prepared by *A.*'s Directions, and told him, that unleſs he would execute it, *A.* would not ſuffer the Match to proceed; and that he muſt not ſo much as mention any Thing relating to this Bond, as he valued his Father's Diſpleaſure. The Condition of the Bond was, that if he ſhould die without Iſſue of that Marriage, he would leave 3000 *l.* to one or more of *B.*'s Children. Under this Terror *C.* executed the Bond: Afterwards he ſpoke to his Father of it, who denied that he gave ſuch Directions, and gave him 3000 *l.* to indemnify him againſt the Bond, which 3000 *l.* was, when this Bond ſhould be delivered up to him, to be diſtributed among the Grandchildren. *A.* dies, *C.* in his Life-time, and by his Will, gave in Land and Money more than 3000 *l.* to one of *B.*'s Children, and dies without Iſſue. The only Evidence of the Manner by which this Bond was extorted was a Recital in *C.*'s Will. It was proved that when *C.* was making of theſe Gifts in Favour of *B.*'s Son, he was adviſed to declare, that this was in Satisfaction of the Bond; but he anſwered, "That this would look like complying with a Bond which "he had all along declared had been unjuſtly extorted from him." This Bond was of 50 Years ſtanding. *Parker* C. ſaid, he made no Doubt but this Bond was fraudulently extorted, but knew not how to come at it; for to allow a Recital in the Will of the Obligor as Evidence to deſtroy a Bond, may be of dangerous Conſequence; however, he thought the Bond had been ſatisfied; and the Reaſon given why he would not declare it to be in Satisfaction, does very plainly amount to a Declaration of his Intention, that he did not deſign to make the Gifts he did over and above the ſatisfying his Bond. *Trin.* 5 *Geo.* 1. *Hancock* and *Hancock*, *Lucas* 438.

6. In a Settlement a Term was raiſed for Daughters Portions, (*i. e.*) 10000 *l.* with a Proviſo, that *if the Father by Deed or Will ſhould give or leave the Sum of* 10000 l. *to his ſaid Daughters, it ſhould be Satisfaction.* The Father leaves Lands to the Daughters of the Value of 10000 *l.* this is no Satisfaction. Decreed by *Talbot* C. *Eaſt.* 1734. *Chaplin* and *Chaplin*, 3 *Will. Rep.* 245.

(F) At what Place a Condition muſt be performed where a Place is limited.

1 *Will. Rep.* 696. *Eaſt.* 1721. S. C. ſays, the Settlement and Will being made in *England*, and all Parties living *here*, the Money was decreed to be paid into Court with *Engliſh* Intereſt (*a*), and without deducting the Charge of the Return from *Ireland*.

(*a*) *Vide Wallis* and *Bright*, Tit. *Annuity and Rent-Charge*, P. 62. Ca. 4.

J. S. upon his Marriage with *C.* made a Settlement of Lands in *Ireland*, wherein, after the uſual Limitation in Tail Male, there *was a Term of* 500 *Years raiſed*, in Truſt *for raiſing* 12000 l. *for Daughters Portions, to be paid at* 18 *or Marriage.* J. S. *died without Iſſue Male, leaving the Plaintiff* C. *his only Daughter*, and *by his Will deviſes to her* 3000 l. *to be added to her Portion*, and 300 *l. per Ann. Increaſe of Maintenance*, which was only 100 *l. per Ann.* by the Marriage Settlement, and *appointed her Guardians by the Will*; two of the Guardians died ſoon after *J. S.* and there being a Suit in Chancery in Relation to the Guardianſhip of *C.* the Court did commit her to the Care of *D.* the ſurviving Guardian under the Will of *J. S.* with this Caution, *that he ſhould not treat of*, or *contract a Match for her without the Leave of the Court.* *C.* was ſent by *D.* in 1718. to her Aunt, to be with her during the Summer at *Windſor*, and while ſhe was there the other Plaintiff got her away, and married her privately without the Conſent or Privity of any of her Friends, &c. And now, they both being under Age, bring their

Bill

Bill by their *prochein Amy* to *have the Intereſt of the Portion* and *Legacy paid to Plaintiff the Huſband*, and *to have the Portion itſelf* and *Legacy given* C. *by her Father's Will, laid out in Land*, and *ſettled upon her* and *her Children in ſuch Manner as the Court ſhould think fit.* One Point was, If the 12000 *l. Portion, charged upon the Term of* 500 *Years of Lands in* Ireland without Impeachment of Waſte, *ſhould be paid in* England *without any Allowance or Deduction for the Exchange from* Ireland *to* England; and *Parker* C. was of Opinion, that the Portion ought to be paid *here where the Contract was made* and *the Parties reſided*, and not in *Ireland*, where the Lands lie *charged* with the Payment thereof; for that this *is a Sum in Groſs*, and *not a Rent iſſuing out of Land* (*a*); and it was certainly the Intention of the Parties that the Portion ſhould be paid here, and not to ſend *C.* over into *Ireland* to get her Portion. *Mich.* 7 *Geo.* 1. *Phipps and Lady Catherine his Wife, by Sir Conſtantine Phipps their prochein Amy*, and *the Earl of Angleſea & al'*, *Viner's Abr.* Tit. *Condition*, (Q. b.) *Ca.* 8.

(*a*) This *is a Sum in Groſs charged upon Land*, and *not a Rent iſſuing out of Land:* That a Tender of Rent upon the Land is ſufficient, but a *Tender of a Sum in Groſs charged upon Land muſt be made to the Perſon who is to receive it whereſoever he is to be found.*——If a Man in *England* lends Money *here*, and takes a Mortgage of Lands in *Ireland* for a Security, the Money is to be paid *here where it was lent*, and *the Contract made*, and not in *Ireland*, where the Lands in Mortgage lie. Said *arg'* in the above Caſe, *Ibid.*—*Vide P.* 62. *Ca.* 62. *Wallis* and *Brightwell.*

CAP. XXII.

Conqueſt.

1. IF there be a new and uninhabited Country found out by *Engliſh* Subjects, as the Law is the Birth-right of every Subject, ſo where-ever they go they carry their Laws with them, and therefore ſuch new found Country is to be governed by the Laws of *England*, tho' after ſuch Country is inhabited by the *Engliſh*, Acts of Parliament made in *England*, without naming the foreign Plantations, will not bind them; for which Reaſon it has been determined, that the Statute of *Frauds and Perjuries*, which requires three Witneſſes, and that theſe ſhould ſubſcribe in the Teſtator's Preſence, does not bind *Barbadoes.*—— But where the King of *England* conquers a Country, it is a different Conſideration; for there the Conqueror, by ſaving the Lives of the People conquered, gains a Right and Property in ſuch People, in Conſequence of which he may impoſe upon them what Laws he pleaſes. 2 *Will. Rep.* 75. cites it as ſaid *per* the Maſter of the Rolls, 9 *Auguſt* 1722. to have been ſo determined by the Lords of the Privy Council, upon Appeal from the foreign Plantations.

In the Caſe of an *Infidel* Country their Laws by Conqueſt do not intirely ceaſe, but only ſuch as are againſt the Laws of God; and in ſuch Caſe where the Laws are rejected, *or* ſilent, the conquered Country ſhall be governed according to the Rules of *natural* Equity. So held *per Cur'*, *Trin.* 5 *W.* & *M. Blankard* and *Gandy*, 2 *Salk.* 412. *Ca.* 1.—*Vide Mo.* 670. *pl.* 918.—*Calvin's* Caſe, 7 *Rep.* 17.—And *Show. Parl. Caſ.* 31. *Howel* and *Dutton.*

2. But until ſuch Laws given by the conquering Prince, the Laws and Cuſtoms of the conquered Country ſhall hold Place, unleſs where theſe are contrary to our Religion, or enact any Thing that is *Malum in ſe*, or are ſilent; for in all ſuch Caſes the Laws of the conquering Country ſhall prevail. *Ibid.*

CAP. XXIII.

Contempt.

1. THE Queſtion was, whether Defendant could be heard before he had cleared his Contempts, tho' he offered to pay all Plaintiff's Demands. Ordered that he bring before the Maſter, Principal, Intereſt and Coſts, and then to be at Liberty to move to have his Sequeſtration diſcharged, but the Sequeſtration not ſuſpended in the mean Time. *Feb.* 20, 1719. *Lord W.* and *Oſbaldiſton*, *Viner's Abr.* Tit. *Contempt*, (C.) *Ca.* 6.

2. The inſerting an Advertiſement in a News Paper, offering a Reward of 100 *l.* to any who will diſcover and make legal Proof of a Marriage in Queſtion in the Court of Chancery, and which Marriage had been before adjudged good in the Spiritual Court, and alſo by the Delegates, and a Verdict given in *C. B.* in its Favour, was by Lord Chan. *Parker* held to be a Reproach to the Juſtice of the Nation, and a Thing inſufferable, and a Contempt of the Court, and that in Juſtice the Inſerter muſt ſtand committed. *Mich.* 1720. *Pool* and *Sacheverel*, 1 *Will. Rep.* 675.

3. Suing the Bail below while a Writ of Error is pending in Parliament, is a Contempt and Breach of Privilege. *Hil.* 1720. *Throgmorton* and *Church*, *in Dom' Proc'*, 1 *Will. Rep.* 685.

4. Encouraging an Infant Ward of the Court of Chancery to go from his Committees, under whoſe Care the Court had placed him, is a Contempt. Dr. *Yalden's* Caſe, cited 1 *Will. Rep.* 697.

5. Contempts for acting againſt an Order of Court diſcharged, the Order being erroneous. *Jan.* 28, 1722. *Stone* and *Burn*, *Viner's Abr.* Tit. *Contempt*, (D) *Ca.* 14.

Vide 1 *Vol. Abr. Eq. P.* 351. *Ca.* 7.

6. If one in Contempt to a Serjeant at Arms for want of an Anſwer puts in an Anſwer, and the Clerk in Court accepts the Coſts of the Contempt, this purges the Contempt. *Trin.* 1728. *Anon.* 2 *Will. Rep.* 481. at the Rolls.

7. Marrying an Infant Ward of the Court is a Contempt, tho' the Parties concerned in ſuch Marriage had no Notice that the Infant was a Ward. *Trin.* 1731. *Herbert's* Caſe, 3 *Will. Rep.* 116.

Vide Tit. Wards, *P.*

CAP. XXIV.

Contribution and Average.

(A) Contribution and Average, in what Caſes and in what Proportion.

1. *A. B.* and *C.* were bound in a Bond, *A.* being Principal, and *B.* and *C.* Sureties; afterwards *J.* becomes bound to the Obligee, that if the other three did not pay according to the Condition, *&c.* that he would. A Month after *B.* one of the Sureties, pays the Money, and prefers his Bill againſt *J.* for Contribution; and the Queſtion was, whether he ſhould be bound to contribute, he being but a ſupplemental Security. And the Maſter of the Rolls ſeemed to think that he ſhould. *Trin.* 1686. *Cooke's* Caſe, 2 *Freem. Rep.* 97.

2. *J. S.* made a Settlement of his Eſtate on himſelf for Life, then to Truſtees for 99 Years, for raiſing 500 *l.* a-piece of *A. B.* and *C.* to be paid at their reſpective Ages of 24, Remainder to *D.* for Life, Remainder to his firſt Son in Tail, with Remainders over. Decreed that *D.* pay 700 *l.* and thoſe in Remainders the other 800 *l.* and then *D.* to be let into Poſſeſſion; and whereas 500 *l.* only was now due, and the other not in ſeveral Years, if the other 800 *l.* ſhould become payable during *D.*'s Life, then he ſhould pay it; but in ſuch Caſe the Term for 99 Years was to be his Security to reimburſe him again. *Hil.* 1690. *Rives* and *Rives*, *Prec. in Chan.* 21.

3. An Eſtate in Jointure was ſubject to a Mortgage. Reſolved that the Jointreſs and the Reverſioner muſt redeem in Proportion, *viz.* the Jointreſs one Third, and the Reverſioner two Thirds. *Hil.* 1696. *Flud* and *Flud*, *in Canc'*, 2 *Freem.* 210.

This has been the Proportion uſual in this Court to charge the Eſtate for Life with a Third; but it ſeems hard, becauſe now an Eſtate for Life is worth nine or ten Years Purchaſe, though formerly it was worth but ſeven. *Ibid.*—And ſo it is if an Eſtate ſubject to a Mortgage is deviſed to *A.* for Life, Remainder to *B.* in Fee, there they may redeem in Proportion, *viz.* *A.* one Third, and *B.* two Thirds. *Ibid.*

4. One ſeiſed in Fee of ſome Lands, and poſſeſſed of Leaſes for Years of other Lands, deviſes the Lands in Fee to *A.* and the Leaſes to *B.* and dies indebted by Bond; on a Deficiency of Aſſets both the Deviſees ſhall contribute in Proportion to the Value of the reſpective deviſed Premiſſes towards Payment of the Bond Debts; but if the Deviſe had been to *A.* of all the Reſt of the Teſtator's Eſtate, then *A.* ſhould have paid the Debts. *Hil.* 1717. *Long* and *Short*, 1 *Will. Rep.* 403.

One ſeiſed in Fee of the Manors of *A.* and *B.* mortgages *A.* for 4000 *l.* and by Will charges all his real Eſtates with Payment of his Debts, and deviſes *B.* to *C.* and *C.* to *D.* and dies; the Deviſee of *A.* ſhall have Contribution againſt the Deviſee of *B.* to pay the Mortgage on *A.* but no Contribution if the Will ſhall prove void. *MS. Notes*, and ſeems to be the S. C.

5. *A.* ſeiſed in Fee of the Manors of *B.* and *C.* mortgages *B.* for 4000 *l.* and by Will charges all his real Eſtate with Payment of his Debts, and deviſes *B.* to *J. S.* and *C.* to *R.* and dies; *J. S.* ſhall compel *R.* to contribute to the Payment of the Mortgage on *B.* but in Caſe the Will ſhould prove void, then there ſhall be no Contribution. *Mich.* 1718. *Carter* and *Barnardiſton*, 1 *Will. Rep.* 505.

6. *A.* was ſeiſed in Fee of the Manors of *D.* and *S.* and by Will gave *D.* to *B.* and *S.* to *C.* and charged all his real Eſtate with Payment of his Debts. Afterwards *A.* mortgaged *D.* for 4000 *l.* *B.* ſhall compel *C.* to contribute to the Diſcharge of the Mortgage of *D.* But if the Will is avoided, ſo as the Coheirs of *A.* become intitled to both Manors, ſo that they come into one Hand, the Right of Contribution is at an end; for a Man cannot contribute to himſelf; and the Right of Contribution, as it was given by the Will, ſo was in Force only while the Party claimed under the Will, and not where the Demand was ſet up in Defiance thereof. *Parker* C. *Mich.* 1718. *Carter* and *Barnardiſton*, *Ibid.* 505, 521.

Gilb. 127. S. C.

7. By Marriage Articles it was agreed, that 6000 *l.* in Truſtees Hands ſhould be laid out in the Purchaſe of Lands, to be ſettled on the Huſband for Life, Remainder to the Wife for Life for her Jointure, Remainder to the firſt, *&c.* Son of that Marriage in Tail Male ſucceſſively, chargeable with 2000 *l.* for younger Children, Remainder to the Huſband in Fee. The Marriage took Effect, and 6000 *l.* being veſted in Lottery Annuities in 1720. with the Conſent of the Huſband and Wife was ſubſcribed by the Truſtees into the *South-Sea* Company, purſuant to the Act of Parliament which impowers and indemnifies Truſtees for ſo doing, upon which there happened a Loſs of near 3000 *l.* On a Bill brought by the only Son of the Marriage againſt the Truſtee, his Father and Mother, and four Infant Siſters, for Execution of the Truſt, *King* C. was of Opinion, that the Loſs upon the Principal Sum of 6000 *l.* ought to be borne in Proportion or Average by all the Children; *the Loſs happening under the Directions of an Act of Parliament*, the Truſtees are not liable to make it good; and it is plain by the Articles that the Parties intended two Thirds for the eldeſt Son, and one Third for the younger Children; but if the eldeſt Son ſhould be at the whole Loſs, it would be juſt the reverſe, the eldeſt Son would have but one Third, and the younger Children two Thirds. And *decreed* that the eldeſt Son bear two Thirds of the Loſs, and the younger Children one Third, according to their ſeveral Proportions in the Money; and referred it to the Maſter to have a Settlement made accordingly. *Trin.* 3 *Geo.* 2. *Chambers* and *Chambers*, *Viner's Abr.* Tit. *Contribution and Average*, (A) *Ca.* 60.

8. If one who confeſſes a Judgment aliens Part of his Land, and the Reſt deſcends, the Heir ſhall *not* have Contribution againſt the Purchaſer. *King* C. 4 *Geo.* 2. *Harvey* and *Woodhouſe & al'*, *Rep. of Sel. Caſes in Chan. &c.* 3, 4.

Ibid. P. 404. The Editor in a Note ſays, that the *Trinity* Term following, on Appeal, Lord Chan. *Talbot* decreed one *R.* the Leſſee (who made Default) to pay the Plaintiff the Contribution Monies he had received from each of the *Ceſtuy que Truſts*, towards working and carrying on the Coal

9. Leaſe of a Coal Mine to *A.* reſerving Rent; *A.* the Leſſee declares himſelf a Truſtee for five Perſons, to each one Fifth. The five

Partners entered upon the Work, and took the Profits of the Mine, which afterwards becomes unprofitable, and the Leſſee inſolvent; the *Ceſtuy que Truſts* not liable but for the Time during which they took the Profits. Sir *Joſeph Jekyll*, Maſter of the Rolls, *Mich.* 1735. *Clavering* and *Weſtley & al'*, 3 *Will. Rep.* 402.

Coal Mine; and if that ſhould prove not ſufficient, the *Ceſtuy que Truſts* that were living,

and the Repreſentatives of ſuch as were dead, and who were all before the Court to contribute each one Fifth, towards ſatisfying the Plaintiff the Arrears of Rent that had incurred during the Time they had concerned themſelves in taking the Profits. The Plaintiff to have back the 10 *l.* Depoſit.

CAP. XXV.

Copyhold (*a*).

(*a*) Copyholds, tho' *now ſupported by Cuſtom, were at firſt eſtabliſhed by Act of Parliament*, as all other Parts of the *Common* Law were, till the Records of them came to be loſt. Said *per* Lord Chan. *Trin.* 1721. in the Caſe of *Sir H. Peachey* and *Duke of Somerſet*, *Prec. in Chan.* 574.—Rules; *Copyhold muſt be immemorial.—Copyholder derives his Eſtate from Cuſtom*, and *not out of the Eſtate of the Lord.—Copyholder is in by him who ſurrendered*, and *not by the Lord.—Cuſtomary Inheritances, ſuch as Copyholds, ſhall not have any Collateral Qualities which do not concern Deſcents.—Copyhold* Deſcents *guided by the Rules of Common Law, but Cuſtomary Inheritances have not the Collateral Qualities of* Freehold; *nor doth a Deſcent bar an Entry. Co. Copyh. c.* 15. *f.* 50.

(A) In what Caſes Equity will interpoſe in Regard to Copyhold Eſtates, &c.——And here of Diſputes inter Lord and Tenant.

(B) Concerning Surrenders of Copyhold Eſtates, Admittance, &c.——And in what Caſes a defective Surrender, or the want of it, will be ſupplied in Equity.

(A) In what Caſes Equity will interpoſe in Regard to Copyhold Eſtates, &c.——And here of Diſputes inter Lord and Tenant.

1. A *Copyholder* preferred his Bill *to be relieved againſt a Forfeiture for cutting Timber*; and *per* Lord *Bridgeman*, if the Waſte be voluntary, the Court will not relieve; and an Iſſue at Law was directed to try whether he cut the Trees with an Intent to do Waſte; and the Lord Keep. being preſſed to alter this Iſſue, would not. 24 *Car.* 1. (*b*), *Biſhop of Worceſter* and *one of his Copyholders*, 2 *Freem. Rep.* 137.

(*b*) So in the Original; but I think it ſhould be 24 *Car.* 2. and have placed it *accord*.

2. A Writ of *Aiel* was brought in the Court of a Copyhold Manor to avoid an Eſtate, for *that there had been no Surrender*, Poſſeſſion having gone with the Defendant there for *forty-five* Years; the Lords Commiſſioners granted a perpetual Injunction, for that *after ſo long Time a Surrender ſhould be preſumed*, and the Rolls may be loſt, and no Reaſon the Eſtate ſhould be avoided after ſo long a Poſſeſſion. *Mich.* 1689. *Knight* and *Adamſon*, 2 *Freem. Rep.* 106.

And Lord *Keck* cited *Lyford* and *Gower* in Lord *Coventry*'s Time, where an Injunction was granted in the like Caſe; and

the Caſe of *Pigeon* and *Loveday*, 11 *Car.* 1. where a Leaſe was attempted to be avoided for want of Livery; and alſo the Caſe of *Roſe* and *Trelawny*, 35 *Car.* 2. *Ibid.*

3. A Copyhold is granted in Reverſion after two Lives, *Habend' poſt mortem, ſurſum-redditionem, &c.* of the Tenants for Life. The Tenants for Life ſell their Eſtate to *A.* and ſurrender to the Lord, to the End that he may admit *A.* the Vendee; the Copyholder in Reverſion enters and brings an Ejectment, and recovers at Law. *A.* brings his Bill, and has Relief, by *Lords Commiſſioners*, becauſe the Surrender being only to admit *A.* the Purchaſer, it was againſt Conſcience that the Reverſioner ſhould enter. *Mich.* 1691. *Anon.* 2 *Freem. Rep.* 118. *Ca.* 134.

4. Held by the *Lords Commiſſioners*, that *if a Copyholder purchaſes a Copyhold for three Lives*, and *puts in his own Life and two others, Habend' ſucceſſive ſecundum conſuetudinem manerii*; if the firſt Taker paid the Money, the other two are but in the Nature of Truſtees for him, and he may diſpoſe of the Eſtate in Equity, altho' it be in a Manor where there is no Cuſtom for the firſt Taker to diſpoſe, unleſs it ſhall appear that the other two Lives were put upon ſome Conſideration, or in Purſuance of ſome Agreement. *Eaſt.* 1692. *Anon.* 2 *Freem. Rep.* 123.

And it was ſaid *per Hutchins*, that above twenty Years ſince this Court would not execute an Agreement for a Copyhold made without the Privity of the Lord, becauſe he was concerned to accept the Surrender and admit. But about twenty Years ſince that Difference between a Copyhold and a Freehold was laughed out of the Court. *Ibid.*

5. If a Man grants a Farm by Name, and all his Lands, *&c.* uſually held and occupied therewith, and it happens that ſome of theſe Lands are Copyhold, this will not be a Forfeiture. Said *per* Lord Chan. *Hil.* 7 *Ann.* in the Caſe of *Oxwith* and *Plummer*, *Gilb. Eq. Rep.* 14.

6. Bill by the Heir of the Mortgagor to redeem a Mortgage of Copyhold Lands upon Payment of Principal and Intereſt. The Defendant inſiſted to have a Judgment, which he had aſſigned to him, firſt ſatisfied before Plaintiff ſhould redeem. *Cur', Copyhold Lands are not liable to an Execution upon a Judgment*; *ergo* the *Judgment ſhall not be tacked to the Mortgage* in this Caſe, but the Plaintiff ſhall redeem upon Payment of Principal, *&c.* without ſatisfying the Judgment. By Lord C. *Harcourt*, *Eaſt.* 13 *Ann. Heir of Cannon* and *Park*, *Viner's Abr.* Tit. *Copyhold*, (O. e.) *Ca.* 6.

7. A Cuſtomary Tenant opened a Copper Mine in his Lands, and dug and ſold Oar, and died, and his Heir continued digging and diſpoſing of great Quantities out of the Mine. The Lord brought a Bill *againſt the Executor* and *Heir for an Account* of the Oar, alledging that theſe Cuſtomary Tenants were as Copyhold Tenants, and that the Freehold was in the Lord as Owner of the Soil; and that the Manner of paſſing the Premiſſes was by Surrender into the Hands of the Lord to the Uſe of the Surrenderee. And *Cowper* C. held *clearly*,

His Lordſhip diſtinguiſhed between this,

which was a taking away the Lord's Property, and thoſe Treſpaſſes which die with the Perſon, as that of breaking up Meadow or antient Paſture Ground; but ſaid, as to the Property of *Oar* or Timber, it would be clear even

clearly, that the *Executor* was liable. *Hil.* 1717. *Biſhop of Wincheſter* and *Knight*, 1 *Will. Rep.* 406.

even at Law if it came to the Executor's Hands, that Trover would lie for it; and if it has been diſpoſed of in the Teſtator's Life-time, the Executor, *if Aſſets are left*, ought to anſwer for it; but that it was ſtronger in the principal Caſe, by Reaſon that the Tenant is a ſort of *Fiduciary* to the Lord, and it is a Breach of the Truſt which the Law repoſes in the Tenant for him to take away the Property of the Lord.——As to the Evidence, that the Tenant might do one Sort of Waſte, as to cut down and diſpoſe of the Timber, his *Lordſhip* ſaid, that might be by ſpecial Grant, but that it was no Evidence that the Tenant has a Power to commit any other Sort of Waſte, (*viz.*) *Waſte of a different Species*, as that of diſpoſing of Minerals; but that a Cuſtom impowering the Tenants to diſpoſe of one Sort of Mineral, as *Coals*, might be an Evidence of their Right to diſpoſe of another Sort of Mineral, as *Lead*, out of a Mine. But this Queſtion being doubtful, his Lordſhip ordered the Lord to bring Trover as to the Oar dug and diſpoſed of by the *preſent* Tenant; *but there never having been any Copper Mine before diſcovered in the Manor, the Jury could not find that the Cuſtomary Tenant might by Cuſtom dig and open new Copper Mines*, ſo that upon producing the *Poſtea*, the Court held, that *neither the Tenant without the Licence of the Lord*, nor the *Lord without the Conſent of Tenant, could dig in theſe Mines, being new Mines. Ibid.* 407, 408.

8. Copyhold Lands were granted to the Huſband and Wife and *J. S.* for their ſeveral Lives ſucceſſive, and by the Copy it appeared that the Fine was paid by the Huſband and Wife. And *per Macclesfield* Lord Chan. *J. S.* is in Equity to be intended but as a Truſtee for the Huſband and Wife, and the Survivor, by whom the Purchaſe Money was advanced; and it being mentioned in the Copy that the Fine was paid by the Huſband, *&c.* is ſtrong Evidence of the Facts being ſo; which tho' the Court will not look upon as concluſive, yet any Evidence given to contradict it ought to be very clear. *Hil.* 1721. *Benger* and *Drew*, 1 *Will. Rep.* 781.

9. Plaintiff's Father, a Copyholder in Fee, on his Marriage ſurrendered to the Uſe of himſelf for Life, Remainder to his firſt and every other Son in Tail Male, Remainder to himſelf in Fee; but no Admiſſion was made on ſuch Surrender. The Father made *Leaſes, not warranted by the Cuſtom of the Manor*, and *worked a Quarry of Stone from his Freehold Lands into the Copyhold Lands*, and *did both without a Licence*, and died. Afterwards Plaintiff, his Son and Heir, cut down Trees, and incloſed ſome of the Copyhold Lands, notwithſtanding ſeveral repeated Admonitions from the Lord, who brought his *Ejectment*, and *had a Verdict as for a Forfeiture.* On a Bill brought for Relief, *Macclesfield* C. was clear of Opinion, that there was no Foundation for Equity to interpoſe; that it would be to alter the Nature of the Tenure, and the Terms whereby Copyholds ſubſiſted; that if this was a Forfeiture at Law, a Court of Equity had nothing to do with it; and that it was like the Caſe of a Feoffment, or Fine levied by a particular Tenant, againſt which there could be no Relief. That Copyholders were but Tenants at Will (*a*), though it were according to the Cuſtom of the Manor; that this intirely differed from the Caſe of a Forfeiture for Non-payment of Rent, Non-payment of a Fine, for there the Eſtate was but in the Nature of a Security for thoſe Sums, and the Lord might be recompenced in Damages and Coſts. That making a Leaſe for Years was a Forfeiture, as it was a Determination of his Will; and *though the Lord ſhould refuſe to grant ſuch Licence*, yet the *Tenant has no Remedy, nor would this Court compel the Lord to grant ſuch Licence.* That though theſe Copyholds are *mended by Time*, and *are in the Nature of an Inheritance*, yet ſtill the Tenant is obliged to obſerve the Law and Cuſtom to which they are ſubject. That *theſe Cuſtoms are in the Nature of the Limitation of an Eſtate*, which determines upon the Breach of them; that *unleſs there were ſome equitable Circumſtances* in this Caſe, this Court cannot interpoſe, which would be to repeal and deſtroy

(*a*) Copyholds were at firſt but a kind of Tenure in *Villenage*, and in Reſpect of their baſe Nature were determinable at the Will of the Lord, though now indeed they have been ſupported and hardened by Time. *Per* Lord Chan. *Mich.* 1 *Geo.* 1. *Gilb. Eq. Rep.* 110.——Rule; *Copyholders hold* ad voluntatem Domini, *but that muſt be* ſecundum conſuetudinem manerii. *Co Lit.* 60.

deſtroy the Law. *Trin.* 1721. *Sir Harry Peachy* and *Duke of Somerſet*, *Prec. in Chan.* 568, 572.

10. *J. S.* a Copyholder by a Surrender *is Tenant for Life*, Remainder *to his firſt and other Sons in Tail Male ſucceſſively*, Remainder *to himſelf in Fee, but no Admittance is made on ſuch Surrender*, for want of which it was clearly held, that *J. S.* continued and was to be conſidered as abſolute Tenant to the Lord; and cites *Cro. Jac.* 403. *Bulſt.* and *Yelv.* that conſequently *J. S.* was but a Truſtee for *B.* his Son, of the Inheritance of theſe Lands; yet that the *whole Inheritance* quoad *the Lord was in J. S.* and any Act of Forfeiture (*a*) done by him would bind the Inheritance (*b*), becauſe there muſt always be ſome Tenants to anſwer for the Whole; but if there had been an Admiſſion of *J. S.* for Life, and of the Son in Remainder, becauſe they come as it were by two diſtinct Grants from the Lord himſelf, the Acts of the one will not bind the other; but till there is an Admittance on ſuch Surrender, the Lord is not bound to take any Notice of it, but the Tenant continues to all Intents and Purpoſes the ſame Eſtate he had before, and the rather, becauſe the Lord has no Means to compel him to come in and be admitted on ſuch Surrender; but if *B.* the Son ſhould bring a Bill againſt *J. S.* and the Lord to compel an Admittance purſuant to the Surrender, it might come then to be conſidered how far the Forfeiture of *J. S.* would bind *B.* *Trin.* 1721. *Sir Harry Peachy* and *Duke of Somerſet*, *Ibid.* 568, 572, 573.

(*a*) *Note*; *J. S.* had committed a Forfeiture.

(*b*) If *J. S.* ſhould commit Treaſon, it would be a Forfeiture to the Lord of the whole Inheritance, and ſo of any other *Truſtee* of a Copyhold, and the Lord would not be bound by the Truſt, nor would the Lands in his Hands be ſubject thereto, for a *Ceſtui que Truſt* is not Tenant, nor can any Acts of his, either of Treaſon, Felony, &c. affect the Copyhold Lands. *Ibid.*

Unleſs it be expreſly found that the Cuſtom of the Manor allows of Intails, then this is a Fee conditional, and plainly merged by the Grant of the Freehold in Fee: But ſuppoſing the Cuſtom of the Manor does warrant Intails, yet the Copyhold is extinguiſhed, becauſe in the Eye of the Law that is but an Eſtate at Will, and muſt be merged by the Grant of the Freehold. The Premiſſes by ſuch Grant are ſevered from the Manor, conſequently the Cuſtom of the Manor cannot corroborate the legal Eſtate at Will. The Copyholder cannot hold of himſelf, and the Copyhold, though intailed, is ſwallowed up in the greater Eſtate of the Freehold; and as the Tenant after ſuch Time as he took the Grant did not himſelf continue a Copyholder, ſo his Son, on the Deſcent of the Freehold, is likewiſe no Copyholder, which may be ſaid from Son to Son *ad infinitum*. If the Intail of the Copyhold be not extinguiſhed, it will be a *Perpetuity*, ſince the only proper way of barring the Intail of a Copyhold is by Recovery in the Lord's Court, but after ſuch Severance as in the preſent Caſe no Recovery can be ſuffered in the Lord's Court. *Per* Lord Chan. *Ibid.* 10. The Editor in a Note refers his Reader to 2 *Chan. Rep.* 174. *Ca.* 1. *Vern.* 393, 458. *Parker* and *Turner* (*c*), where the Lord Chan. *Jefferys* delivered the like Opinion in the like Caſe. *Quære autem* (ſays the Editor) if *A.* be a Copyholder in Tail, Remainder to *B.* in Fee, and *A.* takes a Grant of the Freehold from the Lord to him and his Heirs, and dies without Iſſue; is not *B.* in whom there was once a veſted Remainder in Fee of the Copyhold Premiſſes, intitled to the ſame? *Ibid.* (*c*) *Vide* 1 *Vol. Eq. Abr. P.* 119. *Ca.* 7.

11. *A.* is a Copyholder in Tail, the Lord grants the Freehold of the Copyhold to him in Fee, the Copyhold, though intailed, is extinct. *Per Macclesfield* C. on Time taken to conſider of it, *Trin.* 1724. *Dunn* and *Green*, 3 *Will. Rep.* 9.

MS. Rep. S.C. *accord'.*

12. In this Caſe it was admitted, that a Lord of a Manor by *Cuſtom* may make new Grants of Part of the Manor to hold by Copy; and a Caſe was cited to that Purpoſe; but Lord Chan. *King* ſaid, that in the Caſe cited ſuch Grants were made with *Conſent of the Homage*. The Queſtion here is, whether there be a *Cuſtom* to do it *without the Homage*, and that muſt go to Law, and then it will be by them conſidered how far a *Cuſtom* to make ſuch Grants *without the Homage* be a good *Cuſtom*. *Mich.* 12 *Geo.* 1. *Hughes* and *Games*, *Sel. Caſes in Chan.* 62.

13. The Lord of a Manor brought his Bill, claiming an Houſe built upon the Waſte. Lord Chan. ſaid, that the Lord of a Manor is never ſaid to be out of Poſſeſſion; that what is built upon the

Waſte is his, and that upon a Trial before Juſt. (*John*) *Powell* touching ſome Cottages built upon the Waſte, though the Lord had not been in actual *Survey* of the Cottages in Queſtion for 60 Years, and there had been ſeveral Fines levied thereon, by the Opinion of the Judge the Lord had a Verdict (*a*). 13 *July* 1726. *Loyd* and *Bartlet*, *Viner's Abr.* Tit. *Copyhold*, (X. d.) *Ca.* 1.

2. If it ſhould not be *Poſſeſſion.*

(*a*) It has been ruled in Evidence at the Aſſiſes, that a Cottager on the Lord's Waſte lives there by the Lord's Conſent, and ſo is only a Tenant at Will; but this is very doubtful where there has been a long Poſſeſſion. By *Pratt* C. J. *Mich.* 11 *Geo. B. R.* And *per Cur'*, 20 or 25 Years Poſſeſſion is a good Title in an Ejectment, as well as a Bar to an Ejectment. *Ibid. Ca.* 2.

14. A *ſingle* Copyholder is not relievable in Equity for an *exceſſive* Fine, *becauſe this is determinable at Law.* But to avoid Multiplicity of Suits, ſeveral Copyholders may join to be relieved againſt a *general* Fine that is exceſſive. *King* Lord Chan. *Mich.* 1732. *Cowper* and *Clerk* (*b*), 3 *Will. Rep.* 155.

(*b*) *Vide* Tit. *Bills*, *P.* 163. *Ca.* 22.

15. Defendant and others were Plaintiff's Tenants, and the Duke claimed a general Fine upon the late Dutcheſs's Death, and the Tenants denying his Right, as being only Tenant for Life by Settlement, *&c.* The Duke brought his Bill to eſtabliſh his Right. Defendants by Anſwer inſiſted the Duke was not intitled to ſuch a Fine, as next admitting Lord upon the Dutcheſs's Death; and they brought a Croſs Bill to be relieved againſt the Duke's Demands, and to eſtabliſh their Rights. Lord Chan. directed an Iſſue, whether the Duke was intitled, *&c.* which was found for him; and upon the Equity reſerved the Court declared and eſtabliſhed the Duke's Right to the general Fine, and decreed the Tenants to pay the Fines aſſeſſed, reſerving a Liberty to ſuch of the Tenants as think fit to try the Reaſonableneſs of the Fines aſſeſſed upon Ejectment to be brought by the Duke, at the Peril of forfeiting their Eſtates. *Mich. Vac.* 1735. *Somerſet* (*Duke*) and *Freame & al' & econtra*, *Viner's Abr.* Tit. *Copyhold*, (A. c.) *Ca.* 5. See *Forteſ. Rep.* 42. *Mich.* 12 *Geo.* 1. *in B. R.* S. C. under the Name of *Duke of Somerſet* and *France & al'*, who ſays, it was agreed that a Cuſtom that every Copyholder ſhall upon the Change of every Lord pay a Fine, is a void Cuſtom; but that the Court agreed that where the Lord is only Tenant for Life, or by the Curteſy, ſuch Cuſtom is good.

(B) Concerning Surrenders of Copyhold Eſtates, Admittance, &c. —— And in what Caſes a defective Surrender, or the want of it, will be ſupplied in Equity.

1. IF a *Copyholder do for a valuable Conſideration ſell* or *mortgage*, or *covenant to ſell his Copyhold*, and *dies before any Surrender made*, the *Heir is compellable to ſurrender.* —— But if a *Copyholder deviſes his Copyhold*, and *makes no Surrender to the Uſe of his Will*, the *Heir ſhall not be compellable to make this good to the Deviſee.* *Trin.* 1681. *Anon.* 2 *Freem. Rep.* 65.

But it was made a Queſtion, if a Copyholder do deviſe Lands for Payment of his Debts, and *dies without making any Surrender*, whether the Heir be compellable to make a Surrender; and the better Opinion ſeemed that he ſhould not, *becauſe altho' this be for Payment of Debts*, yet *it is merely voluntary to deviſe his Copyholds*; and his Honour ſaid, that *if this* ſhould be allowed, the Lord would be couſened of his Fine. *Ibid.*

2. *A.* purchaſed a Copyhold in his *own*, his *Wife* and *Daugher's Names*, and afterwards *ſurrenders it to* B. *and his Heirs, for ſecuring a Debt due to him*; this Purchaſe is an Advancement for the *Wife* and *Daughter*, and they are not Truſtees; and the *Huſband* and *Wife* take by *Intireties*, and ſo the Surrender can paſs no Part of the Lands; and it being Copyhold, the Plaintiff might have informed himſelf how the Title ſtood. Bill diſmiſſed, but without Coſts, by all the Commiſſioners. *Hil.* 1689. *Back* and *Andrews*, *Prec. in Chan.* 1.

2 *Vern.* 120. S. C. ſays, that a Bill brought by *B.* againſt the Wife and Daughters after the Huſband's Death was diſmiſſed, but *ſans* Coſts.

3. Where a Copyhold is deviſed, and *no Surrender made to the Uſe of the Will*, Equity will ſupply the Defect of a Surrender in *Caſe it be for Proviſion for a Child*; but it is the *Circumſtances of the Caſe that induce the Court to do it*, for they will not do it in all Caſes. *Hil.* 1690. *Anon. Ibid.* 115.

4. A *Copyholder in Fee* having Iſſue two Daughters, deviſed a Copyhold Eſtate to his younger Daughter, whereby her Fortune was made more conſiderable than the elder Siſter's; *there was no Surrender to the Uſe of the Will*, but ſuch Defect was ſupplied, *it being intended a Proviſion for a Child*, though it made her ſuperior to her elder Siſter in Fortune. *Mich.* 1699. *Baker* and *Jennings*, 2 *Freem. Rep.* 234.

5. The Opinion of the Maſter of the Rolls was, that the Deviſe of a Copyhold *without* a Surrender ought to be made good for *Grandchildren* as well as *Children*; and his Honour ſaid, that if the ſame Caſe was to come *then* into the Houſe of Lords it would be ſo ruled, and that *he* had and would decree it ſo. *Mich.* 1702. in the Caſe of *Watts* and *Bullas*, 1 *Will. Rep.* 61.

The like was alſo decreed *per* Lord *Harcourt* in the Caſe of *Freeſtone* and *Rant*, *Trin.* 1712. and it is obſervable that the Caſe of *Kettle* and *Townſend* being cited before *Cowper* C. in the Caſe of *Furſaker* and *Robinſon*, *Mich.* 1717. his Lordſhip doubted thereof, in Regard that the Grandfather by the 43 *Eliz. for maintaining the Poor*, is bound to maintain his *Grandchild*, which he ſaid he believed was not taken Notice of in that Caſe. *Ibid. in a Note by the Editor.*

6. *A.* ſeiſed of Freehold, Leaſehold and Copyhold Land, made a Surrender of his Copyhold to the Uſe of his Will, (but did not preſent the ſame) whereby he *deviſed his Copyhold to* A. *his eldeſt Son* and *the Heirs Male of his Body*, Remainder *to* C. *his ſecond Son*, who was by a ſecond Venter, and *the Heirs Male of his Body*, Remainder *to* B. *his third Son* and *the Heirs Male*, &c. Remainder *to his own right Heirs.* The Deviſor died, *leaving the ſaid three Sons* and *one Daughter*, who was by the firſt Venter. The *eldeſt Son* entred upon the Copyhold, *but did not preſent the Surrender*, and *died without Iſſue*, whereupon *his Siſter of the Whole Blood*, Defendant's Wife, *claimed as Heir at Law to her Brother*, whom ſhe conceived to be ſeiſed in Fee, for want of a Surrender; the Tenant attorned to Defendant in Right of his Wife, whereupon the Plaintiff, ſecond Wife of *A.* the Deviſor, brought her Bill as *Guardian to her two Sons C.* and *B.* to have the Copyhold according to the Will. Decreed for the Plaintiff by *Trevor*, Maſter of the Rolls, and affirmed, on Appeal, by *Harcourt* C. who decreed that Defendants ſhould join in a Surrender purſuant to the Will. *Mich.* 12 *Ann. Burton* and *Floid & Ux'*, *Viner's Abr.* Tit. *Copyhold*, (M. a.) *Ca.* 20. 3 *Will. Rep.* 285. S. C. cited by Lord *Talbot*, *Trin.* 1734. as decreed firſt by Sir *John*

As to there being a ſufficient Proviſion by the Will for the younger Children beſides the Copyhold, his Honour ſaid, the Parent was the only Judge of that.—— And that if it had been the Teſtator's Deſign that the Copyhold ſhould not be ſurrendred, &c. he ſhould have revoked it; and obſerved, that there *was not ſo much as parol Evidence of a Revocation. Ibid.*——But the Deficiency of a Surrender was denied to be ſupplied in Caſe of a Wife, to whom the Huſband deviſed it by his Will, it being ſuggeſted that ſhe was otherwiſe amply provided for out of the Teſtator's Freehold and Perſonal Eſtates; but the Heir at Law had no other Proviſion but the Copyhold, (30 *l. per Annum*) whereas the Proviſion for the Wife was according to her Fortune, which was upwards of 3000 *l.* but the Court ſent it to the Maſter to inquire into the Facts, and to report it Specially before they would make any Decree. *Mich.* 2 *Geo.* 1, *Briſcoe* and *Cartwright*, *Gilb. Eq. Rep.* 121.

Trevor

Trevor at the Rolls in *Trin.* 1712. and affirmed by Lord *Harcourt*, *Mich.* 1713. And in a Note there the Reporter cites the S. C. by the Name of *Burton* and *Lloyd*, (as taken from the Regiſter's Book) thus: The Bill was brought (*inter al'*) to ſupply the Deficiency of a Surrender left in the Hands of a Cuſtomary Tenant, and not preſented at the next Court. The Uſes of the Surrender were to the Teſtator's eldeſt Son and the Heirs Male of his Body, and for want of ſuch Iſſue, to the Plaintiff the ſecond Son and the Heirs Male, *&c.* Remainder over; ſo that the Plaintiff claimed a Remainder expectant on an Eſtate-tail, and was alſo, as appears by the Pleadings, otherwiſe provided for by the Teſtator. The Cauſe was heard before his Honour, 3 *July* 1712. and who decreed for the Plaintiff; and on 14 *November* 1713. the Decree was, on an Appeal, affirmed by the Lord Chan.

7. *B.* having ſeveral *Freehold* and *Copyhold* Lands, *deviſes all his Lands, Goods* and *Chattels to his three Sons, equally to be divided between them; and alſo deviſes* 100 l. *to his Eldeſt, provided he gives a lawful, good and general Releaſe to his two younger Brothers*; and *by his Codicil appoints, that if one of his younger Sons ſhould die* or *marry in his Minority without Conſent of his Executors, then his Portion to go to the other younger Son.* Lord Chan. was of Opinion, that the Copyhold Lands do not paſs by the Deviſe for want of a Surrender to the Uſe of the Will, though in the Caſe *of younger Children*, becauſe *there are Freehold Lands to ſatisfy the Words of the Will. Mich.* 12 *Ann. Bullock* and *Bullock*, *Viner's Abr.* Tit. *Copyhold*, (M. a.) *Ca.* 19.

8. Where a Copyhold is intailed, it will not be defeated or barred by a bare Surrender, unleſs *a particular Cuſtom be found to warrant it. Per* Lord Chan. *Harcourt*, *White* and *Thornborough & al'*, *Mich.* 1715. *Prec. in Chan.* 225, 226.

But *per* Lord Chan. *Cowper*, a *Surrender* by ſuch Tenant in Tail will bind his Iſſue, unleſs a particular Cuſtom be found. *Ibid.* 429. S. C. *Gilb. Eq. Rep.* 107. S. C. *in totidem verbis.*

9. *J. S.* being ſeiſed of Copyhold Lands, and alſo of a conſiderable Eſtate in Fee, ſettled the ſame on a Papiſt, contrary to the 11 & 12 *W.* 3. *cap.* 4. *ſect.* 4. but made no Surrender of the Copyhold Lands, *&c.* But it was ſaid that he had done all that lay in his Power to ſurrender, for that he had made a Letter of Attorney to *A.* to ſurrender them, and the Steward or Tenants refuſed to accept the Surrender, inſiſting that they ought to keep the Letter of Attorney, upon which they broke off, and no Surrender was made. And *Cowper* C. thought this a lucky Accident in Favour of the Heir, which Equity ought not to deprive him of any more than if the Copyholder and the Lord had diſagreed about a Fine, which had prevented a Surrender; and that *this being a voluntary Conveyance, was not to be aſſiſted in Equity* as a Conveyance to a (*a*) *Wife* or *Children* would be. But if the Heir had himſelf done any Thing to have prevented the Acceptance of the Surrender, it had been material. Beſides, it did not appear that *J. S.* had done all in his Power for the making the Surrender, for which Reaſon the Title to the Copyholds was declared, *per Cur'*, to be in the Heir. *Trin.* 1717. *Vane* and *Fletcher*, 1 *Will. Rep.* 352, 354, 355.

(*a*) *Vide Ibid.* 60. the Caſe of *Watts* and *Bullas*, where a *voluntary* defective Conveyance to a Brother of the half Blood was made good by the Court againſt the Heir.

10. *J. S.*

His Lordſhip ſaid, that if the *Copyhold* paſſes, the *youngeſt* Son who is intitled to ſuch Part thereof as is *Borough Engliſh*, muſt contribute to pay his Proportion of the Debts.

10. *J. S.* deviſes *all his real Eſtate for the Payment of his Debts*, and was ſeiſed of ſeveral Freehold and Copyhold Lands, but had not ſurrendred his Copyhold Lands to the Uſe of his Will, and died, leaving three Sons, and *Part of the Copyhold was of the Nature of Borough Engliſh.* And *Parker* C. was of Opinion, that if the *Freehold* Eſtate was *not* ſufficient to pay the Debts, the Copyhold, *being real Eſtate*, ſhould be liable; and directed the Maſter to ſee if there was enough without the Copyhold for Payment of the Debts. *Trin.* 1718. *Drake* and *Robinſon* (*a*), 1 *Will. Rep.* 443, 444.

——That a Man is not juſt unleſs he takes Care to pay his Debts; for which Reaſon the Teſtator has made choice of Words large enough for that Purpoſe, a *Copyhold Eſtate* being a *real Eſtate*; that ſince the Teſtator's firſt Intention was to be honeſt and pay his Debts, to cramp ſuch his Deſign by a narrow Conſtruction, ſeems like being acceſſary to making the Teſtator a Knave even againſt his Will. *Ibid.* (*a*) *Vide* the Caſe of *Haſlewood* and *Pope*, *P. Ca.* The like Reſolution by Lord Chan. *Talbot.*—*Vide Mallabar* and *Mallabar*, *P. Ca.*

11. J. S. *deviſed Copyhold Lands to his Daughters, without ſurrendring them to the Uſe of his Will*, and *died.* His *Son* and *Heir entred* and *mortgaged them*, the Mortgagee aſſigned his Mortgage to one of the Plaintiffs. Lord Chan. decreed, that the want of a Surrender ſhould be ſupplied for the Benefit of the Daughters, notwithſtanding they had a very large Proviſion beſides the Copyhold Lands, *becauſe the Father was the beſt Judge what was a ſufficient Proviſion for them*; and alſo decreed that the Mortgage being had *without Notice* (of the Deviſe) ſhould be firſt diſcharged, there having been Laches in the Daughters. *Mich.* 4 *Geo.* 1. *Weeks* and *Gore*, *Viner's Abr.* Tit. *Copyhold*, (M. a.) *Ca.* 24. *Note*; This is not the S. C. as 3 *Will. Rep.* 184. *in a Note there.*

12. Admittance by Virtue of a forged Letter of Attorney in the Name of a Copyholder to ſurrender a Copyhold to the Uſe of *A.* and the Attorney ſurrenders accordingly, whereupon *A.* is admitted, is a void Admittance. *Per* Lord Chan. *Macclesfield*, *Trin.* 1722. *in Caſu Hildyard* and *South-Sea Company and Keate*, 2 *Will. Rep.* 77, 78.

13. A Surrender was made of a Copyhold Eſtate to Truſtees to the Uſe of a Will; a Will was made with only two Witneſſes to it. Admitted, that a Will of a Copyhold does not require *three* Witneſſes; but this is a Deviſe of a Truſt relating to Lands, ſo within the Statute of Frauds; ——The Heir controverting the Surrender and the Will, this Point was not determined, but two Iſſues ordered; though the Chan. ſeemed to be of Opinion, that the Deviſe of a Truſt muſt enſue the Nature of the Eſtate, and not make it to be neceſſary to have *three* Witneſſes; as the Copyhold might be deviſed without *three* Witneſſes, this may be a Queſtion to be determined when the Iſſues are tried. *Trin.* 11 *Geo.* 1. *Appleyard* and *Wood*, *Sel. Ca. in Chan.* 42.

Where a Copyhold in *Fee* is ſurrendred to the Uſe of a Will, ſuch Will, atteſted by one or two Witneſſes, is good, *which is only a Declaration of the Uſe of the Surrender*; but if a *Copyholder* be ſeiſed only of the *Truſt* or *Equity* of *Redemption* of the Copyhold, and deviſes ſuch *Truſt* or *Equity of Redemption*, there muſt be three Witneſſes to the Will, for *here can be no* precedent *Surrender to the Uſe of the Will to paſs this Truſt*; and the *Truſt* and *Equity of Redemption of all Lands of Inheritance* are *within* the Statute of *Frauds*, otherwiſe great Inconveniences would ariſe therefrom; and it is no Prejudice to the Lord of the Manor to compriſe the Truſt of a Copyhold within that Statute, *becauſe the Perſon who has the legal*

14. Copyhold *ſurrendred to the Uſe of a Will* ſhall paſs by a Will *atteſted by one or two Witneſſes* only. Decreed by *Macclesfield* C. *Mich.* 1724. 2 *Will. Rep.* 258.

Eſtate of the Copyhold is Tenant to the Lord, and liable to anſwer all the Services. *Hil. Vac.* 1727. admitted by his Honour (in a Caſe at the Rolls) to be a ſettled Point. 2 *Will. Rep.* 261. The *Editor* by way of Note ſays, " But in the Caſe of *Tuffnell* and *Page* (*a*), *Eaſt.* 1740. the Lord *Hardwicke* was of Opinion, that the *Truſt* " *of a Copyhold would paſs by a Will not atteſted* according to the Statute of Frauds; as a *Copyhold ſurrendred to* " *the Uſe of a Will would do*; for that *Equity ought to follow the Law*, and *make it at leaſt as eaſy to convey a* " *Truſt* as *a Legal Intereſt*;" and decreed *accord*. *Ibid.* (*a*) *Vide P. Ca.*

16. Equity will ſupply the want of Surrender in Caſe a *Deviſe for Payment of Debts*, or *for a Wife or younger Children not before provided for*. *Per* the Maſter of the Rolls, *Mich.* 1728. *Tollet* and *Tollet*, 2 *Will. Rep.* 490.

17. *J. S.* by *Will charges all his worldly Eſtate with his Debts*, and dies *ſeiſed of Freehold and Copyhold Eſtates*, which he particularly diſpoſes of by the Will; and Sir *Joſeph Jekyll*, Maſter of the Rolls, was of Opinion, that the *Copyhold* (*though not ſurrendred to the Uſe of the Will*) as well as the *Freehold* was well charged with the Debts, ſince all the Copyhold was by expreſs Words deviſed either to the Heirs, or to thoſe that were not his Heirs, ſo that it appears the Teſtator took the Copyhold to be Part of his *worldly* Eſtate, all which is by the Will charged with the Payment of his Debts; and that it had been ſufficient if the Teſtator had only ſaid, *I charge my Copyhold Lands with the Payment of my Debts*, in which Caſe Equity would have ſupplied the want of a Surrender (*b*). *Hil.* 1730. *Harris* and *Ingledew*, 3 *Will. Rep.* 91, 96, 97.

(*b*) This the Reporter admits to be ſo; he obſerves if it were but an *equitable* Charge, and the *legal* Eſtate of the *Copyholder* had deſcended to the Heir, that would have made it neceſſary that the Heir ſhould be a Party, becauſe otherwiſe the *legal* Eſtate of the Copyhold could not be conveyed to a Purchaſer; but if it had appeared (*which he thinks it did not*) that the Heir at Law had ſince the Teſtator's Death conveyed away all the Copyhold Eſtate, then indeed the *Grantee* of the Heir being capable of conveying to the Purchaſer, it might not be neceſſary to make the Heir a Party. *Ibid.* 97. *by way of Note.*

18. Bill by Plaintiffs for an Injunction againſt Defendant, eldeſt Son of a Copyholder, to make good the Defect of a Surrender of a Copyhold in Favour of a Will, *whereby the Father gave this Copyhold*, and *all other his Eſtate, for the Maintenance of the Plaintiffs his younger Children till* 21. and *then to be divided amongſt the Plaintiffs*, and *Defendant to have a Share*. Lord Chan. ſaid, the Rule is, *when the eldeſt Son is totally diſinherited, not to interpoſe*; and *this is very near to a total Diſinheriſon*, the Eldeſt not being to have any Thing till the Youngeſt are of Age. Injunction denied, *Mich. Vac.* 1733. *Hicken & al'* and *Hicken*, *Viner's Abr.* Tit. *Copyhold*, (M. a.) *Ca.* 20. *P.* 59.

19. *S. M.* having Iſſue three Daughters *B. C.* and *D.* and having Freehold Lands in *A. J.* and *W.* and ſome Copyholds in *J.* (*ſome of which he had ſurrendred to the Uſe of his Will*) he made a Will, and deviſed Part to Truſtees for Charities, and to each of his two Daughters *C.* and *D.* diſtinct Part of his Freehold Lands, and Money and Legacies; to his Wife the Houſe he lived in, and ſeveral Cloſes by Name, till his Daughter *B.* ſhould attain 21. and then are theſe Words, " *And after then the Houſe and Grounds, and all other my* " *Meſſuages, Cottages, Lands, Tenements and Hereditaments whatſo-* " *ever in* A. J. *and* W. *not herein before otherwiſe diſpoſed of, with* " *their and every of their Appurtenances, unto my ſaid Daughter* B. " *and to the Heirs of her Body, to enter upon at her Age of* 21. *and* " *not ſooner.*" *B.* marries Plaintiff, and the Bill was brought by them

Upon the Appeal it was objected, that the Copyhold Lands did not paſs, and that Equity ought not to aid a Surrender to the Prejudice of two other Siſters, who with Plaintiff were Heirs at Law, and Plaintiff better provided for than they *excluſive* of the Copyhold; and here there were other Freehold Lands whereon the general Words might operate. But Lord Chan. ſaid, *the Rule of Evidence is the ſame here as at Law*; the proper Evidence of *Surrenders* or *Titles* to a Copyhold is the *Court Roll*, or a *Copy of it*, or *it muſt appear they exiſted once*, and *are loſt*, &c. and ſo

So make way to go into parol Evidence. —Plaintiff has no Title at *Law*, and as to an *Equity* Title, if it does not appear to be the Teſtator's Intent to give this Copyhold to *B.* the Court ought not to give it, but muſt expound and collect Teſtator's Intent from the Words of the Will.

them *for an Injunction*, and *to have the want of a Surrender ſupplied.* Queſt. 1. Whether the Words of the Will were ſufficient to paſs the other Copyhold in *A.* to the Daughter *B.* 2*dly*, If Equity ſhould ſupply the want of a Surrender in this Caſe. 10 *Feb.* 1732. Held at the Rolls, that the Copyhold *not deviſed to Charities* did paſs by general Words to Plaintiff *B.* and that Equity ſhould ſupply the want of a Surrender; and decreed accordingly, and a perpetual Injunction. On an Appeal Lord Chan. affirmed the Decree. Ejectment was tried before *Cowper* J. and a Caſe made for the Opinion of *C. B.* where it was held, that the Words were ſufficient to paſs Copyhold; and the Maſter of the Rolls was of the ſame Opinion. And as to the ſecond Point, the *Parent is the proper Judge of the Proviſion of his Children*, and here are no Children *provided* (*a*) for. Decree was affirmed by Lord Chan. *Hil. Vac.* 1733. *Andrews* and *Waller*, *Viner's Abr.* Tit. *Copyhold*, (W. e.) *Ca.* 12.

It is clear that the general Words (*viz. of all other*) will take in the Reſt of the Copyhold as well as Freehold; as to Caſes where a Surrender is not ſupplied, they ſtand upon this Reaſon, *that the Intention could not be collected to give Lands to Uſes to which Teſtator could not give them; but when the Intention can be collected, though there are improper Words, yet they paſs in Conſideration of this Court*, where if there had been a Surrender, they would have paſſed in Favour of Creditors, &c. *Per* Lord Chan. And his Lordſhip was of Opinion, that Teſtator intended to compriſe Copyhold in the Deviſe to his Daughter *B.* And if he did, the Rule is general, *That ſuch Deviſe is good to a Wife, younger Children, or Creditors*; but objected, that *B.* is not the youngeſt Child, he is indeed eldeſt, but *Piece of a whole Heir at Law*; and if ſole Heir, yet it is common in *Caſes of Portions that the Eldeſt is conſidered as the Youngeſt*, if not provided for. *In Caſe of* Borough Engliſh, *the Youngeſt muſt be conſidered as Heir*; *ſo in* Gavelkind. In Regard to what does not deſcend in common, they ſtand in the Place of *younger Children*; to determine otherwiſe would be to determine upon Words, and not according to the Nature of Things.—As to the Proviſion made for *B.* his Lordſhip ſaid, he did not know that the Court had gone minutely into the Conſideration of that, &c. otherwiſe where the Heir is totally diſinherited. In *Boſs* and *Boſs*, the Heir had but 6 *l. per Ann.* & *de minimis non curat Lex*, and *in Effect a total Diſheriſon*; but where there is a Proviſion not unreaſonable, and where the Heir is not left in a deſpicable Condition, the Court has not gone ſo far. In *Burton* and *Floid*, it was laid down by Lord *Harcourt* in the ſtrongeſt Terms, and there after an Eſtate-tail a Surrender was ſupplied; and *here* Defendants claim another Eſtate by the ſame Will, and *where a Deviſee claims a Point, he muſt take the Whole*, or *reject the Whole*, according to the Will.——The *Quantum* of a Proviſion of a Child is in the Father's Power and Diſcretion. A Man is bound by Nature to provide for all his Children, and in this Caſe the Father had provided for two, and intended to provide for the third; he intended to make a compleat Proviſion, and give all that he had among his three Daughters, and to leave nothing to deſcend. *Per* Lord Chan. *Ibid.* (*a*) Q. If it ſhould not be *unprovided*.

Vide the Caſe of *Drake* and *Robinſon*, *P. Ca.* the like Reſolution *per* Lord Chan. *Parker.*—— *Vide Mallabar* and *Mallabar*, *P. Ca.*

20. If a Man *deviſes all his Lands*, *Tenements* and *Hereditaments* in *D.* in *Truſt to pay his Debts* and *Legacies*, and the Teſtator has ſome *Freehold* and ſome *Copyhold* Lands there, only the *Freehold* Lands ſhall paſs; for his Will muſt be *intended of ſuch Lands* and *Tenements as are deviſable in their Nature*; *ſecus* if *he had ſurrendred his Copyhold Lands to the Uſe of his Will*, becauſe this ſhews he did intend to deviſe his Copyhold. But even in the firſt Caſe, if the *Freehold were not ſufficient to pay his Debts*, when the Teſtator deviſes all his Lands in Truſt to pay his Debts, it ſeems rather than the Debts ſhould go unpaid, that the Copyhold ſhall in Equity paſs. Decreed *per Talbot* C. *Trin.* 1734. *Haſlewood* and *Pope*, 3 *Will. Rep.* 322, 323.

21. One may *deviſe an Equity of Redemption of a Copyhold* without ſurrendring it to the Uſe of a Will. Decreed by *Talbot* C. *Trin.* 1735. *King* and *King and Ennis*, *on an Appeal from a Decree at the Rolls*, *Ibid.* 358, 361.

Vide the Caſes of *Drake* and *Robinſon*, *P. Ca.* and *Haſlewood* and *Pope*, *P. Ca.*

22. *J. S.* deviſes his *real Eſtate to be ſold to pay Debts* and *certain pecuniary Legacies*, and ſubject thereto deviſes his *perſonal* Eſtate to his Siſter. *Talbot* Lord Chan. refuſed to ſupply the Defect of a Surrender of the Copyhold to the Uſe of his Will againſt the Heir, if the other Eſtates ſuffice to pay the Debts; and diſmiſſed the Bill with Coſts as to this Point, it having been confeſſed by the Anſwer that the Teſtator's other Eſtate (excluſive of the Copyhold) was more than

ſufficient to pay the Debts. *Eaſt.* 1735. *Mallabar* and *Mallabar*, *Caſes in Eq. Temp. Talbot* 78, 79.

23. If a Man *expreſly deviſes Copyhold Lands*, and *dies without making a Surrender to the Uſe of his Will*, the *want of a Surrender ſhall be ſupplied.* —— But *if he died ſeiſed of Freehold* and *Copyhold Land*, and *deviſes his Lands generally*, ſo that there is *no evident Intention to paſs the Copyhold*, there, Equity will not interpoſe againſt an Heir at Law unprovided for, *ſuch Surrenders not being aided but where the Words of the Will cannot be ſatisfied without extending them to the Copyholds. Attorney General* and *Mott & al'*, 8 *Geo.* 2. *MS. Rep.*

24. Upon an Appeal from the Decree of the Maſter of the Rolls, the Caſe was as follows: *R. Cook*, the Plaintiff's late Father, was ſeiſed in Fee of ſeveral Copyhold Lands in *L.* in the County of *Norfolk* and in the City of *Norwich*; and by Will dated 28 *April* 1710. deviſed all his Meſſuages and Lands in the City of *Norwich*, and alſo in the County of the ſaid City, and alſo in the County of *Norfolk*, whether Freehold or Copyhold, to his Grandſon *Richard Cook* (*a*) *for Life*, Remainder *to his firſt and every other Son in Tail for Life*, Remainder *to his Daughter. in Tail*, Remainder *to his younger Son the Plaintiff in Fee*; the Teſtator died ſoon after making his Will, and afterwards in 1718. *Richard Cook* the Grandſon *died without Iſſue*, *but before his Death ſurrendred the Copyhold Lands to the Uſe of his Will*, whereby he *deviſed them to his Mother* Suſannah Cooke and *her Heirs*, under whom the Defendant *Francis Arnham* claims. *There was no Surrender made by the Teſtator* Robert Cooke *to the Uſe of his Will*, *under which the Plaintiff could make out his Title at Law by Virtue of the Limitations contained in the Will*, *though* Richard Cook *the Grandſon was dead without Iſſue*; therefore the only Queſtion was, whether the want of a Surrender ſhould be ſupplied in Favour of the Plaintiff, who was a younger Son of the Teſtator. The Maſter of the Rolls was of Opinion, that as the Intereſt in Remainder of the Copyhold Premiſſes was *not a preſent Proviſion for the Plaintiff*, a Court of Equity ought not to ſupply the want of a Surrender to make good ſuch Deviſe for the Benefit of a younger Child. Two Objections were made againſt ſupplying this Surrender; 1ſt, That the Plaintiff had an ample Proviſion made for him without theſe Copyhold Lands. 2*dly*, That the want of a Surrender ſhould not be ſupplied in this Caſe, becauſe the Eſtate was to ariſe on a Contingency upon *Richard*'s dying without Iſſue Male *or* Female, which being after an Eſtate-tail, is of little Value or Conſideration in Law, and therefore could not be intended a Proviſion for ſuch Son. *Talbot* Lord Chan. The Deſign of ſupplying Surrenders in this Court was not intended

Caſes in Eq. Temp. Talbot 35. *Trin.* 8 *Geo.* 2. S. C. ſtates it: *A.* had *Iſſue* two Sons *B.* and *C. B.* died, leaving *D.* a Son. *A.* being ſeiſed in Fee of Freehold and Copyhold Lands, *deviſed all his Meſſuages and Lands, whether Freehold or Copyhold, to D. his Grandſon* and Heir at Law *for Life*, Remainder to the firſt and other Sons *of D. in Tail*, Remainder *to the Daughters of D. in Tail*, Remainder *to C. in Fee. A. died* without making any Surrender to the Uſe of his Will, but had otherwiſe provided for *C.* ——*D.* the Grandſon died without Iſſue, *but ſurrendred the Copyhold to the Uſe of his Will*, and *deviſed it to his Mother and her Heirs.* It had been decreed at the Rolls, *that this being no preſent Proviſion intended for* C. *the Defect of a Surrender ſhould not be ſupplied.* But on an Appeal *Talbot* C. reverſed the Decree, and ordered the Defect of the Surrender to be ſupplied; ——— And as to the other Proviſion being made for *C.* by *A.* his Lordſhip ſaid, that *it had been often held here, that the Father is ſole and only Judge of the* Quantum *of* the Proviſion; and that the Defects of Surrenders has been ſupplied even where the Copyhold Eſtate intended to paſs has made but Part of the Proviſion, and ſo not liable to the Objection of leaving the Child intirely unprovided for in Caſe the Defect was not ſupplied; and as to the Remainder to *C.* after ſeveral Eſtates-tail, (not being intended as a preſent Proviſion) his Lordſhip held it to be a Proviſion, though not ſo good a one as a preſent Proviſion ——That it could not be ſaid that the Heir was diſinherited, for when this Remainder is to take Place, *C.* then becomes Heir at Law himſelf by the Default of Iſſue of *D.*—Nor can it be ſaid that there is an Heir unprovided for, for though he is made but Tenant for Life, yet there are Limitations to all his Iſſue, who are all to take before *C. Ibid.* 36, 37.———3 *Will. Rep.* 283. S. C. decreed that the want of a Surrender ſhould be ſupplied, and that the Defendant, who claimed under the Mother, ſhould at the Plaintiff's Charge ſurrender to the Plaintiff and his Heirs. *Ibid.* 288.

(*a*) *Richard* was the Teſtator's Heir at Law. *Vide Talbot* 35.

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tended to give the Party himſelf a greater Power over his Eſtate, but to aſſiſt and aid the Perſon for whom it was deſigned, being under equitable Circumſtances. The Rule of the Court is, that a defective Surrender ſhall not be ſupplied in Favour of a younger Son, where the Eldeſt is unprovided for and totally diſinherited. It has been ſaid, that this Power has been firſt uſed in Favour of Charities, but the Rule that I found the Court in Poſſeſſion of is ſometimes to ſupply the want of a Surrender, or a defective one, for the Benefit of Creditors or younger Sons unprovided for, who are in the Nature of Creditors. But it is a general Rule, that the *Father is Judge of the* Quantum *of the Proviſion his Child is to have*, and it would be taking too great a Latitude for this Court to enter into the Conſideration of that Matter. As to the ſecond Objection, I am of Opinion that tho' the Limitation of the Remainder to the younger Son was not of ſuch Value as if it had been an immediate Proviſion, yet as the Law allows of ſuch Limitations, they muſt be of ſome Value more or leſs, as they are more or leſs remote; and the Caſe of *Burton* and *Lloyd was a Caſe in Point* (*a*), for there an Appeal was brought before my Lord *Harcourt*, from the Decree of Sir *John Trevor*, Maſter of the Rolls, wherein a Surrender was ſupplied in Favour of a younger Son *after an Eſtate-tail*, which is ſtronger than the preſent Caſe, where the precedent Limitations are in ſtrict Settlement; therefore decreed that the Surrender ſhould be ſupplied, that the Lady of the Manor (who was a Party to the Bill) ſhould admit the Plaintiff Tenant in Poſſeſſion to the Premiſſes, and that the Plaintiff ſhould have an *Account of the Profits only from the Time of filing his Bill, having been guilty of Laches. Trin.* 8 *Geo.* 2. *Cook* and *Arnham*, *MS. Rep.*

1 *Salk.* 187.

(*a*) *Ca. in Eq. Temp. Talbot* 37. S. C. is ſaid to have been cited *as a Caſe in Point.*

This not in Talbot *or* Will. Rep.

25. If a Copyholder ſurrenders to the Uſe of his Will, and gives them to *B.* but the Will is not atteſted even by any one Witneſs, yet *B.* is well intitled to the Land, for *ſuch Will is ſufficient to declare the Uſes of the Surrender. Per* Lord Chan. *Harwicke*, *Eaſt.* 1740. *Tuffnell* and *Page*, *Barnard. Rep. in Chan.* 9, 11, 12.

Though his Lordſhip had ſome little Doubt of this Point at the firſt Hearing of the Cauſe, yet his Lordſhip at the ſecond Hearing ſaid, he was extremely well ſatisfied of it; and ſaid the Caſe of the *Attorney General* and *Bains*, 2 *Vern.* 597. was an expreſs Authority for that Purpoſe. That *the Party is in by the Surrender*, and *not by the Will*, and therefore it is good tho' the Will is not atteſted by any Witneſſes at all; but that it is neceſſary that the Will be in Writing; and if it be ſo, it is ſufficient if it be ſigned by the Party.— So where a Perſon is intitled to the *Truſt* of a Copyhold, *notwithſtanding there was no Surrender to* the Uſe of the Will, nor the Will atteſted by any Witneſſes, yet it is ſufficient to give the Truſt of a Copyhold. *Per* his Lordſhip, who ſaid, that the principal Caſe is merely the Caſe of a Truſt, and that the *Teſtator could not make a Surrender of it. Ibid.* 13. That it has been often determined at *Law*, that a Will of this Sort need not be atteſted to convey the *legal* Eſtate in the Copyhold, and conſequently ſuch Atteſtation is not neceſſary to convey the *Truſt* of the Copyhold, and in this Caſe *Equity follows the Law*. That this Court is never more ſtrict in requiring Ceremonies to paſs the *Truſt* of an Eſtate, than it is to paſs the *legal* Intereſt in it. And as to convey the *legal* Eſtate of the Copyhold, the Atteſtation of a Witneſs, *&c.* would not have been neceſſary, by the ſame Reaſon it is not neceſſary to convey the Truſt of it. *Per* Lord Chan. *Ibid.* 13. *Vide* the Notes to *P. Ca.*

CAP.

CAP. XXVI.

Costs.

(A) Who shall pay Costs, and in what Cases (a).

(a) Although an Answer confesses every Thing that is prayed by the Bill, so that the Plaintiff in that Case need not be at the Trouble of proving it; yet if the Defendants are Infants, the Court will compel the Plaintiff to prove every Thing. In this Case it was prayed that the Plaintiff shall have *Costs for all, and not for the Bill and Answer only*, which was granted. *Trin.* 7 *Ann. Anon. MS. Rep.*——Lord Chan. would not allow a Mortgagor to redeem until he paid the Mortgagee Costs; and said, a Redemption never was decreed without Costs; but if the Mortgagor only joined in the Sale of the Lands, (the Bill being for that End) he shall not pay Costs. *Trin.* 7 *Ann. Anon. Ibid.*

1. PLaintiffs Daughters by a second Venter brought their Bill against the Defendants Daughters by a first Venter, to prove their Father's Will, whereby Lands were devised to be sold to raise Plaintiffs Portions; and on a Trial at Bar, and Verdict for the Will, Defendants were ordered to join in a Sale, but were allowed their Costs both at *Law* and in *Equity*. *Trin.* 1699. *Crew* and *Jolliff*, *Prec. in Chan.* 93.

2. Trustees that act contrary to their Trust shall pay Costs. 1702. *Haberdashers Company* and *Attorney General*, *Viner's Abr.* Tit. *Costs*, (A) *Ca.* 3.

3. It is the Course of the Court of Exchequer, that *Plaintiffs* shall have Costs in Equity, where they recover, without any Order for them. 1702. *Warburton* and *Warburton*, *Ibid.* (B) *Ca.* 30.

4. If a Bill be brought in Equity for a Partition, no Costs can be on either Side, because it is an amicable Suit; so it is at Law. *Per* the Master of the Rolls, *East.* 7 *Ann. Anon. Ibid. Ca.* 31.

5. Constant Course of the Court where mutual Account is decreed, to reserve Costs till after the Report, that the Court may have it in their Power to punish the Wrong-doer. *Feb.* 16, 1709. *Rider* and *Bayley*, *Ibid.* (B) *Ca.* 32.

6. Decree against an Infant and his Trustees that the Costs should be paid out of the Trust-Money, but reversed, *because the Money was to be laid out in Land, wherein the Infant was to be but Tenant for Life*. *May* 5, 1713. *Peller alias Pollin* and *Husband*, *Ibid.* (Q) *Ca.* 10.

7. Costs shall follow the Event of an Account; but if it be *intricate* or *doubtful*, there shall be no Costs. *May* 8, 1716. *Pitts* and *Page*, *Ibid. Ca.* 11.

8. The *Heir at Law*, or *Heir Male to the Honour of a Family*, shall not pay Costs if there be probable Cause to contend for the Family Estate. *Mich.* 1718. *Shales* and *Sir John Barrington*, 1 *Will. Rep.* 481.

9. A Decree of Coſts neceſſarily follows a Decree of Payment of Principal and Intereſt. *Dec.* 1, 1718. *India Company* and *Ekins*, *Viner's Abr.* Tit. *Coſts*, (Q) *Ca.* 13.

10. If a Bill is brought for a *Matter properly determinable at* Law, the Defendant ought to demur, and not ſuffer the Cauſe to go on to a Hearing; and if the Bill be diſmiſſed upon Hearing, the Defendant ſhall not have Coſts. *Per Jekyll*, Maſter of the Rolls, 4 *Geo.* 1. *Tichburn* and *Leigh*, *Ibid. Ca.* 14.

11. If a Legatee or Creditor, *not Party to the Cauſe*, comes in before the Maſter, he ſhall have his Coſts, for he might have brought a Bill for his Legacy or Debt, which would have put the Eſtate to further Charge. Reſolved *per Macclesfield* C. *Trin.* 1722. *Maxwell* and *Wettenhall*, 2 *Will. Rep.* 26, 27.

12. If the Plaintiff in an *Iſſue directed gives Notice of Trial*, and *does not countermand it in Time*, the Court of Chancery, upon *Motion*, will give Coſts, without putting Defendant to move the Court at Law where the Iſſue is to be tried. *Trin.* 1722. *Anon.* 2 *Will. Rep.* 68.

13. *A.* by forged Letter of Attorney, atteſted by two Witneſſes, transfers *South-Sea* Stock of *B.* to *J. S.* for a valuable Conſideration paid by *J. S.* who after received the next Dividend. *Macclesfield* C. held this Transfer void, and decreed that the Company take the Stock from Defendant, the Transferree, and reſtore it to Plaintiff, the original Proprietor, and that Defendant pay back the Dividend to Plaintiff, and pay both the Company and Plaintiff their Coſts. *Trin.* 1722. *Hildyard* and *South-Sea Company & al'*, *Ibid.* 76.

If one makes a *ſpecial* Election to *proceed at Law as to Part*, and *in Equity as to the other Part*, with Regard to what the Plaintiff in Equity elects to proceed at Law, his Bill ought to be diſmiſſed with Coſts. *Per* his Honour. *Ib.*

14. An Order for making an Election recites only, *that the Plaintiff proſecutes Defendant at Law and in Equity for one and the ſame Matter, ſo that Defendant is doubly vexed*, wherefore it provides the Plaintiff his Clerk in Court, and Attorney at Law having Notice of the Order, do within eight Days after Notice make his Election in which Court he will proceed; and if he elects to proceed in Chancery, then the Proceedings at Law are by that Order to be ſtayed by Injunction; but if he elects to proceed at Law, or in Default of ſuch Election within the eight Days, then his Bill is to be diſmiſſed with Coſts. By *Jekyll*, Maſter of the Rolls, *Mich.* 1723. *Anon.* 3 *Will. Rep.* 90. *in a Note.*

15. A Decree was for the Plaintiff *niſi*, who does not appear; the Maſter of the Rolls looked upon it as giving up of the Judgment, and diſmiſſed the Bill with Coſts. 6 *Feb.* 1724. *Snape* and *Furdon*, *Sel. Caſes in Chan.* 6.

16. A Bill was diſmiſſed with Coſts, and the Perſon who was intitled to them died before they were taxed; there is no Relief to be had in this Caſe. *Trin.* 11 *Geo.* 1. *Anon. Sel. Caſes in Chan.* 21.

17. Decree was had by Default, and a Petition for a Rehearing, the Perſon in Poſſeſſion of the Decree did not attend at the Rehearing, Bill diſmiſſed with Coſts as to the Petitioner. *Wilſon* and *Dabbs*, *Mich.* 11 *Geo.* 1. *Sel. Caſes in Chan.* 50.

2 *Will. Rep.* 707. S. C.

18. The Plaintiff being an Infant, brings in his Bill in this Court by his *prochein Amy*, to diſcover whether a Will was cancelled by the Defendant after the Death of the Teſtator, or by the Teſtator himſelf; and upon the Hearing, the Court directed an Iſſue at Law to try this Point, and upon the Trial of that Iſſue a Verdict was found for the Defendant. Upon the Day of Trial of this Cauſe the *prochein Amy* dies, and within a ſhort Time afterwards the Infant comes of Age, but does not proceed any farther in the Suit. The Defendant brings

brings on the Cauſe upon the Equity reſerved, and the Plaintiff's Bill was diſmiſſed with Coſts; upon which the Plaintiff obtained a Rehearing as to the Point of Coſts; and for the Plaintiff it was argued by *Talbot* and *Cowper*, that any Perſon might bring a Bill in this Court in the Name of an Infant, which the Infant could not diſcover whilſt under Age; that it would therefore be very hard to make an Infant pay Coſts in a Suit which might be commenced without his Conſent, and that it had never been the Practice, unleſs the Infant avowed the Suit after he came to Age, which made it his own Act.

That the *prochein Amy* was the Perſon only relied on for Coſts; and if at any Time it appeared to the Court that he was not reſponſible for this Purpoſe, the Court upon Motion would order a new one to be named that was ſo; and in Caſes where it is neceſſary to examine the *Prochein Amy* as a Witneſs in the Cauſe, it can never be done till he be diſcharged from being *prochein Amy*, and a new one named, becauſe of his Intereſt in the Cauſe, he being ſubject to the Coſts. That they could not find one Inſtance where an Infant under theſe Circumſtances ever paid Coſts; that they had ſearched the *Subpœna* Office, and found that wherever an Infant's Bill was diſmiſſed with Coſts generally, that the *Subpœna* for Coſts was always made out againſt the *prochein Amy*, from whence they argue that this Practice was only to make him liable. A Feme Covert, when ſhe ſues by *prochein Amy*, may be ſubject to Coſts, but an Infant is not, for a Feme Covert may at any Time diſavow the Suit, which an Infant cannot; and this they ſaid was the Diſtinction, and therefore inſiſted that the Plaintiff, in Regard he had not proſecuted the Suit after he attained his full Age, ſhould not be ſubject to Coſts. For the Defendant it was argued by *Lutwych* and *Mead*, that the Infant and *prochein Amy* were both liable, or ought to be ſo, otherwiſe the Infant might be as vexatious as he pleaſed; at Common Law the Judgment is always entered againſt the Infant, and the Execution follows the Judgment, ſo that at Law the Infant there is liable to Coſts; and there being in this Caſe both Coſts at Law and in Equity, a Court of Equity will not in ſuch a Caſe take from the Defendant the Remedy he has at Law. It was admitted they knew of no Precedent in this Court where the Infant paid Coſts, and therefore they would argue from Caſes at Law, which they ſaid were equally founded upon Reaſon, as Caſes in Equity; and the Reaſon of the Common Law in ſubjecting Infants to Coſts, was in Reſpect of their Intereſts in the Matters in Controverſy. The *prochein Amy* has not an abſolute Power to carry on a Suit againſt an Infant's Conſent, for upon any Application to the Court on the Behalf of the Infant, ſuggeſting that the Suit is not for his Benefit, the Court will refer it to a Maſter, if he reports it ſo, the Court will ſtop the Suit. The Caſe of Lord *Dudley* was cited, where an Infant would have controverted an Account before a Maſter, but the Court would not permit him to do it till he had given Security to anſwer Coſts, from whence it was inferred that an Infant ought to be made liable to anſwer Coſts. *King* Lord Chan. At Common Law no Coſts were given either to Plaintiff or Defendant, but the Plaintiff found Pledges *de proſequendo*, and in Caſe it was found againſt him, he was amerced *pro falſo clamore ſuo*. Infants found no Pledges at Common Law; the Statute of *Glouceſter* was the firſt Statute which gave Coſts to Defendants in real Actions; and the Power for Infants to ſue by *prochein Amy* was firſt introduced by *Stat. Weſtm.* 1. in particular Caſes; and by *Stat. Weſtm.* 2. it was made general; and *Coke* in his *Commentary* upon theſe Statutes ſays, that

that both Guardian and *prochein Amy* ought to be admitted by the Court; and that no one can have a Teſtamentary Guardian for this Purpoſe. I think it a proper Power lodged in the Court that they may have reſponſible Perſons; for at Common Law if the Guardian loſt the Infant's Land by miſpleading, the Infant could not falſify the Judgment, but a Writ of Deceit lay to recover in Damages againſt the Guardian. I do not find that any Caſe has been cited where an Infant Plaintiff has been obliged to pay Coſts either at Law or in Equity; and in 1 *Cro.* 33. *Grave* and *Grave*, an Infant brought Treſpaſs by Guardian, and was nonſuited, yet the Court would not charge him with Coſts; and in another Caſe, 1 *Bulſtr.* 109. the Court ſeemed to be of the ſame Opinion. And his Lordſhip having inquired what was the Practice of the Regiſter, who ſaying, he had never known an Infant liable to Coſts in this Court, his Lordſhip diſmiſſed the Bill without Coſts in Equity, but left the Defendant to recover at Law as well as he could. *Trin.* 1725. *Turner* and *Turner*, *MS. Rep.*

19. On a Bill by the Lord of the Manor of *D.* againſt *B.* Lord of the Manor of *S.* to ſettle the Boundaries of the Manor of *D.* (the Parties inſiſting upon different Boundaries) it was ordered, that each Party ſhould give to the other a Note of their Boundaries, and that the Matter ſhould be tried in a feigned Iſſue, which being afterwards found for Defendant on three ſeveral Trials, it was admitted, that as to the Coſts of the three Trials the Plaintiff muſt pay them, but as to the Coſts *here* it was ſaid, the Bill ſeemed to be in Nature of a *Bill of Partition*, (*where neither Side pays Coſts*); but the Maſter of the Rolls diſmiſſed the Bill with Coſts, not only of all the Trials at Law, but alſo the *Coſts in Equity*; for tho' the Objection, that this Bill was *in Nature of a Bill of Partition*, ſeems to be of ſome Weight, yet as the Defendant has no Bill here, and the Plaintiff might have tried the Matter at Law, and more eſpecially ſince no Part of the Iſſue is found for the Plaintiff, who is in the Wrong *in toto*, his Honour ſaid, why ſhould he not be within the common Rule, and pay Coſts throughout. *Mich.* 1726. *Metcalfe* and *Beckwith*, 2 *Will. Rep.* 376.

20. By the Courſe of the Court, where a Cauſe is brought on upon Bill and Anſwer, and the Bill is diſmiſſed as againſt a Defendant, only 40 *s.* Coſts is to be paid by the Plaintiff; but if Plaintiff has a Decree againſt the Defendant, tho' upon Bill and Anſwer only, there if the Plaintiff has Coſts given, it muſt be Coſts to be taxed. *Mich.* 1726. *Anon.* 2 *Will. Rep.* 387.

21. A Witneſs examined on a Commiſſion depoſed reflecting Words upon —— for which he was ordered to pay Coſts; but upon a Motion to diſcharge the Order, Lord Chan. *King* ſaid, that he found the Commiſſioners on both Sides attended at the Examination, and ſince it was their Fault to take down any Depoſition that was ſcandalous or impertinent, he diſcharged the Order. *Hil.* 1726. *Anon.* 2 *Will. Rep.* 406.——But the Reporter ſays, *Quære*, If the Interrogatory had led to it. But that it ſeemed in this Caſe it did not, it being the laſt general Interrogatory. *Ibid.*

22. If an Anſwer be reported ſcandalous or impertinent, the Coſts by the Rule of the Court are to lie upon the Counſel; ſaid *arg'*, and not denied. *Hil.* 1726. 2 *Will. Rep.* 406.

23. Coſts always to be allowed where the Facts conteſted are preſumed to be in the Knowledge of the Party that conteſts them. *April* 4, 1726. *Cockraine* and *Blantire*, *Viner's Abr.* Tit. *Coſts*, (Q) *Ca.* 20.

24. Defendant not confeſſing Plaintiff's Title, but putting him to the Expence and Trouble of proving it, is a Circumſtance to give Coſts. *February* 3, 1726. *Trinity Houſe* and *Ryal*, *Viner's Abr.* Tit. *Coſts*, (Q) *Ca.* 22.

25. A Sum in Groſs ſhall never be added to a Bill of Coſts after it is taxed by a proper Officer. *April* 28, 1726. *Parker* and *Stanley*, *Ibid. Ca.* 21.

26. Equity will not give Coſts at Law contrary to a Verdict. *February* 17, 1726. *Macguire* and *Maddin*, *Ibid. Ca.* 19.

27. *Plaintiff* always pays Coſts where an Account turns againſt him, *or* where he prevails in nothing but what he might have inſiſted on at Law. *February* 29, 1727. *Lyre* and *Parnel*, *Ibid. Ca.* 23.

28. Held by Lord Chan. *King*, that where a Suitor having paid the Regiſter his Fee for making an Entry, which he neglected, by Means whereof the Proceedings were irregular, and the Suitor obliged to pay 58 *l.* Coſts; the Regiſter muſt reimburſe the Suitor, and tho' he dies before the Coſts aſcertained, yet his Executor ſhall be liable, for this was not a bare Miſbehaviour; but the Receipt of the Fee amounting by Implication of Law to a Promiſe and Agreement to procure an Entry. *Mich.* 1731. in the Caſe of *James* and *Philips*, 2 *Will. Rep.* 657, 658.

29. A Man ought not to be condemned in this Court *for inſiſting on a Right which the Law gives. Per King* C. *Mich.* 1733. *Brown & Ux'* and *Elton*, 3 *Will. Rep.* 205.

30. A Truſtee miſbehaving was ordered to pay Coſts *out of his own Pocket*, and *not out of the Truſt-Eſtate. Mich.* 1734. *Loyd & al'* and *Spillet & al'*, 3 *Will. Rep.* 347.

31. An *Heir at Law is made a Defendant*, and *inſiſts on his Title*, he ſhall have his Coſts *tho' it goes againſt him*; but if he be Plaintiff and miſcarries in his Suit, he ſhall *not* have Coſts, but on his Suit appearing groundleſs he ſhall pay Coſts. *Talbot* Lord Chan. *Trin.* 1735. *Luxton* and *Stephens*, 3 *Will. Rep.*

32. If *J. S.* incloſes Lands in a Town under a Cuſtom, and *B.* brings an Action againſt him in order to try that Right, and a Bill is thereupon brought to eſtabliſh the Cuſtom, if upon an Iſſue directed to try the Cuſtom it is found againſt the Defendant, yet Plaintiff ſhall not have the Coſts which were incurred in *this Court*, becauſe in ſuch Caſe the bringing a Bill was not neceſſary; but where eight ſeveral Perſons incloſe Land under a Cuſtom, and another brings eight Actions againſt them on that Account, and a Bill is thereupon brought to eſtabliſh the Cuſtom, and to ſtay the Proceedings in thoſe Actions; if upon an Iſſue directed to try the Cuſtom a Verdict is found in Favour of it, Defendant ſhall pay the Coſts in Equity as well as at Law, for in this Caſe Defendants at Law were put under a Neceſſity of bringing their Bill to ſtop ſuch Multiplicity of Actions, and the bringing ſo many was moſt vexatious. *Eaſt.* 1741. *Codrington* and *England*, *Barnard. Rep. in Chan.* 437.

CAP. XXVII.

Court.

(A) Concerning the Jurisdiction of the Court of Chancery (a), and in what Cases it will give Relief, &c.

(a) When Adjournment of the Terms comes, the Chancery is not adjourned, for that Court is always open. *Bro. Juriſd. pl.* 74.——In former Times the Chancellor uſed to ſend for the Judges, to know what ſhould be admitted againſt the Common Law, and what not; becauſe it is not to be alter'd for every Fancy, and it was a great Doubt in what Points Equity ſhould hold Place. Agreed by *Doderidge* and *Chamberlain* J. *Trin.* 21 *Jan. B. R.* 2 *Roll. Rep.* 434. The Law of the Court of Chancery is as much the Law of the Land as the Common Law. *Per* the Maſter of the Rolls *in Caſu Reeve* and *Herne, Mich.* 4 *Geo.* 2. *Viner's Abr.* Tit. *Charge*, (C) *Ca.* 12.

1. THE Court of Chancery may decree a Conveyance to be fraudulent *merely for being voluntary*, and *that without any Trial at Law. Per* the Opinion of all the Commiſſioners, *Trin.* 1690. in the Caſe of *White* and *Huſſey, & al', Prec. in Chan.* 13, 15.

2. Equity will not relieve againſt the Terms of an Agreement, tho' it may ſeem in Nature of a Penalty. *Mich.* 1699. *Small* and *Lord Fitzwilliams, Prec. in Chan.* 102.

3. A Will as well as a Deed may be ſet aſide in Chancery for Fraud *or* Circumvention. *Per Cur', Mich.* 1700. *in Caſu Welby* and *Thornagh & Ux', & econt', Ibid.* 123.

4. In Caſes in which *Chancery* and the *Spiritual* Courts have a *concurrent* Juriſdiction, *Chancery* will not hinder the *Spiritual* Courts (being firſt poſſeſſed of the Cauſe) from the Proceeding in it. *Mich.* 1700. *Nicholas* and *Nicholas* (b), *Ibid.* 546.

(b) *Nicholls* and *Nicholls*, 1 *Vol. Eq. Ca. Abr. P.* 160. *Ca.* 5. is not S. C.

5. The Spiritual Court cannot oblige a Guardian to pay Intereſt for the Infant's Money in his Hands, tho' they will compel him to give Security, but Chancery will do both. *Ibid.*

6. Chancery will grant an Injunction to ſtay the Huſband's Proceedings in the Spiritual Court for a Legacy given to his Wife, *becauſe that Court cannot oblige him to make an adequate Proviſion on her. Ibid.*

Sed vide Tit. *Prohibition.*

7. In Vacation Time the Court of Chancery (upon a Suggeſtion that the Spiritual Court has proceeded to grant Adminiſtration to a wrong Perſon) will grant a Prohibition returnable into *B. R.* or *C. B. Per Holt* C. J. *Eaſt.* 1701. in the Caſe of *Blackborough* and *Davis*, 1 *Will. Rep.* 41, 43.

8. A Bond *pro Eaſiamento & Favore*, if reduced to a Judgment, is not avoidable at Law, nor *even relievable* in Equity. *Per Wright*

Lord Keep. *Trin.* 1702. *in Caſu Ive* and *Aſh, Prec. in Chan.* 199, 200.

9. Where one *recovered in Trover againſt a Servant of the* African *Company*, Equity would *not* relieve, *becauſe the Plaintiff in Equity might at Law have defended himſelf. Trin.* 1703. *Langdon* and *the African Company, Prec. in Chan.* 221.

But decreed that the Company ſhould indemnify the Servant, and that the Plaintiff at Law (*one of the Defendants in Equity*) might proſecute the Decree in the Servant's Name. *Ibid.*

10. A Matter examinable and already determined at Law, yet Equity may give Relief in it. *Mich.* 1704. *Kent* and *Bridgman, Prec. in Chan.* 233.

Vide P. Ca. this Caſe more fully abridg'd.

11. The Juriſdiction of the Court of Chancery is generally divided into three Parts, *Fraud*, *Truſt*, and *Accident*; by *Accident* is meant, when a Caſe is diſtinguiſhed from others of the like Nature by *unuſual Circumſtances*; for this Court *cannot controul the Maxims of Common Law*, becauſe of *general Inconveniences*; but only when the Obſervation of a Rule is attended with ſome *unuſual* and *particular* Circumſtances that create a *perſonal* and *particular* Inconvenience; and this Maxim, *Boni eſt judicis ampliare legem*, is not to be underſtood as that a Judge in Equity ſhould alter the Maxims of the Common Law, for this would be to aſſume a Power *paramount* to the Law. The utmoſt that can be meant by this Maxim, if it has any Meaning in it, is, that this Court, *provided it has the Law to juſtify it*, ſhould ſometimes uſurp upon the Juriſdiction of the Courts at Law; and therefore in the Caſe of a vexatious Perſon in an Ejectment having tried his Right at Law five ſeveral Times, and been caſt each Time, the Court of Chancery was moved for a perpetual Injunction to ſtop all further Proceedings at Law. But Lord *Cowper* (after Debate and Conſideration) refuſed to grant an Injunction, for by a known Maxim of the Common Law a Man may try his Title as often as he pleaſes in an Ejectment, and for this Court to determine that one, two or more unſucceſsful Trials in an Ejectment (*a*) ſhould be peremptory, *quid aliud*, than to aſſume a Legiſlative Power, and alter the Maxims of Common Law. *Trin.* 8 *Ann. Anon. Lucas* 1, 3. *Prec. in Chan.* 261. S. C. *Trin.* 1706. S. C. under the Name of *Lord Bath* and *Sherwin. Gilb. Eq. Rep.* 5 *Ann.* S. C. and ſtated as in *Prec. in Chan.*

Prec. in Chan. 261, &c. by Note.

See Tit. *Bill*, (D) *P. Ca.* 1.

(*a*) The Proceedings at Common Law are tied up to very ſtrict Rules; and a Man that has a very good Title may be caſt thro' ſome Slip in the Proceedings, or a Man may have better Evidence at one Time than another. *Beſides*, as often as the Plaintiff loſes in an Ejectment, the Court gives Coſts, which is by Law intended as a Recompence; and tho' where Fees are liberally given, it does not come near up to it, yet if Things were managed more frugally, it would come much nearer. *Per* Lord *Cowper, Ibid.* in *S.* C.

12. A. *aſſigns a Bond to* B.—B. *ſues this Bond in* A.*'s Name*, A. *has Judgment*, and the Judgment affirmed in Error; and after Execution taken out, but *before the Return thereof*, A. *gives a Warrant of Attorney to acknowledge a Satisfaction upon Record*, and upon this a *Superſedeas* is ſued out to ſtop the Execution; and upon Motion to ſet aſide the *Superſedeas*, it was held *relievable only in Equity. Mich.* 11 *Ann. Parker* and *Lilly in B. R. Lucas's Rep.* 102.

The *Aſſigning it is a Matter of Equity*, and *is more proper for the Court of Chancery than for the Court of B. R.* And a late Caſe was cited in *C. B.* where a Bond was taken in *Truſt for another*, and the *Obligee dying while the Suit upon this Bond pended*, it was held the *Ceſtuy que Truſt* could not go on in the Action, *becauſe this Court* (i. e. *C. B.*) *could not take Notice of the Truſt*, or *of any other Plaintiff than who appeared to be ſo upon Record. Per Cur', Ibid.* 103.

13. When Iſſue is joined in Chancery, that Court always awards the *Venire.* 1 *Geo.* 1. *Lucas's Rep.* 259.

14. *J. S.*

In this Caſe it was decreed, that the Defendant do account for the Rents and Profits of the Freehold Leaſes to Plaintiff, and Defendant to have all juſt Allowances for Debts and Legacies paid by him, and the Plaintiff to account for 150 Guineas to Defendant with Intereſt, *&c.* As to the Purchaſer *bona fide* of Part of the Freehold Lands, he ſhall convey to Plaintiff upon Payment of the Purchaſe Money, with Intereſt at 5 *l. per Cent.* becauſe he had Notice of the Invalidity of the Deviſe by common Report, tho' not actual Notice from Plaintiff or Defendant; and altho' he was not a fraudulent Purchaſer, yet he was a raſh one, and ought to have inquired into the Validity of the Will, or got the Heir at Law to join in the Conveyance to him. *Per Harcourt* C. *Ibid. in the Margin.* As to this, Mr. *Viner* ſays, *Ex relatione alterius.*

14. *J. S.* being ſeiſed of a conſiderable Eſtate in Fee, deviſed it to *T. B.* Defendant. *J. S.* executed the Will, but it was not atteſted in his Preſence by three Witneſſes. *J. S.* died, and *T. B.* finding that the Will was void, for 100 Guineas paid to Plaintiff, who was *J. S.*'s Heir at Law, procured from him a Releaſe, which recited that *J. S.* by his laſt Will duly executed had deviſed his Eſtate to *T. B.* Afterwards *T. B.* for 50 Guineas more, prevailed with *Plaintiff* to convey the Lands by Leaſe and Releaſe to *A.* who was *T. B.*'s Truſtee, and to whom he afterwards conveyed; then *T. B.* upon a valuable Conſideration, conveyed Part to *C.* who had not any other Notice of the Invalidity of the Will, ſave that he heard it mentioned in common Diſcourſe. Plaintiff brought his Bill againſt *T. B. A.* and *C.* to have the Releaſe, Leaſe and Releaſe delivered up, as fraudulently obtained; and it not appearing that Plaintiff at the Time of making the Releaſe, *&c.* knew that the Will was bad, *Harcourt* C. decreed that they ſhould be delivered up; and it not appearing that *C.* was privy to the Fraud, tho' he had heard of the Invalidity of the Will, as above, it was decreed that he, upon receiving his Purchaſe Money with Intereſt, ſhould convey to *Plaintiff*, and ſhould account for the Rents and Profits which he had received, and be allowed what he had laid out in Repairs, or otherwiſe. *Mich.* 12 *Ann. Broderick* and *Broderick & al'*, *Viner's Abr.* Tit. *Circumvention*, (A) *Ca.* 3.

15. *A.* being Parſon of the Pariſh of *C.* and *B.* having Lands in that Pariſh, told *A.* that there was a Modus of 40 *s. per Ann.* paid Time out of Mind for his Lands in that Pariſh; and to convince *A.* of it, he ſhewed a Copy of a Record in *B. R. Tempore Eliz.* where a Prohibition was granted againſt the Parſon in a Suit for Tithes in Court Chriſtian, upon a Suggeſtion of this Modus, whereupon *A.* agreed with *B.* to take 40 *s. per Ann.* but it appearing in the Cauſe that *B.* ſuppreſſed Part of the Record, wherein afterwards a Conſultation was granted, and thereby deceived *A.* for that Reaſon the Lords did make void the Agreement, being obtained by ſuppreſſing the Truth. *Mich.* 12 *Ann. Viner's Abr.* Tit. *Circumvention*, (A) *Ca.* 4. ſaid by him to be cited in the Caſe of *Broderick* and *Broderick*, as the Caſe of *Doctor Dent* and *Buck in Dom' Proc'*.

16. If a Copyholder ſue by *Petition* in the Lord's Court, upon which the Lord gives Judgment, tho' no *Appeal* or *Writ of Error will lie of the Judgment*, yet the Court of Chancery will correct the Proceedings *in Caſe any Thing were done therein againſt Conſcience. Per Parker* C. J. *Mich.* 1716. in the Caſe of *Criſtian* and *Corren*, before a Committee Council at the *Cockpit*, 1 *Will. Rep.* 330.

17. A Court of Equity will not only grant an Injunction to *ſtay Tenant for Life, without Impeachment of Waſte*, from defacing the Manſion Houſe, but will likewiſe oblige him to put it in the ſame Plight. *Hil.* 1716. *Lord Bernard's Caſe*, *Prec. in Chan.* 454.

Viner's Abr. Tit. *Chancery*, *P.* 402. *Ca.* 21. S. C. *accord'*.

18. Breach of Covenant is triable at Law, *for a Court of Equity cannot ſettle Damages.* 17 *March* 1719. *Stafford* and *Mayor of London*, *MS. Rep.*

19. The

19. The *Court of Chancery* only *proper to compel an Execution of a Truſt*, and conſequently a *Diſtribution* of the *undiſpoſed* Surplus of a perſonal Eſtate. *Trin.* 1719. 1 *Will. Rep.* 549. See this Caſe *P. Ca.* more fully abridged.

20. Bill *to be relieved againſt a Forfeiture for Non-payment of Rent, by a Tenant at a Rack-Rent, after a Recovery in Ejectment.* *King* C. decreed, that upon Payment of the Rent, and *Coſts at Law* and *in Equity*, the Defendant ſhould make a new Leaſe for the Remainder of the Term to the Plaintiff; but ordered a *Covenant to be inſerted for the Tenant to repair during the Term*, tho' *no ſuch Covenant was in the former Leaſe*. *Mich.* 12 *Geo.* 1. *Taylor* and *Knight*, *Viner's Abr.* Tit. *Chancery*, (Y) *Ca.* 31. His Lordſhip ſaid, he did not like giving Relief *here* in theſe Caſes *after a Judgment at Law*, but ſaid, the Precedents were too ſtrong for him. *Ibid.* in S. C.

21. A Court of Equity has a concurrent Juriſdiction with the Admiralty (*a*). *Per Hale* B. *Eaſt.* 12 *Geo.* 1. cites it as a Saying of Sir *John Trevor*, late Maſter of the Rolls. *Gilb. Eq. Rep.* 228. (*a*) And Eccleſiaſtical Courts.

22. The *Court* (of Equity) *ought to be very tender how they help any Defendant after a Trial at Law in a Matter where ſuch Defendant had an Opportunity to defend himſelf*; but *ſtill in ſome Caſes Equity relieves after a Verdict at Law*; as if the Plaintiff at Law recovers a Debt, and the *Defendant afterwards finds a Receipt under the Plaintiff's own Hand for the very Money in Queſtion.* Here the Plaintiff recovered by Verdict againſt Conſcience; and tho' the Receipt were in the Defendant's own Cuſtody, yet he not being then appriſed of it, ſeems intitled to the Aid of Equity, it being againſt Conſcience that the Plaintiff ſhould be twice paid the ſame Debt (*b*). *Per* the Maſter of the Rolls, *Mich.* 1727. in the Caſe of the *Counteſs of Gainſborough* and *Gifford*, 2 *Will. Rep.* 425, 426. (*b*) So if the Plaintiff's own Book appeared to be croſſed, and the Money paid before the Action brought. *Per* the Maſter of the Rolls, *Ibid.* 426.

23. An Eſtate *pur auter vie* is diſtributable in *Equity*, tho' not in the *Spiritual* Court; for tho' the *Spiritual* Court *cannot intermeddle with a Freehold to diſtribute it* (*c*), yet it doth not follow but that this Court may enforce ſuch Diſtribution. *Per King* C. and who decreed *accord'*, *Hil. Vac.* 1730. in the Caſe of *Witter* and *Witter*, 3 *Will. Rep.* 99, 102. *Vide* the Caſe of the *Duke of Devon* and *Atkins*, *P. Ca.* (*c*) It was the Opinion of that great Man Lord Chan. *Cowper*, that an Eſtate *pur auter vie*, when *limited to Executors*, was *perſonal* Eſtate, and as ſuch diſtributable within the Statute of Diſtribution. Said *arg'* by *Talbot*, Solicitor General, 2 *Will. Rep.* 382.—*Vide Salk.* 464. *Carth.* 376. *Oldham* and *Pickering contra.* ——— However, tho' in the *Spiritual* Court an Eſtate *pur auter vie* be not diſtributable *on Account of its being a Freehold*, yet it ſeems as if in Equity it ſhould be diſtributable, and that the *Adminiſtrator* ſhould be taken to be a Truſtee for general Legacies, if any; and if no Will, then for the next of Kin. And as the Adminiſtration may be granted to one only a *principal Creditor*, he ought not to go away with the Reſidue of the Eſtate *pur auter vie* as *Adminiſtrator*. *Ibid.* in a *Note* by the *Editor*. —— But ſee more particularly the Statute of 14 *Geo.* 2. whereby an Eſtate *pur auter vie* being *undeviſed*, or *in Part applied to the Payment of Debts, according to the Statute of Frauds, ſhall be diſtributed in the ſame Manner as perſonal Eſtate.*

24. A weak Man gives a Bond; if it be attended with *no Fraud* or *Breach of Truſt*, Equity will not ſet it aſide *only* for the Weakneſs of the Obligor, if he be *Compos mentis*, for Equity will not meaſure Peoples Underſtanding *or* Capacities.——No ſuch Thing as an equitable *Non compos*, if *compos* at Law. *Per Cur'*, *Mich.* 1731. 3 *Will. Rep.* 130. *Vide* Tit. *Bonds* or *Obligation*, *P.* 186. *Ca.* 8. and the Notes there.

25. Heirs *when of Age* are under the Care of a Court of *Equity*, and *then want it moſt*, the *Law* taking Care of them till that Time. *Ibid.* 131. *Vide* ſame Notes.

26. In Matters within the Juriſdiction of this Court it will relieve, tho' nothing appears which ſtrictly ſpeaking may be called illegal; the Reaſon is, becauſe all thoſe Caſes carry ſomewhat of Fraud in them, tho' it be not ſuch Fraud as is properly Deceit, but ſuch Proceedings as lay a particular Burden or Hardſhip on any Man; it being the Buſineſs of this Court to relieve againſt all Offences at the Law of Nature and Reaſon. *Per* Lord Chan. *Mich.* 1734. in the Caſe of *Boſanquet* and *Daſhwood*, (who cited the Caſe of *Broadway*, which was firſt heard at the Rolls, and then affirmed by Lord *King* as an expreſs Authority in Point (*a*).) *Caſes in Eq. Temp. Talbot* 38, 40.

(*a*) His Lordſhip alſo cited the Caſe of Sir *T. Meers*, heard by the Lord *Harcourt*, as an Authority in Point, that this Court will relieve in Caſes which (*tho' perhaps ſtrictly legal*) bear hard upon one Party; and his Lordſhip cited that Caſe thus: Sir *T. Meers* had in ſome Mortgages inſerted a Covenant, *That if the Intereſt was not paid punctually at the Day, it ſhould from that Time, and ſo from Time to Time, be turned into Principal, and bear Intereſt.* Upon a Bill Lord Chan. *relieved the Mortgagors* againſt this Covenant as unjuſt and oppreſſive. *Ibid.* 40.

27. Where a *Title depends on the Words of a Will*, this is as properly determinable in Equity as by a Judge and Jury at *Niſi prius*. *Per* Lord Chan. *Talbot in Caſu Tanner* and *Wiſe*, *Trin.* 1734. 3 *Will. Rep.* 296.

Vide Tit. *Bills*, *P.* 169. the Notes to *Ca.* 25.

28. The Court of Equity delights to do compleat Juſtice, and not by Halves: As firſt to decree the Heir to perform his Covenant, and then to leave another Suit for him againſt the Executor. *Mich.* 1734. *Ibid.* 334.

29. Plaintiff had a Decree in the *Equity Court of the County Palatine of* Lancaſter, and Defendant being now in the *Guards*, and *living out of the Juriſdiction*, Plaintiff brought his *Bill in Aid of a former Decree*. Defendant by *Anſwer denied his knowing any Thing of the Decree*, but *admitted the Proceedings there*; and Plaintiff now moved for an Injunction. But *per* Lord Chan. An Injunction was denied; and his Lordſhip ſaid, *he never knew a Bill in this Court to aid Juriſdiction in an inferior Court*; and *Plaintiff's Equity for an Injunction muſt appear upon Proceedings here*, and *upon Records of this Court*; and it being mentioned that Plaintiff ſhould have brought a *Certiorari* Bill, it was objected, that the *Proceedings could not be removed out of a County Palatine no more by a* Certiorari *Bill than by Writ of Error at Law, in Caſe of Action* or *Judgment there*. *Trin.* 1734. *Duckingfield* and *Noſworthy*, *Viner's Abr.* Tit. *Court*, *&c.* (S. 4.) *Ca.* 23.

30. Where the *Law provides a particular Remedy, to extend it is the proper Work of the Legiſlature only*. But there are Inſtances in which a Court of Equity *gives Remedy where the Law gives none*; but where a *particular* Remedy is given by Law, and *that Remedy bounded* and *circumſcribed by particular Rules*, it would be very *improper* for a Court of Equity to take it up where the Law leaves it, and extend it farther than the Law allows. *Per* Lord Chan. *Talbot*, *Hil.* 1735. *in Caſu Heard* and *Stanford*, *Caſes in Eq. Temp. Talbot* 173, 174.

31. *Thomas Styles deviſed* (*inter al'*) *an Annuity of* 40 l. *a Year to his Wife, chargeable upon the Reſidue of his perſonal Eſtate*, and made his three Siſters Executrixes; and the Wife in a Croſs Bill prayed that they might give Security for the Payment of it. But by *Talbot* Lord Chan. There is no Colour to oblige them unleſs they had *miſbehaved themſelves* (*b*). But as the Teſtator has *expreſly charged the* Reſiduum *with the Payment of it, it is reaſonable a ſufficient Part ſhould be appropriated*

(*b*) *A.* deviſes to *B.* for Life the Uſe of the Goods in his Houſe; he ſhall not give Security *without ſome Miſbehaviour* or *apparent Danger of Loſs*; Security being always required upon Circumſtances. *Earl of Pembroke* and *Sawyer*, *MS. Notes.* 2. Term and Year.

propriated for that Purpoſe, and ſo it was. *Stanway* and *Styles & econtra*, *Mich.* 8 *Geo.* 2. *MS. Rep.*

32. The Defendant gave a Bond to the Plaintiff's Daughter, Penalty 500 *l.* and in the Beginning of the Condition there was a Recital, that *an Agreement has been made between the Defendant* and *the Plaintiff's Daughter, that a Marriage ſhould be compleated between them within twelve Months after the Date of the Bond*; *then the Condition was that the Defendant ſhould pay the Daughter* 500 l. *in Caſe the Defendant ſhould not marry her within the ſaid twelve Months.* The Plaintiff's Daughter filed her Bill againſt the Defendant, *ſuggeſting that he had got the Bond away from her by Force*, and *had cancelled it*; and *prayed that he might be compelled to execute a new Bond to her under the ſame Terms with the former*; and *alſo prayed general Relief.* To the Bill an Affidavit was annexed, that the Defendant had by Force taken the Bond from her, and had cancelled it, agreeable to the Courſe of the Court. The Defendant by his Anſwer ſwore he did not take the Bond by Force, but that ſhe upon a Quarrel between them did deliver up the Bond to him, and told him ſhe would have nothing to do either with his Bond or him; and alſo by Anſwer flung ſeveral Aſperſions on the Daughter, as if ſhe was a common Whore. It was proved poſitively by one Witneſs, on the Part of the Plaintiff, that the Defendant had taken his Bond from her by Force, and had cancelled it; and another Witneſs proved that the Defendant promiſed to execute a new Bond to the Daughter to the ſame Effect as the former, but the Defendant had made no Proof at all in the Cauſe of any Kind; the Daughter died before the Cauſe could be brought to a Hearing, and the Plaintiff her Mother took out Adminiſtration to her, and revived the Suit. Lord *Hardwicke* Chan. In this Caſe there are two Queſtions; 1. Whether the Plaintiff from the Nature of this Caſe has any original Equity to come into this Court for Relief. 2dly, Whether there is any Thing under the Circumſtances of the Caſe to bar the Plaintiff of that Relief. As to the (1) I think the Plaintiff has ſuch Equity, which is founded on this Bond having been once executed, by which the Plaintiff might have had a Remedy at Law; and afterwards coming into the Hands of Defendant, and being cancelled by him, where ſuch Caſe is of a Bond, it gives the Plaintiff not only Ground for a Diſcovery, but alſo Relief, becauſe the Admiſſion of the Bond by the Defendant's Anſwer, or proving that there was ſuch a one, would not be ſufficient to enable the Plaintiff to bring an Action, becauſe there muſt be a *profert in Curia*, and *oyer* may be prayed thereof. As to the ſecond Point it is objected, that it is only proved by one Witneſs that the Defendant took this Bond forcibly from the Plaintiff's Daughter, which the Defendant hath denied by his Anſwer upon Oath; and it is generally true, that where the *Equity of the Bill was only proved by one Witneſs*, and *is denied by the Defendant's Anſwer, that there is not ſufficient Ground to make a Decree, becauſe there is Oath againſt Oath*; but the Rule is miſapplied here, for in this Caſe the Plaintiff's Daughter was intitled to make the firſt Oath, which ſhe has done; and has alſo proved the ſame Matter by one Witneſs, ſo that this is only the Oath of the Defendant in his Anſwer againſt two Oaths; but there is no Occaſion to rely upon this, becauſe the Anſwer is not a compleat Denial of the Plaintiff's Equity, but only a Confeſſion and Avoidance; and then it is not ſufficient to ſay it is only proved by one Witneſs, for the Defendant ought to make out

his Avoidance; then again here is only one Witneſs that ſwears to the taking of the Bond by Force, and cancelling it; yet there is another who ſwears that after the Bond was got into the Defendant's Cuſtody and cancelled, the Defendant promiſed the Plaintiff's Daughter to execute a new Bond, which could be only becauſe he had got the former wrongfully, and cancelled it; and ſtrongly corroborates what was ſworn by the other Witneſs, ſo as to take it *out of the Rules of the Court, that there can be no Decree where there is one Oath againſt another.* It was further objected, that the Plaintiff's Daughter by her Bill had not averred or proved in the Cauſe that ſhe was ready to perform her Part, and to marry the Defendant; but it lies upon the Defendant to ſhew that he requeſted her, and ſhe refuſed to comply; for the Condition of the Bond does not oblige her to requeſt the Defendant, but puts the Performance upon him. Another Objection has been taken, that it does not appear the Defendant had any Remedy to compel the Plaintiff's Daughter to marry him, there being only a Recital in the Condition of the Bond, that ſuch an Agreement to marry each other had been made between them, but that no ſuch Agreement had been ſigned on her Part in Favour of the Defendant, or any Evidence of it. The Anſwer is, I cannot take it the Defendant had no Evidence of ſuch a Promiſe, and as he has recited there was ſuch a one, I muſt take it to be true; beſides, the Statute of *Frauds and Perjuries* does *not require Promiſes of Marriage to be in Writing*, but *only Money to be given in Conſideration of Marriage.* It has been ſaid, it is very pernicious to give Relief in ſuch Caſes as this, becauſe let the Woman behave ever ſo ill after the Bond given, yet that would be an Obligation on the Defendant to marry her, or pay the Money. But this Court would relieve againſt ſuch Bond, if ſhe became abandoned and profligate, ſo as to put herſelf under different Circumſtances than ſhe was at the Time of making the ſame; but here is no Proof either that it was an improper Match, or that the Daughter ever miſbehaved herſelf. Then the Caſe is no more than this; here is a Bond given to a Woman of very good Character to marry her within a Year, or to pay her a Sum of Money; as to the Caſe of *Key* and *Bradſhaw*, 2 *Vern.* 102. that is a very general Reaſon, and would hold good in all Contracts of Marriage to be executed, either in the Eccleſiaſtical Court, or by Damages at Law; but in that Caſe it was clearly an improper Agreement, and ſuch as from the Nature of it was not right, that the Miſtreſs ſhould marry her Servant, which might be Evidence for the Court to believe ſhe was drawn into it. It has been objected, that this Bill is brought for recovering a Penalty; but that is taking it wrong, for it is only the Damages that have been adjuſted and agreed on between the Parties themſelves; and if in an Action at Law upon a Promiſe of Marriage the Plaintiff had recovered ſo much Damage, the Court would not have relieved againſt it. In this Caſe the Court made a Decree that the Plaintiff ſhould have the 500 *l.* and Intereſt from a particular Time, with Coſts. *March* 1, 1738. *Atkins* and *Farr*, at *Lincolns-Inn Hall, MS. Rep.*

29 *Car.* 2. *c.* 3.

Court of Chancery on the Petty-Bag Side.

1. THE Plaintiff gets Judgment in the Petty-Bag, after which he is ſtopped by an Injunction for two or three Years, ſo that the Plaintiff in the Judgment could not regularly ſue out Execution without a *Sci. Fa.* moved that the Plaintiff at Law might, under theſe Circumſtances, ſue out Execution without a *Sci. Fa.* and not ſuffer by the Act of the Court. But *King* C. ſaid, he would not alter the Courſe of the Court, but would take Care to preſerve it; and it being above a Year and a Day ſince the Judgment obtained, he ordered the Plaintiff to ſue out a *Sci. Fa. Hil.* 1729. *Hodgſon* and *Earl of Warrington, MS. Rep.*

3 *Will. Rep.* 35, 36. *Hodſon* (of the Six Clerks Office) and *the Earl of Warrington, Hil. Vacat.* 1729. S. C. and P. The *Editor* by way of Note ſays, Q. whether in this Caſe the Plaintiff *Hodſon* could not have taken out Execution, and continued it by *Vicecomes non miſit breve*, agreeably to what was ſaid by the Court of *B. R.* in the Caſe of *Booth* and *Booth, Salk.* 322.

CAP. XXVIII.

Creditor (a) and Debtor.

(a) To make a Plantation in *Barbadoes* liable to a Debt contracted *here*, it was ſaid, the Method is by *Procuration* from *hence* under the Seal of the Mayor of *London*, and getting that recorded *there*; or an Acknowledgment of the Debt by the Owner of the Plantation *upon the Place will do it. Trin.* 1687. *Vide* 1 *Vern.* 460. *Noel* and *Robinſon.*

(A) How far Creditors are favoured in Equity.
(B) Concerning Agreements between Debtor and Creditor.
(C) Concerning a Proviſion by Deed or Will for Payment of Debts, &c.
(D) The Order and Manner in which Debts ſhall be paid.
(E) Compoſition of Debts (a).
(F) What Conveyance or Diſpoſition ſhall be fraudulent as to Creditors.
(G) Where there is Money due on two Contracts, and a general Payment is made, to the diſcharging of which Contract ſuch Payment ſhall be applied.

(a) *Vide* (E) P.

(A) How far Creditors are favoured in Equity (a).

(a) The Teſtator ſubjected his *real* and *perſonal* Eſtate to the Payment of his Debts, and his perſonal Eſtate alone not being ſufficient to diſcharge all his Debts, the Queſtion was, whether under theſe Circumſtances the Teſtator's Widow ſhould retain her *Paraphernalia*; and Lord Chan. decreed that another Fund (*i. e.* the *real* Eſtate) being ſubſtituted in Aid of the Perſonal, the Widow ſhould be allowed to retain her *Paraphernalia*, which are *not to be applied but in Caſe of Creditors*, and *of Neceſſity*. *Mich.* 1 *Geo.* 2. (*b*) *Bingham* and *Erneley*, *MS. Rep.*——Another *MS. Rep.* S. C. and P. (*b*) *Q.* If the Term and Year is right.

1. TENANT in Tail ſuffers a Recovery to let in a Mortgage of 500 Years, and then limits the Land to the old Uſes, and makes his Will, and *deviſes all his Lands for Payment of his Debts.* The Court thought that the Equity of Redemption ſhould be Aſſets to ſatisfy Creditors, *or* a ſubſequent Grantee of an Annuity.——Note; *The Redemption was limited to him, his Heirs* or *Aſſigns. Hil.* 1691. *Foſſet* and *Auſtin*, *Prec. in Chan.* 39.

But in this Caſe it was held, that if a Man who had Power to raiſe Money dies in Debt, having made no Appointment for raiſing it, the Creditors *cannot* make this Aſſets, and raiſe the Money purſuant to the Power; but in the Caſe in Queſtion the Money was appointed to be raiſed, which made the Difference. *Ibid.*

2. *J. S.* upon his Marriage with *M.* veſted a Term in Truſtees, *upon Truſt to raiſe* 3000 l. *for younger Children*, and 3000 *l. for ſuch Uſes and Purpoſes as he ſhould appoint.* He appoints 3000 *l.* to be raiſed for his Daughter, and the other 3000 *l.* he appointed to be raiſed, and by his Will gave the laſt 3000 *l.* to his Daughter alſo, and died. The *Creditors brought a Bill to have the laſt* 3000 l. *applied as Aſſets towards Payment of their Debts.* Decreed *accord'*, for *J. S. having appointed it to be raiſed, it was in the Nature of his perſonal Eſtate*, and the Debts ſhould take Place before the Legacy given to his Daughter. *Hil.* 1704. Lord *Cornwallis*'s Caſe, 2 *Freem. Rep.* 279.

For *Defendant*, who was Uncle and Heir at Law to *A.*'s Son, and who claims the 4000 *l.* as real Eſtate deſcended to him, was cited by Mr. *Vernon* the Caſe of *Whittick* and *Jermin*, *Temp. Hale* C. B. which was the firſt Caſe where *Truſt Money to be laid out in Lands*, was *held to be real Eſtate.*—— *Atkins* and *Atkins Temp. Jefferies*; and

3. 4000 *l.* was put into Truſtees Hands upon the Marriage of *A.* with *B. to be laid out in Lands to be ſettled upon the Huſband for Life*, Remainder *to the Wife for Life for her Jointure*, Remainder *to the firſt*, &c. *Son of the Marriage in Tail Male*, Remainder *to the Heirs of the Body of the Huſband*, Remainder *to his right Heirs in Fee.* The *Wife dies, leaving Iſſue a Son*, and *then the Huſband dies before the Money was laid out in Land*, and *deviſes all his Eſtate both real* and *perſonal to Truſtees during the Minority of his Son, and for his Benefit*; and *in Caſe the Son dies before* 21, then *he gives ſeveral Legacies*, and *the Reſidue of his perſonal Eſtate to Charitable Uſes*, &c. The *Son died before* 21; the *Creditors bring a Bill againſt A.'s Executors*, and *his Brother, who claims the* 4000 l. *as real Eſtate*, and *not ſubject to Debts by ſimple Contract*, ſuggeſting the *want of perſonal Aſſets to pay his Debts, without the* 4000 l. *be taken as Money, there being left no Iſſue of the Marriage*, and *the Whole would have veſted in* A. *if he had outlived his Son*, &c. and the *Conſideration of the Marriage Agreement extends no further than the Iſſue of the Marriage*, and *not to the general Heir of the Huſband*, &c. *Harcourt* C. would not

ſuch Truſt Money ſhall be taken as real Eſtate, and *ſhall go to the Heir*, and *not to the Executor*, though *the Articles be ſilent as to the Remainder in Fee*; and *the Limitation of the Articles went no further than the Iſſue of the Marriage.* So a *Wife ſhall have Dower of ſuch Truſt Money*, and a *Huſband ſhall be Tenant by the Curteſy*, &c. But *Harcourt* C. did not think the Caſes cited came up to the principal Caſe; the firſt Caſe was in *Favour of the Iſſue of the Marriage*, and *not for a* collateral *Heir*; and in the ſecond Caſe the Diſpute was *between the Heir* and *the Executors*, but *not of Creditors.*——So in *Dower* and by *Curteſy* it has only been carried *againſt Executors*, and that does not come up to the Caſe of *Creditors. Ibid.*

not now give his Opinion, if the 4000 *l.* ſhould be taken in Equity to be real Eſtate againſt the Creditors by *ſimple* Contract for the Benefit of a *collateral* Heir at Law, but referred the Account of the perſonal Eſtate of *A.* to the Maſter, to ſee if that be ſufficient to pay the Debts by *ſimple* Contract; for if ſo, then his Lordſhip ſaid, this Point cannot come in Queſtion. 13 *July*, 13 *Ann. Fulham* and *Jones & al'*, *Viner's Abr.* Tit. *Creditor and Debtor*, (A) *Ca.* 18.

4. A Bill *by a Judgment Creditor to open a Decree of Foreclоſure to which Suit he was not a Party*, ſuggeſting *Fraud* and *Contrivance between Mortgagor* and *Mortgagee to cheat him of his Debt.* The *Mortgagee pleaded the Decree of Foreclоſure*, and *Purchaſe of the Equity of Redemption*; and by *Anſwer denies the Fraud*, but *admits he had Notice of the Judgment when he brought his Bill to foreclоſe*, but *did not know the Perſon who had got Judgment*, nor *where to find him*, and *for that Reaſon did not make him a Party* to the Suit. The *Mortgagor* by his *Anſwer admits the Mortgage, but ſays he was in Priſon at the Time of the Foreclоſure*; but owns he employed a Solicitor to appear for him, *&c. that being very poor and neceſſitous*, and *in Priſon, he was prevailed on to aſſign his Equity of Redemption for* 20 *Guineas, tho' the Eſtate is worth a great deal more. Per Cowper* C. Since the *Mortgagee had Notice of the Judgment before the Foreclоſure* and *Purchaſe of the Equity of Redemption*, the Plaintiff may go before the Maſter, and be at Liberty to *ſurcharge* or *falſify* the *Mortgagee's* Account, but the *Mortgagee is not to account for the Profits ſince the Decree of Foreclоſure*; and *Plaintiff being a Judgment Creditor*, and *not a Party to the Bill of Foreclоſure, may redeem. Mich.* 2 *Geo. Bird* and *Gandy*, *Ibid.* (A) *Ca.* 20.

Note; In this Caſe the *Plaintiff* being an obſcure Perſon, was ordered *to give Security to anſwer Coſts in Caſe he did not redeem. Ibid.*

5. A Bill was brought for a Sale of Defendant *F.*'s Eſtate for Satisfaction of Creditors by Mortgages and Judgments. *C.* a Papiſt profeſt, had a Mortgage for 2400 *l.* upon the Eſtate prior to Plaintiff's Mortgage, and he had alſo a Judgment ſubſequent to Plaintiff's Mortgage, and to ſeveral other Judgments, and to other Creditors; the Queſtion was, among the Creditors, who ſhould have the Priority in Payment, the Eſtate not being ſufficient to pay off all the Mortgages and Judgments. *Per Parker* C. The Mortgage to *C.* being a Papiſt profeſt, is void by the *Stat.* 11 & 12 *W.* 3. for that is an Intereſt in Land; but as to the Judgment, though a Papiſt cannot take out an *Elegit*, for that gives him an Intereſt in the Moiety of the Debtor's Lands, yet if Lands are decreed to be ſold for Payment of Debts, Equity ought to aſſiſt the fair Creditor (though a Papiſt profeſt) in obtaining a Satisfaction for his Debt; and when the Land is ſold and turned into Money, why ſhould not he be paid his Debts out of that Money as well as another Perſon? Ordered all the Lands to be ſold, and an Account ſtated of the Debts, and their Priority; and if there be ſufficient to pay all the Creditors, then the Money to be ſo applied; but if there be a Deficiency, then, upon the Maſter's Report the Court to determine as to the Preference of the Creditors. *Hil.* 6 *Geo.* 1. *Lowther* and *Fletcher & al'*, *Viner's Abr.* Tit. *Creditor and Debtor*, (E) *Ca.* 4. 3 *Will. Rep.* 46. S. C. *Hil.* 1719. *in a Note.*

Mr. *Viner* ſays, another Point was ſtarted, *i. e.* that one of Judgment Creditors had ſued out a *Ca. Sa.* and taken Defendant *F.* in Execution, to which he ſays, *Quære*, if this Creditor ſhould be let in, in a Court of Equity, to have a Satisfaction out of the Money raiſed by Sale, unleſs he will diſcharge the Execution at Law, and deliver the Defendant out of Priſon, for by the *Ca. Sa.* this Creditor has concluded himſelf from taking out any other Execution as long as Defendant lives; but indeed, if Defendant dies in Priſon, after his Death Creditor may ſue out an *Elegit* or *Fi. Fa.* but as long as his Body remains in Execution, no other Execution can be ſued out againſt him. *Ibid.*

6. *J. S.* made a *Jointure* upon *M.* his Wife, *after Marriage*, of Lands which were his Father's, *in Bar of Dower*, and the Father joined

joined therein; the Uſes in the Settlement were to the *Uſe of the Father for Life*, then *to the Mother for Life*, Remainder *to the Uſe of* J. S. *for his Life*, Remainder *to* M. *his Wife* (the Defendant) *for her Life in Bar of Dower*, &c. *J. S. deviſes his Lands in Truſt for Payment of his Debts*, and died, *living the Father*, and then a *Judgment Creditor* (and who was Adminiſtrator with the Will annexed to *J. S.* as being the largeſt Creditor, the Truſtees under his Will being deceaſed, or refuſing to act) brings a Bill againſt the Widow and others of *J. S.*'s Creditors, to have an Account of the Eſtate, &c. The *Wife by her Anſwer would wave the Settlement, as being made after Marriage, and not to take Effect in the original Creation of it immediately upon the Death of her Huſband, as the Statute about Jointures requires*, for the Father might outlive *J. S.* and *in Fact did ſo*, and ſo might the Mother; and tho' they are ſince dead, yet *that* will not make the Jointure more binding; ſhe therefore inſiſted upon *Dower*. But *Parker* C. ſeeing that if ſhe waved the Settlement the *Lands would go to the Heir at Law, not ſubject to the Payment of any Debts, ſince it never was Part of the Teſtator's Eſtate, the Father outliving him*, and that if ſhe was to have *Dower*, the Aſſets would fall ſhort; and that what the Wife did was in Favour of the Heir at Law, to the Prejudice of the Creditors. His *Lordſhip* decreed that *ſhe ſhould take the Eſtate for her Life under the Settlement, but that ſhe ſhould aſſign it over in Truſt for the Creditors, who ſhould convey to her a Third of her Huſband's Land for her Dower, free from Incumbrances.* *Eaſt.* 8 *Geo.* 1. *Mills* and *Eden*, *Lucas's Rep.* 487.

His Lordſhip ſaid, that this was no more than what was agreeable to what the Court *does* in other Caſes; as in decreeing a *Judgment Creditor*, who has his Election at Law to reſort for his Satisfaction to either *real* or *perſonal*, to make ſuch an Election as *ſimple Contract Creditors* may not be defrauded. *Ibid.* 489.

7. A Creditor cannot ſue one *Co-executor* alone without the other, *nor* as Reſiduary Legatee. *Hil.* 10 *Geo.* 1. *Scurry & Ux'* and *Morſe*, 2 *Mod. Ca. in Law and Eq.* 89.

Note; *In this Caſe there was no Deviſe of the Land for Payment of Debts.*

8. *A.* ſeiſed in Fee, and indebted to ſeveral by *Bond*, in which he bound himſelf and *his Heirs*, *deviſed his Lands to* B. *for Life*, Remainder *to the firſt*, &c. *Sons of* B. *in Tail Male*, Remainder *over*, with a Power to *B. the Tenant for Life*, to *leaſe for one, two or three Lives, at the old Rents, which were very ſmall and Conventionary Rents*, the Lands lying in the Weſt of *England*. *B.* took the Profits, and raiſed conſiderable Sums by Fines on Leaſes. On a Bill by the *Bond Creditors*, the Maſter of the Rolls decreed the perſonal Eſtate to be firſt accounted for, and then *B.* to account for the Rents and Profits of the real Eſtate.—*Macclesfield* C. on Appeal, held it ſufficient that *B. keep down the Intereſt*, and that as *A.* died ſeiſed of ſome Lands let for Lives at *Conventionary* Rents, and others at Rack-Rents, he directed firſt the Sale of the Lands let at Rack-Rents, and if thoſe not ſufficient for Payment of the Debts, then ſo much as is requiſite of the Life Lands, and to account for the Fines of ſuch of thoſe Lands as ſhall be ſold, to be taken as Part of the Purchaſe Money; but if the Lands at Rack-Rent be ſufficient, then *B.* not to account for the Fines, becauſe the Deviſee in Remainder will have the ſame Benefit of raiſing what Money he can by Fines, and ſo every one in his Turn will enjoy the like Liberty. *Trin.* 1724. *Manaton* and *Manaton*, 2 *Will. Rep.* 234.

9. Where Debts by *Specialty*, which are a *Lien* at Law on the *real* Eſtate, are *diſcharged out of the perſonal Aſſets by Executors in Eaſe of the Lands*, the Creditors by *ſimple Contract* ſhall ſtand in the Places of the Creditors by *Specialty* to have *their Debts ſatisfied out*

of the Lands; and the Court decreed the Lands to be ſold for that Purpoſe, and the Infant Heir to join in a Conveyance within ſix Months after he comes of Age. *Trin.* 11 *Geo.* 1. *Charles* and *Andrews*, 2 *Mod. Ca. in Law and Eq.* 151, 153.

10. Bill *by Creditors of Teſtator*, and *one of the Reſiduary Legatees*, againſt *a Debtor to the Teſtator's Eſtate*, the *Executors* and *the other Reſiduary Legatee*, to *compel the Debtor to pay his Debt to ſatisfy their Demands*. And *per* Lord Chan. The Bill is totally improper and inconſiſtent with the Principles of Law, and the Rules of this Court; *contra* by an Executor, the Repreſentative of the Teſtator. The whole Management of the Eſtate belongs to the *Executor*, and the Right of it is veſted in him, and not to be taken out of him by *Creditors* or *Legatees*. If he releaſes and is *ſolvent*, it is a *Devaſtavit*, and he is anſwerable *himſelf* for the Sum releaſed to the Creditors and Legatees. If *Colluſion* and *Inſolvency*, it may be proper to come here for Satisfaction againſt the Debtor, but it muſt be always upon ſome ſpecial Caſe, which is not pretended either by the Bill or at the Bar; and for the many Inconveniences that would attend that Method of Proceeding, (*except a Caſe particularly circumſtanced*) the Bill muſt be diſmiſſed, *but without Coſts, becauſe it might have been demurred to. Mich.* 11 *Geo.* 2. *Bickley & al'* and *Donington*, *MS. Rep.*

Vide the Caſe of *Franklin* and *Fern*, *P.* 254. *Ca.* 14.

11. One owes a Debt by *ſimple* Contract; ſix Years paſs, whereby the Debt is barred, after which the Debtor by Will *charges his Lands with the Payment of his Debts* (*a*). Lord Chan. *King* and *Raymond* C. J. obſerved, that it had been held, that ſuch Will (*b*) revives the Debt, in Regard the ſame, though the ſix Years are paſſed, continues ſtill to be a Debt in Conſcience. *Mich.* 1730. *Jones* and *Com' Staffford & al'*, 3 *Will. Rep.* 79, 89.

(*a*) *Vide Salk.* 154. and 2 *Vern.* 141. *Gofton* and *Mill.*

(*b*) Q. If a Man were to deviſe his *perſonal* Eſtate in Truſt to pay his Debts, whether would this as creating a Truſt revive a Debt barred by the Statute, or would not ſuch Deviſe be merely void, as ſaying no more than the Law of Courſe ſays, (*viz.*) that a *Man's perſonal Eſtate ſhall pay his Debts?* And if the Teſtator ſhould ſay, that his perſonal Eſtate ſhould *not* be liable to pay his Debts, *or* that his *Book* Debts ſhall be paid thereout before his *Bonds*, ſuch Will would be plainly void. *Ibid.* 89. *in a Note by the Editor.*

12. A Legacy of 1000 *l.* was bequeathed to a *Feme Sole Infant*, *charged upon Land*, and *payable at* 25. She took a Huſband, *who aſſigned the ſame during her Infancy to* J. S. *in Conſideration of* 750 l. and *afterwards ſhe attained her Age of* 25. Lord Chan. *King* decreed the Aſſignment good, and that *J. S.* was intitled thereto, with *Intereſt from the Wife's attaining the Age of* 25. (*c*). *Trin.* 1731. *Duke of Chandos* and *Talbot*, 2 *Will. Rep.* 603, 609.

Note; The S. C. is in *Sel. Ca. in Chan.* 24. but S. P. does not appear.—*Vide* Tit. *Aſſignment*, *P.* 89. *Ca.* 13. and the Notes there.

(*c*) It was inſiſted againſt the Aſſignment, that it was made for leſs Money than was really due, *viz.* 750 *l.* inſtead of 1000 *l.* Anſwered, that the Intereſt of the 750 *l.* from the Time it was paid to the attaining 25. and the Hazard of the Wife's dying before that Age, made it a dear Bargain; and that with Regard to any *Judgment* or other Creditors of the Huſband, as *they claimed under him*, and *had no ſpecifick Lien on the Legacy*, they could not be in a better Condition than he himſelf was. *Ibid.*

13. *A.* the Father and *B.* the eldeſt Son reſettle an Eſtate *to the Uſe of* A. *for Life* as to Part, then *to Truſtees for* 200 *Years*, *to raiſe* 1100 l. *to be paid to* C. *the ſecond Son within ſix Months after* A.'s *Death*, or *as ſoon after as the ſame could be raiſed*, and *in the mean Time Intereſt from* A.'s *Death for his Maintenance*, Remainder to *B.* the *Eldeſt*, *&c.* *C.* died indebted, and two Years after him *A.* died, from whom a good Eſtate came to *B.* The Creditors of *C.* cannot have this Portion raiſed, the *Contingency upon which it was payable never happening.* 24 *May* 1736. *Bradley* and *Powell*, *Ca. in Eq. Temp. Talbot* 193.

Vide Bickley & al' and *Donington, P.* 253. *Ca.* 10.

14. Where there are *proper Perſons to get in the Eſtate of another*; Chancery will not ſuffer the *Creditors of the Teſtator to bring a Bill in order to get in that Eſtate*; but *if the Executors will collude with a Debtor, there is no Doubt but a Creditor may bring his Bill in order to take Care of the Eſtate, and charge the Executors with ſuch Colluſion. Per Parker* J. who ſate for Lord Chan. *Hardwicke, Eaſter* 1740. *Franklin* and *Fern*, *Barnard. Chan. Rep.* 32.

(B) Concerning Agreements between Debtor and Creditor.

Vide *Compoſition, P.*

1 *Vol. Eq. Ca. Abr. P.* 298. *Ca.* 2. *Mich.* 1700. *Lord Caſtleton* and *Lord Fanſhaw* is not S. P.

1. *J. S.* by Will deviſes the Surplus, after Debts and Legacies paid, to his Wife, and makes *A.* and *B.* his Executors. The Creditors *fearing want of Aſſets*, compound with the Executors for leſs than their full Debts, but *Aſſets afterwards came in.* On a Bill by the *Wife* for an Account of the Surplus, the Executors would have let in the Creditors to their full Debts, which would have reduced the Surplus to little. But Lord Chan. ſaid, he would not ſet aſide the *Compoſition* the Creditors had made, they having no Bill for that Purpoſe, and only come in before the Maſter, and therefore muſt abide by the Compoſition. *Mich.* 1699. *Lord Caſtleton* and *Lord Fanſhaw*, *Prec. in Chan.* 99, 100.

Another Point in this Caſe was, whether the Creditors ſhould be ſent to Law to recover their Debts, and the *Wife* be ordered to make a Defence in the Executors Place, and ſo be enabled to bar them by Pleading the Statute of Limitations, which the Executors would not do. But Lord Chan. ſaid, he could not conſent that the Statute of Limitations ſhould be pleaded, therefore their Debts muſt be paid. *Ibid.* 100.

2. *A.* was *Executor* and *Deviſee* in the Will of *J. S.* and received the *perſonal*, and the Rents, *&c.* of the *real* Eſtate, but in a Suit in Equity touching the Will, *being decreed to be but a Truſtee, he was ordered to account*, and on an Account was reported to be indebted to *B.* the *Defendant* and *Ceſtuy que Truſt* in 4000 *l.* The Decree was affirmed *in Dom' Proc'*; afterwards *A.* went beyond Sea, and being there, a *Compoſition was made, by which* A. *was to pay a ſmall Sum to B.* and *B. was to indemnify* A. *from the Teſtator's Creditors. A.* being threatned with Suits from ſome of the Teſtator's Creditors, brought a Bill againſt *B.* to indemnify him, *&c.* And *Macclesfield* C. decreed that *B.* execute his Part of the Agreement, and indemnify *A.* againſt the Teſtator's Debts. *Mich.* 1721. *Pollen* and *Sir John Hubard*, 1 *Will. Rep.* 757.

His Lordſhip ſaid, it muſt be admitted to have been in the Power of *B.* to make a *Compoſition of this Demand*, and to releaſe (if he had pleaſed) the whole Debt; that it was very lawful either for *A.* to aſk a Compoſition, or for *B.* to grant it, wherefore all that Equity ought to guard againſt is, if *no Fraud be uſed in obtaining the* (Releaſe or) *Compoſition*; that this Caſe is ſtronger, as it was *B.* who firſt propoſed a Compoſition. Beſides, *A.* having gone out of the Reach of Juſtice, it might be for the Benefit of *B.* to accept of this, tho' a ſmall Compoſition. His Lordſhip took Notice, that there had been a *fair Repreſentation on the Part of* A. and a *juſt Compliance by* B. and *in a great Meaſure executed by* A. therefore decreed, *&c. Ibid.* 752.——*Vide* (E) *Ca.* 3.

3. Equity on a Petition and with the Conſent of the Wife and her Truſtees, (who had about 5 or 6000 *l.* Portion of hers in their Hands, in order to compound with the Husband's Creditor) will order *Part* of the Truſt Money to be paid to the Creditors, in Diſcharge of the Huſband's Debts. Some of the Creditors at executing the Deed of Compoſition took private Securities, *poſt* dated, and for Part of their Debts, beſides their Share with the Reſt of the Creditors. His Honour thought this underhand Dealing a Fraud on the Wife, on the

Truſtees, and on the Court, therefore directed all ſuch Securities to be ſet aſide, and delivered up by the Creditors to the Huſband. *Mich.* 1721. *Middleton* and *Lord Onſlow & al'*, 1 *Will. Rep.* 768.

(C) Concerning a Proviſion by Deed or Will (a) for Payment of Debts, &c.

(a) *Vide* Tit. *Deviſe, P.*

1. S. Having ſeveral young Children, and being much in Debt, conveyed Part of his Lands *in Truſt for Payment of his Debts*, and *by another Deed conveyed other Part to Truſtees for Maintenance of his Children.* This *laſt* Conveyance being *voluntary*, *was declared void as to Creditors*, but *good againſt* S. *himſelf*, and therefore if his *Creditors* ſhould fall upon thoſe Lands for a Satisfaction of their Debts, and thereby ſtrip the *Children* of their Maintenance, the Children ſhould have a Recompence out of the Reſidue of the Eſtate which *S.* had reſerved to himſelf for his own Maintenance; and compared it to the Caſe where *Creditors that have a Lien upon the Land take their Satisfaction out of the perſonal Eſtate, which was liable to other Creditors of an inferior Nature, who have no Lien upon the Land*; *theſe Creditors* in Equity *ſhall ſtand in the Place of the other Creditors who had a Lien upon the Land*, and *have a Satisfaction out of that in their Stead*; this Caſe is the ſame, for tho' the Conveyance was voluntary in the Father, yet *he is bound by* Nature *to provide for his Children*, and *it is a ſort of a Debt. Per Cowper* C. *Mich.* 4 *Geo. Sneed & al'* and *Lord and Lady Culpepper, & econtra, Viner's Abr.* Tit. *Creditor and Debtor*, (D) *Ca.* 7.

2. Lands given in Truſt, *or* deviſed to pay Debts and Legacies, ſhall be deemed in Equity as Money in Reſpect to Creditors and Legatees, but not in Reſpect to the Heir or Reſiduary Legatee. 2 *Mod. Ca. in Law and Eq.* 171.

3. A Will begins, *As to all my worldly Eſtate, my Debts being firſt paid*, I give, *&c.* the *real* Eſtate is liable to the Debts, nothing being deviſed till the Debts are paid. *Hil.* 1730. *Harris* and *Ingledew*, 3 *Will. Rep.* 91.

4. *J. S.* by *Will charges all his worldly Eſtate with his Debts*, and dies ſeiſed of *Freehold* and *Copyhold Eſtate, which he particularly diſpoſes* by the Will; the *Copyhold, tho' not ſurrendred to the Uſe of the Will*, yet ſhall be applied to the Payment of the Debts *pari paſſu* with the *Freehold.* Decreed by *Jekyll*, Maſter of the Rolls, *Hil.* 1730. *Harris* and *Ingledew*, *Ibid.* 91, 96.

5. A *Deviſe of one's Land after Debts paid*, is a *Charge* of the Debts on the Land. *Trin.* 1735. *King* and *King and Ennis*, *Ibid.* 358, 359.

(D) The

(D) The Order and Manner in which Debts ſhall be paid (a).

(a) In Caſe of *legal* Aſſets, *all* Creditors ſhall be paid according to the *legal* or *equitable* Lien they have on the Aſſets *in a Courſe of legal Adminiſtration. MS. Notes.*——If *A.* has a Jointure of Leaſehold Eſtate, with *Covenant that it is of a conſiderable Value*, and *the Term is aſſigned to her Truſtee*, yet ſhe ſhall *not hold the Lands againſt other Creditors till the Deficiency in Value is made up*, but muſt come in ratably with them, *ſuch Covenant not being any ſpecific Charge on the Lands. MS. Notes.*

1. *A.* Was indebted 1500 *l.* whereof 500 *l.* was ſecured by Mortgage, and the Reſidue by Bond; *A.* before his Death *made a Leaſe of all his Lands to Truſtees for Payment of his Debts*, which was worth about 1200 *l.* *A.*'s Heir after his Death ſells as much Land as pays 1400 *l.* whereof the Mortgage was Part, (which was more than the Value of the Truſt Eſtate). *P.* who was a Creditor for the other 100 *l.* brought his Bill againſt the Heir and the Truſtees to have his Debt ſatisfied out of this Truſt Eſtate. It was inſiſted for the Heir, that having paid as far as the Value of the Truſt Eſtate did extend, he ought not to have his Lands charged any further. But it was ruled by Lord Chan. That ſince the Truſt Lands were not ſufficient to ſatisfy the whole Debts, the *Heir*, and the *Truſtees* and the *Mortgagee*, ſhould not juggle together to cheat other Creditors by paying the Mortgage firſt off; but on the contrary, the Truſt Lands ſhould be applied in the firſt Place for the other Debts, *becauſe the Mortgagee could be at no Damage, being ſecured by this Mortgage*; but on the contrary, if the Mortgagee ſhould be firſt ſatisfied, the other Creditors might loſe their Debts, and ſo the Plaintiff in this Caſe had Relief for his Debt. *Eaſt.* 1680. *Povy*'s Caſe, 2 *Freem. Rep.* 51.

2. *A.* is Tenant for Life, ſubject to a Mortgage of 15000 *l* to *B.* Remainder to *J. S.* in Fee; *A.* acknowledges a Statute to *C.* for 500 *l.* and afterwards *A.* ſells his Eſtate for Life to *J. S.* for 3000 *l. who had no Notice* of the Statute to *C.* The 3000 *l.* was borrowed by *J. S.* of *D.* who likewiſe paid off the 15000 *l.* and took an Aſſignment of the Mortgage for the 15000 *l.* and alſo charged with the 3000 *l.* and *J. S.* covenanted to pay the Money, and the *Equity of Redemption is limited to him*, and *D. covenanted on Payment to aſſign to J. S.* or *as he ſhould direct. J. S.* acknowledged a Statute to *E.* who had no Notice of the 500 *l.* Statute to *C.* and after deviſes the Lands to *A.* and *charged with Debts and Legacies.* Decreed that *B.* muſt come in laſt of all even after Debts and Legacies; and affirmed by *Lord Keeper*, with the Aſſiſtance of *Trevor* J. C. and *Blencowe* J. and compared it to the Caſe of a third Mortgagor buying in a firſt. *Eaſt.* 1701. *Blake* and *Hungerford*, *Prec. in Chan.* 158.

3. An *Incumbrance by Judgment being a Lien on the Land*, if *made prior to the Grant of an Annuity*, ſhall be preferred before the Grant of the Annuity, *becauſe his Charge on the Land is poſterior. Per* Lord Chan. *Eaſt.* 7 *Ann.* in the Caſe of *Daviſon* and *Goddard*, *Gilb. Eq. Rep.* 66.

4. Where a Perſon who has a Bill of Sale of Goods for ſecuring a Sum of Money lent, ſhall be preferred to a Judgment Creditor. *Vide* the Caſe of *Buckwel & al'* and *Roiſton*, *P. Ca.*

Gilb. Eq. Rep. 32. S. C. *in totidem verbis.*

5. *J. S.* a Freeman of *London*, by Will (made about 24 Years ſince) deviſes one Third Part of his perſonal Eſtate to *L.* his Wife, and the other two Thirds to his Children, and dies, leaving only

two Daughters *C.* and *D.* who afterwards died inteſtate and unmarried. *L.* poſſeſſed herſelf of the whole Stock, and carried on the Trade, and ſometime after married *E.* who alſo employed the whole Stock in Trade, without making any Diſtribution to the Children. On a Treaty of Marriage between *G.* and *C.* the Daughter, a Computation was made of what Fortune would be coming to *C.* and the ſame appearing to be ſhort of what *G.* expected, *E.* agreed by Parol to make up her Fortune 4000 *l.* and paid 2500 *l.* of it. *E.* about four Years after the Marriage makes his Will, and entred into a Bond to *G.* for Payment of the 1500 *l.* but kept the Bond himſelf, but ſhewed both the Bond and Will to *G.* whereby he had likewiſe given *G.* and his Wife a Legacy; and ſometime after *E.* died indebted to ſeveral Perſons; the Agreement by *E.* to pay the 4000 *l.* and the Execution of the Bond, was proved. *Harcourt* Lord Chan. thought the Bond made ſo long after the Marriage as *four* Years could not be tacked to the Agreement, ſo as to make it any Evidence in Writing of that Agreement, eſpecially on the Circumſtances that the Bond was then made, without any Application of *G.* and *C.* and was not delivered into his or her Cuſtody; and that it being made at the Time the Will was, and ſhewn to them with his Will, and after his Death found with his Will, he looked on it only in Nature of a Legacy, and *voluntary* as againſt his own Creditors, and to be *poſtponed* to them. *Trin.* 1713. *Looffes* and *Lewen*, *Prec. in Chan.* 370, 372.

6. Executors in *Equity* as well as at *Law* may prefer any Creditor *in equal Degree*, or after an Action at Law brought by one Creditor may confeſs Judgment to another. At the Rolls, *Mich.* 1715. *Waring* and *Danvers*, 1 *Will. Rep.* 295.

7. *J. S.* by Will *deviſes his Lands for Payment of his Debts*; *Bonds* and *ſimple* Contract Debts ſhall be paid equally, but if by Will *he only charges his Land with the Payment of his Debts*, ſo that the *Lands deſcend charged with the Debts*, (and conſequently are *legal Aſſets by Deſcent as to the Bond Creditors*, and *charged only in Equity by the Will as to ſimple Contracts*) the *Bonds* ſhall be preferred before the *ſimple* Contract Creditors (*a*). Decreed *per Parker* C. *Eaſt.* 1718. *Freemoult* and *Dedire*, *& econtra* 1 *Will. Rep.* 429.

(*a*) But if the *Heir* before any Action brought has ſold the Lands, and then the Bond Creditors had brought their Actions, they ſhould have been paid only their Share out of the Aſſets; and it is obſervable, that by the expreſs Words of the Statute of 3 *&* 4 *W. & M. cap.* 14. (of fraudulent Deviſes) *where there is any Deviſe* or *Appointment by a Will of Lands for Payment of Debts* or *Childrens Portions, according to an Agreement before Marriage*, other than the Heir at Law, *ſuch Will ſhall be of Force. Per* Lord Chan. *Ibid.* 431.

8. Whether a Judgment Creditor may as well ſecure himſelf by buying in a prior Incumbrance, as a ſecond Mortgagee may by taking an Aſſignment of the firſt Mortgage. *Vide P. Ca.*

9. The late Earl of *Winchelſea* died ſeiſed of ſome Lands in Fee, and conſiderably indebted by *Judgment* and *ſimple* Contract, and after the Death of the ſaid Earl, and before the Eſſoin Day of the next following Term, many of the Judgment Creditors delivered *Fi. Fa.* to the Sheriff, and took the Goods and Furniture in Execution, whereupon the *ſimple* Contract Creditors petitioned (for it did not come before the Court upon Bill) that the Judgment Creditors might be paid out of the Land, or at leaſt that as to ſo much as the Judgment Creditors had by taking it from the *perſonal* Eſtate exhauſted the ſame, they (the *ſimple* Contract Creditors) might ſtand in their Place, and be paid out of the Land. *Sed per Cur'*, The Rule of Equity is very juſt, but not applicable to the preſent Caſe: Here the Judgment Creditors have lodged their Writs of Execution with the Sheriff *in the*

ſame Vacation that the Party died, it *relates to the Teſte of the Writ as to all but Purchaſers*; and conſequently by Relation the perſonal Eſtate, of which the ſimple Contract Creditors would avail themſelves, as being in the Poſſeſſion of the Earl at his Death, was not ſo, being evicted from him in his Life-time by the Execution; and therefore the ſimple Contract Creditors ſeem to be without a Remedy, as to ſuch of the Aſſets as have been ſeized by theſe Executions. *Per Parker* C. *Hil. Vac.* 1719. *Finch* and *the Earl of Winchelſea*, 3 *Will. Rep.* 399. *in a Note by the Editor*, who ſays *ſed Quære.*

10. *A.* lent Money on Bond to *B.* who dying inteſtate, *C.* took out Adminiſtration to him; after which *C.* dying, *A.* took out Adminiſtration *de bonis non, &c.* to *B.* and it was determined (*inter al'*) that *A.* might out of the Aſſets of *B.* retain for ſuch Bond Debt contracted before he took out Adminiſtration; and tho' *A.* happened to die before he had made any Election in what particular Effects he would have the Property altered; yet the Court ſaid, it muſt be preſumed he would elect to have his own Debt firſt paid, and this being preſumed, there would remain no Difficulty as to altering the Property, for as the Executors of *A.* were to account for the Aſſets of *B.* they muſt on the Account deduct to the Amount of the Money lent by *A.* to *B.* At the Rolls, *Mich.* 1720. *Weekes* and *Gore*, 3 *Will. Rep.* 184. *in a Note.*

Ibid. 489. S.P. *per* Lord Chan. *King* in *Mills* and *Eden.*

11. Where a Man dies indebted by *Specialties* and *ſimple* Contract, and leaves both a *perſonal* and *real* Eſtate, this Court will not ſuffer the Debts by *Specialty* to be flung upon the *perſonal* Eſtate, and *that* being exhauſted, leave the Debts by *ſimple* Contract unſatisfied, the Land not being liable to pay them, but will decree the Debts by *Specialty* to be ſatisfied out of the *Land*, and the Debts by *ſimple* Contract out of the *perſonal Eſtate. Per Parker* C. *Mich.* 6 *Geo.* 1. *in Canc' in Caſu Blundell* and *Barker*, *Lucas's Rep.* 462.

12. Any *voluntary* Bond is good againſt an Executor *or* Adminiſtrator, unleſs ſome *Creditor be thereby deprived of his Debt*; but if the Bond be merely *voluntary*, a *real* Debt, tho' by ſimple Contract only, ſhall have the Preference. *Per Jekyll*, Maſter of the Rolls, *Lechmere* and *the Earl of Carliſle and Lechmere*, *Mich.* 1733. 3 *Will. Rep.* 211, 222.

13. *A.* having a Wife who lived *ſeparate* from him, afterwards courted and married another Woman *who knew nothing of the former Wife's being alive*; but it being diſcovered to the *ſecond* Wife that the *former* was alive, *A.* in order to prevail with the *ſecond* Wife to ſtay with him, ſome Years afterwards gave a Bond to a *Truſtee of the ſecond Wife to leave her* 1000 *l. at his Death. A.* died, *not leaving Aſſets to pay his ſimple Contract Creditors*; if this Bond had been given *immediately on the Diſcovery*, and as a Recompence for the Injury done the ſecond Wife, and *they had parted thereupon*, it had been good, and to be paid before any ſimple *Contract* Debt; but being given in *Truſt for the ſecond Wife, after ſuch Time as ſhe knew the firſt was living*, and *to induce her to continue with* A. this was worſe than a *voluntary* Bond, and decreed to be poſtponed to *all the ſimple Contract Creditors. Mich.* 1734. Lady *Cox*'s Caſe (*a*), *Ibid.* 339, 341.

(*a*) *Vide P. Ca.*

14. *J. S.* poſſeſſed of a Term of 1000 Years, articles to purchaſe the Inheritance, but died before a Conveyance made, having by Will given 3000 *l.* to his Daughter, and made his eldeſt Son Executor, who aſſigns the Term in Truſt to attend the Inheritance, and of which he takes a Conveyance in his own Name; afterwards the Son

acknowledges a Judgment to *A.* and mortgages the Inheritance to *B.* without taking any Notice, or making any Aſſignment of the 1000 Years Term, and died inſolvent. *A.* the Judgment Creditor of the Mortgagor, ſhall be firſt ſatisfied according to the Priority of Liens affecting the real Eſtate; then the *Mortgagee* ſhall be paid his Mortgage, and then the Daughter (being Adminiſtratrix to her Brother) is intitled to her Legacy of 3000 *l.* in Preference to the ſimple Contract Creditors. *Talbot* C. *Mich.* 1734. *Charlton* and *Low*, 3 *Will. Rep.* 328.

15. Reſolved by Lord Chan. *Talbot*, that if *J. S.* deviſes his Lands to Truſtees to pay all his Debts, and dies indebted by *Specialty* and *ſimple* Contract, and the Bond Creditors recover Part of their Debts out of the perſonal Eſtate, and afterwards they apply to be paid the Reſt of their Bond Debts out of the real Eſtate deviſed for that Purpoſe; in this Caſe, as the Teſtator intended all his Creditors ſhould be equally paid their Debts, the Bond Creditors ſhall not come in upon the Land until the ſimple Contract Creditors have received ſo much thereout as to make them equal in Payment with the Bond Creditors. *Trin.* 1734. in the Caſe of *Haſlewood* and *Pope*, 3 *Will. Rep.* 322, 323. And this his Lordſhip ſaid was what the Maſter of the Rolls had very rightly decreed on great Conſideration (*a*). *Ibid.*

(*a*) This ſeems to have been the Caſe of *Deg* and *Deg*, 2 *Will. Rep.* 416.

16. *A.* owes Money by *ſeveral Judgments* and *Bonds*, and dies inteſtate; his *Adminiſtrator pays the Judgments, and ſome of the Bonds*, and *pays more than the perſonal Eſtate comes to*; what the *Adminiſtrator paid on the Judgments muſt be allowed him*, but as to what he *paid on the Bonds*, he muſt come in *pro ratâ* only with the other Bond Creditors for a Satisfaction out of the Money ariſing by Sale of an Advowſon, which is *real* Aſſets. Decreed *per Talbot* C. *Mich.* 1735. *Robinſon & al'* and *Tonge*, *Dunn & al'*, 3 *Will. Rep.* 398, 400.

(E) Compoſition of Debts (*a*).

(*a*) *Vide* (B) P.

1. *J. S.* by Will *deviſes the Surplus, after Debts and Legacies paid, to his Wife*, and makes *A.* and *B.* his Executors. The Creditors *compound* for leſs than their full Debts, from an Apprehenſion of Aſſets; but Aſſets afterwards came in. On a Bill by the Wife for an Account of the Surplus, the Executors would have let in the Creditors to their full Debts, which would have reduced the Surplus to little. But the Court would not ſet aſide this Compoſition, the Creditors having no Bill for that Purpoſe. *Mich.* 1699. *Lord Caſtleton* and *Lord Fanſhaw* (*b*), *Prec. in Chan.* 99.

(*b*) *Vide* (B) P. 254. Ca. 1.

2. The Court of Chancery, with *Conſent of the Wife* and *her Truſtees*, who had about 5 or 6000 *l.* Portion of hers in their Hands, in order to a Compoſition with the Husband's Creditors, ordered Part of the Truſt Money to be paid to the Creditors, in Diſcharge of the Huſband's Debts. Some of the Creditors at executing the Deed took private Securities, *poſt dated*, &c. this underhand Dealing is a Fraud on the Wife, on the Truſtees, and the Court. *Per* his Honour, who directed all ſuch Securities to be ſet aſide, and to be delivered up to the Huſband. *Mich.* 1721. *Middleton* and *Lord Onſlow & al'*, 1 *Will. Rep.* 768.

(F) What

(F) What Conveyance or Diſpoſition ſhall be fraudulent as againſt Creditors.

Vide Tit. *Deviſe, P. Ca.* S. C. abridg'd.

1. ONE being in an undue Manner drawn in to execute a Conveyance of his Eſtate, after makes his Will, and thereby *deviſes all his Lands to be ſold for Payment of his Debts*; his Creditors may ſet aſide the Conveyance, *having a Right in Nature of an Equity of Redemption as the Teſtator himſelf had*, tho' urged that it was but in Nature of *a Choſe in Action*, and *not aſſignable*. *Hil.* 1700. *Blake* and *Johnſon*, *Prec. in Chan.* 142.

2. *S.* Having ſeveral young Children, and being much indebted, conveyed *Part of his Lands in Truſt for Payment of his Debts*, and *by another Deed conveyed other Part to Truſtees for the Maintenance of his Children*. This laſt Conveyance being *voluntary*, *was declared void as to Creditors*, and *ſtill liable to their Demands as before*, but *it was good againſt* S. *himſelf*, and *ſhould bind him*; and therefore if his Creditors ſhould fall upon *thoſe* Lands for a Satisfaction of their Debts, and thereby ſtrip the Children of their Maintenance, the Children ſhould have a Recompence out of the Reſidue of the Eſtate which *S.* had reſerved to himſelf for his own Maintenance; and compared it to the Caſe where *Creditors that have a Lien upon the Land take their Satisfaction out of the perſonal Eſtate*, *which was liable to other Creditors of an inferior Nature*, *who have no Lien upon the Land*; theſe Creditors in *Equity*, ſhall ſtand in the Place of the *other Creditors who had a Lien upon the Land*, and *have a Satisfaction out of that in their Stead*; this Caſe is the ſame, for tho' the Conveyance was *voluntary* in the Father, yet he is bound by *Nature* to provide for his Children, and it is a ſort of a Debt. *Per Cowper* C. *Mich.* 4 *Geo.* 1. *Sneed & al'* and *Lord and Lady Culpepper*, *& econtra*, *Viner's Abr.* Tit. *Creditor and Debtor*, (D) *Ca.* 7.

3. On the Marriage of the Defendant, her intended Huſband being under Age, and ſo incapable of making a Settlement, the Wife's Father gave a Bond for the Payment of 1500 *l.* on his making a ſuitable Jointure on her *without taking any Notice whatſoever of the Iſſue*; the Marriage took Effect, and the Huſband ſome Years after, on Payment of the 1500 *l.* *made a Settlement of* 147 *l. per Ann.* on *himſelf for Life*, Remainder to *his Wife for Life*, &c. with *Remainders to their firſt*, &c. *Sons*, in the uſual Form. —— *Plaintiffs were Bond Creditors of the Huſband*, and after his Death brought their Bill againſt the Wife and Children to ſet aſide this Settlement as *voluntary* and *fraudulent*, being made after Marriage, *eſpecially as to the Children*, for whom *no Proviſion appeared to be made on the Treaty previous to the Marriage*, and that therefore they ought to be let in for a Satisfaction of their Debts. But his Honour was clear of Opinion, that this *Bond* was not *fraudulent* nor voluntary againſt the Bond Creditors. *Mich.* 1719. *Brunſden* and *Stratton*, *Prec. in Chan.* 520.

4. *A.* upon his *Daughter's Marriage*, *aſſigns* 300 l. *to Truſtees to pay the Intereſt to the Huſband as long as he ſhall continue in good Circumſtances*; but *if he ſhall fail*, *then to pay it to the Wife*. The Huſband became a *Bankrupt*, and the *Aſſignees brought a Bill againſt the Truſtees to have the Produce of the Money paid to them during the Huſband's Life*; but the Bill was diſmiſſed, for by the Court it is a reaſonable prudent Settlement, and the moſt proper Period of Time

for a Father to provide for his Child. *Lockee* and *Savage*, *Hil.* 6 *Geo.* 2. *in Scacc'*, *MS. Rep.*

(G) Where there is Money due on two Contracts, and a general Payment is made, to the diſcharging of which Contract ſuch Payment ſhall be applied.

1. *A.* Contracted with *B.* to have his Iron ſplit at his Mill, and made into Hoops, and to pay as others did: Upon this Contract Money is due to *B.* Afterwards *A.* undertaking to furniſh the Victualling-Office with a Quantity of Iron Hoops at 24 *l.* the Tun, (the Money becoming due for the ſame being to be paid at a certain Day, or Bills which do carry Intereſt to be then given him) makes another Contract with *B.* for the Hoops to be delivered to him in ſuch convenient Time as he might furniſh the Victualling-Office at 24 *l.* *per* Tun; and upon this Agreement *A.* covenanted either to pay the Money by a certain Time, or at the Expiration thereof to give a Bond for it with Intereſt at 6 *l.* *per Cent.* *B.* delivers all the Goods agreed for by the Contract, except 36 *lb.* weight, which by Miſtake was delivered to a wrong Perſon, and then the Time limited for the Delivery expired. *B.* being acquainted with the Miſtake, offered to make up the Defect of the Quantity; but *A.* having no Occaſion for them, the Parcel never was delivered; and *A.* never complained of any Prejudice he received by the Diſappointment. Several Sums were paid generally to *B.* the laſt of which was 60 *l.* which was more than enough to ſatisfy the firſt Contract; and afterwards another Sum was paid, and an Acquittance wrote upon the Bond which was given upon the ſecond Contract; and *A.* placed ſeveral of theſe Payments in his own Book to the Account of the laſt Contract; the Queſtion was, whether they ſhall be intended to be applied to the Diſcharge of what was due upon the *firſt* or *ſecond* Contract? And *per* Lord Chan. The Money ſhall be firſt applied to the diſcharging of the Demand of the *firſt* Contract, and the Surplus to the Diſcharge of that upon the *ſecond.* A Man that pays Money may pay it upon what Condition he pleaſeth; and the Perſon that receives it, receives the Condition with it; but then the Condition muſt be expreſſed at the Time of Payment. It is moſt natural that the Debt which was firſt contracted ſhould be firſt paid. The Money for which a Diſcharge was given upon the Bond, his Lordſhip allowed applicable to the laſt Contract; and he from hence argued, that *A.*'s Intent in his other Payments was to diſcharge the Debt due upon the firſt Contract. *Eaſt.* 7 *Ann. Wentworth* v. *Manning*, *MS. Rep.*

Curteſy. Vide **Tenant by the Curteſy**, P.

CAP. XXIX.

Cuſtom of London (a).

(a) It is to be obſerved, that Queſtions touching the Cuſtom of *London* have been leſs frequent ſince the making of the Act of the 11 *Geo.* 1. than *theretofore*, for by that Act, (*cap.* 18. *ſect.* 17.) it is enacted, *That it ſhall be lawful for all Perſons who after the firſt of* June 1725. *ſhall become free of the City, and for all who at that Time ſhall be unmarried, and not have Iſſue by any former Marriage, to diſpoſe of their perſonal Eſtate.*——And *Sect.* 18. ſays, *But if any Perſon who ſhall be free of the City hath agreed, or ſhall agree by Writing, in Conſideration of his Marriage, or otherwiſe, that his perſonal Eſtate ſhall be diſtributed according to the Cuſtom of the City; or in Caſe any Perſon ſo free ſhall die inteſtate, his perſonal Eſtate ſhall be ſubject to the Cuſtom of the City.*

(A) Of the Cuſtom of London with Reſpect to the Children of a Freeman, and what is a Bar of the Childrens Orphanage Part;——And here of Advancement and bringing into Hotchpot;——And alſo of Survivorſhip.

(B) Concerning the Widow of a Freeman, and what ſhall be a Bar of her Cuſtomary Share.

(C) Concerning the Legatory or dead Man's Share.

(A) Of the Cuſtom of London (b) with Reſpect to the Children of a Freeman, and what is a Bar of the Childrens Orphanage Part;——And here of Advancement and bringing into Hotchpot;——And alſo of Survivorſhip.

(b) The Cuſtom of *London* is the Remains of the old Common Law, *i. e. that a Man could not give away any Part of his Eſtate without the Conſent of his Children*, and is ſo taken Notice of in *Bracton*; but it being found extremely inconvenient and hard, it was by the *tacit Conſent of the whole Nation abrogated and grown to diſuſe*, (for what Law has ever been made to repeal it?) but in the City of *London*, where the Mayor and Aldermen had the Care of Orphans, they by that *ſole* Authority and Power have preſerved this Part of the Common Law in *London*, which is diſuſed and diſapproved every where elſe. *Per* Lord Chan. *Trin.* 1722. in the Caſe of *Kemps* and *Kelſey*, *Prec. in Chan.* 596.

1. WHERE a Citizen of *London* deviſes a Legacy to one of his Children, notwithſtanding that, that Child ſhall have his Share out of the Cuſtomary Part, unleſs it doth appear that by the Intent of the Teſtator that Legacy was to go in Satisfaction of his whole Share. *Hil.* 1677. Reſolved *per Lord Chan.* in *Ireton*'s Caſe, 2 *Freem.* 28.

2. *A. deviſed* 3000 l. *to his Daughter*, and *the Reſidue of his perſonal Eſtate to his Brother*; the Queſtion was, whether this Daughter ſhould have her Cuſtomary Part beſides this Legacy, by Reaſon that he gave the Reſidue to his Brother, which is a kind of an *Implication* that the Daughter ſhould have the 3000 *l.* and no more; and if ſhe ſhould have her Cuſtomary Part too, there would be nothing left for the Brother. But it was held *clearly per* Lord Chan. *That the Daughter ſhould have her Legacy and her Cuſtomary Share too*; there being

being no Words to exclude her, ſhe *ſhall not be barred by Implication*; tho' it was urged, that in this Caſe *there would be nothing left for the Brother*. *Trin.* 1681. *Bravell* and *Pocock*, 2 *Freem. Rep.* 67.

3. If a Freeman of *London* dies leaving ſeveral Orphans, and any of them die under Age, the Queſtion was, whether this Part is by the Cuſtom to go to the Survivor; and 1702. the Recorder certified the Cuſtom to be, that *if the Orphan Son dies before* 21. *his Share ſurvives*; and *if a Female dies unmarried*, and *within the Age of* 21. *her Share ſurvives likewiſe*, and *the Orphan cannot give it away by Will*. *Mich.* 1702. *Jaſſon* and *Eſſington*, *Prec. in Chan.* 207.

4. A Freeman of *London* having Children by two *Venters*, and being deſirous to make a Difference between them in Point of Fortune, by Will gives two of them a Bond of 3000 *l.* afterwards by Advice the Clauſe was obliterated, and the Will republiſhed, and a new Bond given in the Name of *J. B.* in Truſt for the two Daughters. *Cowper* C. held, that this Bond muſt be brought into Hotchpot, to intitle them to a further Share. *Mich.* 1708. *Hedges* and *Hedges*, *Gilb. Eq. Rep.* 12, 13.

Prec. in Chan. 269. S. C. *in totidem verbis*. *Viner's Abr.* Tit. *Cuſtoms of London*, (B. 8.) *Page* 215. S. C. and ſays, tho' in this Caſe ſome of the *other* Children had given Receipts, but knew nothing of their *equitable* Right, Lord *Cowper* declared that this was but Evidence, and that he would notwithſtanding let them into their Right; tho' otherwiſe if there had been a Receipt under Seal. Cites it from a *MS. Rep.*——2 *Vern.* 615. *Hodges* and *Moor* S. C.

5. A Citizen of *London* ſeiſed of a Freehold, and poſſeſſed of a perſonal Eſtate, had Iſſue a Son and a Daughter; the Son died, and left three Children; the Daughter married the Plaintiff, to whom the Father gave a Fortune; the Father aſſigns over his *perſonal* Eſtate to *B.* and by the Deed of Aſſignment expreſly *reſerves that a Diſpoſition of* 1000 *l. ſhould not be without his Approbation*; and *in Caſe that it ſhould not be diſpoſed of during his Life*, then *B. after his Death to diſpoſe of it as he ſhould think fit*. This Aſſignment was made for the Benefit of the Grandchildren; four Days after the Aſſignment was made, the Father makes his Will, and deviſes the Freehold to his Grandchildren, and ſome ſmall Sum to his Daughter; and inſerts a Declaration of having advanced her, by giving her 500 *l.* upon her Marriage. The Father after the Aſſignment collects the Rents, gives Receipts, and made a Leaſe. *B.* lived with him in the Houſe, and the Writings were liable to be taken back by the Aſſignor whenever he pleaſed. Upon the Father's Death the Daughter and her Huſband exhibit their Bill to have a Moiety of the perſonal Eſtate, according to the Cuſtom of *London*. Lord Chan. Where a Citizen doth by Deed in his Life-time convey away his perſonal Eſtate, and put it abſolutely out of his Power, ſuch a Diſpoſition is good; but if he ſo diſmiſſes himſelf of it as to have himſelf an Hand over it, this is not good, and is in Defraud of the Cuſtom. This Deed of Aſſignment hath the Marks of Fraud in all its Circumſtances: It appears to be made when the Father was very much indiſpoſed; he hath reſerved a Diſpoſition to himſelf during his Life, and doth not abſolutely diſmiſs the Eſtate out of himſelf; but he ſtill continued in Poſſeſſion, and it was in his Power whenever he pleaſed to have poſſeſſed himſelf of the Deed. If this was allowed, there would be an end of the Cuſtom. I would favour the Gift if I could. A Writing muſt be produced to aſcertain the Advancement, or the Daughter will be taken to be fully advanced. The Cuſtom *doth not extend to Grand-*

Grandchildren (*a*); but if there is a want of Proviſion for them, the Equity of the Statute of Diſtributions will help them, and ſtretch out the Cuſtom to the Childrens Repreſentatives. But here is no Occaſion for this Equity, for a Moiety, the Wife being dead, the Huſband had Power to diſpoſe of; and then the Freehold Eſtate is deviſed to them, and there is no Colour to make Maintenance or Education an Advancement. Then it was urged, that the Daughter ſhould bring her Advancement into Hotchpot. Mr. *Vernon* alledged it to be contrary to the Cuſtom, that being only allowed between the Children of a Citizen. Lord Chan. *Coke* in his *Littleton* is of another Opinion; but I remember when I was reading it I conſulted ſome *Serjeants* upon it, who told me that the Cuſtom was otherwiſe; upon which I laid *Coke* before them, which did ſurprize them. They anſwered that *Coke* did not underſtand the Cuſtom; for they knew of their own Knowledge that the Cuſtom was, a Hotchpot only amongſt the Children; and his Lordſhip made his Decree accordingly *Trin.* 7 *Ann. Finner* and *Longland, MS. Rep.*

(*a*) The Cuſtom of *London* does *not extend to Grandchildren*; as if *A.* the Grandfather dies, leaving the Father with ſeveral Daughters; theſe Daughters are not within the Cuſtom. *Per Cowper* Lord Keep. *Hil. Vac.* 5 *Ann. Viner's Abr.* Tit. *Cuſtoms of London*, (B. 5.) *Ca.* 4.

6. A Freeman by Will charges 1500 *l.* on his real Eſtate for his Daughter, and alſo gives her 1500 *l.* out of his perſonal Eſtate.—She would take the 1500 *l.* out of the real Eſtate, (as that is not within the Cuſtom) and alſo claims her Orphanage Part; but in Regard the Teſtator had diſpoſed of all his real and perſonal Eſtate amongſt his Children, and intended an equal Diviſion, the Court would not ſuffer the Child to diſappoint her Father's Will, but *compelled her to abide intirely by the Will*, or *by the Cuſtom. Hil.* 1731. *Cowper* and *Scot & al'*, 3 *Will. Rep.* 123.

7. If there be a Widow and two Daughters, and one Daughter dies, the Orphanage Part which belonged to ſuch Daughter ſhall wholly *ſurvive* to the other Daughter, even after Diviſion and Partition between them; but if the Father's *Legatory* Part was deviſed to the Daughters, that is *under the Direction of the Statute as a Legacy*, and muſt be diſtributed between the Mother and ſurviving Daughter accordingly. Note; *This Difference was taken* and *agreed to by the Court, Trin.* 1713. in the Caſe of *Loeffes* and *Lewen, Prec. in Chan.* 372.

8. The *Children of a Freeman of* London, *where there is no Wife, are intitled to a Moiety*, the *other Moiety being the dead Man's Part.* Admitted by both Sides; and decreed *per* Maſter of the Rolls, *Hil.* 1716. *Northey* and *Strange*, 1 *Will. Rep.* 341.

If a Mother is compounded with, the Eſtate is to be divided as if there was no Wife, and the Children take a Moiety. *MS. Notes.*

9. *A.* a Freeman's Son was by his Father's Will mentioned to have had 400 *l.* and conſequently the *Quantum* of *A.*'s Advancement *appeared under the Father's Hand*, yet this very Declaration by the Cuſtom let the Son in for his Orphanage Part; and *tho'* A. *afterwards received farther Sums amounting to* 600 l. *from his Father, and the Certainty appeared by his own Anſwer*, yet theſe Sums, which were additional Gifts to his Advancement, being with the other 400 *l.* brought into Hotchpot, would not be a Bar to his Orphanage Part. Decreed *per Trevor*, Maſter of the Rolls, *Hil.* 1716. *Northey* and *Strange*, *Ibid.* 340, 342.

Prec. in Chan. 470. *Northey* and *Burbage, Eaſt.* 1717. ſeems to be S. C. ſays, Teſtator by his Will declared that he had given 1000 *l.* to each of his Children in full of their Orphanage Part; yet this very Declaration let them in (bringing thoſe Sums into *Hotchpot*) to their full cuſtomary Shares of the Whole; but whether the Sum mentioned in the Will ſhould be taken to be the Whole of what the Teſtator had given them, *or* if the Parties concerned were at Liberty to prove more paid to them, was the greater Queſtion; and the Court ſeemed inclinable to let them into the Proof thereof. *Ibid.* 471.—*Gilb. Eq. Rep.* 136. S. C. *in totidem verbis.*

10. *Smith*

10. *Smith* was a Freeman of *London*, and had Iſſue one Child only, a Daughter, and gives her 3000 *l.* Portion, and marries her to the Plaintiff *Maggot*, and is a Party to the Marriage Articles, wherein this 3000 *l.* is declared to be given to her for her Portion by her Father; afterwards *Smith* the Father makes his Will, and deviſes 1000 *l.* to his ſaid Daughter, and gives ſeveral Legacies to her Children; he alſo gives to his Daughter certain Lands for her Life, *&c.* and then follows this Proviſo, (*viz.*) *Provided if my ſaid Daughter ſhall not within ſix Months after my Deceaſe, upon Requeſt to her made by my Executrix, give a good and ſufficient Releaſe to my Executrix, of all her Right and Intereſt to her Cuſtomary Share of my Eſtate*, &c. *then my Will is, that the* 1000 l. *Legacy, and the ſeveral Legacies aforeſaid to her Children, ſhall be void*; and makes his Wife (the Defendant) ſole Executrix and Reſiduary Legatee. The Bill was brought by the Huſband and Wife in Right of the Wife for her Cuſtomary Share of the Teſtator's Eſtate.——1*ſt*, It was agreed, *where the Portion of the Child appears in certain under the Father's Hand, ſuch Portion ſhall* not *be taken for a full Advancement in the Life-time of the Father*, to *exclude* and *bar* ſuch Child of her *Cuſtomary* Share.——2*dly*, *Where a Freeman dies, leaving only one Child, who has had a Portion from her Father in his Life-time, ſuch Child ſhall not put her Portion in Hotchpot*, but *is intitled to her Cuſtomary Share, beſides what ſhe had for a Portion*, becauſe where there are more Children than one, ſuch Portion ſhall be put in Hotchpot, *only* with the Cuſtomary Share belonging to the Children, that they all may be equal (*a*). ——3*dly*, It was reſolved, that Plaintiff's Wife *need only releaſe her Chattle Legacy, and not the Deviſe of the Lands to her for Life*, becauſe the expreſs Condition in the Will doth controul the implied Condition by the Cuſtom, *that ſhe muſt renounce all Benefit by the Will, if ſhe will take Advantage of the Cuſtom in Subverſion of the Will.*——4*thly*, If the Daughter's Children, being Infants, ſhall forfeit their Legacies according to the Proviſo, or not, by the Act of the Mother. This Point Lord Chan. would not now determine upon this Bill, but ſaid it would be Time enough to do that when they ſhould bring a Bill for their Legacies; but as to the other Matters decreed *ut ſupra*. *Per Cowper* C. *Trin.* 2 *Geo. Maggot* and *Smith*, *Viner's Abr.* Tit. *Cuſtoms of London*, (B. 6.) *Ca.* 19.

(*a*) See Lord *Delawar's* Caſe, *P. Ca.*

11. Bill by Plaintiff, as *only Child of a Freeman, for her Share of her Father's perſonal Eſtate.* Plaintiff at ſeveral Times had *received ſeveral Sums of her Father in his Life-time*, and he had *transferred* 1700 l. *Bank Stock, in Truſt for himſelf, in order to diſpoſe of it by his Will to Defendants. Tracy* J. who ſat for Lord Chan. ordered an Account to be taken of what Money Plaintiff had received from her Father in his Life-time, and on what Account, and reſerved the Conſideration, whether ſuch Money ſhould be taken in Part of her Cuſtomary Share, or whether ſhe ſhould have a Moiety of her Father's Eſtate, beſides what he had given her in his Life-time, there being no other Child. *Curia aviſare vult. Trin.* 3 *Geo. Stanley* and *Norcliff*, *Viner's Abr.* Tit. *Cuſtoms of London*, (B. 8.) *Ca.* 13.

12. With Regard to the Advancement of a Child, it has been determined, that ſmall inconſiderable Sums occaſionally given to a Child cannot be deemed an Advancement or Part thereof: Thus *Maintenance Money*, or *an Allowance made by a Freeman to his Son at the Univerſity*, or *in travelling*, *&c.* is not to be taken as any Part of his Advancement, this being only his Education; and it would create Charge and Uncertainty to inquire minutely into ſuch Matters.——

So putting out a Child Apprentice, is no Part of his Advancement, for it is only procuring the Maſter to keep him ſeven Years inſtead of the Parent. *Hendern* and *Roſe*, at the Rolls, *Trin.* 1718. 3 *Will. Rep.* 317. *in a Note.*

But the *Father's buying an Office for the Son, tho' but at Will,* as a Gentleman Penſioner's Place, or a Commiſſion in the Army; theſe are Advancements *pro tanto.* By the Lords Commiſſioners *Rawlinſon* and *Hutchins, Mich.* 1692. *Norton* and *Norton, Ibid.*

13. *S.* brings a Bill for one Third of his Wife's Father's perſonal Eſtate; a Settlement by Agreement was made on the Marriage, and the *Father gave with his Daughter an Eſtate, as for her Marriage Portion.* By *Will the Father gave* 1000 l. *to his Wife and* five Tenements, (which were his on Leaſes) *to Truſtees in Truſt for the Daughter's ſeparate Uſe*, and made the Wife Executrix. *S.* being beyond Sea, left the Wife and Children upon the Mother, who maintained them. *Per Cowper* C. Firſt, *an Advancement of a Daughter by a real Eſtate as her Portion was not an Advancement within the Cuſtom*, but if it were in Land the Certainty doth appear, and the Land muſt be valued and brought into *Hotchpot*; the Cuſtom has no Relation to an Eſtate of Inheritance; —— If a Freeman lays out his Money the Cuſtom is defeated; but if there was any Proviſion made by Agreement, *that inſtead of Money as a Portion the Father ſhould diminiſh his perſonal Eſtate by making a Purchaſe, it would be a Queſtion how far this would be within the Cuſtom*; but Lands deſcended *or* purchaſed are not. 2*dly*, That *S.* muſt have one Third of the clear perſonal Eſtate, deducting the Widow's Chamber, Paraphernalia, *&c.* 3*dly*, That the five Tenements given to the ſeparate Uſe of the Wife ſhould *not* go in Part of this one Third, to which the Huſband was intitled, *for that the Daughter had no Election in this Caſe*; ſhe could not chooſe the one Third, becauſe *that was in the Power of the Huſband, and to his Account*; and as the five Tenements are here given to the Truſtees, it is of a different Kind from the Huſband's one Third; nor is it to the ſame Perſon; ſo it cannot go in Satisfaction within the Meaning of the Teſtator. In Caſes of the Cuſtom, the *Legatee has an Election whether he will renounce his Legacy*, or *his one third Part.* Here the Father has under all Events, *ex abundanti*, made a Proviſion for the ſeparate Uſe of his Daughter out of the Part he had Power to diſpoſe of. 4*thly*, If the Legacies fall ſhort, every one muſt abate in Proportion; but if the Daughter's ſeparate Proviſion fall ſhort which the Father intended her, the Court ought to lay hold on that which the Huſband ought to recover till the Account is taken; and it ought to go before the Maſter, eſpecially if the Huſband's going away were without the Wife's Default. 5*thly*, This ſpecifick Legacy of the five Tenements muſt be valued, and every one muſt abate in Proportion. 6*thly*, The Wife *and Executors* (*a*) muſt have 1000 *l.* beſides her one Third Part. *Mich.* 4 *Geo. Stanton* and *Platt* (*b*), *Viner's Abr.* Tit. *Cuſtoms of London*, (B. 6.) *Ca.* 21.

(*a*) *So in the Original.*

(*b*) 2 *Vern.* 753. S. C. but only ſome ſhort Notes of it.

14. If a Freeman *gives a Legacy to his Child*, and *diſpoſes of his whole perſonal Eſtate*, the *Child ſhall not have both the Legacy* and *the Orphanage Part*, even tho' the *Legacy does not exceed the dead Man's Part*; otherwiſe *if the Legacy be given expreſly out of the Teſtamentary Part.* But in *no Caſe ſhall the Child be obliged to make his Election till after the Account taken.* 4 *July* 1718. at the Rolls, *Hender* and *Roſe*, 3 *Will. Rep.* 124. in a Note by the *Editor.*

15. It has been much queſtioned whether a Freeman's Will can any way operate on the Orphanage Part; formerly it ſeems to have been held, that a Freeman had a Power to appoint by Will, that if any of his

Children ſhould die within Age, then ſuch Child's Part ſhould go to the ſurviving Child or Children. 1 *Lev.* 227. *Hamond* v. *Jones*, ruled by *Kelyng* C. J. at *Niſi prius*, and ſaid by *Wyld*, Recorder of *London*, to have been ſo adjudged in Chancery; but latterly it has been admitted to be otherwiſe. See the Caſe of *Jeſſon* v. *Elſington*, *Prec. in Chan.* 207. —— In the Caſe of *Biddle* v. *Biddle*, heard before *Parker* C. *Hil.* 1718. A Freeman having a *Wife and one Child*, (*inter al'*) *deviſed the Orphanage Part to the Child, and in Caſe of the Child's Death before* 21. *then to go over to the Teſtator's Father.* And it was held, that this Deviſe over was void, for that the Father had nothing to do with the Child's Orphanage Part, which came to him by the Cuſtom, and not from the Father; and were ſuch Deviſe over to be good, it would be a Prejudice to the Child, who in Caſe there were but one Child, might Deviſe over ſuch Part at 14. which would take Effect were the Child to die before 21. or if the Mother died inteſtate and unmarried, it would go all to the Mother as his next of Kin, and not according to the Father's Will; or if the Child ſhould marry and die within Age, leaving Iſſue, the Widow and Iſſue would be deſtitute, were ſuch Will to be good. 3 *Will. Rep.* 318. in a Note by the *Editor*.

16. A Freeman having no Wife, and only one Daughter, deviſed all his perſonal Eſtate to his Daughter, who was married, for her own ſeparate Uſe, and which was enjoyed accordingly. The Huſband died, his Repreſentatives are not intitled to ſuch Part as was the Daughter's Cuſtomary Share, but the Whole belongs to the Wife. *Trin.* 5 *Geo. Merriweather* and *Heſter*, *Viner's Abr.* Tit. *Cuſtom of London*, (B. 10.) *Ca.* 18.

17. In this Caſe was cited a Caſe of *Ambroſe* and *Ambroſe*, and another of *Rawlinſon* and *Rawlinſon*, where it had been certified to be the Cuſtom of *London*; and was accordingly decreed by the Lord Chancellors *Harcourt* and *Cooper* ſucceſſively, That if a City Orphan *dies before* 21. *his Orphanage Part ſurvives to the other Orphans*; and that he can make no Diſpoſition by Will to contradict it; but if he *dies after* 21. at which Time he might have by Will diſpoſed of it, there, tho' he die inteſtate, it ſhall go according to the Statute of Diſtributions, between his Mother and ſurviving Brothers and Siſters; and that in the other Caſe the Survivorſhip holds only as to the Orphanage Part belonging to himſelf, ſo that if he had by Survivorſhip the Part of any other of his Brothers or Siſters, that ſhould go according to the Statute of Diſtributions. It was alſo ſaid, that if a Man married an Orphan, yet till 21. his Right was not ſo veſted as to prevent his Wife's Share from ſurviving in Caſe *ſhe died before* 21 (*a*): —Tho' whether the Marriage was *before* or *after* 21. the Huſband was fineable, and might be committed (*b*) *if he had not the Licence of the Court of Orphans*. *Mich.* 1720. in an *Anon. Caſe*, *Prec. in Chan.* 537. *Ca.* 332.

(*a*) 1 *Vern.* 88. *Mich.* 1682. *Fowke* and *Lewen cont'*, for according to that Caſe, if a Man marries an Orphan who *dies under* 21. her Orphanage Part ſhall not ſurvive to the other Children, but ſhall go to the Huſband. *Vide* 1 *Vol. Eq. Ca. Abr. P.* 156. (*b*) One *not* a Freeman of *London* married an Orphan, and tho' it did not appear the Party had any Notice of his Wife's being a City Orphan, yet it was held ſuch Perſon was puniſhable by the Court of Orphans: For every one is obliged at his Peril to inform himſelf concerning the Perſon whom he marries; and here no Body is obliged to give Notice, conſequently the Party muſt at his Peril take Notice. 2 *Lev.* 32. 1 *Vent.* 178. *Hil.* 23 & 24 *Car.* 2. *B. R. The King* v. *Harwood*. 3 *Will. Rep.* 118. *in a Note by the Editor*. ——— *Mod.* 77. *Ca.* 36 & 79. *Ca.* 43. S. C. the Huſband's not knowing that ſhe was an Orphan is not material.

18. Plaintiff's Wife was a Freeman's Daughter, and after her Marriage her Father gave her 100 *l.* and Plaintiff executed a Releaſe for the

Prec. in Chan. 544. *Mich.* 1720. *Kemp* and *Kelſey* S. C. *accord'*.

And afterwards in *Trin.* 1722. Lord Chan. decreed that the Releaſe is a Bar. *Ibid.* 594, *Vide* the Caſe of *Blunden* and *Barker*, *P. Ca.*

the 100 *l. in full of all his Wife's Cuſtomary Part or* Share *which was* or *might be due to her by the Cuſtom of* London *by her Father*; her Father afterwards by Will deviſed to Plaintiff's Wife 400 *l.* and made Defendant his own Wife Executrix, and died poſſeſſed of 10000 *l.* leaving one other Daughter. The Bill was for a Diſcovery of the perſonal Eſtate, and that upon the Plaintiff's bringing the 100 *l.* into *Hotchpot*, they might be let into a Cuſtomary Part of the Father's Eſtate. Defendant pleaded the Releaſe in Bar. And *per* Lord Chan. The Huſband had no Power to releaſe a future Right of his Wife's; that ſhe might ſurvive him, and would then be intitled to it in her own Right; beſides, this Releaſe is ſuggeſted to be fraudulently obtained, and therefore his Lordſhip ordered the Plea to ſtand for an Anſwer, with Liberty to except, ſo as to have an Account of the Freeman's perſonal Eſtate, and the Benefit of the Releaſe to be ſaved to the Hearing, when the Queſtion would come more properly, whether the Releaſe by the Cuſtom was good, or not. *Mich.* 1720. *Anon. MS. Rep.*

19. It is not neceſſary that the *Quantum* of an Orphan's Portion ſhould appear under the Father's Hand, ſince according to the Caſe of *Dean & Ux'* and *Lord Delaware* (*a*), if the Certainty of the Portion with which the Child has been advanced appear in the Freeman's Books of Account, tho' written by the *Freeman's Book-keeper, or his Servant* (*b*), it is as ſufficient as if written by the Freeman himſelf, and ſuch Advancement may be brought into *Hotchpot*. *Per Parker* C. *Eaſt.* 1720. in the Caſe of *Blunden* and *Barker*, 1 *Will. Rep.* 642.

(*a*) 2 *Vern.*

(*b*) But *Ibid.* 643. in a Note is a Queſtion, if this is warranted by the Certificate cited in the Caſe of "*Dean & Ux'* v. *Lord Delaware*, *May* 9, 1710. in Purſuance "of an Order of 16 *December* then laſt it is certified, that if a Freeman of the City dies, leaving a Wife and "one Daughter married in his Life time, and it appears by the Books of ſuch Freeman that he had paid ſeveral "Sums of Money in Part of ſuch Daughter's Portion unto her Huſband, and afterwards ſeveral other Sums, "which ought to be taken as paid on Account of the Portion, but not expreſly entred in ſuch Freeman's Books "as paid in Part of Advancement, *or* in Part of the Portion, (*all which Entries are of the Teſtator's own Hand "Writing*) and Sums taken all together do not amount to a third Part of ſuch Freeman's Eſtate put together, "with what he left at his Death, ſuch Daughter ought not to be taken as fully advanced, but in Part advanced "only; and in ſuch Caſe, by the Cuſtom of the City, ſuch Child and her Huſband are to have a Third of "what the Teſtator left at his Death, without Regard to what was received in the Father's Life-time, and "without putting what had been ſo received to the Eſtate left at his Death."

20. A Freeman left at his Death *a Wife and ſeveral Children, one of the Children died ſeven Years old.* It was agreed that Share ſhould ſurvive, and that it was ſubject to the Statute of Diſtributions; but Q. whether it ſurvived to the Mother, as well as Brothers and Siſters? ——The Orphanage Part is not due till 21. ſo that an Orphan cannot diſpoſe of it ſooner. *Mich.* 7 *Geo. per Maſter of the Rolls, Knipe* and *Wale*, *Viner's Abr.* Tit. *Cuſtoms of London*, (B. 7.) *Ca.* 3.

21. *J. S.* in 1718. made his Will, and thereby gave to his Daughter 7000 *l.* and to his Son and Executor all the Reſt of his Eſtate. He declared that this Legacy to the Daughter was in Satisfaction of all ſhe could claim, *&c.* under the Cuſtom, and ſhe was to declare within one Month after his Death whether ſhe would abide by that or not, and ſhe was to releaſe, *&c.* The Teſtator lived two Years after this Will, and after his Death the Daughter marrying within a Fortnight, they were both made acquainted with the Will; and the Executor and Son came one Morning and made a Delivery of ſome Plate, *&c.* ſpecifically deviſed, and alſo aſſigned an Annuity in the Exchequer, which was given to the Daughter, and being aſked to execute a Releaſe, ſome Time was deſired for Conſideration. In *Michaelmas* Vacation the Queſtion was, on a Plea to the Diſcovery, and Account prayed by a Bill, whether what the Daughter and her Huſband had done did amount to ſuch an Acceptance as did determine their Election,

tion, and to exclude them from a Share by the Cuſtom. And *per* Lord Chan. the Plea was allowed, becauſe they had not made any Election by the Bill to wave the Will, but with a Saving to any further Claim or Right they might make, that is by amending their Bill, and running the Hazard of the Account of the perſonal Eſtate; for whether it be more or leſs they muſt abide by the Event. He declared that it was the Teſtator's Intention, that if ſhe accepted of the Legacy, ſhe was to take it in Satisfaction of the Whole under the Cuſtom, and that he never intended ſhe ſhould have an Account of the perſonal Eſtate, to ſee whether it was her beſt way to abide by the one or the other; ſhe was to have no ſuch Liberty; and therefore his Lordſhip confined her to a Month's Time to declare herſelf; ſo that all Objections made from her being under any Surprize, or having any Thing miſrepreſented unto her, is out of the Caſe. It is likely *J. S.* thought the Cuſtom very hard, and he had a Mind to tie her down; but yet this muſt be a compleat Acceptance by her of all that he had impoſed; but in this Caſe it doth not appear that all was finiſhed and compleated, ſome Things ſhe did accept of; but the Execution of the Releaſe was put off, and other Matters, for further Conſideration, ſo that this was not a full and intire Acceptance; tho' he thought that if all had been done and accepted of without the Releaſe, that was not ſo neceſſary to be done within this Month, but might be executed at any Time. *Per* Lord Chan. *Mich. Vac.* 1721. *Smith* and *Withers*, *Viner's Abr.* Tit. *Cuſtoms of London*, (B. 6.) *Ca.* 22.

22. *J. S.* a Freeman of *London*, had two Daughters *H.* and *E.* and one Son; *B.* married *H.* and upon receiving a ſuitable Portion, releaſed *all Right and Intereſt which he had or might have to any Part of* J. S.*'s perſonal Eſtate by the Cuſtom or otherwiſe*, except *what* J. S. *ſhould give by Will or otherwiſe*, and *covenanted that at any Time after the Death of* J. S. *he would do any further Act for the releaſing of any Right which he might have by the Cuſtom to the Executor or Adminiſtrator of* J. S. *Jekyll* and *Gilbert* Commiſſioners, ſeemed inclined to think that the Releaſe *being for a valuable Conſideration*, purporting an Agreement to quit the Right to the Orphanage Part to be binding in Equity (*a*); but tho' this might not be ſo clear, yet the Covenant *for a valuable Conſideration* to releaſe the future Right is good, and the Executor of *J. S.* having before the Bill brought tendered a Releaſe, which *B.* refuſed to execute, the Court decreed an Execution of the Releaſe to the Executor, and *B.* to pay Coſts. *Eaſt.* 1725. *Cox* and *Belitha*, 2 *Will. Rep.* 272, 273.

(*a*) *Vide* the Caſe of *Blunden* and *Barker*, *P. Ca.*

23. In the above Caſe *J. S.* had left his other Daughter *E.* 3500*l.* by his Will, but it appeared to the Court that ſhe was but a weak Woman, and 40 Years old, and not like to marry; and it was poſitively ſworn by the Anſwer of *B.* the Son-in-Law, that *J. S.* after the making of the Will had deſired him to ſecure an Annuity of 250*l. per Ann.* to *E.* in Satisfaction of her Legacy; and accordingly *E.* after the Death of *J. S.* (in a publick Manner, with the Conſent of her Relations and Friends, and *B.* and his Wife, and the Truſtees in the Father's Will, were Witneſſes to the Deed) releaſed the ſaid Legacy, and all her Right to her Father's perſonal Eſtate by the Cuſtom, to *B.* and in Conſideration thereof *B.* by Mortgage ſecured an Annuity of 250*l. per Ann.* to *E.* and *B.* and his Wife after the Death of *E.* bringing a Bill to ſet aſide this Deed, and to have *E.*'s Orphanage Part, the ſame was diſmiſſed with Coſts. *Ibid.* 272, 274, 275.

24. Where a Freeman's Daughter accepts of a Legacy of 10000 *l.* left her by her Father, who recommended it to her to releaſe her Right to her Orphanage Part, which ſhe does accordingly; if the Orphanage Part be much more than her Legacy, tho' ſhe was told ſhe might elect which ſhe pleaſed, yet if ſhe did not know ſhe had a Right firſt to inquire into the Value of the perſonal Eſtate, and the *Quantum* of her Orphanage Part, before ſhe made her Election, this is ſo *material* that it may avoid her Releaſe. *Trin.* 1724. *Puſey* and *Deſbouvrie*, 3 *Will. Rep.* 316.

25. Where a Daughter who married without the Father's Conſent was afterwards *advanced in Part*, and the *Father ſettled ſome Leaſhold Eſtate to the* ſeparate Uſe of the Daughter the Feme Covert, this ought to be brought into *Hotchpot*, it being in the ſtricteſt Senſe an Advancement of the Child *pro tanto*. *Per Jekyll* and *Gilbert*, Lords Commiſſioners. *Eaſt.* 1725. 2 *Will. Rep.* 273, 274.

26. Any Lands of Inheritance ſettled by a Freeman upon his Children, is not to be called an Advancement either in Part or in the Whole within the Cuſtom of *London*, in Regard ſuch Lands are not within the Cuſtom, *which affects only the perſonal Eſtate of the Freeman*; *otherwiſe* of a Leaſe for Years.——But if Lands of Inheritance are given to a Child *in Bar* of the Orphanage Part, and *accepted as ſuch*, it will be binding, *or* at leaſt the Child cannot have both. So held by *Jekyll* and *Gilbert*, Commiſſioners, *Eaſt.* 1725. *Cox* and *Belitha*, *Ibid.* 274.

27. The Cuſtom of *London* is, where there are ſeveral Children, the Father may appoint a Right of Survivorſhip amongſt them. If there be a *Male* Child only, the Father may deviſe over his Orphanage Part, if *Male* Child ſhould die before the Age of 21. and if there be a *Female* Child only, then the Father may alſo deviſe over in Caſe ſuch *Female* Child die before 21. or Marriage. *Eaſt.* 13 *Geo. Piddington* and *Mayne*, *Viner's Abr.* Tit. *Cuſtoms of London*, (B) *Ca.* 16.

28. Where the Huſband was attainted of Felony, and Pardon on Condition of Tranſportation; and afterwards the Wife became intitled to ſome perſonal Eſtate as Orphan to a Freeman of *London*; this perſonal Eſtate was decreed to belong to the Wife, as to a Feme Sole. *Trin.* 1729. *Newſome* and *Bowyer*, 3 *Will. Rep.* 32.

29. A Freeman of *London* having but one Child, advances that Child in Part only; the Child ſhall ſtill come in for *her Orphanage Share* (*a*) *without bringing what ſhe had before received into Hotchpot*, for the Child's bringing her *partial* Advantage into *Hotchpot*, is only in order to make an *Equality among the Children*, and *not for the Benefit of the Mother*, or *to increaſe the dead Man's Share*. Adjudged upon ſolemn Debate at the Rolls, *Trin.* 1729. *Cleaver* and *Spurling*, 2 *Will. Rep.* 526, 527.

(*a*) *Salk.* 426. —2 *Vern.* 234, 622, 754.

30. If a Freeman *having ſeveral Children*, or *one Child*, does *fully advance all his Children*, or *his ſingle Child*, this ſatisfies the Cuſtom, and is the ſame as if the Teſtator had no Child; or if the Huſband, a Freeman *before* his Marriage, compounds with his intended Wife as to her Cuſtomary Part, it is the ſame as if there were no Wife. Adjudged *per* his Honour, *Trin.* 1729. *Cleaver* and *Spurling*, *Ibid.* 527.

31. Adjudged by the Maſter of the Rolls, that if a Freeman ſhall have advanced his Child in Marriage, and the Certainty of that Advancement does *not* appear under the Freeman's Hand, this is to be taken as a full Advancement. And *per* his Honour, the Advancement in the preſent Caſe being above 40 *Years before the Death of the Freeman*, a Declaration in his Will that he had fully advanced his Child

was

was an Evidence thereof, eſpecially it being ſo difficult a Thing for the Legatees in the Freeman's Will to prove an Advancement made at that great Diſtance of Time; but it being objected, that the Father's own Declaration in his Will was of very little Avail, ſince at that Rate it would be in the Power of every Freeman, by making ſuch Declaration, to bar his Child of the Orphanage Part. Thereupon *a Proof was read, that the Daughter's Huſband had confeſſed he had received above* 1000 l. *Portion with his Wife from the Freeman at his Marriage*, which was ſatisfactory. *Trin.* 1729. *Ibid.* 527, 528.

32. Bill againſt the City of *London* by *Plaintiff in Behalf of himſelf and the Reſt of the Proprietors of Orphan Stock, to have an Account of the Produce of the Orphanage Stock*, and *to have the Surplus of that Fund for ſome Years paſt applied to make good the Deficiencies of former Years*; for that by *Stat.* 5 & 6 *W. & M. cap.* 10. *ſect.* 13. *the Produce of that Fund is applied for the Payment of the annual Sum of* 4 l. per Cent. *to the Proprietors*, or *ſo much thereof only as the Money, by this Act appointed to be raiſed and paid, ſhall yearly amount unto, to ſatisfy and pay towards the ſaid Intereſt to the ſaid Orphans equally in Proportion*, &c. and that there is no Proviſion by the ſaid Act for making good the Deficiency of any former Year by the Surplus of any ſubſequent Year, *&c.* *King* C. aſſiſted with *Raymond* Ch. J. and *Jekyll*, Maſter of the Rolls, held, that the Intent and Scope of this Act was to ſecure 4 *l. per Cent.* to the City Orphans for ever, for the reſpective Sums due to them from the City; and the ſeveral Funds thereby raiſed are appropriated for that Purpoſe, and the City is made Truſtee for them, and are to have no Benefit by thoſe Funds until the 4 *l. per Cent.* be paid to the Orphans. And though *Sect.* 13. of the Act ſays, *That the Fund ſhall be yearly applied only to the Payment of the annual Intereſt of* 4 l. per Cent. yet *the Word* (only) *in that Place ſhall not controul and overthrow the general Tenor and Scope of the whole Act; and that Clauſe ſeems chiefly calculated for the Benefit of the Orphans to prevent any Miſapplications*, or to apply any Part of the annual Fund to make good former Deficiencies before the 4 *l. per Cent.* for the current Year, be fully paid and ſatisfied, and not give the Benefit and Advantage of any yearly Surplus to the City till all former Deficiencies be made good to the Orphans. Decreed that the City account for the ſeveral Years Surpluſſes received by them, and pay over the ſame to the Orphans *pro rata*, until the former Deficiencies be made good to them, *&c.* *Hil.* 2 *Geo.* 2. *Ladds* and *London City*, *Viner's Abr.* Tit. *Cuſtoms of London*, (B) *Ca.* 17.

33. Deviſe of Lands to Truſtees in Fee, *in Truſt within ſix Years after the Teſtator's Death to raiſe and pay* 1500 l. *to his Daughter* A. A. *dies within the ſix Years; the* 1500 *l.* ſhall go to *her* Adminiſtrator, *here being no certain Time limited when, but only the ultimate Time within which it ſhall be raiſed.* *Per Jekyll*, Maſter of the Rolls, *Hil.* 1731. *Cowper* and *Scot & al'*, 3 *Will. Rep.* 119.

34. *A.* having ſeven Children, makes an Executor in Truſt, and *deviſes to each Child one Seventh of his perſonal Eſtate*; one of the Children dies in his Life-time, and one of the ſix ſurviving Children has been advanced by the Father in his Life-time, yet this Child ſhall take his full Share of the ſeventh Part without bringing what he had before received into Hotchpot. *Hil.* 1731. *Cowper* and *Scot & al'*, *Ibid.* 124.

35. If a Child has any Thing by the Will more than the Reſt, which is declared as a Satisfaction for her Advancement, if ſhe will

claim

claim the Benefit of the Cuſtom ſhe muſt wave this. *Per Cowper* C. *Hil. Vac.* 5 *Ann. Viner's Abr.* Tit. *Cuſtoms of London*, (B. 8.) *Ca.* 10.

36. *A.* on his Daughter's Marriage *agrees to give her* 3000 l. *which ſhe being of Age covenants to receive in full of her Cuſtomary Share as a Freeman's Daughter*; and tho' it was objected, that ſuch a future Right cannot be releaſed, and that Parents might make an ill Uſe of the Power they have over their Children in forcing them to give ſuch Diſcharges, yet this was held a good Bar of the Cuſtom, there being *no Fraud in the Tranſaction*. *Lockere* and *Savage*, *Mich.* 6 *Geo.* 2.

37. By the Cuſtom of *London* a Freeman cannot deviſe either the Orphanage Part, *or* the Contingency of the Benefit of Survivorſhip among Orphans; neither can an Orphan deviſe his Orphanage Part, or the Part which accrued by Survivorſhip. But ſuch Freeman may give by Will to his Children Legacies inconſiſtent with the Diſtribution under the Cuſtom, and then ſuch Children muſt make their Election whether they will abide by the Will or by the Cuſtom; but they cannot abide by the Will in Part only, and take the Benefit of the Cuſtom alſo. *Trin.* 1735. *Harvey* and *Deſbouvrie*, *Caſes in Eq. Temp. Talbot* 130.

38. A Freeman had Iſſue two Sons *A.* and *B.* and four Daughters *D. E. F.* and *G.* the Freeman in his Life-time gave to *A.* and *B.* and *D.* and *E.* 1500 *l.* a-piece, which they acknowledge by two ſeveral Receipts, in the Words following, *viz.* "Received of my Father 1500 *l.* "which I hereby acknowledge to be on Account and in Part of what "he has given, or ſhall by his laſt Will give unto me his Son (or "Daughter) in or by his laſt Will." Then the Freeman makes his Will thus, *viz.* "And whereas I have heretofore paid to, given or "advanced with my Children *A. D.* and *E.* (*omitted B.*) 1500 *l.* "a-piece, now I do hereby in like Manner give and bequeath unto "my three other Children *B. F.* and *G.* the ſeveral Sums of 1500 *l.* "a-piece; and then *gives the Reſidue equally amongſt all his Children.*" The Cuſtom being waived on all Sides, the Queſtion was, whether *B.* ſhould have another 1500 *l.* upon the latter Words of the Will, or ſhould be in the ſame Caſe with *A. D.* and *E.* they being equally advanced by the Father; and his omitting *B.* ſeeming only a Miſtake in the Teſtator. It was inſiſted, that the Receipt could not controul the expreſs *ſubſequent* Gift of the Father, and that the omitting *B.* ſhould be plainly intended a Difference between them. But *Talbot* C. decreed the 1500 *l.* received by *B.* in his Father's Life-time to be a Satisfaction for what the Father gave him by Will, and that he ſhould not have another 1500 *l.* upon the latter Words of the Will. *Eaſt.* 8 *Geo.* 2. *Upton* and *Prince*, *Caſes in Eq. Temp. Talbot* 71.

39. The Plaintiff's Wife was the Daughter of *John Burroughs* a Freeman of *London*, and the *Bill was brought to be relieved againſt an Agreement entred into with her Father before he purchaſed his Freedom to preclude her from her Orphanage Share*, and *for an Account of his Eſtate*, and *a Diſtribution of it according to the Cuſtom of* London, offering by the Bill to bring it into Hotchpot what ſhe had received upon the Marriage. *J. B.* lived at *Thame* in *Oxfordſhire*, and had five Children, three of Age, and two Infants; and a Deed to the following Effect was executed by the Father, and the three Children who were of Age, one of whom was *Elizabeth* the Plaintiff's Wife. The Deed recited, that whereas *J. B.* apprehended it would be for his Intereſt to become a Freeman of *London*, but was informed he ſhould be thereby diſabled from abſolutely diſpoſing of his perſonal Eſtate by

Will, or otherwiſe, to and amongſt his Children, as he might now do; and whereas the ſaid Children were deſirous that he would become a Freeman in order to improve his Eſtate, and were contented and agreed that their Father ſhould have and retain to himſelf full Power and Authority to give and diſpoſe of his perſonal Eſtate in ſuch Manner as if he was not a Freeman, and they ſeverally and reſpectively releaſe, diſcharge and diſclaim any Right, Title, Intereſt, Claim and Demand whatſoever, to all the perſonal Eſtate of the ſaid *J. B.* that he ſhould die poſſeſſed of, other than ſuch Part thereof as he ſhall by his laſt Will in Writing, or otherwiſe, legally give unto them ſeverally and reſpectively; or (in Caſe the ſaid *J. B.* ſhall die inteſtate) that they ſhall be legally intitled unto by the Laws of the Land and the Cuſtom of the City of *London:* And they further covenant with *J. B.* that if he make a Will, they will not ſue for, claim or demand any other Part or Share of the ſaid Eſtate whereof he ſhall die poſſeſſed, than ſuch Part as ſhall be given to them by ſuch Will; but upon Payment thereof they will execute Releaſes to the Executors of their Demands to any Part or Share of the perſonal Eſtate. By Will the Father had given the Plaintiff *Elizabeth* ſome Legacies; and the Bill was in the Alternative for theſe Legacies in Caſe the Court ſhould be of Opinion that ſhe was precluded from the Orphanage Share. The Queſtion was, if ſhe was barred by this Agreement. *Hardwicke* Lord Chan. This is a Caſe of the firſt Impreſſion, and muſt therefore be determined upon the Reaſon of the Thing, and Caſes bearing Analogy with it. It has been objected, that the Plaintiff is not proper to be relieved againſt her own Agreement; and as the Court is not obliged to enforce voluntary Agreements, ſo on the other Hand it will not relieve againſt them if there be no Fraud in obtaining them, which is not pretended in the preſent Caſe; but this Bill is not ſingly to be relieved, but for an Account and Diſtribution of the Eſtate; and one way or other ſhe is intitled to a Decree, if not to the Orphanage Share, yet to a Satisfaction for the Legacies given her by the Father's Will; and therefore as ſhe is intitled to an Account of the Eſtate, it is neceſſary to determine as an Incident to the general Queſtion, what Intereſt ſhe has in that Eſtate, as in the Caſes of Redemption and Truſts; and it is often incumbent upon the Court to determine mere Points of Law before the Court can come at the Equity; as where there are two Volunteers, one in Poſſeſſion, and the other not, a Suit is commenced, tho' the Court will not interpoſe in Favour of Volunteers, yet if there be a Truſtee, the Court muſt take Cognizance of the Suit, in order to determine for whom he ſhall be Truſtee; and the Queſtion is, if this Agreement ſhall be binding, either as a Releaſe, or as a mutual Agreement. If the Father had been Free it could not have operated as a Releaſe, for the Party has neither *jus in re*, nor *ad rem*; and I think it can have no Effect as an Agreement, it is merely voluntary, and no Conſideration at all moving from the Father. It hath been inſiſted, that there is an Agreement on the Father's Side to take up his Freedom; but that is a Miſtake, there is no Covenant for that Purpoſe, nor one Word ſaid to bind him to take up his Freedom or not, or at what Period of Time, and when it might be moſt for his Advantage, and (*a*) *leaſt* for the Benefit of his Children; and tho' his Eſtate might be improved, yet it would be all in the Power of the Father, and the Children would not be ſure of any Benefit from it, he might ſpend it, or lay it out in Land, and it is only conſequentially and poſſible that it

(*a*) *So in the Original.*

might come to the Children. But the ſtrongeſt Point I rely upon is, that the Agreement is vain and nugatory, and the Intention of it cannot be obtained, for the Intention of the Articles was to give the Father the ſame Power over the Eſtate that he then had, which was impoſſible, for the other Children were not bound, and therefore would go away with the whole Orphanage Part, which affects the Conſideration and Intention of the whole Agreement; and his Power of Diſpoſal, which might be exerciſed in Favour of the Children, who were bound, would be reſtrained contrary to the Deſign and Purpoſe of the Agreement, and therefore it was an Agreement founded upon a Miſtake on both Sides; that it is a proper Head of Equity to relieve againſt it, and theſe Sorts of Agreements are never countenanced by the Cuſtom; tho' where there is a Conſideration they are no Bar, nothing bars but an Advancement, the Certainty whereof does not appear under the Hand of the Father; but Courts of Equity have thought it reaſonable that Agreements made upon valuable Conſiderations ſhall be a Bar, becauſe it is for the Benefit of the Children to have their Portions when they may want them, upon Marriage, or to ſet up any Trade, it is exchanging an uncertain Poſſibility for a certain Proviſion. *Blunder* v. *Baker* (*a*) was never determined finally by Lord *Macclesfield*; and it was only that a Releaſe may be good as an Agreement. *Metcalf* v. *Wye* (*b*) the Agreement was upon Marriage, and the whole Intention of it might be compleated, and not ſaid to be in Bar of the Children, but only of the Child, who was a Party, which might well be; and the Force and the Influence of a parental Authority is always an Ingredient in theſe Caſes, and therefore a valuable Conſideration is neceſſary to remove the Preſumption. I will not ſay what my Opinion would have been if the Children had been all of full Age, and had joined, the Caſe then would have had a very different Conſideration. It was ſaid in this Caſe, that where the Wife is compounded with, it is conſidered by the Cuſtom as if there was no Wife at all; and the Children take a Moiety of the Eſtate, and the Share of the Wife does not accrue to the Teſtamentary Share. The Attorney General mentioned a Caſe where an Agreement affecting only a *Poſſibility* hath been ſupported in Equity.——In the principal Caſe the following Caſes were cited: ——— v. *Sir George Newland*, where two agreed to divide the Eſtate of a third Perſon that was expected by them both, but *doubtful* to which it would be left; and the Agreement was ſupported. *Whitcomb* v. *Whitcomb*, 3 *May* 1718. before the Maſter of the Rolls. Small petty Sums are no Advancement, but it muſt be Sums given as a Portion. *Hil.* 11 *Geo.* 2. *Morris & Ux'* and *Burroughs*, *MS. Rep.*

(*a*) Q. In what Book this Caſe is to be found.
(*b*) Q. Where to be found.

(B) Concerning the Widow of a Freeman, and what ſhall be a Bar of her Cuſtomary Share.

1. IF a Wife be intitled to her Cuſtomary Part, and the Huſband dies, (*and then the Wife dies* *) the Executor of the Huſband ſhall not have this, but the (*Executor of the* †) Wife, becauſe it is a Thing in Action. Held *per* Lord Chan. *Hil.* 1677. *Ireton*'s Caſe, 2 *Freem. Rep.* 28.

* *Not in the Original.*
† *Not in the Original.*

2. If

2. If a Citizen of *London* has a Truſt of a Term attending his Inheritance, and dies, the Truſt of the Term ſhall not be ſubject to the Cuſtom of *London*, to be divided between the Wife and Children, as *other perſonal Eſtate* and *Chattles ſhall*. *Per Lord Chan. Trin.* 1681. in the Caſe of *Tiffin* and *Tiffin*, 2 *Freem. Rep.* 66. *Vide* 1 *Vol. Eq. Ca. Abr. P.* 241. *Ca.* 1. *Tiffin* and *Tiffin, Hil.* 1680.

3. A *Citizen* of *London* entred into a Bond to a Truſtee to *leave his Wife at his Death* 500 *l.* He dies and *leaves her nothing*, ſhe brings her Bill *for the* 500 *l.* and *to have a Moiety of the Reſidue of her Huſband's perſonal Eſtate.* Decreed that ſhe cannot have *both*, but ſhe may have her Election. The 500 *l.* is to be left her at all Events, altho' at his Death ſhe was intitled unto a *Moiety* of his perſonal Eſtate, yet the Huſband might have converted that *Moiety into a real Eſtate. Eaſt.* 8 *Ann. Eaſt* and *Coggs, MS. Rep.*

4. The Wife of a Freeman ſhall not take by her Huſband's Will, and likewiſe by the Cuſtom, unleſs it be ſo declared in the Will. *Per* Lord Keep. who was *clearly* of this Opinion. *Mich.* 1712. *Kitſon* and *Kitſon, Prec. in Chan.* 351, 354. *Gilb. Eq. Rep.* S. C. *in totidem verbis.*

5. A Freeman purchaſed Lands in the Names of *B.* and *C.* and the Conſideration Money (being 9400 *l.*) was mentioned in the Conveyance to be paid by *B.* but *no Truſt was declared*; *B.* kept the Writings, and received the Rents for ſo much of the Eſtate as was let; and *A.* by a Paper, (*all of his own Hand Writing*) and purporting to be an Eſtimate of his Eſtate, and what he was then worth) *had charged* B. *as Debtor for Money lent him to buy this Eſtate* (*a*), and *alſo for Intereſt due on Account thereof. A.* died; *B. afterwards* executed a Declaration that the Purchaſe was made in Truſt for *A.* Decreed *per Cowper* C. that this Declaration *after* A.*'s Death* is ſufficient to bar *A.*'s Widow's Cuſtomary Part. But the Court, upon the Circumſtances of the Caſe, recommended it to the *Heirs* or Deviſees of *A.* to let the Widow have her Dower of the Truſt Eſtate. *Trin.* 1716. *Ambroſe* and *Ambroſe*, 1 *Will. Rep.* 321, 323. —— This Decree was affirmed *in Dom' Proc'* in *June* 1717. *Ibid.* 323.

(*a*) It was inſiſted for the Widow, that the Huſband being a *Freeman*, and this Purchaſe not being intended, much leſs compleated in *A.*'s Life-time, and the Declaration of Truſt being only adviſed by the Friends of the Family as the moſt effectual Method to ſecure the ſaid Debt upon *A.*'s Death, the ſame ought to be looked upon as in Nature of a perſonal Eſtate, and conſequently that a Right veſted in her by the Cuſtom to a Share of this Money in the Hands of *B.* which Right could not be altered or eluded by ſuch *ſubſequent* Declaration. But decreed *per* Lord Chan. That the *Strength* of the Evidence was, that this Purchaſe made in *A.*'s Life in the Names of *B.* and *C.* was in Truſt for *A.* However it plainly appearing *upon the Evidence on both Sides* that the Conſideration Money was *A.*'s, had it not been for the Statute of Frauds this would have made a reſulting Truſt; and *B.* after *A.*'s Death, executing the Declaration of Truſt, this plainly took it out of the Statute.——As to the Objection, that the Declaration of Truſt ſhould not by *Relation* prejudice *A.*'s Wife, who was a third Perſon, his Lordſhip anſwered that the Declaration given by *B. was Evidence of the Truſt*, and *all Evidence muſt affect a third Perſon*; and as if *B.* had after *A.*'s Death been examined as a Witneſs, and had declared on his Oath that he was but a Truſtee for *A. this would have bound* A.*'s Wife*, and *would have barred her Pretence*; ſo here the Declaration of Truſt executed by *B.* was rather a *ſtronger Evidence of the Truſt*, and ought to bind *A.*'s Wife. *Ibid.* 322, 323.

6. A Freeman *deviſed to his Wife ſeveral Shares in the* New River Water, *with Remainder over*, &c. and *gave her ſeveral Legacies*; the *Will was ſealed up in a Sheet of Paper*, and *incloſed in the ſame Paper was a Bond* found, (*executed by Teſtator ſome Time before the Date of the Will*) conditioned *to pay Defendant* (*his Nephew*) 1000 *l.* or *to transfer to him* 1000 l. *Stock* in the Million Bank; *but this Bond appeared to be voluntary*, and *not given upon a valuable Conſideration.* The Freeman's Widow brings a Bill for *her Cuſtomary Share of her late Huſband's Eſtate*; and *Trevor*, Maſter of the Rolls, ſaid, *ſhe muſt diſclaim all Benefit and Advantage by the Will if ſhe will have a Decree for her Cuſtomary Share, contrary to the Will*; and this is the conſtant Courſe of this Court; and the *Bond* being in Nature of a *voluntary* Gift, *is fraudulent* quoad *the Wife's Cuſtomary Share*, and ſhall

ſhall not ſtand in her way; and ſuch Sort of Conveyances to *evade the Cuſtom*, are always ſet aſide in this Court. *Trin.* 2 *Geo. Edmundſon* and *Cox*, *Viner's Abr.* Tit. *Cuſtoms of London*, (B. 3.) *Ca.* 11.

His Lordſhip obſerved, that it had been admitted that a Jointure of *Land* ſettled *in Bar of Dower*, would no more Bar the Widow of her *Cuſtomary* Part, than it would exclude her from her Share by the Statute of Diſtribution in Caſe her Huſband ſhould die inteſtate; and his Lordſhip ſaid, it was the ſame Thing in the principal Caſe where a Freeman had covenanted to lay out of his own Eſtate 1500 *l.* in a Purchaſe, and to ſettle it on himſelf for Life, &c. (*ut ſupra*); 1*ſt*, becauſe from that Time the 1500 *l.* was not his own Eſtate, nor what the Cuſtom could meddle with, for a Man's own Eſtate is what he has beyond his Debts, and what he owes is as *alienum*, and the Cuſtom affects only what is beyond his Debts. 2*dly*, For that Money covenanted to be laid out in Land is, as to all Reſpects, laid in Equity, and would deſcend as Land for the Benefit of the Heir, and not go to the Executor, it might be intailed as Land, and had the other Qualities of Land, and conſequently was not within the Cuſtom. ——This could not be breaking into the Cuſtom, for the Freeman might at any Time during his Life, even in his laſt Sickneſs, have inveſted his perſonal Eſtate in the Purchaſe of Land, which would defeat the Cuſtom, and ſtand good (*b*), tho' the Freeman ſhould at the ſame Time have ſaid, that *he did this on Purpoſe to defeat the Cuſtom*; and as this (if the Purchaſe was real) would have held good to Bar the Cuſtom, ſurely the Caſe could not be worſe where ſuch Agreement for making the Purchaſe was for a valuable Conſideration, and Part of the Marriage Articles. *Per* Lord Chan. *Ibid.* 532. (*c*) As in the Caſe of *Atkins* and *Watſon* (*d*), 6 *June* 1716. *cited arg'*, where the Court of Aldermen by the Recorder certified they had no Cuſtom extending to that Caſe. (*b*) *Vide Frederick* and *Frederick*. (*d*) *Vide* 1 *Vol. Eq. Ca. Abr.* 157. *c.* 5. S. C. 1 *Will. Rep.* 710. (*c*) *Vide Blunden* and *Barker*, *P. Ca.*

7. A Freeman of *London* on his Marriage covenanted to add 1500 *l.* out of his own perſonal Eſtate to 1500 *l.* which was the Portion of his then intended Wife, and both theſe Sums were *to be laid out in Lands*, and to be ſettled upon the *Huſband for Life*, and *then to the Wife for her Life for her Jointure*, and *in Bar of her Dower*, with Remainder to the Children of the Marriage. *Parker* C. held *clearly*, that a Jointure of Land made (*c*) by a Freeman upon his Wife, *if expreſſed to be in Bar of her Cuſtomary Part*, would be ſo; but if it were *not*, but only ſaid to be *in Bar of her Dower*, this would be *no Bar of her Cuſtomary Part*, becauſe Lands or a real Eſtate is of a quite different Nature from perſonal Eſtate, and a Matter wholly out of the Cuſtom (*e*). *Hil.* 1718. *Babington* and *Greenwood*, 1 *Will. Rep.* 530.——*Prec. in Chan.* 505. S. C.

8. A Freeman makes his Will, and thereby (*inter al'*) *gives a Legacy to his Wife*. *Per* Lord Chan. *Parker*, It appearing that this Legacy, together with all the other Legacies, (*for ſo it muſt be intended*) did *not exceed the Huſband's Teſtamentary Part*, it was (his Lordſhip ſaid) the ſame Thing as if theſe Legacies had been given by the Freeman expreſly out of his *Teſtamentary* Part, which he had full Power to diſpoſe of by his Will; and therefore this Legacy being no ways inconſiſtent with the Cuſtom, the Wife might in ſuch Caſe take both; for it was only the *Inconſiſtency* betwixt the Legacy and the Cuſtom that prevented the *Widow* or Child in any Caſe from taking both; the Conſequence of which was, that if the Freeman gave any Legacy out of his *Teſtamentary* Part, the *Wife* or *Child* might (*provided there was ſufficient*) take both by the Will and by the Cuſtom, and therefore ſo might the Wife do here (*f*). *Hil.* 1718. *Babington* and *Greenwood*, 1 *Will. Rep.* 530, 533. *Note*; In this Point, and alſo the *above Point*, (*Ca.* 7.) the Court was *extreamly* clear. *Ibid.* 534.

(*f*) *Ibid.* 533. at the Bottom of the Page is a *Quære* added by the *Editor*, whether ſuch Legacy muſt not be given out of the *Teſtamentary* Part, as (he ſays) appears from the Reporter's Notes to have been determined in the Caſe of *Biddle* and *Biddle* about this Time. See the Caſe of *Frederick* and *Frederick*, *Ibid.* 710.

9. The Widow (of a Freeman of *London*) is intitled to the *Furniture of her Chamber*, as *in Caſe the Eſtate exceeds* 2000 l. *then to* 50 l. *inſtead thereof*. In a Caſe before Lord *Parker*, 18 *Mar.* 1718. *Biddle* and *Biddle*, *Viner's Abr.* Tit. *Cuſtoms of London*, (B. 2.) *Ca.* 2.

10. If a *Freeman of* London *dies without Iſſue, his Wife is intitled by the Cuſtom to a Moiety* of her Huſband's perſonal Eſtate *in Value* but *not in Specie.*——If ſuch a Freeman makes his Will, and *diſpoſes of his whole Eſtate without Notice of the Cuſtom, and gives ſeveral ſpecific Legacies, and ſeveral pecuniary Legacies, and deviſes the* Reſiduum *to* A. *and the Widow waives her Legacy, and claims a Moiety of his perſonal Eſtate by the Cuſtom,* if the *Reſiduum* be ſufficient to anſwer her Moiety or Share, it ſhall be taken out of the *Reſiduum*; but if that fall ſhort, then the pecuniary Legatees ſhall abate in Proportion; and *if the* Reſiduum *and Pecuniary Legacies be ſufficient to anſwer her Moiety, the ſpecifick Legatees ſhall not be brought in to contribute, but enjoy their Legacies* intire. *Per Parker* C. *Trin.* 5 *Geo. Kitſon* and *Robins, Viner's Abr.* Tit. *Deviſe,* (Q. d.) *Ca.* 37.

11. A Settlement is made on a Citizen's Wife *of Part of her Huſband's perſonal Eſtate, in Bar and Satisfaction of all her Claim and Demand out of his perſonal Eſtate by the Cuſtom, or otherwiſe*; the Huſband died inteſtate, the Wife is barred of her diſtributive Share of her Huſband's Eſtate by the Statute of Diſtributions, by Force of the Words (*or otherwiſe*) for they can extend to nothing elſe; and it was ſaid to be twice ſo adjudged by *Cowper* C. in *Pitt* and *Lee*, and *Davila* and *Davila*; and now decreed by *King* C. 13 *Geo. in Badcock* and *Stanhope, Ibid.* Tit. *Cuſtoms of London,* (B. 6.) *Ca.* 24.

(C) Concerning the Legatory or dead Man's Part.

1. THE Cuſtomary Part, belonging to the Adminiſtrator of a Citizen of *London* dying inteſtate, is not within the Act of Diſtribution, and becauſe the Cuſtom of *London* being ſaved by the Act, the Cuſtomary Part ſhall go wholly to the Adminiſtrator as it did before; and ſo it hath been reſolved at Common Law and in Chancery. 2 *Freem. Rep.* 85. *Ca.* 94. cites it as reſolved *per North* Lord Keep. *Hil.* 1682. in an *Anon. Caſe.* *Vide* 1 *Vol. Eq. Ca. Abr. P.* 159. *Ca.* 2. *Trin.* 1718. *Walſam* and *Skinner contra.* —— 2 *Vern.* 559. alſo *contra.*

2. *J. S.* a *Freeman* of *London*, by *his Will directed that an Inventory ſhould be taken of his perſonal Eſtate by his Executors, and that his Wife ſhould have her Widow's Chamber, and after his Debts and Funeral Charges paid, gave her a third Part of his perſonal Eſtate, another third Part he gave equally amongſt his Children* A. B. C. D. *and* E. *who died in the Teſtator's Life-time, and the remaining third Part he gave as follows,* (viz.) 740 l. *to* B. 40 l. *in ſmall Legacies,* 200 l. *a-piece to ſaid* C. D. *and* E. *and the Overplus* (*if any*) *to be equally divided amongſt four of his Children, and to be paid them by his Executors,* (viz.) *to his Sons at* 21. *and to his Daughters at* 21. *or Marriage.* And *if the third Part of his perſonal Eſtate* (*in his diſpoſal*) *ſhould by bad Debts or Accidents fall ſhort, and not be ſufficient to pay all his ſaid Legacies, he willed that each of the ſaid Legatees ſhould bear ſuch Loſs* (whatever it amounted to) *in Proportion according to their Legacies,* and made *F. G. H.* and *J.* Executors. *F. G.* and *J.* only proved the Will, and exhibited an Inventory of their Teſtator's perſonal Eſtate into the Chamber of *London*, and entred into the uſual Recognizance, and paid the Widow and the Plaintiff who married *A.* (one of the Daughters) ſeveral Sums on Account of their Cuſtomary Shares. *J.* (one of the Executors) died, and *F.* took out Adminiſtration to him; a Bill was exhibited againſt *F.* and *G.* the *Prec. in Chan.* 409. *Read* and *Duke, Trin.* 1715. S. C. Certificate and Decree.

two ſurviving acting Executors, for an Account of the Teſtator's perſonal Eſtate, and to have a Diſtribution thereof according to the Cuſtom and the Will. The Defendant *F.* (*who was become inſolvent*) was indebted 163 *l.* 1 *s.* 10 *d.* as the Ballance of his own Account, and 279 *l.* 19 *s.* received by his Inteſtate *J.* out of the Teſtator's Eſtate.

Quære, *Whether by the ſaid Cuſtom the Loſs of* J. S.*'s Eſtate, by the Inſolvency of his Executors, ought to be born out of the Teſtamentary Part of his Eſtate only, or out of the whole perſonal Eſtate only, as well Cuſtomary as Teſtamentary.*——And the Cuſtom was certified 26 *April* 1715. by the Recorder *ore tenus* (*a*), to be thus, (*viz.*) *That if a Freeman of* London *dies, leaving a Widow and Children, his perſonal Eſtate* (*after his Debts paid, and the Cuſtomary Allowances for his Funeral, and for the Widow's Chamber, being firſt deducted thereout*) is by *the Cuſtom to be divided into three equal Parts, and diſpoſed of as follows,* (viz.) *one third Part thereof belongs to his Widow, another third Part belongs to his Children unadvanced in his Life-time, and the other third Part ſuch Freeman by his laſt Will may deviſe as he pleaſes. But where a Loſs of a Freeman's Eſtate doth happen by the Inſolvency of his Executors, there is not any Cuſtom of the City of* London *which directs whether ſuch Loſs ought to be born out of the Teſtamentary Part of his Eſtate only, or out of his whole perſonal Eſtate, as well Cuſtomary as Teſtamentary.* Upon this Certificate *Cowper* C. upon hearing Counſel, was of Opinion, that the Widows and Orphans of a Freeman of *London* are in the Nature of Creditors, for two Thirds of the perſonal Eſtate he ſhall die poſſeſſed of; and that if any Loſs happen by the Inſolvency of his Executors, ſuch Loſs ought to be born by the Legatees of a Freeman out of his Teſtamentary Part. And ſo decreed (*b*), *Trin.* 1 *Geo. Readſhaw* and *Duck & al'*, *Viner's Abr.* Tit. *Cuſtoms of London*, (B. 9.) *Ca.* 4.

(*a*) It is ſufficient if the Cuſtom of *London* be certified by the Recorder at the Bar *ore tenus*, for the Mayor or Recorder is not within the Statute of *York* *, which obliges a Sheriff to do it. *Mich.* 1727. 3 *Will. Rep.* 16, 17. ——But if a Certificate be falſe, an Action lies againſt the Mayor and Aldermen, and not againſt the Recorder, for it is their Certificate by the Recorder. *Ibid.* 17. in a Note by the *Editor*, cites *Hob.* 87. *Day* v. *Savage.* (*b*) So that the Widow and Orphans had two full Thirds of the Freeman's Eſtate as if no ſuch Loſs had happened. *Prec. in Chan.* 410. in S. C. * 2 *Ed.* 2. *cap.* 2.

3. *A.* by his Will *gave all his Eſtate according to the Cuſtom, having* a *Wife and Children*, viz. *two Thirds to his Wife, and one Third to his Children, with a Deviſe over.* Held *per* Maſter of the Rolls, that though this was not exactly conformable to the Cuſtom, yet that the Deviſe of one Third to the Children was void, being what the Cuſtom gave, and ſo *the Deviſe over was not good*; that as the Wife was to have two Thirds, ſhe ſhall take one by the Cuſtom, and the other ſhall be the dead Man's Part; theſe Proportions are to ariſe after a Deduction of the Widow's Chamber and her Paraphernalia, *i. e.* ſuch Ornaments as ſhe uſually wore about her Body; for tho' this is not by the Cuſtom, and was at firſt only allowed to Citizens of the better Sort, yet it is fit to give the ſame Privilege to all Citizens Widows. *Trin. Vac.* 1718. *Ibid.* (B. 9.) *Ca.* 5.

4. By *Stat.* 11 *Geo.* 1. *cap.* 18. *ſect.* 17. *It ſhall be lawful for all Perſons who after the firſt of* June 1725. *ſhall become Free of the City, and for all who at that Time ſhall be unmarried and not have Iſſue by any former Marriage, to diſpoſe of their perſonal Eſtate.*

5. Sect. 18. *If any Perſon who ſhall be Free of the City hath agreed, or ſhall agree by Writing, in Conſideration of his Marriage, or otherwiſe, that his perſonal Eſtate ſhall be diſtributed according to the Cuſtom of the City; or in Caſe any Perſon ſo Free ſhall die inteſtate, his perſonal Eſtate ſhall be ſubject to the Cuſtom of the City.*

CAP. XXX.

Cuſtom concerning Heriots.

1. THE Lord of a Manor being intitled to Heriots from his Freeholders, upon every Alienation or Death, the Tenants made long Leaſes, by which they barred the Lord of his Heriots; the Lord preferred his Bill againſt the Tenants to eſtabliſh this Cuſtom. Lord Chan. Here does not appear to be any Truſt, and therefore I will not help the Lord. I think the Cuſtom of Heriots to be unreaſonable, the Loſs a Family ſuſtains thereby being aggravated, and Equity never will interpoſe in ſuch Caſes. *Eaſt.* 7 *Ann. Wirty* and *Pemberton, MS. Rep.*

CAP. XXXI.

Decree.

(A) Concerning the drawing up, entring and inrolling of Decrees, &c. —— And here of Caveats to prevent the ſame.

(B) Who are bound by a Decree.

(C) Of opening and reverſing Decrees for Error, Repugnancy or Fraud.

(D) Concerning the Performance and Execution of a Decree.

(A) Concerning the drawing up, entring and inrolling of Decrees (a), &c.——And here of Caveats to prevent the ſame.

(a) All Appeals from the Rolls are to be made to the Lord Chancellor; and Decrees made at the Rolls muſt be ſigned or approved of by the Chancellor, to make them Decrees of the Court of Chancery. *March* 13, 1727. *Morſe* and *Dubois, Viner's Abr.* Tit. *Decree*, (D) *Ca.* 28. —— If a *material Party die before a Decree is inrolled*, yet *it may be inrolled afterwards*; and *if more than ſix Months expire before the Inrolment*, yet by *Leave of the Court it may be done after that Time. Duke of Buckingham* and *Sheffield, MS. Notes* *.——What might have been *ſupplied by Motion* is no Objection to a Decree. *Nov.* 24, 1721. *Banbury* and *Bolton, Viner's Abr.* Tit. *Decree*, (D) *Ca.* 19. * Q. Term and Year.

1. IT is a Rule, that whenever a Decree is *entred by Conſent*, the Merits after ſhall never be inquired into, unleſs there be an Objection that the Word *Conſent* be ſtruck out of the Order. 1702. *Norcott* and *Norcott, Viner's Abr.* Tit. *Decree*, (D) *Ca.* 13.

2. If

2. If a Caveat be entred to ſtay the *ſigning* and *inrolling* a Decree, *it ſtays the ſigning* 28 *Days*, being a *Lunar* Month, not only after pronouncing the Decree, but from the Time of the Decree's being preſented to the Great Seal to be ſigned, in order to its Inrolment, and Notice thereof given by the Lord Chancellor's Secretary to the Clerk in Court of the other Side. Lord Chan. *Parker* at firſt ſaid, he thought it an unreaſonable Delay, there being no Rule or Order of Court for that Purpoſe. But this Practice being not only confirmed by the Maſter's Report, but alſo by a Certificate of the greateſt Number of Clerks in the Office, his Lordſhip at another Day allowed it, ſaying, it ſeemed to him to be the conſtant Practice. *Hil.* 1719. *Burnet* and *Theobald*, 1 *Will. Rep.* 609, 610.

3. Decree *before Inrolment* thereof, *ought to be delivered to the adverſe Party, or his Attorney*, who is in eight Days to return the ſame *ſigned by the Counſel of that Side* (*a*), or to make his Objections to the Draught. *Mar.* 6, 1720. *Cheevers* and *Geoghegan*, *Viner's Abr.* Tit. *Decree*, (D) *Ca.* 17.

(*a*) Q. *If this is now the Practice.*

4. Ordered that no Application ſhall be made againſt the *Minutes after a Week*, and no *further* Time to be allowed to petition for a *Rehearing* but *within a Week* after that. *Trin.* 11 *Geo.* 1. *Anon. Sel. Caſ. in Chan.* 21.

5. A Decree may be altered upon proper Application the ſame Term it is pronounced without a Rehearing. *May* 3, 1725. *Vaughan* and *Blake*, *Viner's Abr.* Tit. *Decree*, (D) *Ca.* 25.

6. Matters proper to be excepted to upon the Maſter's Report ſhall never be objected to the Decree *after the Report confirmed*. *April* 28, 1726. *Parker* and *Stanley*, *Ibid. Ca.* 27.

7. No *original* Bill can be to *vacate* a Decree *ſigned* and *inrolled*. *Hil.* 12 *Geo.* 1. *Floyd* and *Manſell*, *Gilb. Eq. Rep.* 185.

2 *Will. Rep.* 73. *Trin.* 1722. *Loyd* and *Manſell* S. C. —— *Vide* Tit. *Anſwers, Pleas and Demurrers, P.* 71. *Ca.* 10. S. C. abridged.

(B) Who are bound by a Decree (*a*).

(*a*) A Decree will not bind a Remainder Man who is no Party. *Per* Lord Keep. *Eaſt.* 1706. 1 *Will. Rep.* 91.

1. A Decree by Conſent for a Leaſe *or* other *perſonal* Eſtate ſhall bind Purchaſers, otherwiſe you will blow up the Court of Chancery. Said *per* Lord Keep. *Trin.* 1667. *Windham* and *Windham*, 2 *Freem. Rep.* 127.

2. If an *Infant* ſuffers a Decree by Conſent, it is for ever *reverſible*, but otherwiſe of an adverſary Bill. *Trin.* 1667. *Ca.* 147. *Anon. Ibid.*

3. A Decree cannot be pleaded in Bar unleſs it binds both Parties. *Eaſt.* 1740. *per* his Honour, in the Caſe of *Atkinſon* and *Turner*, *Barnard. Eq. Rep.* 77.

(C) Of opening and reverſing (a) Decrees for Error, Repugnancy or Fraud.

(a) Where Matters have been examined in Equity and determined, the Court will be cautious of *unravelling former Decrees*, Agreements or Releaſes. *Trin.* 1721. *Cann* and *Cann*, 1 *Will. Rep.* 723.

1. WHERE Error appears in the Body of the Decree drawn up and inrolled, the Court will open the Decree. *Trin.* 1706. *Grice* and *Goodwin*, *Prec. in Chan.* 260, 261.

2. The ſame Decree gives Liberty to *try the Title at Law*, and yet awards *Injunctions* to put Plaintiff into Poſſeſſion, and quiet him in his Poſſeſſion; *reverſed as repugnant.* *April* 28, 1721. *Lord Laneſborough* and *Elwood*, *Viner's Abr.* Tit. *Decree*, (D) *Ca.* 18.

3. A *Decree* (and much more an interlocutory Order) gained by *Fraud* may be ſet aſide on a Petition; *a fortiori* may ſuch Decree be ſet aſide by Bill. *Per* Lord Chan. *King*, *Eaſt.* 1731. in the Caſe of *Sheldon* and *Forteſcue Aland & al'*, 3 *Will. Rep.* 111.

(D) Concerning the Performance and Execution of a Decree (b).

(b) As Decrees are not *pleadable* at Law, this Court indemnifies all ſuch as pay Money in Obedience to their Decrees. *MS. Notes.* —— Decrees are executed by Proceſs *both againſt Perſon, Goods* and *Lands*, as Judgments at Common Law, but *the Execution more effectual, becauſe all may iſſue together.* *MS. Notes.* —— Real and perſonal Eſtates are both bound by a Decree. *Ibid.*

1. A Sequeſtration may be granted *in Scacc'*, as it has been always practiſed in Chancery, where a Decree is for a perſonal Duty, otherwiſe the Juriſdiction of the Court of Equity would be to little Purpoſe if it had not ſufficient Authority to ſee its Decrees executed. *Per* three Barons; but the Lord Ch. Baron doubted, becauſe *Hale* nor *Montague* could never be prevailed upon to grant it; but by the Opinion of the other three it was granted. *Trin.* 1687. *in Scacc'*, *Guavers* and *Fountaine*, 2 *Freem. Rep.* 99.

2. After Service of a Writ of *Execution* of a Decree againſt a Corporation the next Proceſs is a *Diſtringas*, and after that a *Sequeſtration*, which being once awarded, they can never after come and pray to enter their Appearance, as they might have done on the *Diſtringas*, which iſſues, to compel them to appear; but the Appearing being paſt, the Proceſs muſt go on, becauſe the Appearance being only in Favour of Liberty, can be of no Service to a *Corporation which cannot be committed.* *Mich.* 1700. *Harvey* and *Eaſt-India Company*, *Prec. in Chan.* 128. 2 *Vern.* 395. S. C.

3. On a new Bill to carry a Decree into Execution, the Court may vary and alter what is thought proper, but on a *Rehearing* no further than the Petition extends; but if the Petition be againſt the Decree in general, though particular Reaſons are given, the Whole is open; but otherwiſe it is if the Petition be only againſt one or two Particulars. *Eaſt.* 11 *Geo.* 1. *Colcheſter* and *Colcheſter*, *Sel. Caſes in Chan.* 13, 14. *MS. Rep.* S. C. *accord'.*

CAP. XXXII.

Deeds (a) and other Writings.

(a) A *voluntary* Deed found to be *fraudulent* againſt a *Mortgagee*, yet the *Grantee* in the Deed may afterwards ſue for Redemption, for it is *good* againſt the *Grantor* and his *Heirs*, and he ſhall have the Equity of Redemption. *Per* the Maſter of the Rolls, 5 *Nov.* 16 *Car.* 2. *Ramm* and *Cartwright*, 2 *Freem. Rep.* 183.——In Caſe of *Inrolment* of Deeds, tho' a Perſon has *no Title till Inrolment* yet from the Inrolment he is in from the *Time of Execution of the Deed. Per Hardwicke* C. *December* 19, 1744. in *Baſſett* and *Baſſett*, *Viner's Abr.* Tit. *Deviſe*, (I. 9.) *Ca.* 12.

(A) Of the Operation of Deeds, &c.

1. LADY *Grace* ſeiſed in Fee of certain Lands, *conveyed the ſame to her Father in Fee*, but he was to reconvey theſe Lands, *together with others of his own of twice the Value*, to Truſtees in *Fee*, in Truſt for the Lady *for her Life for her ſeparate Uſe*, no Huſband to intermeddle or receive the Profits; and *afterwards to every of her Sons in Tail*, &c. with *a Power of Revocation*. Lord Chan. A Deed made by a Child to a Father doth generally lie under the Suſpicion *of a Truſt* and *a Fraud*, *by reaſon of the Authority the Father hath over his Child*; but neither *Law* nor *Equity* ſaith it is *void*. And this Court will ſupport it, when done upon a good *Conſideration*. Lady *Grace* was the Darling of her Father, and he prevailed upon her to convey the Lands to him in order to ſettle them upon her in this prudent Manner, to which ſhe complied. Now ſuch Obedience cannot produce Effects to her Prejudice. She ſo far obliged him in it, that he ſettled other Lands twice the Value thereof upon her. This was upon a Bill exhibited by the Deviſee againſt the Remainder-men, alledging that the Deed made by the Father was fraudulent. *Manners* and *Banning*, *Eaſt.* 8 *Ann. MS. Rep.*

Prec. in Chan. 480. S. C. *in totidem verbis.*

2. *A.* being poſſeſſed of ſeveral Meſſuages for a Term of 999 Years, *upon valuable Conſiderations*, by Leaſe and Releaſe *grants*, *bargains*, *ſells* and *deviſes* the ſame to *Truſtees and their Heirs*, to the *Uſe of himſelf*

himſelf and *his Wife for their Lives*, and *the Survivor of them*, Remainder *to the Heirs of the Wife*; and covenants that he was *ſeiſed in Fee*. Then the Wife dies without Iſſue, having made a *Writing in the Nature of a Will*, and thereby deviſed the Premiſſes ſo ſettled on her to *B. and his Heirs*. It was inſiſted that nothing at all paſſed by the Settlement, for it being only a Term in Groſs, no *Uſe* paſſed to the Truſtees by the Statute of 27 *H.* 8. *which only raiſes the Uſe when a Perſon is ſeiſed:* That by the Leaſe for a Year (*which was only a Bargain and Sale*) no Uſe paſſed, and there was no Attornment to veſt it as a Reverſion; and the Releaſe being to enure upon it by way of Enlargement of the Eſtate, if nothing paſſed by the Leaſe, if no Poſſeſſion was transferred by that, then there was no Eſtate whereon the Releaſe could operate; that the Eſtate ſettled on the Wife being *only a Term for Years*, the *Limitation to her Heirs was void*; and admitting it had been good, yet ſhe was under Coverture, and had no Power to make a Will; *ergo* the Deviſe to *B.* thereof was void; and then a Releaſe by her Heir at Law to *B.* and his Heirs could have no Operation, and ſo the Term muſt go to *A.* the Huſband. Lord Chan. was of Opinion, that tho' the Settlement could not operate as a Leaſe and Releaſe, yet *A.* the Huſband being in Poſſeſſion, and there being the Word *granted* in the Releaſe, it took Effect as a *Grant or Aſſignment of his whole Intereſt at Common Law*; and tho' it would not go to the Heirs of his Wife, yet his Intention being plain to exclude himſelf from the whole Intereſt of that Eſtate, he ſhould not be afterwards admitted to *derogate* from it, and therefore ſhould (*not* *) veſt in thoſe in whom by Law it ought, and ſhould go to the Wife's Adminiſtrator, for as *A.* intended to diveſt himſelf of the whole Fee, if it had been a Fee, there was no Reaſon when it appeared to be a leſs Intereſt that it ſhould not paſs. *Hil.* 1717. *Marſhall* and *Frank & Ux'*, *Gilb. Eq. Rep.* 143.

* The Word (*not*) is in the Original, but ſhould be out.

(B) Where Writings (i. e. Bonds) remain in the Cuſtody of the Obligors.

1. *A.* Executes a Bond of 5000 *l.* to one of his Daughters *without any Condition*, and payable *immediately*, but *always kept it by him*, and it was found amongſt his Papers after his Death. It appeared to be the Father's Intention that no Uſe ſhould be made of it, but only to *protect him from Taxes*, as *the* Daughter had owned ſhe took the Intent to be. The Father by Will gives *Portions to all his Daughters*, and dies; and Lord Keep. *Wright* thought that if the Daughter had got the Bond from her Father, and had put it in Suit againſt him in his life-time, Equity would have relieved him againſt it; and that it being a *voluntary* Bond, and *only* entred into to *ſkreen him from Taxes*, it was a Truſt for himſelf; and decreed it to be ſet aſide, *this Daughter being equal to the Reſt without this Bond*; and the Teſtator having always *declared that he intended his Daughters equal*, and *Equality is the higheſt Equity* (*a*). *Hil.* 1701. *Ward* and *Lant*, *Prec. in Chan.* 182, 183.

Note; No *Fraud* or *Circumvention* appeared to have been uſed in obtaining this Bond, but the Court decreed ſolely upon the Circumſtances of the Caſe. *MS. Rep.* in S. C.

(*a*) *Maxim.*

2. *J. S.* made a *voluntary Settlement to Truſtees* and their Heirs, in *Truſt to receive the Profits*, &c. and to put them out from Time to Time *for the Increaſe of the Fortune of his Daughters* A. *and* B. and if either of them died before 18 or Marriage, the Whole to go to the Survivor; and alſo executed a Bond to the ſame Truſtees for Payment

ment of 1000 *l.* at a certain Day, in Truſt for the ſame Daughters, but kept both Deed and Bond, and received the Profits of the Eſtate till his Death; after the Execution of the Deed and Bond *J. S.* by Will taking Notice of the Bond, gives to his ſaid two Daughters Legacies in full Satisfaction of the Benefit of the ſaid Bond, and the Surplus of his perſonal Eſtate, after Debts and Legacies paid, to be equally divided between his ſaid Daughters and his four younger Children. On a Bill by the Daughters to have an Account of the perſonal Eſtate, and a Satisfaction out of the Profits from the Date of the Settlement, and of the 1000 *l.* with Intereſt from the Time it was payable; *Wright* Lord Keep. ſaid, theſe were the Father's Deeds, and he could not *derogate* from them; but at laſt the *Defendants* agreed to ſet the Profits of the Lands received during the Father's Life againſt the two Daughters Maintenance, but the *Plaintiffs* inſiſted to have Intereſt on the Bond for the Time the Money was payable, and it was decreed *accord'*. *Mich.* 1702. *Barlow* and *Heneage*, *Prec. in Chan.* 210.

(C) In what Caſes Equity will order Deeds, &c. to be delivered up.

1. IF a Deed is made of an Eſtate with a Power of Revocation, and after it is revoked, he to whom the Inheritance belongs may by Bill compel ſuch Deed to be delivered up to him, to be cancelled; becauſe the Deed of Revocation may be loſt, and then it is unreaſonable the other Deed ſhould be ſtanding out (*a*). *Eaſt.* 4 *Ann.* *Gilb. Eq. Rep.* 1.

(*a*) Says it was ſo held in Chan. *Ibid.*— *MS. Rep. accord'*.

2. *J. S.* lent Money on a bad Security, which his *Lawyer* adviſed him was a good one; if it prove otherwiſe, and he has Notice that another made Title to it, he muſt deliver up all the Writings except the Mortgage Deed, for there may be a Covenant in that for Payment of the Mortgage Money. At the Rolls, *Mich.* 1720. *Opie* and *Godolphin*, *Prec. in Chan.* 548.

3. If Deeds are *depoſited with* A. *by Mortgagor* and *Mortgagee*, before the Condition broken, *A.* is Truſtee for the *Mortgagor*, afterwards for the *Mortgagee*; and if *A.* deliver them to the Mortgagee, Equity will not decree them to be delivered to the Mortgagor. *Anon. MS. Rep.* (*b*).

(*b*) Q. What Term and Year.

4. Equity will oblige *Tenant for Life* to deliver Deeds to the Heir *confirming the Life Eſtate*; but if there are any *meſne* Remainders in Tail, as long as there is a Poſſibility of Iſſue the Court will not order them to be taken out of the Hands of the Tenant for Life. *Joy* and *Joy*, *MS. Rep.* (*c*).

(*c*) Q. What Term and Year.

(D) In what Cases the Court will order Deeds to be brought into Court for Inspection, &c.

1. THE late Earl of *Suffolk* having no Iſſue, but having two Brothers, *viz.* the preſent Earl, his next Brother, and Defendant *Howard*, and conceiving the preſent Earl to be extravagant, the late Earl *cut off the Intail of his Eſtate by a Recovery*, and *by Deed and Will ſettled it on Defendant, his younger Brother, for Life*, Remainder *to his firſt Son* (then in Being) *for Life*, Remainder *to Truſtees to preſerve contingent Remainders*, Remainder *to the firſt*, &c. *Son of that Son in Tail Male, charging the Eſtate with* 100 l. per Ann. *Annuity only, to his next Brother the preſent Earl*, and died without Iſſue. *Macclesfield* C. on Bill and Anſwer (without going to a Hearing) ordered all the Deeds and Writings to be brought before the Maſter, and that Plaintiff, the preſent Earl, might either by himſelf or Agents have the Inſpection of them, that if any Thing has ſlipped the Conveyance, or if the Intail be not well docked, the Plaintiff may have the Benefit thereof. *Trin.* 1723. *Earl of Suffolk* and *Howard*, 2 *Will. Rep.* 177, 178.

His Lordſhip ſaid, he thought this a hard Caſe; and obſerved that Equity even for younger Children ſupplies the want of a Surrender of a Copyhold, and puts them on a Level with Creditors, taking it to be a Debt by Nature from a Father to provide for all his Children, as well the Youngeſt as the Eldeſt: But is not this a ſtronger Caſe, where the King has beſtowed an Honour on the Family, whereby the Heir of the Honour is *Conſiliarius natus*, and ſits as a Judge in the higheſt Court, the Houſe of Lords? Surely it is incumbent on the Anceſtor to leave ſome Proviſion for the Maintenance of the Honour, and looks like want of Gratitude to the Crown (from whence this Honour did ariſe) to leave it naked, eſpecially where the Anceſtor had a great Eſtate in his Power, and has given it from the Earldom, leaving only 100 *l.* a Year to the preſent Earl. There ought to be more done in this Caſe than a common Caſe; here is no Purchaſer, and there ſeems no Neceſſity to bring the Cauſe to a Hearing, for that would be only putting both Sides to great Charges, which would be ſtill harder on the Earl, as he is ſo little able to bear it; and ſo his Lordſhip decreed *ut ſupra*. *Ibid.* 178. —— *Vide* the Caſe of Sir *Edward Bettiſon* and *Harrington & al'*, *Ca.* 4. But in this Caſe *Peerage* was not concerned.

2. Every Remainder-man has a Right to come into this Court (*i. e.* the Court of Chancery) and pray the Aid thereof, to compel Perſons to bring in the Deeds and Evidences relating to the Eſtate. *Per Cur'*, *Hil.* 11 *Geo.* 1. in the Caſe of *Reeves* and *Reeves*, 2 *Mod. Ca. in Law and Eq.* 132.

3. An Order made at the *Rolls*, that the Defendant might *inſpect a Deed proved in the Cauſe*, and *referred to by the Depoſition as Part thereof*, was diſcharged by Lord Chan. *King*, for that the Defendant *before* Hearing is not to ſee the Strength of the Cauſe, or any Deed to pick Holes in it; and no ſuch Order in the like Caſe was ever yet made. *Eaſt.* 1727. *Davers* and *Davers*, 2 *Will. Rep.* 410.

4. Plaintiff claimed by Virtue of a Remainder in Tail expectant on an Eſtate-tail, and was *Heir Male of the Family*, and the *Defendants* were Siſters and the *Heirs General* of the Tenant in Tail, and by their Anſwer ſhewed that their Brother, the Tenant in Tail, had ſuffered a Recovery, and declared the Uſe to himſelf in Fee, referring to the Deed in their Cuſtody. Lord *Talbot before the Hearing* ordered the Defendants to leave with their Clerk in Court the *Deeds*, *making the Tenant to the* Præcipe, *and declaring the Uſes of the Recovery*. *Hil.* 1735. (*a*) *Sir Edward Bettiſon* and *Harrington & al'*, 2 *Will. Rep.* in a Note by the *Editor* at the Bottom of *Page* 178.

(*a*) 3 *Will. Rep.* 363. S. C. *accord'*.

Note; The Order was firſt obtained from the Maſter of the *Rolls* on Motion without Notice, and afterwards affirmed by *Talbot* C. *Trin.* 1735. *Ibid.*

(E) Defects in Deeds, &c. in what Caſes ſupplied in Equity.

1. WHERE a Deed is made on *good Conſideration*, Equity will ſupply a Defect in the Execution. *Trin.* 1702. 2 *Freem. Rep.* 256.

1 *Will. Rep.* 60. S. C. *in totidem verbis*, before *Wright* Lord Keeper, and the Maſter of the Rolls.

2. *J. S.* made a voluntary Conveyance to his Brother of the Half-Blood, which was void and defective at Law; afterwards *J. S.* died without Iſſue, upon which the Brother (*who by reaſon of the Half-Blood could not be Heir to* J. S.) brought his Bill to compel the Heir to make good this Conveyance. Objected, that this being a voluntary Conveyance, it ought not to be made good in Equity, eſpecially againſt an Heir at Law. But *Wright* Lord Keep. was of Opinion, that as the *Conſideration of Blood would at Common Law raiſe an Uſe*, and as before the *Stat.* 27 *H.* 8. ſuch *Ceſtuy que Uſe* ſhould have compelled an Execution of the Uſe in a Court of Equity, ſo would this imperfect Conveyance raiſe a *Truſt* (*a*) in *Reſpect of the Conſideration of Blood*, and *conſequently ought to be made good in Equity*. *Mich.* 1702. *Watts* and *Bullas*, *MS. Rep.*

(*a*) Q. If it ſhould not be an *Uſe*.

Sel. Ca. in Chan. 24. S. C. *in totidem verbis.*

3. A Bond was put in Suit againſt an Executor, who pleaded *Plene Adminiſtravit*, that he was a Bond Creditor himſelf, and had paid himſelf; on the Trial it appeared there was an *Interlineation of* 50 l. *after the Bond was executed*, and ſo at Law the Bond was void. Moved that tho' the Bond be void at Law, yet that it may be conſidered as good in Equity for ſo much Money as was really ſecured thereby. But *per* Lord Chan. *King*, This at moſt can be but a ſimple Contract, for you yourſelves have deſtroyed its being as a Bond, ſo it is as if it never had been, therefore can be no Bar to a Debt of a ſuperior Nature. *Trin.* 11 *Geo.* 1. *Anon. MS. Rep.*

Gilb. 146. *Mich.* 4 *Geo.* 2. S. C.

4. A Deed of Lands in *two different Counties*, by way of *Feoffment*, and *Livery* and *Seiſin* of the Land in one County indorſed only; decreed that tho' no Livery appeared of the other Lands, yet by reaſon of the Poſſeſſion and great Length of Time, (being upwards of 70 Years before) Equity will *ſuppoſe* and *ſupply* it. It had been much ſtronger on the other Side, had the Livery been indorſed of Lands in one County in the Name of both; it would have been an *Implication* that none was of the other, ſince one was deſigned for both. *Mich.* 1730. *Jackſon* and *Jackſon*, *Sel. Ca. in Chan.* 81.

(F) Of ſuppreſſing, cancelling, and burning Deeds and Writings.

1. THE Plaintiff claimed as Deviſee under the Defendant's Father's Will; by Proof it appeared that there was ſuch a Will, tho' no exact Account was given of the Contents thereof; but in as much as the Court was ſatisfied the Defendant had ſuppreſſed the Will, and for that (tho' no exact Proof was made of the Contents) the Defendant might clear this by producing the Will, therefore it was decreed that the Plaintiff the Deviſee ſhould hold and enjoy until the Defendant produced the Will and farther Order. 8 *December* 1708. decreed by *Trevor*, Maſter of the Rolls, and affirmed by Lord

Chan. on Appeal, and afterwards by the Houſe of Lords. Cited by *Jekyll*, Maſter of the Rolls, *Mich.* 1721. in the Caſe of *Dalſton* and *Coatſworth*, 1 *Will. Rep.* 733.

2. *A.* makes a *voluntary* Settlement on her Nephew, *keeping the Deed in her Power*, in which *Settlement there is no Power of Revocation*; afterwards one *ſecretly* and by *Fraud*, on Behalf of the Nephew, gets an atteſted Copy of this Settlement; and then the *Party who made the Settlement burns it*, and ſettles the Premiſſes on another Nephew. The firſt Nephew's Bill to eſtabliſh the Copy of the firſt Settlement is diſmiſſed with Coſts. Upon which the ſecond Nephew claiming under his Settlement, brings a Bill to have the atteſted Copy delivered up, and has a Decree for it, becauſe ſuch Copy had been indirectly gained. *Parker* C. *Mich.* 1719. *Naldred* and *Gilham*, *Ibid.* 577.

3. *J. S.* by a Deed had ſettled a Term, ſo that *after his* and *B. his Wife's* (the Defendant's) *Death without Iſſue, the ſame was to come to the Plaintiff for the Reſidue of the Term.* *J. S.* died *ſans* Iſſue, and *B.* had burnt the Deed; and by her Anſwer but faintly denied it, (*viz.*) *That ſhe did not remember* ſhe ever burnt or deſtroyed the Deed. Two Witneſſes ſwore the Limitations of the Settlement to be in Truſt for *J. S.* for Life, Remainder to *B.* his Wife for Life, but their Evidence differed as to the Words of the Remainder, for one ſwore that the Remainder was *to the Heirs of their Bodies*, and the other Witneſs that it was *to the Iſſue of their Bodies, and for want of Iſſue by* J. S. *and* B. Remainder *to the Plaintiff*. And *per Jekyll*, Maſter of the Rolls, where a *Term is limited to a Man* and *his Wife for their Lives*, Remainder *to the Heirs of their Bodies*, and *for want of ſuch Iſſue* Remainder *over*; this *Remainder over being but of a Term, is void.* But his Honour ſaid, that a Limitation of a *Term* to Truſtees *in Truſt for J. S.* and *B. his Wife for their Lives*, and afterwards for *their Children, or for their Iſſue*, and *for want of ſuch Children or Iſſue living at the Death of* J. S. *and* B. then to *go over to the Plaintiff*, is a *good Limitation*; and that ſince a Term might be limited in ſuch Manner, his Honour ſaid, he would intend it to have been ſo limited in the preſent Caſe, for every Thing ſhall be preſumed *in Odium Spoliatoris* (*a*). But his Honour ſaid, there could be *no Decree for the Poſſeſſion*, nor *any preſent Conveyance to the Plaintiff, it being only the Remainder of a Term after* B.'s (the Defendant's) *Death.* But ordered *B.* to aſſign over the Term to Truſtees *in Truſt for herſelf for Life*, and *afterwards for the Plaintiff*, and *to bring the Deeds relating to the Title into Court*, and *to pay Coſts.* *Mich.* 1721. *Dalſton* and *Coatſworth*, *Ibid.* 731.

His Honour conſidering in what Manner the Decree ſhould be pronounced in the preſent Caſe, cited *Hob.* 109. (*b*), *Trin.* 14 *Jac.* *The King and Lord Hunſdon* ver. *Counteſs Dowager of Arundel*, where the King and his Farmer under him claimed Title by the Attainder of *Francis Dacres*, who was attainted of High Treaſon, and was ſuppoſed to be *Tenant in Tail by Virtue of a Deed not extant*; but vehemently ſuſpected to be ſuppreſſed by ſome under whom the Defendants claimed; and therefore it was decreed by Lord Chan. *Elleſmere*, Lord *Coke* and *Hobert* Ch. Juſtices, (*c*), that the King and his Farmer under him ſhould hold the Land until the Defendants produced the Deed; and the Court made farther Order thereon.——His Honour ſaid, that upon Search he found this Caſe under the Name of *Hobert Attorney General* v. *L*——. *Ibid.* 732.—— 2 *Will. Rep.* 680, 681. *Mich.* 1734. S. C. cited *in Caſu Cowper* and *Cowper*, *per Jekyll*, Maſter of the Rolls, (from the Regiſter's Book, *Trin.* 14 *Jac.* 1. *lib. B. fol.* 1095 *b.*) who ſaid the Decree was drawn up thus, " That the King, his Heirs, and the Lord *Hunſdon* his Farmer, ſhould hold and " enjoy the Lands, until the Defendants ſhould procure the Deeds therein particularly mentioned, and *proved* " *once to have been extant* and *duly executed.*" And his Honour obſerves, that *here* we ſee that the *Exiſtence* of the Deeds was *fundamental* to the Decree, and the *Proof* of them fully and expreſly aſſerted by the Court in framing the Decree.—— And *Ibid.* 682. his Honour ſays, that he does not remember or believe that any one Caſe had been cited where there was not *ſome Proof made of the Exiſtence of the Deed* or *Writing* ſuppoſed to be *ſuppreſſed* or *deſtroyed.* *Vide* 1 *Chan. Ca.* 292.——1 *Vern.* 408.——1 *Vol. Eq. Ca. Abr. P.* 169.

(*a*) *Vide* 1 *Vern.* 207, 308 (*b*) *Moor* 823. (*c*) And alſo the *Maſter of the Rolls*, 2 *Will. Rep.* 681.

4. *J. S.* Tenant for Life without Impeachment of Waſte, with Power to make a Jointure on any Wife, not exceeding 100 *l. per Ann.* for each 1000 *l.* brought by her, and ſo ratably for any leſs Sum;

Sum; Remainder to Truſtees to preſerve contingent Remainders; Remainder to the firſt, *&c.* Son in Tail Male; Remainder over. *J. S.* marries *A. whoſe Fortune does not appear what, or any*; the Huſband and Wife part by Conſent, and a Deed is drawn between them, the Remainder Man, and Truſtees, with *Covenant to ſettle* 30 l. per Ann. *for* A.*'s Proviſion during the Separation*, and *for a Proviſion for her after her Huſband's Deceaſe, in Conſideration of which ſhe is to claim no Thirds, or any Thing out of the Huſband's Eſtate under the Statute of Diſtributions.* *J. S.* executes this Deed, and ſends it into the Country to be executed by the Remainder Man, who did ſo, and returned it to the Huſband, *who did not deliver it to the Truſtees.* *A.* applied for it, but could not get it, but has *Money paid to her in Purſuance of this Deed.* Afterwards *J. S. cancels the Deed in the Preſence of the Remainder Man*; *A.* after the Death of *J. S.* brings a Bill againſt the Remainder Man to have the Benefit of this Covenant from *J. S.*'s Death, which was ſo decreed by his Honour, and on Appeal affirmed by *King* C. *Trin.* 2 *Geo.* 2. *Sepalino* and *Twitty*, *Sel. Ca. in Chan.* 75.

CAP.

CAP. XXXIII.

Deviſes.

(A) Deviſes by whom (*a*), and to whom good. —— What Words will amount to a Deviſe; —— And here of Deviſes (or Limitations) over.

(*a*) In what Caſes a Will made by a Feme Covert is good, *vide* Tit. *Baron and Feme*, (O) *P.* 157.

(B) What Eſtate or Intereſt in the Deviſor at the Time of the Deviſe he may diſpoſe of; and in what Caſes new acquired Lands paſs.

(C) What Words paſs a Fee.

(D) What Words paſs (or create) an Eſtate-tail, —— and what an Eſtate for Life.

(E) What general Words will paſs Lands, Houſes, &c. —— And what Chattels perſonal and real.

(F) What will paſs by the Word Lands.

(G) What Words paſs a Reverſion; —— And what the Reſidue of an Eſtate real or perſonal.

(H) What Perſons ſhall take by the Word Heir; —— Heirs Male; —— Children, &c.

(I) In Caſe of a Deviſe to an Heir, where he ſhall take by Deviſe, and where by Deſcent.

(K) Of executory Deviſes; And here of the Limitation of the Truſt of a Term.

(L) Of Deviſes by Implication.

(M) Deviſees; who ſhall take by Survivorſhip.

(N) Deviſe of perſonal and real Eſtate, with Remainder, &c.

(O) Where a Deviſe ſhall be in Satisfaction of a Thing certain.

(P) Of void Deviſes (*b*) (or Limitations in a Will); —— and here of lapſed Deviſes.

(*b*) *Vide* (A) *P.* 290. *Caſes.*

(Q) Of Deviſes upon Condition, Contingency, and until, &c. ——And here what is a Condition; what is a Limitation, and what is a Truſt under a Will.

(R) Who ſhall be the Taker where there is an uncertain Deſcription of the Perſon.

(S) Where the Words are in the disjunctive who ſhall take.

(T) Where Lands are deviſed in Truſt, or to be ſold for, or charged with, the Payment of Debts, —— Legacies; with Remainder over (*c*).

(*c*) *Vide* Tit. *Heir.*

(U) Where Money is deviſed to be inveſted in Lands to be ſettled, &c. how conſtrued.

(W) Where a Contingency in a Will ſhall extend to all the Deviſees.

(a) In what Caſes a Will made by a Feme Covert is good, *vide* *P.* 157.

(A) Deviſes by whom (a), and to whom good. ——What Words will amount to a Deviſe;——And here of Deviſes (or Limitations) over.

1. THE Law is clear now, that a Deviſe to an Infant *en ventre ſa mere* is good enough, tho' he be born after the Death of the Teſtator, and he ſhall take by way of *executory Deviſe* when he is born. *Per North* C. J. *Trin.* 1677. *Anon. in C. B.* 1 *Freem. Rep.* 293. (344. *b.*)

2. A Deviſe to an Infant *en ventre ſa mere* was formerly held void, for that the Infant not being born, there was no Perſon to take; but it is now held good, *becauſe the Law ſhall intend that the Deviſor did intend it to him when he ſhould be born*, ſo that *it works in the Nature of an executory Deviſe*; and where it appears that the Teſtator did not intend it to be executed preſently, there it ſhall wait. *Per North, Hil.* 1677. in the Caſe of *Taylor* and *Bydall, Ibid.* 243, 244.

3. *A.* deviſed a *Term for Years to his Daughter* and *her Children*, (ſhe then having three Children) and *alſo to ſuch other Children as ſhe ſhould have*, and *the Children of thoſe Children*; ſhe having other Children afterwards, held that the *Woman* and *her three Children took jointly* each a fourth Part, and that the *after born Children took nothing*; and that theſe Words were Words of *Limitation*, and *not of Purchaſe*; and it is as much for the Wife's Part as tho' it had been *given to her* and *the Heirs of her Body. Mich.* 1692. *Alcock* and *Ellen*, 2 *Freem. Rep.* 186.

4. *J. S.* deviſes all his perſonal Eſtate to his Wife for Life, and what ſhe has left at her Death, he ſays, it is *my Will, and I do deſire her, that it may be equally diſtributed betwixt my own Kindred and hers. J. S.* died, and the Widow married the Defendant. The Bill was brought by the *Relations* to have an Inventory taken, and Security given that the ſame ſhould not be imbeziled, for that by the Will the Wife had only the Uſe of the perſonal Eſtate during Life; and the Words *what ſhe has left*, ſhall be conſtrued to be by reaſon of Goods that are *bona peritura*, or may be quite worn out with uſing. But it being anſwered for Defendant, that the Eſtate left was ſo ſmall that ſhe could not live upon it without ſpending the Stock, his Honour ſaid, that if that be ſo, it might alter the Caſe; therefore let the Maſter ſtate the Value of the Eſtate, and then he would give further Directions. *Eaſt.* 1697. *Cooper* and *Williams, Prec. in Chan.* 71.

Vide (C) *P. Ca.*

5. Direction in a Will that the *Heir ſhould renounce all his Right in ſuch Lands to a younger Son*, amounts to a Deviſe. Cited by *Treby* C. J. 9 *W.* 3. as a Point lately referred to *Holt* C. J. and himſelf by Lord Chan. *in Caſu Hodgkinſon* and *Star*, 1 *Lord Raym. Rep.* 187.

6. A Deviſe by *Ceſty que Truſt* in Tail is good without any further Act to bar the Right in Tail. So declared by Lord Keeper, *Hil.* 1703. *Woolnough* and *Woolnough, Prec. in Chan.* 228.

7. *A.* hath Iſſue *B.* and *C. C.* deviſed to *B.* 1000 *l.* and *after to the Poſterity of* A. *for their Education*, at which Time *B.* was ſixty Years of Age, and *A.* dead. The queſtion was, who ſhould have the 1000 *l.* after *B.*'s Death? And by Lord Keeper, the *lineal* Heir, if there

there be any, ſhall take it under the Word *Poſterity*. But *B.* dying without Iſſue, and there being no *lineal* Heir of *A.* the *collateral Heir ſhall take it*, but thoſe of the *Half Blood ſhall not*, as in the Caſe of Diſtribution. *Hil.* 5 *Ann. Anon. MS. Rep.*

8. A Baron gives *all his Eſtate to his Wife*, and ſays, " *I deſire* " *and requeſt my ſaid Wife to give all her Eſtate which ſhe ſhall have* " *at the Time of her Death to her and my neareſt Relations equally* " *amongſt them.*" *Harcourt* C. The Words being ſo *very general*, both in reſpect of the Money, and of the Perſons to take it, it does *not* amount to a Deviſe, but *it is only a Recommendation to the Wife to make ſuch a Diſpoſition*; but *if he had deſired ſhe would have given it to a particular Perſon, it is a good Deviſe*, and a Truſt. A Deviſe to the *neareſt Relation is good*, and *ſuch ſhall be ſo accounted as are next by the Statute of Diſtributions.* 1712. *Anon. Viner's Abr.* Tit. *Deviſe*, (I. 6.) *Ca.* 25.

9. *J. S.* deviſes the *Reſidue of his Eſtate to his Wife, and deſires her to give all her Eſtate at her Death to his and her Relations.* Quære, *If this does amount to a Deviſe* on a *Truſt in the Wife for all the Eſtate which the Huſband gave her by his Will. Harcourt* C. thought theſe Words *too general to amount to a Deviſe over of his Eſtate after the Death of the Wife*, nor *can it be taken as a Truſt*, becauſe the Words extend to *all the Eſtate which ſhe ſhall be poſſeſſed of at the Time of her Death*, which the Huſband has not any Power over, and therefore it muſt be *taken over as a Recommendation*, and *not as a Deviſe or Truſt*; but if the Teſtator had deſired his Wife by his Will to give at her Death *all the Eſtate which he had deviſed to her, to his and her Relations*, there the Eſtate deviſed to her ought to go after her Death to his and her Relations, according to the Statute of Diſtributions. Bill diſmiſſed. *Eaſter* 12 *Ann. Palmer* and *Schribb, Ibid.* (N. b.) *Ca.* 25.

10. A *Bequeſt* or *Deſire to pay Debts*, is a poſitive Deviſe, for a *Requeſt to pay Debts can mean nothing but to charge the Lands*; for the *perſonal in all Events is liable. Hil.* 1715. *Trot* and *Vernon* (*a*). ——In Sir *Oliver Aſhcomb*'s Caſe the *Deviſee is Executor*, and *deſired to ſee the Will performed*, and *real* and *perſonal Eſtate both liable to Debts. Ibid.* (I. 6.) *Ca.* 26.

(*a*) *Vide* 1 *Vol Abr. Eq. P.* 198. *Ca.* 6. S. C. fully reported.

11. One deviſes the *Surplus of his Eſtate to his Children* and *Grandchildren*; a Grandchild *in ventre ſa mere* at the Teſtator's Death ſhall not take; *ſecus*, had it been to the Children and Grandchildren living at his Death. Sir *John Trevor*, Maſter of the Rolls, *Hil.* 1716. *Northey* and *Strange*, 1 *Will. Rep.* 340, 342. *Vide* the Caſe of *Beale* and *Beale*, *P. Ca.*

Prec. in Chan. 470. *Eaſter* 1717. S. C. and P. under the Name *Northey* and *Burbage.*— *Gilb. Eq. Rep.* S. C. and P. *Eaſter* 1716.

12. *J. S.* deviſes his *perſonal Eſtate* to *A.* and *B.* and *if either die without Children*, then to the *Survivor*; and *if both ſhould die without Children*, then to the Children of the Teſtator's other Brothers and Siſters. His Honour (having taken Time to conſider of it) held the Deviſe over good. *Hil.* 1718. *Hughes* and *Sayer*, 1 *Will. Rep.* 534, 535.

13. A deviſed 3000 *l.* to *all the natural Children of* B. *his Son by* J. S. *Parker* C. inclined, that a natural Child *in ventre ſa mere* could not take, for that a Baſtard cannot take until he has got a name of reputation of being ſuch a one's Child, and that a Reputation cannot be gained before the Child is born. *Hil.* 1718. *Metham* and *Duke of Devon*, 1 *Will. Rep.* 530.

For this Reaſon it has been determined, that where a Judgment was given to a Papiſt he could not extend the Land, for *that would give him an Intereſt in the Land*; and it is the ſame Thing where the *Judgment is given in Truſt for a Papiſt.* By Lord *Parker*, *Lawther* and *Fletcher*, *Hil.* 1717. *Ibid.* in a Note by the *Editor.*

14. A Papiſt *cannot* take a *Freehold* or *Leaſehold Eſtate* by Will, becauſe taking by Will is *in Conſtruction of Law* taking by *Purchaſe*, and by the expreſs Words of the *Stat.* 11 & 12 *W.* 3. *c.* 4. a Papiſt is diſabled to take by *Purchaſe*; alſo Terms for Years are expreſly mentioned in the Statute. *Per* Lord Chan. *King*, *Trin.* 1730. *Davers & al'* and *Dewes & al'*, 3 *Will. Rep.* 46.

15. Plaintiff claimed as *contingent* Deviſee of a Term for Years on *A.* the Legatee's *dying without Iſſue*; and the Court was *clear* of Opinion that the Deviſe over was good, the *dying without Iſſue being confined to a Life then in Being.* At the Rolls, *Mich.* 1720. *Opie* and *Godolphin*, *Prec. in Chan.* 549.

Afterwards in *Trinity* Term 1720. upon an Appeal *Parker* C. reverſed the Decree; and ſaid, that if *J. deviſe a Term to A.* and *if A. die without leaving Iſſue*, Remainder *over*; in the vulgar and natural Senſe this muſt be intended if *A. die without leaving Iſſue at his Death*, and then the Deviſe over is good; that the Word (*die*) being the laſt Antecedent, the Words (*without leaving Iſſue*) muſt refer to that. Beſides, the Teſtator, who is *inops Conſilii*, will under ſuch Circumſtances be ſuppoſed to ſpeak in the vulgar, common and natural, and not in the legal Senſe of the Words.——That the Reaſon why a Deviſe of a *Freehold to one for Life*, and *if he die without Iſſue*, then to another, is determined to be an Eſtate-tail, is in Favour of the Iſſue that ſuch may have it, and the Intent take Place; but that there is the *plaineſt* Difference betwixt a *Deviſe of a Freehold* and *a Deviſe of a Term for Years*; for in the Deviſe of the *latter* to one, and *if he die without Iſſue, then to another*, the Words (*if he die without Iſſue*) cannot be ſuppoſed to have been inſerted in Favour of ſuch Iſſue, ſince they cannot by any Conſtruction have it. *Per* Lord Chan. *Ibid.* 666, 667.

16. *A.* poſſeſſed of a Term deviſed it to *B.* and *C.* and if either of them die and *leave no Iſſue* of *their reſpective Bodies*, then to *D.* His *Honour* was of Opinion, that the Deviſe over was void; and ſaid, that had the Words been, if *B.* or *C. ſhould die without Iſſue*, Remainder over; this *plainly* would have been void, and exactly the Caſe of *Love* and *Windham*, 1 *Sid.* 450. 1 *Vent.* 79. 1 *Mod.* 50. that there is no Diverſity betwixt a Deviſe *to one for Life*, and *if he die without Iſſue*, *Remainder over*; and a Deviſe thereof to *one for Life with ſuch Remainder, if he die leaving no Iſſue:* For both theſe Deviſes ſeem equally relative to the Failure of Iſſue at any Time after the Teſtator's Death; and cited, and much relied upon, 1 *Leon.* 285. *Mich.* 1720. *Forth* and *Chapman*, 1 *Will. Rep.* 664.

17. *J. S.* deviſed Lands, *in Caſe he ſhould leave no Son at the Time of his Death*, to *B.* and his Heirs; the Teſtator dies, leaving his Wife *Privement enſeint* of a Son; the Queſtion was, whether the Deviſee was intitled to theſe Lands, in regard (as was objected) the Teſtator died without leaving a Son at his Death. And *Parker* C. referred it to the Judges of *B. R.* (*viz. Pratt* C. J. *Powis*, *Eyre*, and *Forteſcue Aland* J.) who certified that the Deviſe to *B.* and his Heirs was *not an abſolute Deviſe*, but ſubject to the Contingency of *J. S.*'s leaving no Son at the Time of his Death, ſo that ſuch Contingency *not* happening (*a*), the Deviſe to *B.* and his Heirs cannot take Place. And *J. S.* having expreſſed no Intention in his Will of diſinheriting his only Son, *B.* is not intitled to the Premiſſes, with which his Lordſhip agreed; and *accord'* 5 *Oct.* 1721. decreed *B.* to deliver up the Poſſeſſion of the Premiſſes, and account for the Rents and Profits. *Burdet* and *Hopegood*, 1 *Will. Rep.* 486.

(*a*) For the Judges were *unanimouſly* of Opinion, that the Plaintiff tho' not born (*at the Time of his Father's Death*) yet had an Exiſtence in the Eye of the Law, as *in ventre ſa mere*, which in many Reſpects was regarded; as if a Woman takes Poiſon to kill a Child then in her Womb, and the *Child is born alive*, and *afterwards dies of that Poiſon*, the Woman is guilty of Murder (*b*).——Alſo a Child *in ventre ſa mere* may be *vouched*, and may be a *Deviſee*; and it would be hard to diſinherit ſuch an *only* Child, nor could it be imagined the Teſtator ever intended ſo to do. *Ibid.* 487. (*b*) *Vide Beale* and *Beale*, 1 *Will. Rep.* 244.

18. *J. S.*

18. *J. S.* by Will gives 500 *l.* *to his Wife for Life*, Remainder *to the Pariſh Church of St. Helen's, London*, (which is an Impropriation). The Maſter of the Rolls decreed that this 500 *l.* ſhould not go to the Vicar or Stipendiary of the Church, but did belong to the Churchwardens for the Reparations of the Church, and improving and adorning the ſame. *Hil.* 1722. *Attorney General* and *Ruper*, 2 *Will. Rep.* 125.

19. *A.* has *B. a Nephew*, and *C. a Niece*; *A.* makes his Will, and *deviſes Lands to* B. *and* C. *for their Lives*, Remainder *to the Children of* B. *and to the Children of* C. *C.* had *then one Child. A.* afterwards made a Codicil, *at which Time* C. *had two more Children.* This is a *future* Deviſe, and *takes in the Children after born*; for the Word *Children in the Will, extends to more than the Child born at the making of the Will. Mich.* 11 *Geo. Bateman* and *Roach*, 2 *Mod. Ca. in Law and Eq.* 104.

20. *J. S. poſſeſſed of the Reſidue of a Term*, deviſes it to *A. in Truſt to raiſe Money to diſcharge her Debts* and *Legacies*, and after Payment thereof *to permit* B. *to receive the Rents for his Life*, and after *to his firſt*, &c. *Son in Tail Male*; and in Default of Iſſue Male, Remainder *to his Daughters*; and *in Default of Daughters*, or *in Caſe of their Death before* 21 *or Marriage*, then *to* C. *for the then Reſidue of the Term.* *B.* died without having had *any* Iſſue. Sir *Joſeph Jekyll*, Maſter of the Rolls, decreed the *Deviſe over to* C. *to be good*, and that *A.* the Truſtee do convey the Reſidue of the Term *unſold* to him (*a*). *Mich.* 1732. *Stanley* and *Leigh*, 2 *Will. Rep.* 618, 631.

(*a*) *Vide* the Caſe of *Sabberton* and *Sabberton*, *Mich.* 1736. where on the like Limitation over of a *perſonal* Eſtate a Caſe was made by Lord *Talbot* for the Opinion of the Judges of *B. R.* who certifying the Limitation to be good, the Lord *Hardwicke* in 1737. decreed agreeably thereto. *Ibid.* 631. in a Note by the *Editor.*—*Vide* this Work, *P. C.*

21. *A.* by Will *gives* and *bequeaths all his real and perſonal Eſtate unto* B. *his Son, and to the Heirs of his Body, to his and their Uſe, to be paid unto him in three Years after his* (*the Teſtator's*) *Death, and during that Time he makes* J. S. *Executor of his Will, and after the ſaid three Years expired he appoints his ſaid Son Executor, and if his ſaid Son ſhould die, leaving no Heirs of his Body living, then he gives and bequeaths ſo much of his ſaid real and perſonal Eſtate as his ſaid Son ſhould be poſſeſſed of at his Death to the Goldſmiths Company of London*, in Truſt for ſeveral charitable Uſes mentioned in the Will; and declares his Will to be, *that the Company ſhould not give his ſaid Son any Diſturbance during his Life.* The Teſtator dies, and after the three Years the Son takes upon him the Execution of the Will, and ſuffers a Recovery of the real Eſtate, and afterwards makes his Will, and thereof the Defendant his then Wife Executrix, and then dies *ſans* Iſſue. The court was unanimous that the *Limitation over was void*, as the *abſolute Ownerſhip had been given to the Son*, for *it is to him and the* Heirs of his Body, and the Company are to have no more than he ſhall have left unſpent; and *therefore he had a Power to diſpoſe of the Whole*, which *Power was not expreſly given to him*, but *it reſulted from his Intereſt*; the *Words that give an Eſtate-tail in the Lands muſt transfer an intire Property of the perſonal Eſtate*, and then nothing remains to be given over. Bill diſmiſſed. By *Lord Chancellor*, his *Honour*, and *Reynolds* C. B. *Trin.* 5 *Geo.* 2. (*b*) *Attorney General* and *Hall, Fitz-Gibb. Rep.* 314, 321.

(*b*) *MS. Rep.* 5 *June* 1731. S. C. ſtates it thus: *Thomas Hall* by Will dated 16 *Feb.* 1717. deviſed (*inter al*) as follows: *I give and bequeath to my Son* F. Hall *and the Heirs of his Body lawfully begotten, all my real and perſonal Eſtate to his and their own Uſe within three Years after my Deceaſe, but in Caſe my Son* F. Hall *ſhall depart this Life leaving no Heirs of his Body lawfully begotten living, then I give all and ſo much of my Eſtate as he ſhall be actually poſſeſſed of at the Time of his Death to the Company of Goldſmiths in* London, *upon ſeveral charitable Truſts*, &c. *F. Hall dying without Children*, this Information was to have *the Eſtates*

Eſtates appropriated to the Charities mentioned in the Will: As to the real Eſtate Defendant, *who was Deviſee* and *Executrix of* Francis, *pleaded a common Recovery ſuffered by her Huſband, whereby he declared the ſame to himſelf in Fee,* and *then deviſed it to her.* The Court upon arguing the Plea, taking *Francis to be Tenant in Tail,* allowed it, and ſo the *real Eſtate well barred*; and the only Queſtion now was, if the Perſonalty was well limited over. And it was argued by Mr. Attorney General, that this was an executory Deviſe to take Effect upon *Francis Hall*'s dying without Children, and that the Word *Heirs,* as it ſtood connected with the Words *leaving* and *living,* imported no more than Children which the ſaid *Francis* ſhould leave living at the Time of his Death, to which Period the whole Contingency was to be referred; and cited 1 *Vern.* 234, 250, 298. 2 *Vern.* 38, 59, 766. And though the Word *Heirs* has a larger Senſe as to the real Eſtate, which is capable of being intailed, yet with Regard to the perſonal it ought to be conſidered only as veſting a Property in Caſe the Contingency did not happen, but not as creating an Eſtate tail; and that the ſame Words have according to the ſubject matter been differently conſtrued, were cited 2 *Vern.* 86, 195. And this Conſtruction ought rather to prevail, becauſe it is the only one that can ſupport the Teſtator's Intention. Mr. Solicitor General *contra,* That by the Will the ſole Property of the perſonal Eſtate was veſted in *Francis Hall*; he cited theſe Words omitted in the Caſe, *But my Will is that the Company of Goldſmiths ſhall not give my Son any Trouble whatſoever concerning my perſonal Eſtate.* It is plain he might have aliened it all, for the Deviſe over is only of ſuch Part as he ſhould be poſſeſſed of at his Death: And the Difference is where the Thing itſelf, as here, and where the Uſe only is deviſed. 2 *Vern.* 245, 600. And *Richards* and *Lady Abergavenny* in Point, where a Houſe together with the Furniture thereof was limited to a Wife and ſuch Heir of her Body as ſhould be living at her Death, and in Default of ſuch Heir Remainder over; the Wife has an Eſtate-tail in the Houſe, and an abſolute Property in the Furniture. 1 *Vern.* 326, 347. 2 *Vent.* 367. 1 *Vent.* 478. 2 *Vern.* 110. *Cro. Jac.* 590. The Words inſiſted upon in the Will to confine the dying without Iſſue to the Time of the Death of *Francis Hall* are (*living* and *leaving*), but if a Man dies without Heirs of his Body at any Time, he dies without Heirs of his Body living, ſo if he leaves no Iſſue, he dies without leaving Iſſue; but for the Reaſons aforeſaid this is not material to be determined. *King* C. *Jekyll* Maſter of the Rolls, *Reynolds* Ch. B. In Regard the *Ownerſhip and Property of the perſonal Eſtate was veſted in* F. Hall, and *not the Uſe only,* the *Limitation to the Company is void,* it is giving a Man an Eſtate in Money to ſpend, and limiting over to another what does not happen to be ſpent, and therefore the Information was diſmiſſed.

Where the Words of a Deviſe of a *Leaſehold would make an expreſs Eſtate-tail in the Caſe of a Freehold,* there a Deviſe over of ſuch Leaſehold is void;—*ſecus* if the Words in the *former* Deviſe *would in the Caſe of a Freehold make an Eſtate-tail only by Implication.* *Ibid.* 259.

22. Deviſe *of a Term to* A. *for Life,* Remainder *to the Children* A. *ſhall leave at his Death,* and *if* A.'*s Children die without Iſſue,* then to *B. A.'s Children die without leaving any Iſſue living at the Time of their Death*; this is a good Deviſe over to *B.* Decreed *per Talbot* C. *Eaſter* 1734. *Atkinſon* and *Hutchinſon,* 3 *Will. Rep.* 528.

23. An *executory* Deviſe of an Eſtate of Inheritance to a Perſon *unborn* when he ſhall attain 21, is good, and there is no Danger of a Perpetuity. *Mich.* 1736. *Stephens* and *Stephens, Ca. in Eq. Temp. Talbot* 228.

In Confirmation of this Opinion the Court cited the Caſe of *Jones* and *Weſtcombe* (*a*), and ſaid, they had ſeen the decretal Order, by which it appeared that the ſame Queſtion ariſing upon the ſame Will, and concerning the ſame Premiſſes, came before Lord *Harcourt,* and that he was of Opinion that the Deviſe over of the Reverſion in Thirds to the Wife and two Siſters was good notwithſtanding the Wife was not *enſeint* with any Child. *Ibid. pl.* 10.

24. In Ejectment at the Sittings at *Guildhall* this Caſe was made for the Opinion of the Court; *J. S.* being poſſeſſed of a Term deviſed it as follows, *viz.* "*To my Wife for her Life, and after her Deceaſe to ſuch Child as my ſaid Wife is now ſuppoſed to be with Child and* enſeint *of, and his Heirs for ever; provided always that if ſuch Child as ſhall happen to be born as aforeſaid ſhall die before it has attained the Age of* 21 *Years, leaving no Iſſue of its Body, then the Reverſion of one Third Part to my ſaid Wife, and the other two Thirds to my Siſters* A. *and* B." The Teſtator dying within a Month after, the Wife entered and enjoyed during her Life, but *had no Child or Miſcarriage,* and upon her Death the Queſtion was, whether *as no Child had ever been born, the Remainders limited upon his dying under* 21 *without Iſſue could take Effect?* And the Court held that they might; that *according to the Law now ſettled* the Deviſe to the Infant *in ventre ſa mere* was well limited, and if any Child had been born, would have paſſed the Term accordingly. 2*dly*, That tho' no Child was ever born, yet *the Remainders are notwithſtanding good,* for there being no Deviſee, the Deviſe tho' void only *ex poſt facto* falls to the Ground as much as if it had been void in its *Creation,* and this lets in the Remainders immediately; that tho' the Clauſe by which the Remainders are limited is in Words ſtrictly ſpeaking *conditional,* yet

(*a*) 1 *Vol. Eq. Ca. Abr. P.* 245.

yet *they don't make it a Condition*, but only a Limitation. *Laſtly*, That the Contingencies muſt happen within a reaſonable Time, and therefore it may well operate by way of *executory* Deviſe. *Trin.* 11 *Geo.* 2. *B. R. Andrews on the Demiſe of Jones* and *Fulham*, *Viner's Abr.* Tit. *Deviſe*, (L) *Ca.* 53.

25. A Deviſe to a *Papiſt above the Age of* 18 is void; and if ſuch Deviſee convey to a Proteſtant Purchaſor for a *valuable Conſideration*, that Conveyance is void alſo. *Eaſt.* 15 *Geo.* 2. *B. R. Fairclaim on the Demiſe of Borlace* and *Newland & al'*, *Ibid.* (I. 7.) *Ca.* 4. *Vide P. C.* this Caſe more fully abridg'd.

(B) What Eſtate or Intereſt in the Deviſor at the Time of the Deviſe he may diſpoſe of; and in what Caſes new acquired Lands paſs.

1. EJECTMENT brought for Lands in *Kent* on the Demiſe of *Bockenham*, and on *Not guilty* pleaded, there is a *ſpecial* Verdict, whereby the Jury find that *William Bockenham*, Eſq; being Commander of his Majeſty's Ship the *Grafton*, on the 3d of *May* 1692. made his laſt Will in Writing; and they find it *in hæc verba*; He recites that he was then bound to Sea, and then goes on and ſays, *I do hereby give and bequeath unto my well beloved Wife* F. Bockenham (the Leſſor of the Plaintiff) *all ſuch Sum and Sums of Money which now is or ſhall become due from his Majeſty, for my own and Servants Wages, and all ſuch Sums of Money, Lands, Tenements, Goods, Chattels and Eſtate whatſoever, wherewith at the Time of my Deceaſe I ſhall be poſſeſſed of or inveſted with, or which ſhall belong to me, and I do appoint her my whole and ſole Executrix of this my laſt Will.* The Jury alſo find that *William* the Teſtator *at the Time of making his Will* was not ſeiſed of any Lands in *Kent*, but *afterwards* by Deeds of Leaſe and Releaſe, dated 20 and 21 *March* 1700. Sir *George Wheeler* and others being ſeiſed in Fee of the Lands in the Declaration particularly named, conveyed the ſame to the ſaid *William Bockenham* the Teſtator and his Heirs, by Virtue whereof he became ſeiſed. They find the Lands are held in *Socage*, and are in the Nature of *Gavelkind*, and *deviſable by the Cuſtom of* Kent; and ſome Time afterwards the ſaid *W. B.* dies, then the *Deviſee* enters, and the *Heir at Law* enters upon her; and ſo the Queſtion is between them, whether theſe Lands do paſs and are diſpoſed of by *William Bockenham*, or not. And by the Opinion of *Holt* C. J. *Powell*, *Powys* and *Gould* J. the Will as to theſe *Lands* is a void Will, and that the Lands do not paſs thereby; and accordingly Judgment was given for the Defendant (*a*) the Heir at Law. *Per tot' Cur'*, which was affirmed on a Writ of Error in the Houſe of Lords, 24 *February* 1707. *Bunker* and *Cook in B. R. Gilb. Law of Deviſes* 122. *Rep. of Caſes in B. R. Temp. Ann.* 121. S. C. *in totidem verbis* with *Gilb. Law of Deviſes*.— *Holt's Rep.* 248. *Mich.* 6 *Ann. Broncker* and *Coke* S. C.— 1 *Salk.* 238. S. C. *Fitz-Gibb.* 228.

(*a*) For theſe Reaſons, (*viz.*) firſt in Regard it is a Will at the Time of the making. 2*dly*, In as much as the Teſtator had not Power to give what he had not. 3*dly*, The conſtant Manner of pleading ſhews the Neceſſity of the Teſtator's being ſeiſed. 4*thly*, A *Deviſe of Lands is not comparable to a Deviſe of a perſonal Eſtate*, becauſe a *perſonal* Eſtate is *altering* every Day. 5*thly*, Becauſe a Deviſe is *repugnant* to the Nature of a Purchaſe; a Purchaſe is to the *Deviſor* and *his Heirs*, and the Deviſe is to another and her Heirs. 6*thly*, Becauſe there is no Caſe nor Authority in Law to warrant any contrary Judgment. *Rep. Temp. Ann.* 130. in S. C.——*Gilb. Law of Deviſes* 140. *accord.*'

2. *A.* deviſes his Manor, and before his Deceaſe a Tenancy eſcheats, and after the Teſtator dies. The Queſtion is, whether the *eſcheated Tenancy* ſhall paſs, becauſe the Manor is deviſed, and that is Part of it; for this *Tenancy* is not deviſed as a diſtinct Thing, but as a Part of 1 *Salk.* 238. it was admitted it ſhould paſs. —*Gilb. Law of Deviſes* 138. S. P. in S. C.

of the Whole, which he could deviſe. *Per Holt* C. J. 6 *Ann.* in *B. R.* in the Caſe of *Bunter* and *Cook*, *Fitz-Gibb. Rep.* 231.

3. *A.* ſeiſed of a *Reverſion* expectant *on an Eſtate for Life* deviſes it, and afterwards Tenant for Life dies, and then *A.* dies, yet it paſſes (*a*). *Per Holt* C. J. *Mich.* 6 *Ann. in Caſu Broncker* and *Coke*, *Holt's Rep.* 248.

Rep. of Caſes in B. R. Temp. Q. Ann. in S. C. *Per Holt* C. J. —— So it is of *Lands in Reverſion expectant on an Eſtate-tail,* and before his Death the Tenant in Tail dies *without Iſſue*, theſe Lands will paſs tho' a Reverſion *only* at the Time of making the Will, becauſe he is ſeiſed at the Time as much as he can be, and it is a certain preſent Intereſt tho' to commence *in futuro*, and all the Eſtate he could give he intended him. —— 1 *Salk.* 237. S. C. and P. agreed *per Cur'*. —— *Fitz-Gibb. Rep.* 231. S. C. and P. by *Holt* C. J.

4. If a Man deviſes a Term for Years *which he had not at the Time of the Deviſe*, but *purchaſed ſome Time before his Death. Holt* C. J. doubted very much whether this would be good. Suppoſe one takes a College Leaſe, and another makes his Will, and ſhould deviſe that Leaſe away to another, and afterwards the Teſtator ſhould purchaſe that College Leaſe ſubſequent to the making of his Will; his Lordſhip ſaid he was inclined to think this would not be a good Deviſe. *Trin.* 6 *Ann.* in the Caſe of *Brunker* and *Cook*, *Rep. of Caſes in B. R. Temp. Q. Ann.* 126.

3 *Will. Rep.* 169. in a Note by the *Editor* it is ſaid, that notwithſtanding the Doubt the Court of *B. R.* ſeems to have been in in the Caſe of *Bunker* and *Cook*, 1 *Salk.* 237. whether a *Leaſe for Years would paſs by a Will made before the Purchaſing thereof*, it has been *clearly* held to paſs by ſuch Will. —— *Vide* the Opinion of Lord Chan. *Parker* in the Caſe of *Wind* and *Jekyll and Alborne*, *poſt. Ca.* 6.

5. A Man deviſes all his Lands *in Tail*, and *afterwards purchaſes other Lands*, and dies *without Republication*, thoſe purchaſed Lands will not paſs; but if he *republiſhes the Will in ſuch Manner*, and *with ſuch Circumſtances as are neceſſary to compleat Execution of an original Will*, then the purchaſed Lands will paſs as by an original Will. Said *per Holt* C. J. *Trin.* 6 *Ann.* in the Caſe of *Brunker* and *Cook*, *Rep. of Caſes in B. R. Temp. Ann.* 127.

His Lordſhip doubted much if a *Chattel real purchaſed after the Will made* will paſs by the Will. *Gitz-Gibb.* 228. in S. C. —— 1 *Salk.* 238. S. P. in S. C. doubted *per Cur'*. —— *Sed vide, P. C.*

6. A *Deviſe of a Leaſe for Years* differs *from a Deviſe of a Freehold* or *Fee-ſimple*, for one cannot deviſe *Fee-ſimple* Lands which he has *not at the Time of making the Will*, but *Leaſes* or *perſonal Eſtate*, tho' they were not the Teſtator's *at the Time when he made his Will*, yet if they be his at the Time of his Death, ſhall paſs by the Will. Therefore if one deviſes *all his real* and *perſonal Eſtate*, and afterwards acquires more of each Kind, the real Eſtate acquired afterwards ſhall not paſs; *ſecus* as to the *perſonal Eſtate*; and yet the Intention of the Party muſt have been the ſame as to both. The Reaſon of this *Difference* ſeems to be, that with Regard to the *real Eſtate* bought after the making the Will, ſuppoſing *that* not to paſs, ſtill there is one in Law capable of taking it, (*viz.*) the *Heir*; but as to the *perſonal* Eſtate, if the Executor, tho' made before the Acquiring thereof, does not take it, it is uncertain who ſhall. *Per* Lord Chan. *Parker*, *Mich.* 1719. in the Caſe of *Wind* and *Jekyll & al'*, 1 *Will. Rep.* 575.

7. Dr. *Fulham agreed to lay out* 4000 l. *in a Purchaſe of Lands to be ſettled in ſtrict Settlement*, Remainder *in Fee to himſelf.* The *Wife died, leaving only one Son* by the Doctor. The Doctor borrowed Part of the Money of the Truſtees, and by his Will declared that *if his Son ſhould die before* 21. the 4000 *l.* and 500 *l.* more *ſhould go equally among the Children of his three Siſters.* The *Son died before* 21. and the Doctor's Brother and Heir brought a Bill to have had the 4000 *l.* laid out in Land, inſiſting that the Will, as made only of a perſonal Eſtate,

Eſtate, did not bar him, becauſe the Money ought to be conſidered as Land. But decreed, that as the Doctor was become *abſolute* Owner of the Money by the Death of his Son, *he might either lay it out in Land*, or *turn it into perſonal Eſtate* (*a*) *as at firſt*; and he *ſhewing an Intention to have it as perſonal Eſtate*, the Money was decreed *per Parker* C. to the Children. *Fulham* and *Jones*, *Mich.* or *Hil.* 1720. *MS. Rep.*

(*a*) *Vide* the Note to *C.* 10. *P.* 198.

8. *A.* ſeiſed of Land of 600 *l. per Ann.* deviſed 300 *l. per Ann.* to *C.* an Infant, Son of *B.* which *B.* was Heir at Law to *A.* and deviſed 300 *l. per Ann.* to *B.* for his Care and Pains in looking after his Son's Eſtate till he ſhould be 21. *B.* died, *C.* then being ſix Years old, but *B.* deviſed this 300 *l.* to his Wife, and appointed her Guardian to *C.* his Son.——The Father being appointed Guardian, was the only Perſon that could extend his Care as a Guardian after his own Death; that he had by Law a Power to appoint a Guardian over his own Children; and that tho' he was now dead, yet he ſtill by the Guardian which he had appointed took Care of his Son; that his Deviſe of the 300 *l. per Ann.* is good, being given to *B.* till his Son ſhould attain the Age of 21; and that it could not determine even by the Wife's Death, unleſs for want of Care of the Son or his Eſtate, which when that happens the Son may complain; *per Macclesfield* C. *Trin.* 1722. *Anon. Prec. in Chan.* 597.

9. Plaintiff by Articles dated *November* 1725. agreed to convey Lands in *C.* to *D.* and *his Heirs* before next *Lady-day*, and *D.* covenanted to pay him 1500 *l.* *D.* lived till after *Lady-day*, but had in 1722. made his Will, by which he *deviſed all his real Eſtate to his Son* R. *for Life*, Remainder *to* R.*'s eldeſt Son* J. *for Life*, Remainder *to his firſt*, &c. *Son in Tail Male*, with ſeveral Remainders over, and thereby *bequeathed all his perſonal Eſtate to Truſtees to be inveſted in Lands* and *ſettled as above*; and dying ſoon after *Lady-day* 1726. *R.* his eldeſt Son and Heir claimed the Lands as deſcending to him, and *made his Will*, and by expreſs Words he *deviſed the Premiſſes* thus articled *to be purchaſed, to Truſtees* to pay his Debts, *&c.* and died, leaving ſaid *J.* his Son and Heir, to whom *D.* had deviſed all his Eſtate expectant on the Death of *R.*——*D.*'s Will being made *prior* to the Articles for this Purchaſe, *before he had any equitable Intereſt in the Lands*, and conſequently when he had no Kind of Title, he could deviſe nothing, ſo that this Intereſt in the Premiſſes gained by *D.*'s Articles muſt have *deſcended to his Son* R. *as Heir at Law*, *who might well deviſe the ſame*; and though it may at firſt look ſtrange that when *D. deviſed all his real and perſonal Eſtate*, theſe words ſhould not carry *all*, yet it will not ſeem ſo when it is conſidered that *an Eſtate purchaſed after the Will cannot paſs thereby*; and theſe Articles are a Purchaſe ſubſequent; *per* the Maſter of the Rolls, who decreed the Deviſe by *R.* good, and that the Maſter inquire whether the Plaintiff can make a Title, if he can, the Purchaſe Money to be paid by *D.*'s Executors out of his Aſſets; the Maſter to ſee who has been in Poſſeſſion ſince *Lady-day* 1726. at which Time the Purchaſe Money was to be paid, and the Conveyance compleated. Intereſt and Coſts to be reſerved. *Trin.* 1731. *Langford* and *Pitt*, 2 *Will. Rep.* 629. On Appeal to Lord Chancellor this Decree was affirmed. *Ibid.* 632.

The Caſe of *Greenhill* and *Greenhill*, 2 *Vern.* 679. (abridged 1 *Vol. Eq. Ca. Abr.* 174. *C.* 4.) was cited and admitted *per* his Honour, but he ſaid this material Difference is to be obſerved between that Caſe and this of *Langford* and *Pitt*: There the Articles for the Purchaſe were entred into by the Teſtator *before he made his Will*, and ſo the *equitable Intereſt which he gained thereby was well deviſable*, but in the *preſent* Caſe *D.* had *no equitable Intereſt in the Land*, for the *Will* was *prior* to the *Articles*, and ſo having no Title could deviſe nothing. *Ibid.* 633.

Vide 1 *Vol. Eq. Ca. Abr. P.* 175. *Ca.* 5. *Lingen* and *Sowray*, where it was decreed

10. Money *articled to be laid out in Land to be ſettled on the Huſband* and *Wife* and *Iſſue*, Remainder *in Fee to the Huſband* will *paſs by the Deviſe of a real Eſtate* though the Money was never laid out. *Mich.* 1733. in the Caſe of *Lechmere* and *Lechmere*, 3 *Will. Rep.* 221. *per Harcourt* C. in 1711. that 1400 *l.* articled to be laid out in the Purchaſe of Land to be ſettled on *Huſband* and *Wife for Life*, Remainder *to the firſt*, &c. *Son in Tail Male*, Remainder *to the Daughters in Tail*, Remainder *to the Heirs of the Huſband*, could *not paſs by a Deviſe of the perſonal* (*a*) *Eſtate*, but *belonged to the Deviſee of the real Eſtate*, becauſe Money articled to be laid out in Land was as Land. Affirmed by Lord *Cowper* in 1715.—Cited *per Jekyll*, Maſter of the Rolls, *in the above Caſe* of *Lechmere* and *Lechmere*.—(*a*) It is obſervable that the Huſband might have deviſed this 1400 *l.* (ſubject to his Wife's Eſtate for Life) either as *real* or *perſonal* Eſtate, according as he ſhould have ſignified his Intention: Thus if he had in his Will deſcribed it *as ſo much Money agreed to be laid out in Land*, this would have been ſufficient to have made it paſs as *perſonal* Eſtate, and by a *Will not atteſted by three Witneſſes*; but without ſuch a particular Interpoſition of the Teſtator, manifeſting his Intention, it remained as Land, and conſequently belonged to the *Deviſee* or *Repreſentative* of the *real*, not of the *perſonal* Eſtate. Determined in the Caſes of *Croſs* and *Addenbroke*, *Hil.* 1719. and *Fulham* and *Jones*, *Mich.* 1720, both by Lord *Parker*, 3 *Will. Rep.* 221. in a Note by the *Editor*.—But more particularly in the Caſe of *Edwards* and *the Counteſs of Warwick*, *Trin.* 1723. *Cor'* Lord *Macclesfield*, where Money was agreed to be laid out in Land, and he that is intitled to the *Fee* of the Land when purchaſed may diſpoſe of it by Will *tho' not atteſted* by three Witneſſes. 2 *Will. Rep.* 171.——If *Money is to be laid out to the Uſe of* A. *for Life*, then *to the Uſe of* D. *in Tail*, Remainder *to* D.'s *Heirs*; *D. may deviſe this either as Money* or *Land*, and *the Reverſion in Fee will paſs in Caſe* D. *dies without Iſſue*. *Hungerford* and *Winter*, (*b*) *MS. Rep.* (*b*) Q. What Term and Year.

(C) What Words will paſs a Fee (*c*).

(*c*) Here we muſt obſerve, that the Intent of the Deviſor will ſupply the want of thoſe Words which are *neceſſary in Deeds to convey an Inheritance*; as if a Man deviſe Lands to another *in perpetuum*, or *in feodo ſimplici*, or *to him and his Aſſigns for ever*, or *to him and his*; in all theſe Caſes a Fee ſimple paſſes by the Will, for it is evident by the Deviſor's Intention, that the Gift ſhould continue beyond the Life of the Deviſee; but a Deviſe cannot direct an Inheritance to deſcend againſt the Rules of Law. *Gilb. on Deviſes* 17, 27. who cites *Co. Lit.* 9. *b.* 1 *Bulſt.* 222. 3 *Bendl.* 11. *Bro.* Tit. 1 *Co. Lit.* 27. *a.* *Hob.* 33. 1 *Vent.* 228, 229. 1 *Roll. Abr.* 835. *Co. Litt.* 9. *b.* *Ibid.* 25.—— If *A.* deviſes *all his Eſtate*, viz. *One half of Mon Platt*; this is *local*, and *deſcriptive of the Lands only*. But if he ſays, what Eſtate I *have I intend to ſettle* thus, *my Eſtate at* Kirby-Hall *to* B. *this paſſes a Fee*. The Introduction to the Deviſe ſhews an Intent to all the Eſtate he had, and the confining it to *Kirby-Hall* no more proves the Deviſe *local*, than if he had ſaid *all his Eſtate in* England. *Tuffenall* and *Page*, *MS. Notes* (*d*). (*d*) Q. Term and Year.

1. *A.* Deviſes to *C.* and *D.* and if either died the other ſhould be his Heir; the Queſtion was, whether *C.* or *D.* had an Eſtate for Life or in Fee? And it having been argued by Serjeant *Borril* that they had but an Eſtate for Life, Serjeant *Maynard* was to maintain that they had a Fee, but he threw it off upon another Point. *Mich.* 1677. *Gyles* and *Kempe in C. B.* 1 *Freem. Rep.* 235.

2. *A.* being ſeiſed of 10 *l. per Ann.* Lands in Poſſeſſion, and the Reverſion of 34 *l. per Ann.* more expectant upon an Eſtate for Life, deviſes a Legacy of 20 *l.* to *B.* to be paid in twelve Months out of his Lands, and deviſes 50 *l.* to *C.* to be paid in two Years, and 50 *l.* to *D.* to be paid in the Space of two Years out of his Land; and having two Sons *W.* his Eldeſt and *R.* the Younger, *deviſes all his Lands to R.* who did not pay the Legacies within the Time. The Court *all* agreed that a Fee was deviſed to *R. becauſe it did appear that the Sum to be paid was more than the Profits of the Land would amount to in that Time*. *Trin.* 1679. *Reake* and *Lea*, 1 *Freem. Rep.* 479, 480.

3. Another Queſtion in the *above* Caſe was, whether admitting it a Fee to *R.* it were not *conditional*, for many Words in a Will ſhall make a *Condition* that in a Deed will not. Cites 1 *Inſt.* 204. *a.* *Dyer* 164. And as to this Point *all* but *Jones* inclined that it was a *Truſt*, becauſe that Conſtruction would be more beneficial for the Legatees; and tho' the Law did conſtrue ſome Words *conditional* in Wills, that would not be ſo in *Deeds*, yet that was always with this Difference, *i. e. when that Conſtruction was moſt favourable to*

the Legatees. But *Jones* doubted of that Point, for he ſaid that *this Court would not take Notice of the Proceedings in a Court of Equity*, and relied upon 1 *Roll.* 410. 1 *Inſt.* 236. *Cur' adviſare vult. Ibid.* 480, 481.

4. " I hear *J. S.* is inquiring after my Death, but I am reſolved to " leave him nothing but what his Father left him, but I leave all my " Eſtate to my Wife;" there the Wife took all the real Eſtate, and the Reaſon was, becauſe of the other Words which ſhew he meant to exclude the Heir at Law. Cited *per Powell* J. in the Caſe of *Slate* and *Bull*, *Caſes in B. R. Temp. W.* 3. 594. out of 3 *Mod.* 45. as the Caſe of *Reeves* and *Winnington*, *Trin.* 36 *Car.* 2. *in B. R.*

5. Deviſe to *A. for Life*, and *after to his Heir*, this is an Eſtate in Fee; but if it be *and to the Heirs of* ſuch Heir, *ſuch* there is a contingent Remainder. *Per Holt* C. J. in *B. R. Mich.* 6 *W. & M. Skin. Rep.* 559.

The Word *Heir* is *Nomen Collectivum*, and in a Will contains *Heirs and Heirs of the Heir*, and gives a *Fee. Skin. Rep.* 563.

6. *A.* ſeiſed of Lands in Fee had Iſſue two Sons *B.* and *C.* and by Will *deviſed ſeveral Lands to* B. *and that* B. *ſhould renounce all his Right in Blackacre* (of which the Deviſor was then ſeiſed) to *C.* And it was objected that this was no Deviſe of the Land to *C.* 2*dly*, That if *B.* ſhould releaſe his Right, this was intended to be only an Eſtate for Life; but becauſe the Words were (*all his Right*) it was apparent that *A. intended that* C. *ſhould have a Fee*; and accordingly *Holt* C. J. and *Treby* C. J. certified their Opinions to Lord Chancellor. *Eaſter* 9 *W.* 3. cited by *Treby* C. J. as the Caſe of *Hodgkinſon* and *Star.* 1 *Lord Raym. Rep.* 187.

7. *J. S. having a Remainder in Fee* deviſed *all his Remainder* to *J. N.* and adjudged that a Fee was deviſed. Cited by *Treby* C. J. *Eaſt.* 9 *W.* 3. in the Caſe of *Baker* and *Wall*, as a Caſe lately adjudged in *C. B. Ibid.* 187.

8. I deviſe to *B. all my Right, Title and Intereſt in thoſe Terms of Years which I have in ſuch a Place*, and *alſo my Houſe called the* Bell Tavern, *in which Houſe the Teſtator had a Remainder in Fee.* Held in *B. R. cont' Holt* C. J. that a Fee paſſed in the *Bell Tavern. Trin.* 11 *W.* 3. *Rot.* 113. *Moor* and *Rawleſon.* This Judgment was *affirmed* in the Exchequer Chamber, *Viner's Abr.* Tit. *Deviſe*, (Q. b. 2.) *Ca.* 4. *Vide P.* 300. *Ca.* 13. which ſeems to be S. C.

9. One deviſes *all his Tenant Right in D.* if he had *no other Freehold in D.* it ſhall paſs, *otherwiſe* not. *Per Powell* J. *Mich.* 13 *W.* 3. in the Caſe of *Shaw* and *Bull*, cites 1 *Mod.* 100.——3 *Keb.* 140, 145. *Caſes in B. R. Temp. W.* 3. 594.

10. If a Deviſe were *to* A. *and his Poſterity*, it would be only an an Eſtate-tail. *Per* Lord Keeper's Opinion; but the Maſter of the Rolls thought that ſuch a Deviſe would create a Fee, whereupon the Lord Keeper ordered Precedents to be ſearched. *Mich.* 1703. *Attorney General* and *Bamfield*, 2 *Freem.* 268.

11. *Inheritance* ſhall paſs without any other Circumſtances to manifeſt the Deviſor's Intent merely by Deviſe *of his Eſtate. Hil.* 2 *Ann. per Holt* C. J. in the Caſe of the *Counteſs of Bridgewater* and *Duke of Bolton*, 6 *Mod.* 109.

12. There is a great *Difference* between a *Will* and a *Conveyance* at Common Law, for the Law has appointed proper Words to be made uſe of in Limitations of Eſtates in Deeds, as the Word (*Heir*) to carry a *Fee-ſimple*, and no other Word *tantamount* or *equivalent* will be admitted;

admitted; whereas in a Will it is otherwiſe, for that is a new Conveyance by Force of the Statute of 32 *H.* 8. which ſays, *that it ſhall be lawful for a Man to diſpoſe of his Lands by Will at his Will and Pleaſure*; and this is the Reaſon why a Deviſe to a Man *in perpetuum* paſſes a *Fee-ſimple* at the ſame Time that theſe Words in a *Deed* give only an *Eſtate for Life*. *Per Holt* C. J. *Eaſt.* 1705. in the Caſe of *Idle* and *Cook*, 1 *Will. Rep.* 70, 77.

Vide P. 299. *Ca.* 8. which ſeems to be S. C.

13. The *Bell Tavern* was *ſettled upon* A. *for Life*, Remainder *to* B. *in Tail*, Remainder *to* A. *in Fee*; A. *deviſes all the Houſe called the* Bell Tavern *to* B. *without ſaying what Eſtate*; the *Fee paſſes*, otherwiſe *B.* could take nothing. 1705. *Cole* and *Rawlinſon*, *Viner's Abr.* Tit. *Deviſe*, (L. a.) *Ca.* 29.

2 *Salk.* 685. *Eaſt.* 4 *Ann. B. R. Smith* and *Tindall* S. C. ſays, this Deviſe to the Wife was adjudged to paſs a Fee. *Per Curiam*, becauſe it was *ſubject to a perpetual Charge*.

14. *A.* ſeiſed in Fee deviſes *to the Poor of* S. 40 s. (*a*), *to be diſtributed by his Executors with four Coats, four Hats, upon every 21ſt of* November *for ever*, and then deviſes all his Lands, Tenements and *Hereditaments*, and all his perſonal Eſtate, to his Wife and Executrix. Adjudged *a Fee*, *Mich.* 1706. *Smith* and *Tindal*, *Rep. of Caſes in B. R. Temp. Ann.* 102.

But in *Rep. of Caſes in B. R. Temp. Ann.* 103. *Holt* C. J. held, that the Words of the Will gave a Fee, here being a general Charge for ever, and a ſufficient perſonal Eſtate to purchaſe, &c. But he was not ſatisfied to fix it upon the Land; he went upon the Word *Hereditament* to make a Fee; the Words *Lands and Tenements* carry only an Eſtate for Life, but *Hereditament* carries the Fee, for if he had not a Fee, then it was not his Hereditament, and when he gives his *Hereditament*, he gives a *deſcendable* Eſtate, otherwiſe it is no Hereditament. Cites *Co. Litt.* 6. Theſe Words cannot be ſatisfied unleſs this Word carries the Inheritance. *Hob.* 2. is *rightly* reported, and *wrong* in *Moor* 873. Lands of Inheritance is only a Deſcription of what Lands ſhall paſs. *Ibid.* 104.

(*a*) 20 l. *a Year to be paid to the Alms-Houſes of* A. *for ever*. *Holt's Rep.* 235. in S. C. —— 2 *Salk.* 685. ſays *four Coats to four poor Boys of the Pariſh of* A. *for ever*.

Rep. of Caſes in B. R. Temp. Ann. 207. S. C. *in totidem verbis.* — 1 *Salk.* 238. *Aumble* and *Jones* S. C. *adjudged accord'*.

15. A ſpecial Verdict finds, that the Grandfather was ſeiſed in Fee, and by Will deviſes thus: I *give to my Daughter* A. *for Life*, Remainder *to* A. L. *and his Heirs, and for Default of ſuch Heirs* Remainders *over*; and the Queſtion was, if this be an Eſtate in Fee or in Tail. *Holt* C. J. ſaid, you will find it a hard Point to make this an Eſtate-tail. Sir *Peter King* urged that it was, and cited *Idle* and *Cooke*, *Eaſt.* 4 *Ann.* (*b*). If the Remainder had been to his Brother, or to any Body that had been Heir at Law, it would have been a Tail; for then he could not have died without an Heir, and ſo a Remainder might properly be; or if it had been *de ſe exeunte*, or the like; but theſe Limitations were never carried further. But the Court gave Judgment that this was a Fee, but made the Rule *niſi*, &c. —— *Note*; The Controverſy was between the *Heir of the Deviſor* and the *Heir of the Deviſee*, who was no ways related to the *Deviſor*. *Hil.* 7 *Ann.* 1708. *Grumble* and *Jones in B. R. MS. Rep.*

(*b*) *Vide P. Ca.*

MS. Rep. S. C. *accord'*.

16. In a ſpecial Verdict the Caſe was found thus: *A.* by his Will *deviſes Lands to* B. and *then bequeaths Legacies*, and after two or three Legacies to different Perſons, he *gives* 5 l. *to* C. and *directs* B. *to pay it*, but *gives him two Years Time to pay it*. The Jury find the Lands to be 50 *s. per Ann.* and the Queſtion was, what Eſtate *B.* had, whether for *Life* or in *Fee?* And adjudged to be a *Fee*, for that the Deviſe here was a Sum in Groſs, and a *debitum in præſenti ſolvend' in futuro*; and it was a Sum certain to be paid by *B.* at all Adventures, whether the Land yielded full 5 *l.* or not; and ſo not like the Caſes where the Sum deviſed is to ariſe out of the Profits, &c. *Hil.* 7 *Ann. Reeves* and *Gower in C. B. Rep. of Caſes in B. R. Temp. Ann.* 208.

17. *A.* ſeiſed in Fee of a Plantation and ſeveral Lands in *Jamaica*, by Will directed that *his Debts* and *Funeral*, &c. *ſhould be paid*, and *gave his Wife Power to ſell his Lands, Goods*, &c. *for Payment thereof*, and *then to pay ſuch Legacies as are given by the Will*, and *gave his Wife* 1000 l. *to be by her detained out of the firſt Money that could be raiſed by the Profits or Sale of his Eſtate after Payment of his Debts*, and *the Reſidue, after Debts and Legacies paid, he gave to his Wife, whom he made ſole Executrix. Cowper* C. was *clear* of Opinion that a *Fee paſſed by the Deviſe of all the Reſt of his Eſtate to his Wife, ſubject to Payment of his Debts*, &c. But held, *that where a Man deviſes all his Eſtate, Goods and Chattels*, and *no Mention had been made before in the Will of Lands of which the Teſtator was ſeiſed in Fee*, a Fee-ſimple will not paſs; but where a *real Eſtate is mentioned before in the Will, and then ſuch Words follow*, a Fee paſſes. *Mich.* 1 *Geo.* 1. *Cliffe et alii* verſ. *Gibbons, Kadwell et alios*, 2 *Lord Raym. Rep.* 1324.

18. *J. W.* on his Marriage with *F.* entred into Articles, whereby he covenanted, in Conſideration of the Marriage and of 12000 *l.* Portion, that *in Caſe he ſhould happen to die after the Marriage before the ſaid* F. *he would leave her worth* 1500 l. *immediately upon his Death, or if ſhe ſhould then judge it more convenient to take the third Part of all his Eſtate both real and perſonal, ſhe ſhould have Liberty ſo to do.* The Marriage took Effect, and *J. S. died without Iſſue, having made his Will, and thereby gave ſeveral Parts of his real Eſtate to his Wife for Life, and made her ſole Executrix and Reſiduary Legatee. J. W.* had but a ſmall Fortune at the Time of the Marriage, but afterwards acquired an Eſtate in Land of 1000 *l. per Ann.* and a perſonal Eſtate of about 1200 *l.* after Debts and Legacies paid. The Widow proved the Will, and then brought a Bill againſt the Deviſee of her Huſband's real Eſtate, and againſt the Heirs at Law, to have the Benefit of her Election to have a Third of the Teſtator's real Eſtate, and alſo to have the Benefit of the Lands deviſed to her by the Will, and alſo the *Reſiduum* of the perſonal Eſtate. Lord Chan. *King* decreed a Third of the real Eſtate in Fee (*a*) and Reſidue of the perſonal Eſtate to the Plaintiff; Partition of real Eſtate to be made by Commiſſioners. *Mich.* 2 *Geo.* 1. *Waller* and *Fuller*, *Viner's Abr.* Tit. *Deviſe*, (Z. a.) *Ca.* 19.

(*a*) The Meaning of the Parties was, that whatſoever the Huſband ſhould acquire, the Wife ſhould have a Third of it.—Articles are a promiſe to do a Thing, and muſt be *conſtrued according to the Intention of the Parties*, and *the common Acceptation of the Words*; and that by *all my Eſtate, is commonly meant all my Intereſt in it*.—The Plaintiff cannot take the Eſtates for Life deviſed to her by the Will, becauſe that is inconſiſtent with the Claim ſhe makes to the Inheritance of the third Part by Virtue of the Articles.—But as to the *Reſiduum* of the perſonal Eſtate, that ſhe may take by the Will; for that Claim is not inconſiſtent with the Articles, and where the Articles and Will are not inconſiſtent, but both may ſtand, then ſhe may claim and have the Benefit of both, like the Caſe of the Cuſtom of *London*, there Children may take *both by the Cuſtom* and *Will*, where the Eſtate is ſufficient to ſatisfy both the *Will* and the *Cuſtom*; but a Child in that Caſe ſhall not take by the Will, if by ſo doing the Intention of the Teſtator will be diſappointed. *Per* Lord Chancellor. *Ibid.*

19. In Ejectment the Jury found that *J. S.* was ſeiſed *in Fee* of the Lands in Queſtion, being Copyhold, and that he had ſurrendered to the Uſe of his Will, and that by his Will he deviſed in theſe Words, *As touching the worldly Eſtate it hath pleaſed God to beſtow upon me*, I *give the ſame in Manner following:* Item, I *give to my Couſin* T. S. *all that my Parcel of Land lying in* Waltham Abbey (being the Lands in Queſtion). Item, I *give to my ſaid Couſin* T. S. *my Wearing Apparel, Linen, Books, with all other my Eſtate whatſoever and whereſoever not herein before given and bequeathed, and him the ſaid* T. S. I *make the ſole Executor of this my Will for performing the ſame. T. S.* was admitted, and afterwards deviſed *to the Leſſor of the Plaintiff and his Heirs*, and if *T. S.* by this Deviſe had an Eſtate for

Life or in *Fee*, was the Queſtion. The Court held, that when *J. S.* gave *all his Eſtate whatſoever*, that comprehended all that he had, *real* or *perſonal* (*a*); and when he had ſurrendered to the Uſes declared by his Will, the Will ſhall have the ſame Conſtruction as if it had paſſed the Land itſelf. Adjourned, but afterwards the Plaintiff was admitted to take Judgment. 6 *Geo.* 1. *C. B. Scott* and *Alberry*, *Comyns's Rep.* 337, 340.

(*a*) Tho' it was urged *arg'* that *J. S.* by his Will gives only his *Apparel*, *Linen*, *Books*, with his other perſonal Eſtate, which muſt be conſtrued with his other Eſtate of the ſame Nature, and not an Eſtate of an higher Nature; here the Eſtate was Copyhold, which paſſes by the Surrender, not by the Will, and when he ſurrenders to ſuch Uſes as ſhould be declared and expreſſed by his Will, and in the Clauſe by which he deviſes the Copyhold he gives it to *T. S. only, without ſaying any Thing of his Heirs*, it would be a forced Conſtruction that the Words, (*with my other Eſtate not before bequeathed*) ſhould enlarge the Eſtate before expreſly limited to *T. S.* and after theſe Words he adds, (*and him I make my Executor for performing my Will*) which Words import that he intended nothing for him by this Clauſe except ſuch Eſtate as belonged to an Executor. *Ibid.*

20. *A.* deviſe to *B. and her Heirs*, and *if ſhe and* D. *die without Iſſue*, Teſtator gives ſeveral Annuities charged upon the Premiſſes to charitable Uſes. Reſolved that *B.* had an Eſtate in *Fee*. *Eaſt.* 9 *Geo. Scrape* and *Rhodes & al' in C. B. Ibid.* 542.

21. A *Deviſe of Lands to Truſtees*, tho' the Words *and their Heirs* be omitted, ſhall convey an Eſtate in Fee to them, if that be neceſſary to ſupport the Intention of the Teſtator. Said *arg'* *Mich.* 10 *Geo.* 1. in *Acherly* and *Vernon*, *Lucas's Rep.* 523.

1 *Mod. Ca. in Law and Eq.* 253, 382. 1 *Geo.* 2. *Shaw* and *Weigh*, adjudged that in Caſe of a *Deviſe of Lands to Truſtees*, and *to the Survivor and Survivors of them*, without ſaying *to their Heirs*, that the Truſtees in this Caſe took a Fee *by Implication*; for the Intention of the Teſtator was that they ſhould take *ſuch an Eſtate as would ſupport the ſeveral Truſts* in the Will; and the *ſeveral Truſts in the Will being Eſtates of Inheritance*, the *Truſtees muſt have an Eſtate of Inheritance to ſupport ſuch Truſts*; *per* the Opinion of all the Judges. Cites 1 *Roll. Abr.* 611. *Note*; This Point being given up on the firſt Argument, the *Judges* ſaid they needed not labour it. *Ibid.* 382.

22. *A.* gave *ſpecifick* Legacies to his Daughters, and other Legacies to others; then he gave *all the Reſidue of his Eſtate to W. R. &c.* in Truſt *to increaſe his Daughters Portions*. Lord Chan. decreed that this gave the Daughters a *Fee*. *Eaſt.* 10 *Geo.* 1. *Anon.* 2 *Mod. Ca. in Law and Eq.* 92.

His Lordſhip at the firſt Opening ſaid he did not remember that it was ever *adjudged*, that an *Inheritance* ſhould paſs by the *bare* Deviſe of *all his Eſtate* (*b*), but that this was not the preſent Caſe, for here the *Deviſe was of all the Reſidue of his Eſtate*, &c. *to his three Daughters to increaſe their Portions*, which Words plainly ſhew the Teſtator intended to paſs the *Inheritance* immediately, otherwiſe they might never get any Thing by it. *Ibid.* (*b*) *A.* deviſes *all his Eſtate* to *J. S.* a *Fee paſſes*. 1 *Roll. Abr.* 834. *Style* 193, 281. *Johnſon* verſ. *Kerman.* 3 *Keble* 245. *Wilſon* verſ. *Robinſon.* 3 *Mod.* 228. *Hyley* verſ. *Hyley*. *Vide* the Saying of Lord Chan. in the Caſe of *Cliffe* and *Gibbons*, *P.* 301. *Ca.* 17.

His Lordſhip ſaid, that the introductory Words prove the Teſtator to have had his whole Eſtate in View, and that taking the Words in the firſt Senſe will make only a partial Diſpoſition, and leave a Chaſm, whereas taking them in the laſt Senſe will make a compleat Diſpoſition of the Whole; and that this Clauſe of the Deviſe to *E.* and *J. D.* depends upon Conſtruction of the Word (*Eſtate*), which will be clear from the Senſe he hath taken it in thro' all the other Parts of the Will, where whenſoever he has uſed it, he hath meant thereby to paſs the *Inheritance*; and tho' the Word (*Eſtate*) in common Speech may not mean an *Inheritance*, yet it is clear he has meant it ſo here; and tho' the Limitation to *E.* in the firſt Inſtance was for Life, yet the Deviſe to *J. D.* was in general Words: He thought this could make no Difference, and that no great Streſs could be laid upon the incorrect Wording, and that the Intent plainly appears to paſs the Inheritance. *Ibid.*

23. *As touching my worldly Eſtate*, I *diſpoſe thereof as follows*: Imprimis, I *give my Eſtate at* —— *to* B. Item, I *give my Eſtate at*, &c. *to* C. *Item*, I *give to* E. *all my Eſtate at* N. &c. *with all my Goods and Chattels as they now ſtand, for her natural Life, and to my Nephew* J. D. *after her Death, if he will but change his Name to* J. S. *If he does not*, I *give him only* 20 l. *to be paid him for his Life* out of *N. &c.* which I give *E.* upon my Nephew's refuſing to change his Name, to her and her Heirs for ever; the Queſtion was, whether *J. D.* was intended to have an Eſtate for Life only, or in Fee? And Lord *Talbot* decreed an Eſtate in Fee. *Mich.* 1735. *Ibberton* and *Beckwith*, *Caſes in Eq. Temp. Talbot* 157. (*c*).

(*c*) *Note*; This Caſe is *miſplaced* as to Time.

24. The Teſtator being ſeiſed in Fee, deviſed his Lands *to Truſtees and their Heirs* in Truſt for *B.* and *C. for their* Lives, Remainder *to the Children of* B. and *to the Children of* C. *by her* then *Huſband*, in Truſt *that they ſhould have the Profits thereof when they come of Age.* The whole Court were of Opinion that the Children took an Eſtate in Fee as Tenants in Common. *Mich.* 11 *Geo.* 1. *Bateman* and *Roach*, 2 *Mod. Ca. in Law and Eq.* 104, 6.

Note; *B.* and *C.* had each of them a Child, when the Will was made, but *B.*'s Child died, and *M.* the Plaintiff who was the Child of *C.* ſurvived. The Teſtator afterwards by a Codicil confirmed all the Deviſes in his Will, and at that Time *C.* had two other Children *who are ſince dead.* Now the Repreſentatives of the dead Children claiming a Share of the *real Eſtate*, *M.* exhibited her Bill, and it was inſiſted for her, that this Deviſe being *per Verba de præſenti*, none but the Children born at the Time of the making the Will could take. And cites *Wild*'s Caſe, 6 *Rep.* 16. But the Court was of Opinion, that ſince *C.* had but one Child *M.* when the Will was made, the Teſtator could never intend it to be a Deviſe *in præſenti*, ſo that no other ſhould take but that Child, but rather as a *future* Deviſe, *becauſe it was to the Children of* C. *by her Huſband*; and it is very probable that if he had intended it for the Plaintiff *M.* who was *C.*'s only Child at the Time of making the Will, he would have taken Notice of it in the Codicil when there were *two other Children* to ſhare with her; and tho' the Expreſſion as to the Profits, *viz.* that they ſhall have and receive all the reſt of the Profits *(after Legacies paid)* when they come of Age, yet they have a Right to it in their Minority, at leaſt to ſo much thereof as may be ſufficient for their Support and Maintenance. Decreed that the Truſtees account for the Shares of the Profits of the Lands of the two Children who died from the Death of their Mother, to the Time of their Death, and that they have all reaſonable Allowances and Leave to apply to the Court, *&c. Ibid.* 105, 6. in S. C.

25. *William Hewer* 5 *Sept.* 1715, *deviſed all his real and perſonal Eſtate to Truſtees and their Heirs*, on Truſt that *they ſhould convey the real Eſtate to his Godſon* E. Edgely *for Life*, ſans Waſte, Remainder to *preſerve contingent Remainders*, &c.—*To the firſt and every other Son of* E. Edgely *in Tail, with Power to make a Jointure not exceeding a Moiety of the real Eſtate*, and directed his *perſonal Eſtate ſhould be laid out in Lands, and ſettled in the ſame Manner*; and in Caſe *E. Edgely* ſhould die *without Iſſue*, then he Willed that his Kinſwoman *Ann Edgely ſhould enjoy all the Rents of his Eſtate during her Life*, and after her Deceaſe one *fourth Part thereof ſhould be enjoyed by* William Blackbourne, *his Heirs and Aſſigns*; another *Fourth by* Abraham Blackbourne, *his Heirs and Aſſigns*; one other *Fourth by* Ann J. *her Heirs and Aſſigns*; and the other *Fourth by* Suſannah Edgely, *her Heirs and Aſſigns*; and directed that in Caſe *any of them the ſaid* William, Abraham, Ann *and* Suſannah, *ſhould be dead at the Time when by Virtue of the ſaid Deviſe the ſaid Eſtate in Manner aforeſaid would devolve upon them*, that then the *fourth Part which the dead Perſon would have been entitled to, if living, ſhould be conveyed to their reſpective Heirs. Ab. Blackbourne* made his Will in 1719, and made his Wife *Mary reſiduary Legatee*, and on the 16th of *Feb.* 1720, after reciting the contingent Intereſt that he had by the Will of Mr. *Ewer*, he *deviſed that whenever his fourth Part ſhould come to his Son and Heir* Levit Blackbourne, or *to ſuch Perſon as ſhould be his Heir, that it ſhould ſtand charged with the Sum of* 12000 *l. for his Wife* Mary, *and* 3000 *l. apiece to his three younger Children*, and ſoon afterwards died; *Mary* his Widow married the Plaintiff. In 1728 *Ewer Edgely* died without Iſſue. In 1729 *Ann Edgely* died, and then the Plaintiff and his Wife and her three younger Children brought their Bill againſt *Levit Blackbourne Abraham*'s Heir at Law, and the Truſtees, to have the 12000 *l.* and 3000 *l.* raiſed out of *Abraham*'s fourth Part; and the Queſtion was, *As the Eſtate never veſted in Poſſeſſion in* Abraham, *nor any Settlement made in his Life-time, whether he could charge it in the Hand of his Heir*, or *the Heir was a Purchaſer. King* Ch. By the firſt Clauſe in the Will, a plain *Fee-ſimple* is deviſed to *Abraham* after the precedent Limitations, ſo that his Remainder was veſted; and tho' by the latter Clauſe in Caſe of his Death a Conveyance is directed to be made to his Heir, yet that cannot be taken to be a contingent Limitation

that

that was to veſt originally in the Heir, but only a Direction to the Truſtees how to convey in Caſe he who was to take the Benefit ſhould die before a Settlement made: So I think the Eſtate is well charged, but there is a Queſtion, whether *Levit Blackbourne*, who is an Infant, ought to have a Day to ſhew Cauſe againſt the Decree; but reſolved (*a*), that where the legal Eſtate was in Truſtees, and an Execution of the Truſt is to be directed, there is no Occaſion to give the Infant a Day; ſo that the Money was decreed to be raiſed, and no Notice to be given to the Infant to ſhew Cauſe. *May* 12, 1731. *Thornton* and *Blackbourne & al' MS. Rep.*

(*a*) *Note* this Reſolution.

26. *J. S.* by Will *conſtitutes and appoints his well-beloved Wife* A. *ſole and whole Heireſs and Executrix of all his Lands, Tenements, Goods and Chattels whatſoever, real and perſonal, the ſame to ſell and diſpoſe of as ſhe ſhall think fit, to pay his Debts and Legacies*, and gives the Heir at Law 5 *l.* *Quære*, whether there be not a reſulting Truſt to the Heir at Law, *being ſaid to be for a particular Purpoſe.* Decreed *per* Lord Chan. to be no reſulting Truſt, *Trin.* 1733. *Rogers* and *Rogers*, *Sel. Caſ. in Chan.* 81.——2 *Vern.* 247. is in Point, the Reſolution of which Caſe is in 1 *Vol. Eq. Abr.* 272.

3 *Will. Rep.* 193, *Trin.* 1733. S. C. The Queſtion was, whether the Wife was a Truſtee for the Heir at Law as to the *Surplus* of the real Eſtate after Payment of Debts and Legacies. Decreed by *King* C. that the Wife was intitled to the Premiſſes deviſed for her own Benefit, and that there was no reſulting Truſt to the Heir at Law; that the Caſe of *North* and *Crompton*, 1 *Chan. Rep.* 196. *(Vide* 1 *Vol. Eq. Abr.* 272. *Ca.* 3.*)* was in Point; that the Deviſe that the Wife ſhould be *ſole Heireſs of the real Eſtate* did in every Reſpect *place her in the* (*a*) *Stead of the Heir*, and not as Truſtee for him; that it was the *plainer* by reaſon of the Language of Tenderneſs and Affection, *his dearly-beloved Wife*, which muſt intend to her ſomething *beneficial*, and not what would be a *Trouble* only; and what made it ſtill ſtronger was, that the Heir was not forgot, but had a Legacy of 5 *l.* left him. *Per* Lord Chan. *Ibid.*

(*a*) See *Noy* 48. *Clements* and *Caſſy*. *Hob.* 34. *Counden* and *Clerk*. *Sty.* 308.

27. Teſtator's Will was thus: *As to all my* temporal *Eſtate*, I *diſpoſe of the ſame as follows:* I will that my Debts be paid, after which he diſpoſed of ſeveral *pecuniary* and *perſonal* Legacies, and gave 4 *s.* a Week to a Relation for her Life. Then comes theſe Words, all the reſt *of my Eſtate, Goods and Chattels whatſoever, real and perſonal, I give to my beloved Wife, whom I make my Executrix.* The Teſtator died poſſeſſed of Leaſes for Years, and ſeiſed of Lands of Inheritance in Fee. The Heir at Law of the Teſtator claimed the Lands, and the Teſtator's Widow inſiſted that all the *real* Eſtate was by the Will deviſed to her in Fee; and Counſel on both Sides (without arguing this Point) declaring, that they ſhould willingly acquieſce to the Judgment of the Court, *Talbot* C. with great Clearneſs decreed, that all the real Eſtate did well paſs by this Will to the Teſtator's Wife and her Heirs. (*b*) *Trin.* 1734. *Tanner* and *Wiſe*, 3 *Will. Rep.* 295, 299.

Note; This was on a rehearing from a Decree of the Lord Chan. *King.*

(*b*) Firſt, for that tho' it had been objected that the Words *temporal Eſtate* did more properly refer to *perſonal Eſtate*, and eſpecially to Leaſes for Years, (which, comparatively ſpeaking, are but of ſhort Continuance) and not to an Eſtate of Inheritance, which is *permanent*, and may laſt for ever, yet here this Expreſſion ſeems to have been made uſe of in the Will in Contradiſtinction only to the Teſtator's *eternal Concerns*, which every Man, at the Time of making his Will, is naturally ſuppoſed to have in View; ſo that the Words *temporal Eſtate* ſignify the ſame as *worldly Eſtate*, or all that a Man has in the World, *(c)* and conſequently takes in both *real* and *perſonal Eſtate*.——Secondly, where the Teſtator had ſaid, that as to all his *temporal Eſtate* he diſpoſed of the ſame as followed; and, after having given ſeveral Legacies, proceeded to deviſe the *reſt* and *Reſidue* of his Eſtate, Goods and Chattels, *real* and *perſonal*; theſe Words *reſt* and *Reſidue* are Words of Relation, and muſt refer to ſome Eſtate before mentioned in the Will, if any ſuch there were. Now in the principal Caſe, there was an Eſtate mentioned before by the Teſtator, *(viz.* his *temporal Eſtate)* which brought it to ſignify the ſame as if the Teſtator had ſaid, "*I deviſe* "*the* reſt *and* Reſidue *of all my temporal Eſtate*," which, without the Word *Heirs*, *(d)* would have ſufficed to paſs all his *real Eſtate*. *Per* Ld. C. who, for theſe Reaſons, decreed as above.

(*c*) 1 *Vol. Abr. Eq.* 177. *Ca.* 14. and 2 *Vern.* 690. *Beachcroft* and *Beachcroft*.

(*d*) *Vide* the Caſe of *Barry* and *Edgeworth*, 2 *Will. Rep.* 523.—And S. C. 1 *Vol. Eq. Abr.* 178. *Ca.* 18.

28. Lord Chan. *Hardwicke*, in the Caſe of *Tuffnel* and *Page*, *Eaſter* 1740, ſaid, he did believe that there were Caſes where the Word *Eſtate* has been held to ſignify *barely* the Land itſelf; but all theſe Caſes depend upon their particular Circumſtances, and the Evidence of the Teſtator's Intention ariſing from thoſe Circumſtances.——Where the Words

Words were, *What I have I intend to ſettle in this Manner*, this ſhews that the Teſtator *intended to diſpoſe of his whole Intereſt in the Premiſſes*; and it is as ſtrong as if he had ſaid, *All my Eſtate I diſpoſe of in this Manner*; and the Caſe is *ſtronger*, becauſe of the Word *ſettle*; by this Expreſſion the Teſtator ſhews his Intent to make a Settlement of his whole Eſtate. *Eaſt.* 1740. *Barnard. Rep. in Chan.* 14, 15.

29. *J. S.* deviſed *all his Lands*, &c. *in* B. *unto his three Daughters* M. S. *and* A. *to be equally divided between them, to hold to them, their Heirs and Aſſigns for ever.* And *if his ſaid three Daughters ſhould happen to die, and leave no Iſſue of their Bodies to inherit ſuch Eſtates, as in his Will is before deviſed to them, and not be of Age, or make no other Diſpoſal thereof, in ſuch Caſe his Will was, that the ſaid Lands ſhould be veſted and be the ſole and proper Eſtates of his Kinſman* S. B. and *he did thereby deviſe the ſame to the ſaid* S. B. *his Heirs and Aſſigns for ever accordingly.* Provided always, *that the ſaid* S. B. *ſhould pay unto every one of all his* (the Teſtator's) *Siſters Children that ſhould be then in Being at the Time of ſuch his* (the Teſtator's) *Eſtate falling to him* (S. B.) *by Failure of his* (the Teſtator's) *Iſſue, the Sum of* 100 *l. to each and every of them. A.* the youngeſt Daughter *died in her Infancy in the Life-time of the Teſtator*; *S.* the ſecond Daughter *ſurvived her Father and Mother*, and *many Years after ſhe came of Age, by her Will made a Diſpoſal of her Intereſt in the ſaid Premiſſes by the Name of all her Meſſuages, Lands, Tenements and Herediaments*, and *M.* the eldeſt Daughter (the Defendant) *is now living and married, and has ſeveral Children.* This Caſe being ſent to the Judges of *B. R.* for their Opinions, they certified, that after hearing Counſel on both Sides, they were of Opinion, that *S.* and *M.* two of the Daughters of *J. S.* by Virtue of his ſaid Will, and by the Death of the ſaid *A.* their younger Siſter, *in the Life-time of the Teſtator*, took an Eſtate in *Fee-ſimple* in their reſpective Shares of the ſaid real Eſtates. Lord Chan. *Hardwicke* being of the ſame Opinion, it was decreed accordingly. *Eaſt.* 1740. *Miller* and *Moor*, *Barnard. Rep. in Chan.* 7, 9.

30. *A.* has a Fee-ſimple in a Light-houſe, and poſſeſſed of a Term for ninety-nine Years in Land adjoining to it. *A.* by Will *gives to his Son* B. *and to his Aſſignees all his Eſtate and Intereſt in the Light-houſe, Lands, Tenements and Appurtenances* thereunto belonging, upon Truſt out of the Rents, *&c.* of the Term during the Remainder thereof, to pay 200 *l. per Annum.* *B.* takes a *Fee-ſimple* in ſuch Part of the Premiſſes wherein the Deviſor had a *Fee-ſimple*, and a Term for ninety-nine Years in ſuch Part of the Premiſſes wherein the Deviſor only had ſuch a Term. Decreed *per* Lord Chan. *Hardwicke*, *Hil.* 1740. *Villiers* and *Villiers*, *Barnard. Ch. Rep.* 307, 311.

(D) What Words paſs (or create) an Eſtate-tail, —and what an Eſtate for Life.

1. DEviſe to *A.* for Life, Remainder *to his Heir*, is a *Fee-ſimple*, for Heir is *Nomen Collectivum*; but if he adds *and to his Heirs of ſuch Heir*, it is for Life only; for Words of Limitation being added to the Word *Heir*, it ſhall be taken as *Deſignatio Perſonæ*. 3 *Salk.* 126.

2. *I. S.* had Iſſue *A.* and *B.* and deviſes Lands to *A.* and *if he die without Heirs*, B. *his Brother ſhall have it. Per Cur'*, This ſhall *create an Eſtate-tail in* A. becauſe it appears in the Will that the Teſtator muſt intend an Eſtate-tail, for *that it is impoſſible for him to die without Heirs whilſt* B. *his Brother was alive*; and ſo they ſaid it had

been often ruled (*a*). *Trin.* 1673. *Allen* and *Spendlove*, 1 *Freem. Rep.* 74.

(*a*) As in the Caſe of *Herne* and *Allen*, 1 *Cro.* and in the Caſe of *Hill* and *Power*, cited *per Cur'*. *Ibid.*

3. *A.* had three Sons *B. C.* and *D.* and deviſed Lands to *C.* and *D.* and if *C.* died without Heirs *D.* ſhould have his Part, and if *D.* died without Heirs *B.* ſhould have it. The Court inclined to think that *D.* had but an Eſtate for Life in his Moiety, *becauſe Implications that carry Eſtates ought to be plain and ſtrong*, and ſo gave Judgment *niſi*. *Eaſt.* 1673. *Allen* and *Spendlove* 1 *Freem. Rep.* 85.

4. A. *deviſed to* B. *and* C. *Brothers, ſeveral Parcels of Land*, and *if either of them die, that the other ſhould be his Heir*; *B.* dies. *Quære*, Whether *C.* ſhould have the Fee, or only an Eſtate for Life? The Court inclined to the latter; *ſed adjournatur*. *Trin.* 1677. *Gynes* and *Kemſley*, 1 *Freem. Rep.* 293.

5. Upon a ſpecial Verdict the Caſe was, *R. G.* ſeiſed in Fee of Lands in *S.* by Will deviſes to *R.* Son of his late Brother *all his Lands commonly called* P. *and alſo all other his Lands, during his natural Life*, and *to his Heirs Male of his Body begotten*; and *for want of ſuch Iſſue, the ſaid* R. *to have the ſaid Eſtate but during his natural Life*, and no longer; and then his Will was, *that the ſaid Eſtate ſhould deſcend to P.* his Nephew. *R.* ſuffers a Recovery to the Uſe of himſelf and his Heirs, and deviſes this Land to the Defendant in Fee, and *dies without Iſſue Male*. And it was adjudged to be an Eſtate-tail in *R.* (and ſo the Remainder barred by the Recovery) and not an Eſtate for Life, and ſo forfeited by the Recovery, for the Words, *and for Want of ſuch Iſſue, he the ſaid* R. *to have but an Eſtate during his natural Life*, is no more than the Law implies; for *if Tenant in Tail has no Iſſue*, it reſolves *into an Eſtate for Life*, and ſo it was adjudged. The Objection was, that it ſhould be conſtrued thus: *I give the Land to* H. *during his Life, and no longer, in Caſe he has no Iſſue Male of his Body*; and ſo *an Eſtate-tail upon a Contingency*; and *he dying without Iſſue Male, it is now become an Eſtate for Life* ab initio, but the Judgment was *ut ſupra*. *Hil.* 29 & 30 *Car.* 2. *Rol.* 1247. *Fountain* and *Gooch*. 2 *New Abr. of the Law* 59, 60.

6. *P.* was ſeiſed of two Meſſuages in Fee after the Death of his Brother, and had Iſſue two Sons and four Daughters. *P.* deviſed theſe Meſſuages to *N.* his youngeſt Son, and he to have 30*l. per Annum* for his Maintenance for ten Years after the Death of his Grandfather, and the Reſidue of the Profits to be applied for raiſing Portions for his Daughters; and if *N.* die, then he giveth the Eſtate that *N.* had to his four Daughters, Share and Share alike, and if all his Sons and Daughters die without Iſſue, then he deviſes it to his Siſter in Fee. The Deviſor dies, the Grandfather dies, *N.* enters and dies without Iſſue; the four Daughters enter. Adjudged *per tot' Cur*, that here is no Eſtate-tail in the Daughters. *Hil.* 2 & 3 *Jac.* 2. *B. R. Price* and *Warren*, *Skin.* 266.

Prec. in Chan. Hil. 1696. S. C. *accord'* ſays, this was a Caſe ordered to be ſtated by the Maſter, and adds, that *Lord Keep.* ſaid it was plain that *Thomas* took an Eſtate for *Life*, for all the Contingencies upon which he is to take muſt happen *within the Compaſs of a Life*, and ſo no Danger of a *Perpetuity*; and this is the ſame with *Pele* and *Brown*'s Caſe in Effect, tho' not in Words, and is like the Caſe of *Brett* and *Rigden*, and the *Appointee* of *A.* the Executor would have taken but an Eſtate for Life. *Ibid.* 68.

7. *J. S.* deviſed in theſe Words, *I give all my Freehold and Copyhold Lands which I have in Poſſeſſion, Remainder and Reverſion*, (not herein after diſpoſed of) *after the Death of* A. *my Executor to* B. *his Son, and his Heirs for ever*; *but if he dies leaving no Son, then to that Son or Sons my Executor ſhall think fit to give them to by his laſt Will, which Son or Sons ſo nominated* (if *B.* die as aforeſaid) I *declare ſhall have my Lands, charged notwithſtanding with ſuch Annuities, Legacies and Payments as hereafter ſpecified*; and *for Want of a Son of my* [illegible] *Executor*,

Executor, I *give the ſaid Lands to the eldeſt Son of* C. *charged as aforeſaid*; *and* I *give my Leaſes to* D. *and* E. *in Truſt for the Benefit of my Executor for Life, and after his Death, in Truſt for all my Executor's Children*; *and for want of any Child or Children, in Truſt for the eldeſt Son of* C. *and the Truſtees to renew the Leaſes or change the Lives as they ſhould think fit. And if his Executor did not provide Money enough for that Purpoſe within a Month after Demand*, that *the Truſtees might mortgage any of the Lands of Inheritance to renew the Leaſes*, (except thoſe belonging to the Alms-houſe) *and appointed his Executor to pay his* (the Teſtator's *Wife*) *out of any Part of the Eſtate* (except the Alms-houſe Lands, and a Farm near *W.* &c.) 200 *l. a Year for Life, Half-yearly, without any Deduction whatſoever, and gave ſeveral other Legacies*; and *made* A. (his Heir at Law) *ſole Executor* and *Reſiduary Legatee*. *B.* died an Infant without Iſſue in *J. S.*'s Life-time, and *J. S.* died without Iſſue; and *A.* the Executor proved his Will, and poſſeſſed perſonal Eſtate ſufficient to pay all Debts and Legacies, and paid them accordingly, leaving the Plaintiffs his Daughters and Co-heirs. *C.* had two Sons, *Thomas* the eldeſt (*now Defendant*) and *Horatio*, who were living at *J. S.*'s Death; and the Queſtion was, whether *Thomas* the eldeſt Son of *C.* took any and what Eſtate by the Will? And Lord Keep. *Somers* was of Opinion, that he took only an Eſtate for Life, and no more; for if Lands be given to a Man *generally, without limiting for what Eſtate*, this makes *but an Eſtate for Life*, unleſs it plainly appears that the Teſtator intended *a greater* Eſtate, which does not here; *and the Monies directed to be paid by him cannot enlarge it, for none of them do affect his Perſon*, and *ſo* he cannot take but an Eſtate for Life. *Hil.* 1696. *Fairfax* and *Heron*, *MS. Rep.*

8. In Ejectment, the Jury find ſpecially, that *J. S.* being ſeiſed in Fee of the Lands in Queſtion, had Iſſue two Sons *A.* and *B.* and by Will deviſed thus: *Item*, I *deviſe to* A. *my eldeſt Son, all that my Farm called* D. *to him and his Heirs Male for ever*, but *if* (his Heir ſhall be) *a Female, my next Heir ſhall allow and pay to her* 200 *l. in Money, or* 12 *l. a Year, out of the Rents and Profits of* D. *and ſhall have all the reſt to himſelf, I mean my next Heir, to him and his Heirs Male for ever.* That the *Deviſor died*, that A. *the Son entered* and died, *leaving Iſſue but one Daughter*, the Leſſor of the Plaintiff, and that *B.* the younger Son *entered*, and that A.'s *Daughter entered upon him*, and leaſed to the Plaintiff, *who entered*; that *B.* re-entered and ejected him, upon which the Plaintiff brought this Ejectment *et ſi*, &c. Adjudged *per totam Curiam* upon *great Conſideration*, that the Deviſe to *A. and his Heirs Male for ever*, was an Eſtate-tail, and Judgment (*a*) was given for *B.* the Defendant. *E.* 9. *W.* 3. *C. B. Baker* and *Wall*, 1 *Lord Raym. Rep.* 185.

Prec. in Chan. 468. *Trin.* 8. *W.* 3. *Rot.* 1484. S. C. in *C. B.* cited *per* Ld. C. thus: *J. S.* made his Will in this Manner: *I give to my eldeſt Heir Male, and his Heir Male for ever, all my Lands, in ſuch a Place, and if there be a Female*, ſhe to have 12 *l. per Annum as long as ſhe lives*; and the Teſtator having two Sons, the *eldeſt of which died in his Life-time*, (*) leaving a Daughter who was *Heir General*, yet the *youngeſt Son* went away with the Land; and that this Caſe, as appears by the Adjournments on the Rolls, was depending for a conſiderable Time, ſo that it ſeems to have been ſettled with *great Judgment* and *Deliberation*; and that in this Caſe there were ſeveral Expreſſions to ſhew the Teſtator never meant that his Heir General ſhould take.

(*) Not ſo reported in Lord *Raymond*, for there it is ſaid *the Deviſor died firſt, and that the eldeſt Son entered and died.*

(*a*) Firſt, becauſe it is very manifeſt that the Deviſe to *A.* the Son was an Eſtate-tail Male; for tho' in a *Deed* it ſhall be a *Fee*, yet in a Will to gratify the Intent of the Deviſor, the Law will ſupply the Words *(of his Body)*. Secondly, it is apparent that the Deviſor had a Deſign, that if *A.* had a Daughter, *ſhe ſhould not have the Lands*; for the Words *(if a Female, then my next Heir*, &c.) ſhall be intended as if he had ſaid, *but if my Son* A. *ſhall have only Iſſue a Female*, then *that Perſon who would be my next Heir, if ſuch iſſue Female of* A. *was out of the Way, ſhall have the Land*; and to make his Intent more manifeſt, he gives a Rent to ſuch *Female* out of the Lands, which demonſtrates that he had no Deſign that ſhe ſhould have the Land, for *ſhe could not have both the Land* and *Rent iſſuing out of the Land. Per Cur'.* 1 *Lord Raymond's Rep.* 186. in S. C.—As to the Objection that *B. is Male*, but *not Heir*, for *A.*'s *Daughter*, the Leſſor of the Plaintiff, *is right Heir to the Deviſor*; (and *Hobart* ſays, that no Man can take as *Purchaſer* by the Name of *Heir*, but *he who is right Heir*;) the *Court* anſwered, that this is generally true *where the Deviſe is to the right Heirs of* J. S. &c. without ſaying more, but if the Party takes Notice that he has a *right Heir*, and *ſpecially excludes him*, and then *deviſes it to another by the Name of Heir*, this ſhall be a *ſpecial Heir to take*, as 1 *Vent.* 381. the Caſe put by *Hale* C. J. *Ibid.* 187. in S. C.

1 *Lord Raym. Rep.* 505. *Mich.* 11 *W.* 3. *Helliard* and *Jennings*, S. C ſays, the Father deviſed the Lands in Queſtion *to his Son and his Heirs for ever*, but if it ſhould ſo happen that his Son ſhould die *without Iſſue of his Body*, or *before he ſhould attain the Age of* 21 *Years*, then he deviſed the Premiſſes *to be equally divided between his two Daughters*, and *their Heirs for ever*. And it was inſiſted that the Son had all the Fee in him, and therefore might well deviſe to the Plaintiff, for the Word *(or)* ſhall be conſtrued *(and)*, ſo that the Remainder could not veſt before the Son died without Iſſue, and under the Age of twenty-one, and cited *Soulle* and *Gerrard*, *Cro. E.* 525. *Moor* 422. as in Point. But *per Holt* C. J. there is no Neceſſity to conſtrue *(or)* as *(and)* in this Caſe, and the Caſe of *Soulle* and *Gerrard* was adjudged to be an Eſtate-tail. And here it may be it was the Father's Deſign to reſtrain the Marriage of his Son before the Age of twenty-one Years, but to that Point the Court gave no poſitive Opinion; but upon the ſecond Point, whether the Son's Will was a good Will within the Statute of Frauds, *&c.* the *Deviſee* being one of the three Witneſſes, the whole Court were of Opinion to give Judgment for the Defendant, but adjourned. *Ibid.* 507. ——— 1 *Freem. Rep.* 510. in S. C. held clearly *per Cur'*, that the Deviſee could be no Witneſs.——— *Caſes in B. R. Temp. W.* 3. 276. *Hilliard* and *Jennings*, S. C. with the *Dictum* of *Holt* C. J. about the Words *(or)* *(and)*, and *Holt* denied the Caſe of *Soulle* and *Gerrard* to be Law.———Judgment *pro Def'* on the ſecond Point *niſi Cauſa*, which was afterwards made abſolute. *Ibid.* 277.———*Carth. Rep.* 514. S. C. but not S. P.

9. *A.* the Father, having Iſſue a Son and two Daughters, deviſed the Eſtate in Queſtion *to his Son and his Heirs.* Provided nevertheleſs, *that if the Son ſhould die before he comes to the Age of twenty-one*, or *without Iſſue of his Body*, then *it ſhould go to the Teſtator's two Daughters.* The Father dies; and the Son lives to the Age of twenty-one, and makes his Will, and deviſes the Eſtate to the Plaintiff. And whether the Plaintiff, who claimed under the Will of the Son, or the Defendant, who claimed under the Daughters, had the beſt Title, was the Queſtion? And the Court inclined againſt the Plaintiff, *viz.* that the *Son, had but an Eſtate-tail*, and ſo the Deviſe to the Daughters took Effect, the Son being dead without Iſſue; for tho' it is deviſed to him and his Heirs, yet the latter Words, *if he die without Iſſue*, make it an Eſtate-tail; for his Meaning ſeems to be plain, that if the Son had Iſſue, that Iſſue ſhould have it; if not, it ſhould go to the Daughters. *Mich.* 1699. *in B. R. Helier* and *Jennings*, 1 *Freem. Rep.* 509.

1 *Salk.* 233. *Trin.* 11 *W.* 3. *B. R.* S. C. and P.—— 1 *Lord Raym.* 568. *Trin.* 1700. S. C. *Per Holt* C. J. *Turton* and *Gould*, J. the ſecond Son has an Eſtate in Fee-tail.—*Comyns's Rep.* 82. S. C. adjudged accordingly.

10. A Deviſe by a Father to a ſecond Son (after the Death of the Teſtator's Wife) *and his Heirs for ever*, and for want of ſuch Heirs, then *to the right Heir of the Teſtator*, is an Eſtate-tail. *Per tot' Cur'.* ———But had the Deviſe over been *to a Stranger*, the ſecond Son would have taken a Fee-ſimple, and conſequently the Deviſe over had been void. *Per Holt* C. J. *Trin.* 1700. *B. R. Nottingham* and *Jennings*, 1 *Will. Rep.* 23.

11. One deviſes *to* A. *for Life*, and *if* A. *die without Iſſue*, then *to his* (the Teſtator's) *right Heir*, this an *Eſtate-tail*, for *where the Deviſee over was Heir*, there muſt have been a moſt neceſſary *Implication* that *A.* the firſt Deviſee ſhould have an Eſtate-tail, *becauſe the Teſtator's Heir was excluded from taking 'till* A. *the firſt Deviſee died without Iſſue. Per Powell* in the Caſe of *Bampfield* and *Popham*, *Hil.* 1702. 1 *Will. Rep.* 57.

12. Deviſe to *A. for Life*, Remainder *to the firſt Son of* A. *in Tail Male*, and *ſo on to the tenth Son in Tail Male*, and *if* A. *die without Iſſue Male of his Body*, Remainder *over*; alſo by a Codicil, the Deviſor recited *whereas he had given an Eſtate-tail to* A. &c. Objected that by the Codicil the Intent of the Deviſor appeared, and that by the Will *A.* had an Eſtate-tail; for he might have *poſthumous Children, and more than ten Sons. Sed non allocatur*; for *per Cur'*, where a *particular Eſtate is expreſly deviſed, we will not by any ſubſequent Clauſe collect a contrary Intent, inconſiſtent with the firſt, by Implication*; and therefore they conſtrued *dying without Iſſue Male, a dying without ſuch Iſſue Male*, and ſaid there was a mighty Difference between a *Deviſe to* A. and *if he die without Iſſue*; then to *B.* and a *Deviſe to* A. *for Life*, and *if he die without Iſſue*, then *to* B. Adjudged *per* Lord Keep. *Wright.*

Wright, *Holt*, and *Trevor* Ch. J. *Hil.* 2 *Ann. in Chan. Popham* and *Bamfield* (*a*), 1 *Salk.* 236.

(*a*) This Caſe is miſreported in 1 *Salk.* The Caſe in Truth was, a Deviſe was made *to* A. *for Life*, Remainder *to all and every Son and Sons of his Body*, (which material Words are dropped by *Salk.*) who therefore would all be intitled to take before the remainder Man; ſo that here being a *Deviſe to all the Sons*, there was no Occaſion to conſtrue it *an Eſtate-tail*, in order to fulfil the Intent of the Teſtator. *Per Raymond* Ch. J. in the Caſe of *Shaw* and *Weight*, *Eaſt.* 1 *G.* 2. *in B. R.* who ſaid, he had ſeen the Caſe. *Fitz-Gibb. Rep.* 26. ——*Popham* and *Bampfield*, 1 *Vol. Eq. Ca. Abr.* 108. *Ca.* 2. is not S. P.

13. Deviſe to *A.* the Teſtator's Wife, for Life, and then to be at her Diſpoſal, provided it be to any of his Children, if living; if not, to any of his Kindred that his Wife ſhall pleaſe. The Teſtator dies, leaving Iſſue a Son and a Daughter. *A.* the Widow marries *D.* and they by Leaſe and Releaſe, reciting the Teſtator's Will, grant the Premiſſes in Queſtion to Truſtees and their Heirs to the Uſe of *A.* for her Life, *ſans* Waſte, Remainder to the Uſe of *C.* the Teſtator's Daughter and the Heir of her Body, Remainder to the Uſe of *D.* the Teſtator's Son and his Heirs. *A.* and her ſecond Huſband levy a Fine to theſe Uſes. All of the Judges were of Opinion, that by the Will *A.* the Teſtator's Wife has but an Eſtate for *Life*, with a *Power* of diſpoſing of the Inheritance (*b*), and that the Conveyance by way of Leaſe and Releaſe is an *effectual* tho' *improper* Execution of the Power; and affirmed the Judgment in *C. B. Trin.* 1711. *Tomlinſon* and *Dighton*, on a Writ of Error from a Judgment in *C. B.* on a ſpecial Verdict in Ejectment. 1 *Will. Rep.* 149.

(*b*) *Lucas's Rep.* 31, 71. *Mich.* 10 *Ann.* S. C. held *accord' per tot' Cur' in B. R.*—— 1 *Salk.* 239, 246. *Eaſt.* 10 *Ann. B. R.* S. C. held *accord'*.

14. *J. S.* by his Will deviſed Lands to four Perſons and their Heirs for Payment of Debts, and afterwards to the Uſe of them and their Heirs; after which by a Codicil he deviſed, that his Will ſhould ſtand, ſaving that when his Debts were paid, *A.* who was one of the four Deviſees in the Will, ſhould have his Share of the Lands to himſelf for Life, with a Power (*c*) to make Leaſes for ninety-nine Years, determinable on three Lives, Remainder to the Heirs Male of the Body of *A.* Remainder over; *A.* levied a Fine, and ſuffered a Recovery to the Uſe of himſelf and his Heirs, and brought a Bill for a Partition, praying that the other three might join in a Conveyance of a divided fourth Part to him in Fee; and the Cauſe coming on to be heard 26 *July* 1709, before *Cowper* C. his *Lordſhip* was of Opinion, that *A.* ought to be Tenant for Life only, with Remainder to his firſt, *&c.* Son in Tail Male, with Remainder over.—Afterwards Lord Keep. *Harcourt*, on a Rehearing, held it an Eſtate-tail (*d*) in *A.* (and ſo barrable by a Fine and Recovery) but decreed *A.*'s fourth Part to be conveyed to him and the Heirs Male of his Body, Remainder over, *&c.* that being thought more proper by *A.*'s Counſel than an Eſtate in Fee. *Eaſt.* 1711. *Bale* and *Coleman* (*e*), 1 *Will. Rep.* 142.

(*c*) It cannot be inferred (with any Certainty) from the Power of Leaſes given by the Teſtator, that no Eſtate-tail was intended; in regard ſuch Power of leaſing is more beneficial than that given to Teſtator in Tail by the Stat. *Hen.* 8. *Per* Lord *Harcourt*. *Ibid.* 145. (*d*) *Secus* in Caſe of Marriage Articles to ſettle an Eſtate on *A.* for Life, Remainder to the Heirs Male of his Body; this being an Agreement to do a future Act, and in which the Iſſue are particularly conſidered and looked upon as Purchaſers. *Per Harcourt* C. *Ibid.*——(*e*) 2 *Vern.* 670. *Eaſt.* 1711. *Baile* and *Coleman*, S. C. ſays, it was a Deviſe of Lands in Truſt for *A.* for Life, with Power to make Leaſes, and after his Deceaſe in Truſt for the Heirs Male of the Body of *A.* lawfully to be begotten. Ld. Chan. *Cowper* decreed the Truſtees to convey only an Eſtate for Life to *A.* and to his firſt, *&c.* Sons in Tail Male; but *Harcourt* Lord Keep. reverſed that Decree, and deceed an Eſtate-tail to be conveyed to *A. viz.* to him and the Heirs Male of his Body; but his *Lordſhip* admitted it might be otherwiſe upon Articles of Marriage, founded on the Agreement of the Parties; but in a Will you muſt take the Words as you find them. —— *Vin. Abr.* Tit. *Deviſe*, (D. b.) *Ca.* 7. *Bale* and *Coleman et al'*, *Trin. Vac.* 8 *Ann.* and *Eaſt.* 10 *Ann.* S. C. ſtates it at large from a *MS. Rep.* and which being more fully reported by Mr. *Viner* than in either of the above Reports, I ſhall ſtate it here in as brief a Manner as I well can.——*W. S.* by Will dated 2 *June* 1702, deviſed unto *William Coleman*, *Eliz. Bale* Wife of *C. Bale*, and *William Bogan*, Son of *William Bogan*, and *John Legaſſick*, all his Lands, *&c.* in *F.* and *G.* to hold the ſame unto them, *their Heirs and Aſſigns, for ever*, to the Intent *that they ſhould after his Deceaſe ſell and diſpoſe of all or any Part of the ſaid Lands*, &c. *and with the Money to diſcharge all his Debts*; and then declared that his Will was, that all his juſt Debts and Legacies ſhould be punctually paid; after which he *deviſed unto the ſaid* W. Coleman, E. Bale, W. Bogan, *and* J. Legaſſick, *their Heirs and Aſſigns, for ever, equally to be divided between them, all ſuch*

Lands, &c. *as ſhould remain over and above the Diſcharge of his Debts and Legacies*, and further *declared that the Eſtate of Inheritance he had thereby deviſed unto the ſaid* J. Legaſſick, *his Heirs and Aſſigns, was in Truſt to, and for the ſaid* W. Bogan, *his Heirs and Aſſigns.* 10th of the ſaid *June*, the Teſtator *made a Codicil* in theſe Words: Item, *My Will is that after my Debts and Legacies are paid, and a Dividend made of the Remainder of my Manors*, &c. *by and between the ſaid* W. Coleman, E. Bale *and* W. Bogan, *and their Heirs and Aſſigns, that notwithſtanding the expreſs Words in my Will to* E. Bale, *and her Heirs and Aſſigns for ever, I do hereby declare*, and my Will, Intent and Meaning is, and my Deſire is, *that it be ſo taken and conſtrued* in Law, that *that Part of my ſaid Manors*, &c. *which ſhall happen to fall for the Share and Dividend of the ſaid* E. Bale, *ſhall be and remain to ſuch Uſes, Intents and Purpoſes as are herein after mentioned, and to no other Uſe whatſoever*, i. e. *To and for the Uſe and Behoof of the ſaid* E. Bale, *for and during the Term of her natural Life, with Power of letting, ſetting and leaſing all or any Part of ſuch Share or Dividend for ninety-nine Years, determinable upon one, two, or three Lives, either in Poſſeſſion or Reverſion; and after her Deceaſe, to the Uſe and Behoof of her Son my Couſin* Chriſtopher Bale, *for and during the Term of his natural Life, with the like Power of letting*; and *after the Deceaſe of the ſaid* Chriſtopher, *then to the Uſe and Behoof of the Heirs Males of the Body of the ſaid* Chriſtoper, lawfully to be begotten; *and for Default of ſuch Iſſue, to the Uſe and Behoof of the ſaid* William Coleman *and* William Bogan, *their Heirs and Aſſigns for ever, equally to be divided between them.*—Some ſhort Time after the Teſtator died, and there being a Defect in the Will by not enabling the ſaid *John Legaſſick* to act as a Truſtee for the fourth Part deviſed unto the ſaid *William Bogan, an Infant*, and to ſell the ſaid Eſtates, the Teſtator dying much in Debt, and his Lands being moſtly mortgaged, an Act of Parliament was in the 2d of Queen *Anne* paſſed, enabling the ſaid *William Coleman* and other Truſtees to make Sale of Lands for the Payments of the Debts and Legacies of the Teſtator; and after the Payment thereof, the ſaid Act did direct that the ſaid *William Coleman, Elizabeth Bale* and *John Legaſſick*, and the Survivor of them, ſhould make a Diviſion of the Overplus, according to the Directions of the Will. *But no Notice is taken of the Codicil in the Act.*—In *Hil.* 1 *Ann. a Fine was levied by* Elizabeth Bale *and her Huſband, of a Moiety of all the Teſtator's Eſtate* to *T. Bowdage, in order that a Recovery might thereupon be ſuffered to bar the Eſtate-tail limited to* Chriſtopher Bale, *the Son and the Heirs Males of his Body*; and accordingly a *Præcipe* was brought by *J. S.* againſt *T. Bowdage*, who vouched *Eliz. Bale*, and *Chriſtopher Bale* her Son, who vouched over the common Vouchee; *and this Fine and Recovery were declared to be to the Uſe of* Chriſtopher Bale *the Son and his Heirs after the Death of his Mother. Note*; At this Time none of the *Debts* and *Legacies* of the Teſtator were paid, or but to the Amount of 120 *l.*———But the *Debts* being all now paid, *C. Bale* the Son preferred his Bill againſt *Coleman*, his Father and Mother, *William Bogan* and *John Legaſſick*, that they might come to a Dividend of the Overplus of the Teſtator's Eſtate now remaining after his *Debts* and *Legacies* were paid, and inſiſted, that there being an Eſtate veſted in him and his Heirs after the Death of his Mother, by the ſaid Fine and Recovery, he ought to have ſuch Eſtate ſettled in him upon the Dividend. Mr. *Coleman* then preferred his Croſs-bill againſt the ſaid Parties, and prays that a Dividend may be made of this Eſtate, and that the Court would direct what Eſtate ſhould be limited by the Diviſion-deeds to the ſaid *C. Bale*, he inſiſting that his Eſtate was but in Contingency until after the Debts and Legacies paid, and a Dividend made; and that the Words in the Codicil did declare a Truſt of the Dividend of Mrs. *Bale*'s Share, which when it comes to be put in Execution by a Court of Equity, ſhall be executed according to the Intention of the Teſtator, expreſſed in the Codicil, and that the *Limitation ought to be after the Death of Mrs.* Bale to *C. Bale* her Son, during his natural Life, with Power of letting and leaſing, as aforeſaid; Remainder to the firſt, *&c.* Sons of the ſaid *C. Bale*, and to the Heirs Males of ſuch firſt, *&c.* Sons; Remainder over to the ſaid *William Coleman* and *William Bogan*, and their Heirs, *&c.* Upon the Hearing, *Cowper* C. declared his Opinion for the Plaintiff *Coleman*, and directed, that an Account ſhould be taken of the Teſtator's Eſtate, and that what remained ſhould be divided into four Parts, and that the fourth Part which ſhould fall for the Share of Mrs. *Bale*, ſhould be limitted to the *Uſe of her for Life, with ſuch Power of leaſing as in the Codicil*; and *after her Deceaſe, to the Uſe of* C. Bale *her Son, during his natural Life, with the like Power of leaſing*; and *after his Deceaſe, to the firſt*, &c. *Sons of his Body*, Remainder *to* William Coleman *and* William Bogan, and to their Heirs and Aſſigns (*a*).—Afterwards *(Eaſt. 10 Ann.)* this Cauſe was reheard before *Harcourt* L. K. upon the Plaintiff *Bale*'s Petition, and his Lordſhip directed that Mrs. *Bale*'s divided fourth Part ſhould after her Death be conveyed to the Uſe of her Son *C. Bale*, in Tail; and Lord *Cowper*'s Decree was accordingly varied as to this Limitation (*b*). *Trin. Vac. 8 Ann. Eaſt. 10 Ann. Bale* and *Coleman et al', et econt'. Vin. Abr.* Tit. *Deviſe*, (D. b.) *Ca. 7.*

(*a*) In the Arguments of this Caſe before Lord *Cowper*, two Points were made; firſt, whether this Overplus ſhould be divided into three Parts or four Parts; ſecondly, what Eſtate was to be limited to *C. Bale* the Son upon ſuch Diviſion. As to the firſt Point, that depended upon the Words of the Codicil, whereby it was declared, that after the Dividend made between the ſaid *William Coleman, Elizabeth Bale* and *John Legaſſick*, their Heirs and Aſſigns, Mrs. *Bale*'s Share and Dividend ſhould be to ſuch Uſe as aforeſaid; for here the Dividend is mentioned to be made between three Perſons; but Lord *Cowper* declared, that the Eſtate ſhould be divided into four Parts, one Moiety whereof was to belong to the ſaid *William Bogan*; for tho' the Words here ſeem to imply that this Eſtate ought to be divided into three Parts, yet they have relation to the Will itſelf, and by that it is expreſly ſaid, that the Eſtate ſhall be equally divided amongſt *Coleman, Bale, Bogan* and *Legaſſick*.———As to the ſecond Point, his *Lordſhip* ſaid, that a *Diſtinction* would govern this Caſe, *i. e. when an Eſtate was executed, and when it was only executing*; and therefore if in this Caſe a *Deviſe had been to the Son for his natural Life, with ſuch a Power of leaſing* as aforeſaid, and *after his Deceaſe, to the Heirs Males* of his Body, this *would have been an Eſtate-tail in the Son executed*; for tho' the Party's Intention was plain that he ſhould have an Eſtate for Life only, yet the Law executing theſe two Limitations into an Eſtate-tail, Equity will not interpoſe, but as the Tree falls ſo it muſt lie. But *when an Eſtate was only executory, and ſomething was to be done before any Eſtate could be veſted or executed in the Party, this Court will direct the Conveyance*, not that it ſhall be in the Words of the Will, but *according to the Intention of the Party*. Now in this Caſe, after the Debts and Legacies paid, the Deviſe is to Mrs. *Bale* and her Heirs and Aſſigns, of one fourth Part in common, and when this Diviſion, directed to be made, is compleated, the Limitation to the Son is to ariſe out of a divided fourth Part, ſo that the Codicil is a Declaration of the Uſe or Truſt of this fourth Part; and *tho' the Words of the Codicil be, that it ſhall be ſo taken in Law, yet theſe Words are not of any Weight, ſo as to make this a legal Eſtate executed.* And then this being a Truſt, this Court will direct the executing it, and the *Intent of the Teſtator here was plain that this Son ſhould have an Eſtate for Life*, for it is limited to him during the Term of his natural Life, with a Power of leaſing for ninety-nine Years, and goes on and ſays, *and*

and after the Deceaſe of the Son, to the Heirs Males of his Body, with Remainder over; and as to an Objection that was made, that it was the Intention of the Deviſor that this Son ſhould have an Eſtate-tail, becauſe he had by the Codicil a greater Power of leaſing than was given to a Tenant in Tail by the Statute, it was well obſerved at the Bar, that no ſuch Inference ſhould be made of the Party's Intention, for that the Power of leaſing was annexed to the Eſtate for Life, and therefore when that Eſtate was merged by the Acceſſion of the Eſtate limited to the Heirs Males of the Body of the Son, the Power of leaſing annexed to that Eſtate was deſtroyed with it, ſo that upon the whole *he* decreed as above; for in the Caſe of a *Will* or *Articles*, where the Thing is to be executed, the Intent of the Party ſhall be purſued.——A Point was ſpoken to about the Validity of the Fine and Recovery, *viz.* that the Fine and Recovery could not bar this Eſtate tail (ſuppoſing it to be one) it being but a *Poſſibility* or a *contingent* Intereſt after the Debts and Legacies paid and a Dividend made, according to *Pell* and *Brown*'s * Caſe, but no Opinion was given to this Point, becauſe the Fine and Recovery could not ſignify any Thing as this Caſe ſtood, ſeeing Lord *Cowper*'s Opinion was, that *C. Bale* the Son ought to be Tenant only for Life, with Power of leaſing, *&c. Ibid.*—(*b*) *Lord Keeper Harcourt* ſaid, that he had a great Reſpect for his Predeceſſor, but that he muſt determine Cauſes according to his own Conſcience, and could not agree with Lord *Cowper*'s Decree; and added, that this Caſe differed from the Caſe of Articles, where the Intent of the Parties was to be regarded; they are to be looked upon as Purchaſers, the Nature and Matter of Articles is to fix Eſtates in Families, and it would be abſurd to make ſuch a Conſtruction of them as to be of no Effect. In the Caſe of a Deviſe there is no Purchaſer, no Contract, no Family to be provided for; yet here it is ſaid the *Intent ought to govern, but then it muſt be a manifeſt and certain Intent*, and not an arbitrary one: It muſt be according *as it appears upon the Will*, and *according to the known Rules of Law*; it is *not to be left to a Latitude*, and, *as it may be, gueſs'd at.* In this Caſe there is a Deviſe jointly to Truſtees till Debts and Legacies are paid; what if the Eſtate had been charged and ſubjected for this Purpoſe, and after this the Teſtator had deviſed in the ſame Words as in the preſent Will? this Court had no Power over it. Doth a Deviſe of legal Eſtate alter this Caſe? It is the ſame as if there had been no Truſt. *Truſts in a Will ſhall have the ſame Conſtruction as a Court of Law could make upon the ſame Words.* At Law it is agreed that *C. Bale* would be Tenant in Tail. It is the ſame Thing *here*, a *precedent Truſt will not alter a ſubſequent Eſtate. Ibid.*——As the *Debts are admitted to be all paid*, the ſame Conſtruction is now to be made as if there had been *originally* no Truſt. *Per Harcourt* Lord Keep. in S. C. 1 *Will. Rep.* 145. * *Vide* 1 *Vol. Eq. Ca. Abr. P.* 187. *Ca.* 4.

15. I deviſe *all my Lands in* B. *to my eldeſt Son*; Item, I *give to my ſecond Son* C. *and* (*c*) (*all*) *my Lands in* D. Alſo *to my Daughter* A. R. I *give* 500 l. *to be paid as ſoon as may be out of the aforeſaid Eſtate and Premiſſes*, and within three Years, if it be poſſible. *Per* his *Honour*, the ſecond Son has but an *Eſtate for Life*, chargeable with the 500 *l.* Portion, and granted a perpetual Injunction againſt Waſte in the younger Brother. *Hil.* 1713. *Redoubt* and *Redoubt*, *Vin. Abr.* Tit. *Deviſe*, (Q. a.) *Ca.* 18.

(*c*) *And* in the Original.

16. *B.* having ſeveral Freehold and Copyhold Lands, deviſes *all his Lands, Goods and Chattels, to his three Sons, equally to be divided between them, and deviſes over and above this*, 100 l. *to his eldeſt, provided he gives a lawful and general Releaſe to his two younger Brothers; and by his Codicil appoints, that if one of his younger Sons ſhould die, or marry in his Minority without Conſent of his Executors, then his Portion to go to the other younger Son. Per Harcourt*, C. there being no Words of Limitation of Eſtate in the Deviſe to the two younger Sons, they can take only an Eſtate for Life in the Lands, and as to the general Releaſe directed by the Will to be given to the younger Sons, that is ſatisfied by releaſing his Right to the perſonal Eſtate without affecting the real Eſtate; ſo the Deviſe over to the younger Son in Caſe of the Death of one under Age, *&c.* may be ſatisfied by the perſonal, and the Word (*Portion*) properly ſignifies nothing. *Mich.* 12 *Ann. Bullock* and *Bullock*, *Ibid.* (X. a.) *Ca.* 10.

17. *J. S.* being ſeiſed in Fee of Lands in *W.* by Indentures ſettled the ſame *to the Uſe of* A. *his Son for Life*, Remainder *to* M. *his Wife for Life*, Remainder *to the right Heirs of* A. and dies. *A.* by his Will deviſes in theſe Words, *viz.* " *My Lands in* W. *my Wife is to* " *enjoy for her Life, and after her Death, of Right it goeth to my* " *Daughter* E. *for ever, provided ſhe has Heirs; if my ſaid Daugh-* " *ter ſhall die before her Mother, or without Heirs, and my ſaid Wife* " M. *ſhould marry again, and have an Heir Male*, I *bequeath him* " *all my Right to the Eſtate, not thinking* I *can ſufficiently reward her* " *Love.*" *A.* the Son died without Iſſue Male, leaving only one Daughter ſaid *E. who died without Iſſue Male*, and the Leſſors of the

Plaintiff

Plaintiff are *Heirs at Law to her*, and *Cohiers* of *B.* Brother of the ſaid *A.* After *A.*'s Death, *M.* married *T. H.* by whom ſhe had Iſſue the Defendant. It was inſiſted that the Leſſors of the Plaintiff are the Heirs at Law to whom the Eſtate belongs, if it is not diſpoſed of otherwiſe by the Will of *A.* That by this Will (*i. e. A.*'s Will) nothing paſſed to the Defendant; for he could not take but by way of *Remainder*, or by way of *executory* Deviſe; and he could not take by way of *Remainder*, becauſe *nothing is deviſed to* E. the Daughter, for the *Will does not give her any Eſtate, but only recites the Eſtate*, which ſhe had before; for it ſays, *his Wife ſhall enjoy for her Life, and after her Deceaſe of Right it goes to his Daughter for ever, provided ſhe have Heirs*, which is only a Narration or Recital of the Eſtates as they were by the Marriage Settlement; and afterwards Judgment was given for the Plaintiff upon the *firſt* Point, that here was no Deviſe to *E.* and then the firſt Son of the Wife *M.* by her ſecond Huſband could not take by way of Remainder. (*a*) *Mich.* 2 *Geo.* 1. *in B. R. Right* and *Hammond et al'*, *Comyns's Rep.* 232.

(*a*) And afterwards in another Cauſe between the ſame Parties *in Canc'*, *Mich.* 9 *Geo.* 1. for an Eſtate in *Eſſex*, which was purchaſed by *J. S.* in the Name of Truſtees, purſuant to his Marriage Articles, and which was to be ſettled according to the Limitations in the ſaid Indentures, and which after the Death of *A.* the Son upon a Bill exhibited in 1675 by *M.* his Wife and *E.* his Daughter, was ſettled upon *E.* in Tail, and for Default of ſuch Iſſue, to *M.* in Tail; and it was now prayed upon a Bill exhibited by the Heirs at Law of *E.* that the Eſtate in *Eſſex* ſhould be conveyed to them; for the Decree in 1675 *directed the Settlement to be purſuant to the Will of* A. but according to the Judgment of *B. R.* the Will of *A.* did not alter the Eſtate of *E.* and therefore the Settlement to *E.* in Tail, and then to her Mother in Tail, was an irregular Execution of the Decree, and therefore the Truſtees ought to convey to the Plaintiff. And the Maſter of the Rolls was of the ſame Opinion, for he thought that *E.* did not take any Eſtate by the Will of *A.* which did not make any Deviſe or Gift to her, but only recited that his Wife was to enjoy it for her Life, and that after her Death of Right it was to go (not that he gave it) to *E.* his Daughter. *Ibid.* 234.

18. In Ejectment upon the Demiſe of *E. M.* the Caſe was, *A.* ſeiſed in Fee of the Lands in Queſtion, deviſed the ſame *to his Wife during her Widowhood*, and after her Deceaſe or Marriage, unto E. M. *and* R. S. *during their natural Lives, equally to be divided between them, and after their Deceaſes, then to the next Heirs Male of their Bodies lawfully to be begotten, equally to be divided between them; but in Caſe either of them the ſaid* E. M. *and* R. S. *died without ſuch Iſſue*, then *he deviſed the ſame Eſtate to the other of them for Life*, and *after his Deceaſe to the Heirs Males of his Body, lawfully*, &c. with diverſe Remainders over; *Proviſo, that if his ſaid Wife or any of his Deviſees ſhould cut down or ſell any Timber growing upon the ſaid Lands other than for Repairs, and Fire-wood for themſelves and Family*, and *their Tenants Uſe, to be ſpent on the Premiſſes, that then they ſhould forfeit their ſeveral and reſpective Eſtates.* E. M. *and* R. S. *did by their Deed, for themſelves and the Heirs Male of their Bodies, make Partition of the ſaid Lands*, and *that they and the Heirs Male of their Bodies ſhould have and hold the Lands in Severalty, but for no other Eſtate than they might take by the Will.* R. S. *levied a Fine*, and *ſuffered a Recovery of the Lands allotted to him*, and died without Iſſue. Defendants entered as his Heir. Upon the firſt Argument, *Parker* Ch. J. *Eyre* and *Pratt* (*Powis* abſent) clearly reſolved that *E. M.* and *R. S.* had by the Will *Eſtates-tail in common executed in them*, becauſe the Words *equally to be divided* between them, are *ſufficient in a Will to make a Tenancy in common*, tho' they are not ſo in a Deed; and that thoſe Words being applied as well to the Eſtates given to their Heirs Male as to the Eſtates given to them, made the Eſtates-tail, Eſtates in common, and that the Tails were executed in them, becauſe Eſtates for Life being limited to them, *Heirs in this Caſe is a Word of Limitation*, and that the Words (*after their Deceaſes*) *were to be taken reſpectively* (i. e.) *that after the Death*

of

of E. M. *his Moiety ſhould go to the Heirs Male of his Body*, and *after the Deceaſe of* R. S. *his Moiety ſhould go to the Heirs Male of his Body*, and that the Proviſo was no Proof that Teſtator intended *E. M.* and *R. S.* Eſtates for their Lives only, becauſe the Teſtator intended that Proviſo to be extended to all his Deviſees, and if *E. M.* and *R. S.* took only Eſtates for Life, yet their Heirs Male would be Deviſees in Tail, and his own right Heirs to whom he gave the Fee were Deviſees. Judgment *pro Quer'*. 3 *Geo. Thurſtout* and *Peak et al', Vin. Abr.* Tit. *Deviſe*, (X. a.) *Ca.* 11.

19. A Limitation to one to take and enjoy the Profits of an Eſtate during his Life, and *after his Deceaſe, to the Heirs Male of his Body*, would make an Eſtate-tail, where nothing appears that explains the Teſtator's Intention to the contrary, otherwiſe not. *Mich.* 5 *Geo.* 1. *C. B. White* and *Collins, Comyns's Rep.* 289.

20. *J. S.* deviſes his Freehold Eſtate to Truſtees and their Heirs, Executors and Adminiſtrators, in Truſt *to convey to* B. *without Waſte*, Remainder *to Truſtees during his Life, to preſerve contingent Remainders*; Remainder *to his firſt*, &c. *Son in Tail Male*, Remainder *to Daughters in Tail General, as Tenants in common*, with *Power to* B. *to make a Jointure* of any Part of the Premiſſes, not *exceeding Half*, and *if* B. *die without Iſſue of his Body*, the Teſtator then *deviſed the ſame over* in Fee. *Objected*, that *B.* by Virtue of the Words (*if he die without Iſſue of his Body*) ſhould have an *Eſtate-tail*, and the rather, for that otherwiſe the Daughters of *B.*'s Son could never take, which would be againſt the Teſtator's Intention. *Anſwered*, that here was an expreſs *Eſtate for Life* to *B.* and the Words (*if he ſhould die without Iſſue*) being only Words of *Implication*, would not *merge* and *deſtroy* an expreſs *Eſtate for Life*, according to the Caſe of *Bamfield* and *Popham*. But *Parker* C. exploded the Notion *that Words of Implication ſhould not turn an expreſs Eſtate for Life into an Eſtate-tail*, and ſaid, that if *I deviſe an Eſtate to* A. *for Life, and after his Death without Iſſue then to* B. *this will give an Eſtate-tail to* A. according to *Sunday*'s Caſe, 9 *Co. Rep.* 276. (*a*) But here being a *Limitation upon* B.'*s Death to his Sons*, and *after to his Daughters*, the Words (*if* B. *ſhould die without Iſſue*) muſt be intended, *if he ſhould die without* (*b*) *ſuch Iſſue*; and that as to what was agreed, that unleſs theſe Words were to create an *Eſtate-tail* in *B.* his Son's Daughters could not take, his Lordſhip ſaid, that it did not appear the Teſtator intended that *B.*'s Son's Daughters ſhould take, for the Teſtator might think that on *B.*'s dying without Iſſue Male, his Name and Family would be determined, for which Reaſon he might limit it over to the Daughters of *B. himſelf*; beſides, *the Son of* B. *would be Tenant in Tail*, and *when of Age might by docking the Intail give the Premiſſes to his Daughters. Hil.* 1719. *Blackborn* and *Edgely et econt'*, 1 *Will. Rep.* 600, 605, 606.

(*a*) *Sed Q.* for in *Sunday*'s Caſe there is no expreſs Eſtate for Life given to the *firſt* Deviſee. *Ibid.* 605, in a Note by the *Editor*.

(*b*) *Vide* the Caſe of *Humberſton* and *Humberſton*, 2 *Vern.* 737. *Prec. in Chan.* 455. 1 *Will. Rep.* 332. 1 *Vol. Eq. Abr.* 207. *Ca.* 8.

21. *J. S.* ſeiſed in Fee of a real Eſtate, and poſſeſſed of a perſonal Eſtate, by Will gave one third Part of *all his Eſtate whatſoever* to his Wife *A.* and deviſed *to his Son* B. *and his Heirs, two Thirds of all his real and perſonal Eſtate*, upon Condition to pay his Debts. *Raymond*, and *Eyre* Chief Juſtice, and *Jekyll* Maſter of the Rolls, without Difficulty, held, that by the Deviſe of a third Part of *all the Teſtator's Eſtate whatſoever*, the *Lands did paſs*, as well as the *perſonal Eſtate*, by Virtue of the Word (*whatſoever*), but they conceived that the Wife ſhould have but an Eſtate for Life therein, the Word (*Eſtate*) being rather a *Deſcription of the Thing itſelf* than of the Teſtator's Intereſt in it; and by the next Clauſe it appeared, and where the Teſtator intended to give a Fee, he took Care to add the Word (*Heirs*) to the

Word (*Eſtate*) (*a*). *Hil.* 1721, at the Council, *Cheſter* and *Painter*, 2 *Will. Rep.* 335.

(*a*) But ſee the Caſe of *Ibbetſon* and *Beckwith*, *P. Ca.* where the Deviſe was of *all my Eſtate* to *A.* for Life, and to *T. D.* after her Death, he taking the Teſtator's Name; and if he refuſed, to *M. B.* and *her Heirs for ever*. The *Maſter of the Rolls* held, *T. D.* took only an Eſtate for Life, but 11 *Dec.* 1735, Ld. *Talbot* was of Opinion *T. D.* had a Fee, and varied the Decree at the *Rolls*.

22. *J. S.* was ſeiſed *in Fee of the legal Eſtate of Lands in* H. and *only of the Truſt* or *equitable Eſtate of Lands in* S. which he had formerly purchaſed in the Name of his Brother *T. S.* and which on his ſaid Brother's Death had deſcended to his Son (the Teſtator's Nephew) *W. S.* *J. S.* by Will charged all his Eſtate with the Payment of his Debts, and *directed* W. S. *his Nephew and Truſtee, to convey his Lands in* S. *to the Uſe of his Will*; then he deviſed *all his Lands in* S. *and* H. *to* W. S. *for Life*, and afterwards *to the firſt Son* or *Iſſue Male of his Body, lawfully to be begotten*, and *to the Heirs Male of the Body of ſuch firſt Son*, Remainder *to* W. S.'*s ſecond Son, and his Heirs Male in Tail*, (not carrying the Limitations over to his third or other Sons) and then comes this Clauſe, *viz.* (*that immediately after the Death of the Teſtator's Nephew* W. S. *without Iſſue Male of his Body, the Premiſſes ſhould go to Truſtees for Charities.* Afterwards *W. S. ſuffered* a *Recovery* and *died without Iſſue*; and whether the Recovery barred the *Charities* was the Queſtion? And upon an Appeal from an Order (*b*) made *Feb.* 10, 7 *Geo.* by the Barons of the Exchequer to the Houſe of Lords, all the Lords agreed that as to the Lands in *H.* wherein the Teſtator had a legal Eſtate, the Recovery was clearly good, and barred the Charities. But as to Truſt Eſtate in *S.* the Order of the Court of Exchequer was reverſed by a Majority, the Effect whereof was only to reverſe the Plea allowed by the Exchequer, and ſo did only put the Reſpondents to anſwer over without determining the Right any Way againſt them. (*c*) *Mich.* 1721. Attorney General, at the Relation of *Folkes* and *Battely*, Appellants, and *Sutton* and *Payman*, Reſpondents, *in Domo Procerum.* 1 *Will. Rep.* 754, 765.

(*b*) By which they called the Reſpondents Plea (*) to an Information brought for eſtabliſhing the Charities given by the Will of *J. S.* out of the Lands in *S.* wherein he had only the *Truſt* or *equitable Intereſt*, and out of the Lands in *H.* wherein he had the *legal Eſtate*. (*) The Reſpondents who claimed under the Recovery, pleaded, "*That* W. S. *the Teſtator's Nephew, being Tenant in Tail by the Will, had ſuffered a common Recovery, and had thereby barred the Charities.*" *Ibid.* 754. (*c*) In Conſequence of this Order made by the Houſe of Lords, the Defendants anſwered, and on 29 *Jan.* 1732, the Cauſe by the Name of the *Attorney General* v. *Young et al'* (*Payman* being then dead) came on in the Exchequer, where the *Barons* decreed, that the Recovery ſuffered by *W. S.* of the Truſt Eſtate was void, being contrary to the Truſt created by *J. S.*'s Will; and becauſe there had been no Conveyance of the Premiſſes in *S.* to Truſtees, purſuant to the Directions in the Will of *J. S.* Defendants to convey to the Truſtees for the Charity, and awarded a perpetual Injunction to quiet them in the Poſſeſſion; but in reſpect to the Lands in *H.* (in which the Teſtator had the *legal* Eſtate) the Court retained the Information, with Liberty to either of the Parties to aſcertain their Title by Trial at Law; upon which the *Suttons* (who claimed under the Recovery) brought their Ejectment *in Scac'*, and the Jury found a ſpecial Verdict, *viz. J. S.*'s Will and all Facts neceſſary to bring the Matter of Law before the Court, and in *Eaſter* Term 1737 the ſame was argued; in the Term following the Court gave Judgment for the Leſſors of the Plaintiff, being of Opinion that *W. S.* the Nephew, took an *Eſtate-tail* in the Lands in *H.* and on 22 *June* 1737 the Court ordered the Tenants to attorn to the *Suttons*. 1 *Will. Rep.* 766. in a Note. *Vin. Abr.* Tit. *Deviſe* (B. b.) by Way of Note to Ca. 22. S. C. reports it thus: Deviſe to *B.* for Life, and after his Death to the firſt Son of *B.* or Iſſue Male of his Body, and to the next Heirs Male of ſuch firſt Son, and for Want of ſuch Iſſue, to the ſecond in like Manner; but goes not to the third or other Sons. "*Provided that the ſaid* B. *nor the Heirs Male of his Body, ſhall not commit Waſte*, or defeat the Annuities or charitable Bequeſts in this Will, and then deviſes Annuities to two Siſters, and after their Death the Truſtees ſhould apply the Annuities to certain Charities. Adjudged *in Scac'*, that this was an *Eſtate-tail*, 20 *Dec.* 1720, affirmed in *Dom. proc.* cites it to a MS. Tab.——S. C. cited *arg'* in *Fitz-Gibb. Rep.* 13. thus: Deviſe to *B.* for Life, and after his Deceaſe to the firſt Son of his Body, and the Heirs Male of ſuch firſt Son, and ſo to the fourth, Remainder to his Siſters, provided that *B.* commit no Waſte, and after *B.*'s Deceaſe without Iſſue of his Body, to a Charity. Adjudged and affirmed *in Dom. proc'*, that *B.* had an Eſtate-tail.—— S. C. cited *arg'* 1 *Mod. Caſes in Law and Eq.* 257. by the Name of *Sutton* and *Sammon*, *Hil.* 7 *Geo.* 1. *Sutton* deviſed his Lands to *T. Sutton for Life*, Remainder *to his firſt Son in Tail*, and if *T. Sutton and his Wife ſhall die without Iſſue*, Remainder to *charitable Uſes*. A Bill was exhibited *in Scac'* to eſtabliſh the Charity, and the Defendant pleaded that *T. Sutton* ſuffered a Recovery, and declared the Uſes to himſelf and his Heirs, which Plea was allowed: 'Tis true, that upon Appeal to the *Houſe of Lords*, the Defendant was ordered to anſwer, but it was on foot of being a Deviſe to a Charity; and tho' the Teſtator might intend it for a Charity, yet ſince by *Operation* of Law it was an *Eſtate-tail*, that muſt be obſerved. *Ibid.* 258.——S. C. cited *arg'* *Forteſc. Rep.* 66. under the Name of *Sutton* and *Paman*.

23. A Deviſe, that *if* W. *the eldeſt Son of the Teſtator ſhould happen to die without Iſſue, that then, and not otherwiſe, after* W.'s *Death, he deviſed it over to his Son* R. *and his Heirs.* Held that *W.* took an Eſtate-tail by Implication. *Trin.* 9 *Geo.* 1. *C. B. Walter* and *Drew et al'*, (*a*) *Comyns's Rep.* 327.

(*a*) *Vide P. Ca.*

24. A Deviſe *to his Son for Life, et non aliter*, and *to his Sons*, was adjudged an Eſtate for Life only in the Son. *Arg' Trin.* 1725. in the Caſe of *Shaw* and *Weigh*, 1 *Mod. Caſes in Law and Eq.* 261.

1 *Vent.* 231. S. C. cited *per Hale* Ch. J.

25. *A.* deviſed to *B.* and *C. during their natural Lives, equally to be divided between them*, and after their Deceaſe *to the next Heirs Male of their Bodies*, but in Caſe *either of them die without ſuch Iſſue*, then *he deviſed the ſame to the other of them*, and *after his Deceaſe to the Heirs Male of his Body*, and for Want of ſuch Iſſue of both of them, then he deviſed over to others, with a Proviſo, *that if any of the Deviſees cut down Timber, unleſs for neceſſary Bootes, they ſhould forfeit their Eſtates* This was held to be an Eſtate-tail in *B.* and *C.* notwithſtanding the Eſtate was limited to the next Heirs *Male* (*b*). Cited by *Forteſcue* J. as the Caſe of *Seagrave* and *Miller*, 12 *Geo.* 1. *Forteſc. Rep.* 84.

(*b*) *Ibid.* Mr. *Forteſcue* ſays this was the *unanimous* Reſolution of the Court of *C. B.* when the Lord Chancellor preſided there, and was as he (*Forteſcue* J.) held, to the Satisfaction of all *Weſtminſter-hall*; and when this Cauſe was brought into *B. R.* by Writ of Error, that Court ſeemed to be of the ſame Opinion; but as to the Points of the Pleading, being in a *Formedon*, theſe were debated, but *no Queſtion made as to the Limitation of the Eſtate. Ibid.* 85.

26. *J. S.* deviſed Lands to *B. for his Life*, and after his Deceaſe *to the Heirs Males of the Body of the ſaid* B. lawfully to be begotten, and *his Heirs for ever*, but if *B. ſhould die without ſuch Heir Male*, then he deviſed them over. The Judges were all *unanimous* of Opinion, that this was an Eſtate-tail (*c*) in *B.* and Judgment, on a ſpecial Verdict in Ejectment, was given accordingly, *Nov.* 18, 1726, in *B. R. Goodright* v. *Pullyn et al'*, 2 *Lord. Raym. Rep.* 1437.

(*c*) For if Lands are deviſed *to* A. *for Life*, tho' the Words *without Impeachment of Waſte* are added, *or*, with *a Power to make a Jointure*, and *after his Deceaſe to his Heirs Male*, *A.* thereby takes an Eſtate-tail, and this is ſettled ſo firmly ſince the Caſe of *King* and *Melling*, 2 *Lev.* 59. that it is not to be diſputed; for the Word *Heirs* is properly a Word of Limitation, and therefore if Lands, &c. by *Deeds* are conveyed *to* A. *and his Iſſue Male*, or *Iſſue Female*, he takes *no Eſtate-tail*; but in a *Will*, a Deviſe *to* A. *for Life*, and *after his Deceaſe to his Iſſue*, without more, will *carry an Eſtate-tail to* A. ſo that *Iſſue* is ſometimes a Word of *Purchaſe*, ſometimes of *Limitation*, according to the different Penning of the Will. *Per Cur.' Ibid.* 1440. The Court alſo held, that the *ſubſequent* Words as *his*, and *if he dies without ſuch Heir Male*, are not ſufficient to reſtrain and alter the Operation of the Words *Heirs Male*, and ſo qualify them as to make them a Deſcription of the Perſon.——*Forteſcue* J. thought *his ingrammatical* Conſtruction would properly refer to *B.* but as to that the other Judges gave no Opinion; but they all held, that the Operation of plain and clear Words and a ſettled Rule of Law could not be defeated or broke into by *uncertain* or *doubtful* Words, which they took the laſt at leaſt to be. In Effect, the Words *Heirs Males* muſt be rejected to make this an Eſtate for Life only in *B. Ibid.*———*MS. Rep. Mich* 13 *Geo.* 1. S. C. ſays, the Queſtion was, whether by the Words of the Will *B.* had an Eſtate tail or for Life deviſed to him? and it was ſtrongly objected for the Plaintiff, that it was an Eſtate for Life only; for by the Words *his Heirs*, were meant the Heirs of the Iſſue Male; and that tho' the Words *Heirs Male* were generally put, and in the plural Number, yet it was ſaid one Heir Male of his Body was only intended, and that appeared from the ſubſequent Clauſe, *viz. and if he ſhould die without ſuch Heir Male*, which is in the ſingular Number: But *Cur' cont'*, for they ſaid, it was very true if this was ſo, that one Iſſue Male was only intended, *B.* could be only Tenant for Life, and the Remainder Man a Purchaſer, and they took the ſame Diſtinction as there is in *Shelly*'s Caſe, 1 *Rep.* 104. between a Remainder Man limited upon an Eſtate for Life, to the Heirs Male of the Body of the Tenant for Life; and where 'tis only limited to the Heir Male; for in the firſt Place, they ſaid the Heirs Male take by Deſcent, and conſequently the firſt Perſon who is to take has an Eſtate-tail; but in the other Caſe, the Heir Male of the Body of the Tenant for Life takes by Purchaſe, and the firſt Perſon who is to take has but a bare Eſtate for Life. But in the *preſent* Caſe, the Court ſaid, the Words were properly Words of Limitation; that if thoſe Words had been in a *Deed*, as they are in a *Will*, it would have been beyond all Queſtion that an Eſtate tail had paſſed to the firſt Taker; and they laid it down for a Rule, *that Words in a Will ſhall give the very ſame Eſtate as ſuch Words in a Deed would*, unleſs the Intent of the Party can be diſcovered to the contrary. Accordingly they adjudged that *B. took an Eſtate tail*, Remainder *to his Heirs in Fee.* 1 *Barnard. Rep. in B. R.* 6. 13 *Geo.* 1. S. C. *in totidem verbis with MS. Rep.*

27. An Eſtate was deviſed *to two Siſters* and *their Heirs*, and that *if they* (who were the Teſtator's Daughters) *ſhould die without Heirs*, then

then the Teſtator *gave his Eſtate to his Brother* Thomas. Upon a ſpecial Verdict the Queſtion was, whether this was an Eſtate *in Fee* or *in Tail* to the Daughters? For if it was *in Fee, it was a joint Eſtate*, but *if in Tail, the Iſſue muſt take by Moieties. Co. Lit.* 182. And *all* the Court ſeemed to be of Opinion, that it was an *Eſtate-tail in the two Daughters*, and took this Difference, that where in ſuch a Deviſe *the Remainder over is limited to a Relation of the Deviſee's, it ſhall be conſtrued an Eſtate-tail in the firſt Deviſee*; but *if the Remainder over be limited to a Stranger, it ſhall be conſtrued an Eſtate in Fee, and the Over-remainder void. Cro. Jac.* 415. 1 *Roll. Abr.* 126. 3 *Lev.* 70, 102. *Salk.* 233, 235. but adjourned. *Mich.* 13 *Geo.* 1. *in C. B. anon. MS. Rep.*

2 *Lord Raym. Rep.* 1561. S.C. ſays, it was inſiſted for the Defendants, that an expreſs Eſtate-tail being given to *B.* by the ſaid Words (of the Deviſe) and no expreſs Eſtate for Life, the *viz.* that comes after, and the ſubſequent Words in the other Deviſes, cannot turn that only into an Eſtate for Life in *B.* with Intails to his Sons ſucceſſively, for what follows the *viz.* and the other Deviſes to the Sons is contrary to the expreſs Deviſe to *B. Sed non allocatur*, for *per Cur'*, the whole Will muſt be taken together, and one Part explained by the other, and the Intent was moſt manifeſt that the Deviſor in all the Deviſes of the Lands in Queſtion deſigned to give *B. only an Eſtate for Life*, and not an Intail, and the *viz.* and the other Clauſes were not contrary but explanatory of what *Heirs of the Body of* B. the Deviſor meant, and Judgment was given for the Plaintiff *Nov.* 18, 1729, by the unanimous Opinion of all the Judges. *Ibid.* 1562.——3 *Barnard. Rep. in B. R.* 38. *Law* and *Davis*, and others, S. C. ſays, it was *(int' al')* inſiſted that the Words under the *viz.* ſhould reduce the general Deſcription of the Word *Heirs* to ſignify *Male Heirs*, and to give *B.* an Eſtate in *Tail Male.* But the three Judges, *Page* abſent, were clearly of Opinion, that the Words under the *viz.* aſcertained the general Deſcription of the former, and explained the Meaning of the Teſtator to be, that *B.* ſhould have a bare Eſtate for Life, the Remainder to his Sons in Tail: They thought the Caſe cited for the Defendants out of 2 *Ven.* (*Legate* and *Shewell, Vol.* 1. *Eq. Abr.* 394. *Ca.* 7.) diſtinguiſhable from this, for there the Words are by way of Limitation; here the Words explain one another. Judge *Reynolds* ſaid too, that the Caſe in *Cro. Eq.* 248. did not come up to this; for there the Deviſor intended that the Son of *S. ſhould take an Eſtate to himſelf and the Heirs of his Body*, the Remainder to the Heirs of the Body of the Father, which would be a different Eſtate from his taking the whole as *general* Heir of the Body of his Father. *Accord'* the Court gave Judgment for the Plaintiff. *Ibid.* 239. Cites *Salk.* 236.—*Fitz-Gibb. Rep.* 112. adjudged an Eſtate for Life only in *B.*

28. *J. S.* deviſed Part of the Lands in Queſtion to his Wife for Life, and after her Deceaſe to his Son *B.* and his Heirs lawfully to be begotten, *that is to ſay*, to his firſt, *&c.* Son and Sons ſucceſſively, lawfully to be begotten of the Body of the ſaid *B.* and the Heirs of the Body of ſuch firſt, *&c.* Son and Sons ſucceſſively, lawfully iſſuing, as they ſhall be in Seniority of Age and Priority of Birth, the eldeſt always and the Heirs of his Body to be preferred before the youngeſt and the Heirs of his Body, and in Default of ſuch Iſſue, then to his right Heirs for ever. He then deviſed other Part of the Lands to his Wife for Life, and after her Deceaſe to ſaid *B.* and to the Heirs of his Body, *viz.* to his firſt, *&c.* Son and Sons in Manner aforeſaid, and for Want of ſuch Heirs, then to the Uſe of his right Heirs for ever. And in the ſame Manner of Expreſſion he deviſed five other Parcels of his Lands, by diſtinct Clauſes in his Will. The Deviſor died, and left his Widow and three Sons. *T.* his eldeſt, *R.* his ſecond Son, and ſaid *B.* his youngeſt Son. *T. R.* and ſaid *B.* all died without Iſſue *Male*, and only *R.* the ſecond Son, left *M.* the Wife of *Fowler*, (his only Daughter and Heir, and alſo right Heir of the Deviſor) who were Leſſors of the Plaintiff. The Defendant claimed under *B.* who, after a Surrender by his Mother of her Eſtate for Life to him, ſuffered a Recovery to the Uſe of him and his Heirs, and of the ſeveral Parcels of Lands, and conveyed to *Waring*, under whom the Defendants claimed. The ſingle Queſtion was, whether *B.* by this Will was Tenant in Tail, or only Tenant for Life? If he was Tenant in Tail by that Suffering the Recovery, that would be barred, and alſo the Remainder to the right Heirs of his Father, under which the Leſſor of the Plaintiff claimed. But if he was but Tenant for Life, the Recovery would not affect the Reverſion deſcended to the Plaintiff. *Per tot' Cur'*, *B.* took only an Eſtate for Life, and Judgment was given for the Plaintiff, 18 *Nov.* 1729. *Lowe* and *Davies et al' in B. R. MS. Rep.*

29. I *deviſe my Lands to* A. *for Life, and after his Deceaſe, Remainder to the Heirs Male of the Body of* A. *and to the Heirs Males of ſuch Iſſue Male.* The Chief Juſtice was of Opinion, that theſe Words conveyed an Eſtate-tail to *A.* and ſaid, that the ſettled Diſtinction was, where the Word *Heir* is in the *ſingular* Number, and *a Limitation made to the Iſſue of ſuch Heir*, the Word *Heir* is conſidered as a Word of *Purchaſe*, and a *Deſcriptio Perſonæ*; but whereever the Word (*Heirs*) is in the *plural* Number, and a *Limitation made to the Iſſue of ſuch Heirs*, the Word *Heirs* is conſidered as a Word of *Deſcent*, and *not of Purchaſe*. *Trin.* 3 *Geo* 2. 1730. *Burnet* and *Coby*, 1 *Barnard. Rep. in B. R.* 367.

30. Where the Words of a Deviſe of a Leaſehold would make and expreſs Eſtate-tail in the Caſe of a Freehold, there a Deviſe over of ſuch Leaſehold is void; *ſecus*, if the Words in the former Deviſe would, in the Caſe of a Freehold, make an Eſtate-tail only by Implication. *Eaſt.* 1734. *Atkinſon* and *Hutchinſon*, 3 *Will. Rep.* 259.

31. *J. S.* deviſed the Manor of *A. to his firſt Son* (William) *for Life*, Remainder *to the Heirs Male of his Body*, Remainder *to his ſecond Son* (Thomas) *for Life*, and *after his Deceaſe to the firſt Heir Male of his Body*, Remainder *to his third Son* (Chriſtopher), *and the Heirs Male of his Body*, Remainder *in like Manner in Tail Male to the fourth, fifth*, &c. *Sons*. The Court held, that the Words *Heir Male* were to be underſtood *collectively*, and that *Thomas* the ſecond Son took an Eſtate-tail, it appearing that ſuch was the Teſtator's Intention by the other Deviſes; and this was diſtinguiſhed from *Archer*'s Caſe, (1 *Rep.* 66. 2 *Anderſon* 37.) no Limitation being ſuperadded to the Words *firſt Heir Male*; and the Word *firſt* ſhall be underſtood firſt in Order of Succeſſion from Time to Time. *Eaſt.* 8 *Geo.* 2. *C. B. Dubber* on the Demiſe of *Trollop* v. *Trollop*. Judgment *affirmed in B. R. Robinſon of Gravelkind* 96.

Vin. Abr. Tit. *Deviſe*, (U. a.) *Ca.* 13. S. C. ſays, a Writ of Error was brought in *B. R.* but upon the firſt Argument the Court ſeemed clear, and afterwards the Judgment was *affirmed.*

32. In *Formedon*, Defendant pleads *ne done pas*; on Trial a Will was produced, dated 28 *July* 1683, made by *J. S.* Grandfather of the Demandant, whereby he deviſes the Premiſſes to his Son *P.* (the Father of the Demandant) and his Heirs, on Condition that he pay 30 *l.* to his Brother *W.* &*c.* Then deviſes Copyhold Lands to his other Sons in like Manner, and then goes on and ſays, *And in Caſe any of my Children die without Iſſue, then I give the Eſtate of him or them ſo dying, to the right Heirs of them or him ſo dying, for ever.* No Subſcription of ſigning, ſealing and publiſhing, &*c.* was to the Will, but only the Witneſſes Names ſubſcribed. Verdict for the Plaintiff. Two Points were ſtated for the Determination of the Court: Firſt, whether there is ſufficient Proof of the Will? But it was anſwered, this is a Fact left to the Jury. Secondly, whether *P.* (the Demandant's Father) had an Eſtate-tail? And the Chief Juſtice ſeemed of Opinion for the Demandant; for the Words, (*if he die without Iſſue*) are explanatory of the Word (*Heirs*) in the firſt Part of the Will; and ſhews, in the firſt Words the Teſtator meant to give to his Son *P.* and his Heirs, (*that is, ſuch Heirs as were the Iſſue of his Body*) and after (*to his right Heirs generally*). If Lands be given by Deed to a Man and *his Heirs*, being underſtood to him and the Heirs of his Body, that makes an Eſtate-tail. But it was ſaid, that the Tenant in this Caſe was a Purchaſer, and therefore a further Argument deſired, which was granted. *Eaſt.* 9 *Geo.* 2. and in *Eaſt.* 10 *Geo.* 2. Judgment was given for the Demandant. *Per tot' Cur'*. *Brice* and *Smith in C. B. Comyns's Rep.* 539.

33. Deviſe to *Serjeant Miller* and *his Wife, for their Lives*, Remainder *to his next Heir Male of their two Bodies.* Held, that this was a Deviſe in Tail, unleſs there are Words of Limitation ſuperadded, ſo as to bring it within the Reaſon of *Archer's* Caſe, 1 *Rep.* 66. But the Words *firſt*, *next* or *eldeſt*, or any like Words ſuperadded, make no Difference. *Mich.* 10 *Geo.* 2. *B. R. Miller* and *Seagrave*, *Robinſon of Gavelkind.*

34. Teſtator deviſed Lands to *A. for Life*, Remainder to Truſtees, to preſerve contingent Remainders *during the Life of* A. Remainder *to the Heirs of the Body of* A. And *Verney*, Maſter of the Rolls, doubting whether this was an Eſtate for *Life* in *A.* or in *Tail*, ſent it as a Caſe to the Court of *B. R.* and notwithſtanding the Teſtator's plain Intention to paſs only an Eſtate for Life, yet that Court held, *that where the Anceſtor takes an Eſtate for Life*, and *in the ſame Inſtrument a Limitation is made to his Heirs*, or *the Heirs of his Body*, the *Heir cannot be a Purchaſer*, therefore *this was a plain Eſtate-tail. Coulſon* and *Coulſon*, *Hil.* 13 *Geo.* 2. and ſo the Judges certified their Opinions on the *firſt* Argument. *MS. Rep.*

(E) What general Words will paſs Lands, Houſes, &c. (a)—And what Chattels perſonal and real.

(a) It is a moſt known and eſtabliſhed Rule of Law, that an Heir is never to be diſinherited but by expreſs Words or neceſſary Implication. *Per Cowper* C. *Eaſt.* 1717, in the Caſe of *Piggot* and *Penrice*, *Prec. in Chan.* 471, 473. *Vide Caſes in B. R. Temp. W.* 3. 594, 595, 596, 597.

2 *Freem. Rep.* 40. *Ca.* 44. S. C. *accord'.*

1. TEſtator having 1000 *l. due upon a Mortgage*, deviſed *the Profits of it to Defendant for her Livelihood and Maintenance*, and *after her Death, without Iſſue, to Plaintiff*; and made Defendant Executrix, and died. Plaintiff preferred his Bill to compel the Defendant to give him Security, that the Money ſhould be preſerved to him in Caſe ſhe ſhould die without Iſſue. The Queſtion was, whether this Deviſe of the Money to the Plaintiff after the Defendant's Death, without Iſſue, was good or not? And Mr. *Attorney General* argued that it was not; for if this ſhould be permitted, *here would be an Intail of a perſonal Eſtate that could by no Means be barrable*; for this is as much as if he had *deviſed it to the Defendant and her Iſſue*, and *ſo it is in the Caſe of Lands*; but in this Caſe the Iſſue could not have it, becauſe it cannot deſcend but to the Defendant's Executor. *Note*; the major Opinion at the Bar ſeemed to be, that the Limitation over to the Plaintiff was void, but *Lord Chancellor* gave no Opinion, for he ſaid, altho' this Court doth ſometimes compel Executors to give Security for Legacies, yet that muſt be when they are clear and without Diſputes, and not when the Right is diſputable, as in this Caſe, or at leaſt depends upon a Contingency. Plaintiff's Bill diſmiſſed. And by *Mr. Attorney* a Mortgage cannot be intailed, *being for a Security of a perſonal Duty*, and *to go to the Executors. Mich.* 1678. *Dingly* and *Dingly*, *MS. Rep.*

Quod Nota.

2 *Freem. Rep.* 64. *Ca.* 73. S. C. *accord'.*

2. *J. S. deviſed his Houſhold Goods and Stuff to his Wife*, and died, *having made his Daughter Executrix.* The Queſtion was, whether or no by this Deviſe the Wife ſhould have the Plate that was commonly uſed about the Houſe, *viz.* a Silver Tankard, twelve Silver Spoons; and alſo whether ſhe ſhould have a Bracelet ſhe uſed to wear, and ſome Pieces of old Gold, *viz.* two Pieces that were given her to join in a Fine with her Huſband, and ſome other Pieces that were given

her before Marriage by her Friends, which ſhe had kept all the Time of her Marriage? Reſolved, that the Tankard and Spoons will paſs by the Deviſe of Houſhold Goods, and as for the Bracelet and Pieces of Gold which her Huſband gave her, and permitted her to uſe and diſpoſe of in his Life-time, it cannot be intended that he deſigned to take them away at his Death, without expreſs Words; and ſince ſhe might have diſpoſed of them, which ſhe has not, but has been a good Houſewife, and ſaved them, they ſhall not now be taken from her, *there being no Want of Aſſets for Payment of Debts.* *Hil.* 1680. *Flay* and *Flay*, *MS. Rep.*

3. *J. S.* ſeiſed of an Houſe in Fee, rented a Barn and Stable of *P.* which was in the Occupation of *P.* together with another Houſe, and this he was Tenant to for eleven Years; and then he bought the Barn and Stable, and occupied it with his ancient Houſe, and then he purchaſed *P.*'s Houſe. After this he makes his Will, and *deviſes to his Wife the Meſſuage wherein he then dwelt, and the Yards, Gardens, and Outhouſes*, with all the Appurtenances thereunto belonging, *for Life*, and *after to his Son.* And then he further *gives to his Wife all that Meſſuage or Tenement, which he purchaſed of* P. *with the Gardens and other Appurtenances* as they are ſituate in *B.* in the Occupation of *A. B. C. &c. for her Life*, and *after to his Daughter*; and the Queſtion upon a ſpecial Verdict was, which of them *ſhould have the Barn and Stable?* *Holt* argued, that the Barn and Stable paſſed as Part of the Houſe in Poſſeſſion, becauſe it is now become Part of the Houſe; for if one hath an Houſe, and purchaſe Lands to it, and makes a Garden, and lays it to his Houſe, tho' it were not originally belonging to his Houſe, it is now become Part of the Meſſuage, being occupied together with it, by one that had a permanent Eſtate in the Land. 2 *Cro.* 121, 122. And the uſing it and enjoying it together is a ſufficient Reputation to make it paſs for Part of the Houſe; and all People will take it as Part; and cited 6 *Rep.* 65. 1 *Cro.* 308. *Sid.* 190. His Intent was, that the *Barn and Stable ſhould paſs with the Houſe to his Son*, for in this Part of the Will he ſaith, *and all my Outhouſes*, ſo that tho' *Meſſuage* in Strictneſs of Law will carry *Yards*, *Backſides*, *Orchards*, *Barns*, *Stables*, *&c.* yet he added Outhouſes to make his Intention plain; and when he deviſes the *other* Houſe, he omits to ſay *Outhouſes*, but ſays, in the Tenure or Occupation of *A. B. &c.* and the *Barn and Stable* were *not* then in the Tenure of *A. B. &c.* Wherefore he prayed Judgment for the Plaintiff; and the Court *clearly* adjudged for the Plaintiff. *Trin.* 36 *Car.* 2. *C. B. Anon. Skin. Rep.* 187.

4. *J. S.* deviſed his Manor, *&c.* to his Wife for Life, and alſo *his Goods and Furniture*; and by the ſame Will deſired that his Goods and Furniture might be preſerved for his Heir, ſo that the Children which ſhe had by the Plaintiff's Father might enjoy the ſame. An Inventory (*a*) was ordered by the Lords Commiſſioners to be taken and delivered to the Maſter, and the Wife to have the Uſe during her Life, after which they were to be delivered and remain to the Plaintiff's Uſe and Benefit. 28 *May* 2 *W. & M. Shirley* and *Ferrers*, 1 *Will. Rep.* 6. in a Note by the *Editor.*

(*a*) Where the Uſe of Goods is given to one for Life, the *Ceſty que Uſe* for Life muſt ſign an Inventory, expreſſing that ſhe is intitled to theſe Things for Life, and that afterwards they belong to the Perſon in Remainder. *Mich.* 1734. *Slanning* and *Style, et econt'*, 3 *Will. Rep.* 336.

5. A Deviſe *of Goods to* A. *for Life*, Remainder *after his Deceaſe to* B. is now clearly ſettled to be a good Deviſe to *B.* and that *B.* may exhibit a Bill againſt *A.* to compel him to give Security that the Goods

Goods ſhall be forth-coming at his Deceaſe; and it is all one, whether *the Goods*, or *the Uſe of them*, be deviſed for Life. *Mich.* 1695. *Anon.* 2 *Freem. Rep.* 206. *Ca.* 280.

MS. Rep. S. C. *accord'.* 6. *A.* poſſeſſed of a long Term for Years, deviſes it to *B.* for Life, and after his Deceaſe to *C.* for Life; and ſays nothing what ſhall become of the Remainder of the Term after the Deceaſe of *B.* and *C.* And the Queſtion was, whether *C.*'s Executors or the Executors of *A.* ſhould have it as a reverſionary Term? Held *per Cur'*, that it ſhould revert to *A.*'s Executors, becauſe it being expreſly limited to *C.* for Life, it doth not appear to be the Teſtator's Intent that his Executors ſhould have it; and the Court ſaid, that ſince it was now held that a *Deviſe of the Remainder of a Term after an Eſtate for Life is good*, there could be no Reaſon given why, if the Remainder were not deviſed, it ſhould not remain in the Executors of the Deviſor. But it was admitted, that if after the Death of *B.* it had been limited to *C.* and his Aſſigns, or to *C.* generally, *without ſaying for his Life*; or if it had been ſaid, *if* C. *die without Iſſue, then to a third Perſon*; in all theſe Caſes *C.*'s Executors ſhould have had it. But when the Teſtator gives it *for his Life expreſly*, and is ſilent as to the *Reſiduum*, then it ſhall remain with the Executors of the Deviſor. *Mich.* 1697. *C. B. Anon.* 1 *Freem. Rep.* 272. *Ca.* 299.

7. *I make my Wife my Executrix, and give her the Overplus of my Eſtate.* This will only give her perſonal Eſtate or Chattels. *Per Blincow*, J. *Mich.* 13 *W.* 3. *in Caſu Shaw* and *Bull, Caſes in B. R. Temp. W.* 3. 593.

1 *Salk.* 234, 236.—6 *Mod.* 106. 8. One ſeiſed in Fee of *five Meſſuages*, by Will deviſed *two of them to his Wife for Life*, Remainder *to his two Daughters in Fee*; and deviſed *the third to the Wife and her Heirs*; the *fourth he deviſed to the Wife and her Heirs, ſhe paying his Legacies. In Caſe his Goods and Chattels did not anſwer them all*, and *if ſhe did not make Proviſion for the Payment of his Legacies in her Life-time, that it ſhould be lawful for the Legatee, after her Death, to ſell the ſaid Meſſuage, to ſatisfy the Legacies out of the Value thereof.* And then follows this Clauſe, on which the Doubt ariſes: *And all the Overplus of my Eſtate to be at my Wife's Diſpoſal*; and make *her my Executrix.* And *per Trevor*, C. J. *Powell* and *Blincow*, J. the fifth Meſſuage does not paſs, and Judgment *accord'*, *cont' Nevill*, J. *Mich.* 13 *W.* 3. *Shaw* and *Bull* (*a*), *Caſes in B. R. Temp. W.* 3. 592, 593.—But as the Judges gave their Opinions *ſeritatim*, I have inſerted the ſame in the Margin, as well from a MS. Rep. of this Caſe, as from *Caſes in B. R. Temp. W.* 3.

(*a*) *MS. Rep.* S. C. adjudged *accord'*, and *per Blincow*, J. it appears the Deviſor *had five* Meſſuages, and deviſed *four* of them, and ſays nothing expreſly, or at leaſt particularly, of the fifth. If he at firſt had deviſed to his Wife *all his Eſtate*, this Houſe would have paſſed to her; but compare this Clauſe to the ſubſequent Words, *and make her my Executrix*, it ſhews his Intent was to grant her ſuch Eſtate as ſhe was capable of as Executrix, and that is only perſonal Eſtate; ſo the Senſe would be, *and I give my Wife all the Overplus of my perſonal Eſtate, and make her my Executrix.* If he had ſaid, *I make my Wife my Executrix, and give her the Overplus of my Eſtate*, that would only give her *perſonal Eſtate* or *Chattel*; and will it not be the ſame Thing to invert the Sentence? Again, to conſider this Clauſe as it ſtands with the precedent Words, there is *a Deviſe of the fourth Meſſuage to her and her Heirs, paying his Legacies*, &c. and *if ſhe does not provide for Payment of them, that it ſhall be lawful for the Legatee to ſell it, and all the Overplus*, &c. which may very well be ſatisfied, by making a Deviſe of the Overplus of the Price of the Houſe, when ſold by herſelf or Legatee; for if ſhe in her own Life-time had ſold the Houſe, it would become a Chattel of an Inheritance; that is, the Overplus, after paying the Legacies, was what he intended her by theſe Words: For the Houſe being deviſed *to her and her Heirs*, and ordered to be ſold for Payment of Legacies, the Overplus would, perhaps, in Equity, be adjudged to her as Executrix; but by theſe Words, and this Conſtruction, ſhe would be a reſiduary Legatee; ſo that if you couple it with the ſubſequent Words, ſhe has only the Overplus of this Chattel Eſtate; if with the precedent, it will be the Overplus of the Purchaſe Money of the *fourth* Houſe when ſold, and ſo by no Means does extend to the *fifth* Houſe. *MS. Rep.*—*Ca. Temp. W.* 3. 593. *accord'*.

———*Powell*, J. Uncertain Words in a Will muſt never be carried ſo far, as by them to diſinherit the Heir at Law; and tho' there be Words which of themſelves would diſinherit him, yet if they come in Company with other Words which do render their natural Import leſs forcible, they ought to be conſtrued favourably for the Heir. And in the Caſe of *Bowman* and *Milbank*, (*Vide* 1 *Vol. Abr. Eq.* 207. *Ca.* 1.) the Words

Words were, I *give all to my Mother*, which might include whatever he had to give, either *Chattel* or *Inheritance*; yet becauſe it may be all *perſonal* or *all real*, or *Inheritance*, it was taken to be too looſe and general to diſinherit an Heir at Law, and therefore no Land did paſs. *Nov* 48. *A.* ſeiſed of *Blackacre* and *Whiteacre*, deviſeth both to his Wife for Life, Remainder of *Blackacre* to *J. S.* in Fee, and leaves the Fee of *Whiteacre* undiſpoſed of; and then ſaid, *and I make my Wife my Executrix of my Goods and Lands.* The Inheritance did not paſs, tho' the Words, according to the *Civil* Law, would include it.—An Inheritance will paſs in a Will by the Words *all my Eſtate*; yet *they are very general*, and *do take in a perſonal Eſtate*, or *a real Eſtate*, or *both together*; and therefore when the Words, *all my Eſtate*, are in a Will, they are alſo let to be governed by ſome other Words in the Will. And therefore *in Caſu Johnſon* and *Kerman*, a Deviſe *of all his Eſtate, paying Debts and Legacies*, and Teſtator was found to owe Debts beyond his Aſſets; the Inheritance was adjudged to paſs. A Man, among all other Things, deviſes his perſonal Eſtate; his Inheritance does not paſs. 1 *Mod.* 100. *Keb.* 140, 145. One deviſed all his Tenant Right in *Dale*; if he had no other Freehold in *Dale*, it ſhall paſs; *ſecus* not. 3 *Mod.* 45, *Reeves* and *Winnington.* "I hear *J. S.* is inquiring after my Death, but I am reſolved "to leave him nothing *but what his Father left him; but I leave all my Eſtate to my Wife.*" There the *Wife took all the real Eſtate*; and the Reaſon was becauſe of the other Words, which ſhew he meant to exclude the Heir at Law. *Mich.* 32 *Car.* 2. *Rol.* 473. *A.* had Freehold and Copyhold Lands, and in his Will ſays, *I give all my Eſtate of what Kind ſoever, not before mentioned by me, to my Wife, whom I make my Executrix.* And it was held the Copyhold Lands did paſs, not by Force of the Words alone, but becauſe it appeared that he had made a Surrender of the Copyhold Eſtate before to the Uſe of his Will. But in the *principal* Caſe, here is nothing to help the Words; for, firſt, here is a Deviſe of his other Houſes by particular Words; two of them the Teſtator gave to his Wife for her Life, with Remainder over; the third to her and her Heirs, the fourth for her and her Heirs, conditionally, and all by expreſs Words. And it is hard to ſay, that if he deſigned her the fifth Houſe, that he would attempt to paſs it by theſe general Words, more than he did the former Houſes, eſpecially to make ſuch Conſtruction to *diſinherit an Heir at Law.* *MS. Rep. in* S. C.—*Caſes in B. R. Temp. W.* 3. 594, 595. *in* S. C. *accord'.*——*Nevill*, J. *cont'*, He agreed the Words of a Will to *diſinherit an Heir at Law*, muſt be very *plain* and *apparent* in the Will; but ſince Men may deviſe their Land, as well as paſs it by Deed executed, we ought to follow their Intent, and make it their Will, and not ours. It is true, an Heir at Law ſhall not be lightly diſinherited; and the Teſtator's Intent is to be gathered from the Words on the Face of the Will; but ſure the Words in Queſtion are very comprehenſive, *all the Overplus*, which relates to ſome Thing before of which it is an Overplus; and the Things gone before are a real Eſtate of Inheritance: And if he had ſaid, all the Overplus of my real Eſtate, the fifth Houſe would paſs by it; and there being *Verba relata*, are the ſame.——*Trevor*, C. J. agreed with his two Brothers that ſpoke firſt. The Caſes of this Kind in Books are each upon it's own particular Reaſon, and affect not this Caſe; and he confeſſed that in Conſtruction of Wills generally, the Words, *my Eſtate, the Reſidue of my Eſtate*, or *the Overplus of my Eſtate*, may well paſs an Inheritance, where the Intent is apparent to paſs it; but ſuch Intent to carry an Inheritance by ſuch Words, muſt be very apparent and neceſſary, to be drawn from the Words of the Will, and the Circumſtances of the Caſe; for if the Words be indifferent to real and perſonal Eſtate, or may be applied to perſonal alone, there the Heir at Law is not to be diſinherited by the Implication of ſuch Words, or by any Implication at all, but which is a neceſſary one. *Style* 293. Deviſe of Lands, paying all his Debts and Legacies, the Inheritance paſſes, becauſe by the apparent Intent of the Teſtator his perſonal Eſtate was not ſufficient to pay his Debts, *&c.* and ſo for the Neceſſity of performing his Intent in Payment of them, it was held the Inheritance did paſs. 3 *Keb.* 45. upon the ſame Reaſon. Then upon Conſideration of the Parts of *this* Will, there is no neceſſary Intent to be gathered from the ſeveral Parts of it to paſs this fifth Houſe; firſt, it is plain the Teſtator was very particular in expreſſing what he would paſs in his Will, and leaves little Room for Conſtruction; he very particularly and expreſly deviſes and limits the four Houſes, and what Eſtates Deviſees ſhall have in them; and that of a ſudden he ſhould alter his Method of deviſing, and go about to give his Wife an Eſtate by general and doubtful Deſcriptions, ſeems odd; and we will intend, he remained conſiſtent and agreeable to himſelf during the whole Will, and knew that what he did not give to the Wife would go to the Heir, and therefore had no Occaſion of ſaying any Thing about the fifth Houſe, or of him. And as to the Objection, that if theſe Words do not carry the fifth Houſe, they are of no Uſe; he owned that if that were true, it were a weighty Objection; but they are to be otherwiſe well ſatisfied; for the fourth Houſe is deviſed to her in Nature of a Truſt, liable to the Payment of Legacies, and upon Default in her, Power is given to Legatees to ſell; ſo if theſe Words had not been put in, what ſhould become of the Overplus? It would be doubtful how it would be in Chancery; and there are Caſes on both Sides; it was a Queſtion whether when Lands are given in Truſt, and the Money is raiſed by Sale of them, and there is an Overplus, whether that ſhall be a *reſulting Uſe for the Heir at Law*, or *for the Truſtee.*—*Vide Brown* and *North*, in Lord *Bridgman*'s Time, it was a Queſtion again; and it was held, the Truſtee ſhould have it.—So in the principal Caſe, here being a Truſt in the Wife of the fourth Houſe for Payment of Legacies, it was not neceſſary to explain that his Wife ſhould have the *Surplus* or *Overplus*, which rightly ſignifies a *Reſidue of ſomething before not diſpoſed of.* And this Reſidue, after Sale and Payment of Legacies, is an Overplus of his Eſtate; and *where Words in a Will may be ſatisfied without carrying an Eſtate from the Heir at Law, they ſhall never be conſtrued to diſinherit him*; for the *Heir is not to be diſinherited at all by any Implication, but ſuch as are neceſſary, and without which the Words would be rejected as void*, and *of no Senſe* or *Signification.* And ſhe herſelf *(i. e.* the *Wife)* might ſell in her Life-time, and then ſhe was to have the Reſidue; or if the Legatee ſold after her Death, her Executor ſhould have it in the Right of her, and not as a Truſtee, to be accountable to any. *MS. in* S. C.——*Caſes in B. R. Temp. W.* 3. 595, 596, 597, *accord'.*

9. By a Deviſe of *all Rings and Houſhold Goods*, Plate *uſed* in the Houſe does *not* paſs. Lord Keep. *Wright*'s Opinion, *Mich.* 1702. *in Caſu Jeſſon* and *Eſſington*, *Prec. in Chan.* 207. *Sed vide* the Margin, and Ca. P.

It was *formerly* held, that by the Deviſe of all the Teſtator's *Furniture* or *Houſhold Goods*, Plate in *common Uſe* would not paſs, in regard this was but *Curta Supellex*; but, as the Nation grew richer, and Plate became a more common Furniture, it has been conſtrued to be included within thoſe Words, by the Maſter of the Rolls, in the Caſe of *Budgen* and *Elliſon & ux'*, *Eaſt.* 1731. 1 *Will. Rep.* 425. in a Note by the *Editor.*——Plate in common Uſe paſſes by the Deviſe of Houſhold Goods, notwithſtanding

ſtanding any parol Proof that it was not intended to paſs: At the Rolls, *Nichols* and *Oſborn*, *Trin.* 1727, 2 *Will. Rep.* 419, 421. *Vide P. Ca.*

10. A perſonal Eſtate was deviſed to *A.* and in Caſe ſhe died without Iſſue, then to *B.* *Reſolved*, that the Deviſe over to *B.* is void, and the Whole decreed to *A.* *Eaſt.* 1705. *Anon.* 2 *Freem. Rep.* 287.

11. The Huſband *deviſed to his Wife all his Houſhold Goods*, and *what ſhe ſhould think fit to accept of.* The Wife brings her Bill againſt the Executor, and inſiſted that by this Deviſe *all the Plate paſſed to her.* Lord Chan. decreed, that the Plate in *ordinary* only did paſs to her. Theſe Words, *and what ſhe thought fit to accept of*, muſt be rejected. *Swinborn* and *Godolphin* are contradicted by no Authorities, and therefore his Lordſhip relied upon them. *Eaſt.* 8 *Ann. Anon. MS. Rep.*

12. A Wife (having Authority to make a Will) deviſed *to her Huſband her gold Watch, and all the Goods which ſhe brought into his Houſe.* And decreed, that ſuch Goods only paſſed as were then brought in, and *not* any brought in after; but that *Books, Jewels, Pictures and Money*, did *not* paſs. *Hil. Vac.* 1711, *Dormer* and *Biſhop of Sarum*, *Vin. Abr.* Tit. *Deviſe*, (Q. b.) *Ca.* 26.

2 *Vern.* 638. *Hil.* 1708. *Lillcot* and *Compton.* *Plate* ſhall paſs by a Deviſe of Houſhold Goods.

13. Held by his Honour, That a Deviſe of all one's Houſhold Goods will paſs all Houſhold Goods that the Teſtator has at the Time of his Death; *contr'*, of a *Deviſe of all one's Lands*, for *that will paſs only the Lands which the Teſtator then had*; but Houſhold Goods are always changing and periſhing, and therefore the Will as to the *perſonal* Eſtate ſhall relate to the Time of the Teſtator's Death, otherwiſe it would be very inconvenient, for then a Man muſt make a new Will every Day; and as to *Plate*, if *commonly made Uſe of by the Family*, the ſame ſhall paſs as Houſhold Goods. (*a*) *Eaſt.* 1711. *Maſters* and *Sir H. Maſters*, 1 *Will. Rep.* 421.

(*a*) *Vide* the Note to Ca. 9. P. 321.

Prec. in Chan. 323. *Hil.* 1711. *Gibbs* and *Barnardiſton*, S. C. *in totidem verbis.* *Gilb. Eq. Rep.* 79. S. C.

14. In this Caſe it was held clearly, and decreed, that a Deviſe of a perſonal Eſtate *to one and his Iſſue*, or *to one, and if he die without Iſſue, Remainder over* to another, that the Deviſe over is void, and the whole Intereſt veſted in the firſt Deviſee, ſo as to be liable to his Debts; and Mr. *Vernon* ſaid, the Reaſon that a Deviſe over of ſuch perſonal Eſtate upon a Life barely was good, was, becauſe in Conſtruction of this Court the firſt Deviſee had but the Uſe of it, and not the intire Property. *Hil.* 1711. *MS. Rep.*

MS. Rep. S. C. *accord.*

15. *J. S.* ſeiſed in Fee *deviſes Houſes to his Daughter* (who was his Heir at Law) *when ſhe ſhould attain the Age of twenty-one Years*; and in another Clauſe *he deviſes all the Reſt and Reſidue of his Lands to his Wife, for Payment of his Debts and Legacies.* The Daughter *dies before twenty-one.* Held that the Rents and Profits of the Houſes ſhould go to the Wife 'till the Daughter *ſhould have attained the Age of twenty-one Years.* *Trin.* 10 *Ann. C. B.* *Crockford* and *Winſell*, *Vin. Abr.* Tit. *Deviſe*, (H. a.) *Ca.* 7.

16. *A.* ſeiſed of Lands in Fee, by Will gave ſeveral Legacies, and then bequeathed in theſe Words, *viz.* "I give the reſt of my Eſtate, "Chattels real and perſonal, to *J. S.*" Reſolved *per Harcourt*, C. that nothing but his Chattels paſſed by the Word Eſtate. *Hil.* 11 *Ann. Anon. Vin. Abr.* Tit. *Deviſe*, (O. b.) *Ca.* 7.

17. One deviſed *all his Goods*; and whether a Debt by Bond paſſed to the Deviſee, was the Queſtion? And *Cowper* C. decreed that it did; that theſe Words ſeemed at Common Law to paſs a Bond, and to extend to all the perſonal Eſtate; but this being in the Caſe of a Will,

and a Will relating to a perſonal Eſtate too, his Lordſhip ſaid, it ought to be conſtrued according to the Rules of the Civil Law; and that the Civil Law makes *Bona Mobilia*, and *Bona Immobilia* the *Membra Dividentia* of all Eſtates. The *Bona Immobilia* are Land, *Bona Mobilia* are all Moveables, which muſt extend to Bonds, and therefore by a Deviſe of all the Teſtator's Goods, a Bond muſt paſs. *Mich.* 1714. *Anon.* 1 *Will. Rep.* 267.

18. Deviſe was of the *better Part, or more Part of his Goods.* Decreed that he gave no more than Half, and nothing is intended but the firſt Choice; and the *better Half* and *more Part* are ſynonymous Terms. *Hil.* 1714. *Werrington* and *Cotterel*, *Vin. Abr.* Tit. *Deviſe*, (Q. b.) *Ca.* 29.

19. *J. S.* being on Ship-board, and intitled to Part of a conſiderable Leaſehold Eſtate by the Death of his Father, which he did not know he had any Right to, makes his Will at Sea, and gave to *A.* his Mother (if living) his Gold Rings, Buttons, and Cheſt of Cloaths, and deviſes to *B.* his red Box, Arrack, *and all Things not before bequeathed*, and made *B.* ſole Executor. This ſhall not paſs the Leaſehold Intereſt, or what the Teſtator did not know he was intitled to, but ſhall be reſtrained to ſuch Things as were on Board the Ship, or Things *ejuſdem generis* with thoſe above-mentioned. And his Honour decreed, that *B.* the Executor ſhould be but a Truſtee as to the Surplus for the Teſtator's Brothers and Siſters; but with reſpect to the Rings, *&c.* they were lapſed Legacies, by reaſon of the Mother's dying in the Teſtator's Life-time, and ſhould therefore fall to the Executor. *Hil.* 1715. *Cook* and *Oakley*, 1 *Will. Rep.* 302.

20. *J. S.* deviſed all his *Freehold* Houſes in *B.* to the Plaintiff and his Heirs, and in Fact *J. S.* had no *Freehold* Houſes there, but had *Leaſehold* Houſes there. Held *per Tracy*, J. (in the Abſence of Lord Chancellor) that tho' in a *Grant* of all one's *Freehold* Houſes, *Leaſehold* Houſes could *not* paſs; and that in the Caſe of a *Will*, had there been any *Freehold* Houſes to ſatisfy the Will, the *Leaſehold* Houſes ſhould not have paſſed; yet the plain Intent of the Teſtator in this Caſe being to paſs ſome Houſes, and he having no *Freehold* Houſes in *B.* the Word *Freehold* ſhould rather be rejected than the Will be wholly void. And decreed that the *Leaſehold* ſhould paſs. And he ſaid, that the Suit was proper in Equity, ſince the *Leaſehold* Houſes *being Chattel*, could not paſs by the Will *without* the Aſſent *of the Executor*, which Aſſent he was compellable to give in Equity. *Mich.* 1715. *Day* and *Trig*, *MS. Rep.*

1 *Will. Rep.* 286, 287. S. C. *in totidem verbis.*

21. *J. S.* deviſes all his perſonal Eſtate, and the Produce thereof, to *A.* and if *A.* die within Age, and without Iſſue, then he gives the perſonal Eſtate to *B.* His *Honour* held that the Intereſt Money of what ſhall be made of the perſonal Eſtate does in all Events belong to *A.* and ſhould be put out from Time to Time for his Benefit, and if he die within Age, and unmarried without Iſſue, *B.* ſhall only have the Principal Money. *Mich.* 1718. *Tiſſen* and *Tiſſen*, 1 *Will. Rep.* 500. *Parker*, C. upon an Appeal, (*a*) affirmed the Decree.

(*a*) *Jovis* 11 *Decem.*

22. *A.* deviſes to *H.* his Wife, all his Debts, Goods, *&c.* provided that if *H.* died without Iſſue by him, he appointed that 80 *l.* ſhould remain to his Brother *J. D.* *A.* dies; then *J. D.* dies in the Life-time of *H.* and then *H.* dies without Iſſue by *A.* Firſt Queſtion, whether this was a good Deviſe to *J. D?* Secondly, whether, he dying before the Contingency happened, it was ſo veſted in him that his Executor ſhould have it, or only intended as a perſonal Benefit to *J. D?* *Cowper*, C. ſaid, there is a Difference between this Deviſe here,

Vin. Abr. Tit. *Deviſe*, (F. e.) *Ca.* 24. S. C. *in totidem verbis.*

here, which is upon a Condition precedent, and where it is upon a Contingency over, *as to one for Life, and if he die without Iſſue, or Heirs of his Body, then over to another.* Here the Wife has nothing in this Money, but this is an Appointment of ſo much Money when the Contingency happened. In the former Caſe, the Eſtate-tail abſorbs the whole Intereſt. The Word *remain* is obſervable, if ſuch an Accident happened, then ſo much was to remain to him. If this had been a Deviſe over, there had been no Queſtion. May not this be conſtrued, if *H.* died without Iſſue living by him, this Legacy was to ariſe upon a Condition precedent, which makes the Legacy the worſe? But all the Caſes put are of a Deviſe over, and the Fund here is deviſed to the Wife. As to the Point, if the Deviſe be good, it muſt go to the Executor of the Deviſee; but his Lordſhip ſaid he would conſider of it. *Hil.* 4 *Geo. Anon. MS. Rep.*

23. *A.* deviſed his Library of Books *now* in the Cuſtody of *B.* to *All-Souls* College in *Oxford*, and in the ſame Will he deviſed 4000 *l.* more to augment their Library; and afterwards buys more Books, which he places in the ſame Library. Decreed by his *Honour*, that the after-bought Books ſhould paſs, the Court being of Opinion that the Word *now* did not relate to the Books which were in the Library at the Time of making the Will, but, on Conſtruction of the whole Sentence, denoted where the ſaid Library was, and might be intended to diſtinguiſh it from any other Library of the Teſtator's. *Hil.* 1719. *All-Souls College* and *Coddrington*, 1 *Will. Rep.* 597.

24. I deviſe all the Corn *now* in my Barn. If that Corn be afterwards ſpent, and new Corn put in, ſuch new Corn will *not* (*a*) paſs. But if I deviſe all my Flock of Sheep *now on ſuch a Hill*, or *in ſuch a Paſture*, in that Caſe, becauſe Sheep are in their Nature fluctuating, ſome muſt die, ſome be killed, and ſome Lambs be produced, which will afterwards breed, and it being the Caſe of a *collective* Body, the Sheep produced afterwards ſhall paſs; and this is within the Reaſon of a Deviſe of a perſonal Eſtate, which being always fluctuating, ſhall therefore relate to the Time of the Teſtator's Death. Beſides, a Will, as to *perſonal* Things, does not ſpeak 'till after the Teſtator's Death. *Per* his Honour, in the Caſe of *All-Souls College* and *Coddrington, et ecnt'. Ibid.* 598.

(*a*) *Vide Swinb.* 448. *contra.*

Vide Maſters and *Maſters*, and *Wind* and *Jekyll* and *Albone.*

25. A Deviſe of all the Leaſes which I *now* have, or of all the Horſes *now* in my Stable, and afterwards I purchaſe more of each, the *new* Leaſes or Horſes will not paſs, becauſe theſe are *particular* Chattels, and not Part of a *collective* Body, as a Flock of Sheep or Library of Books; indeed a Flock of Sheep differs ſomewhat from a Library of Books; for the former muſt of Neceſſity fluctuate as above, but there is no Neceſſity that Books ſhould be changed. *Per* his Honour in ſame Caſe. *Ibid.*

26. By a Deviſe of an Houſe *cum pertinentiis*, only the *Garden* and *Orchard* will paſs with the Houſe; but by a *Deviſe of an Houſe with the Land appertaining thereto*, the Land uſually occupied therewith will paſs. *Per Parker*, C. *Hil.* 1719, in the Caſe of *Blackborn* and *Edgley*, 1 *Will. Rep.* 603.—So,

27. Where *J. S.* being ſeiſed in Fee of a ſmall Parcel of Land, by him always employed for producing Corn and Hay, (which was conſtantly ſpent in his Houſe) and the Land was ploughed with his Coach Horſes, *deviſed that* A. *ſhould continue to live in his Houſe, and to be at the Charge of keeping the Houſe in the ſame Manner as himſelf did, and the ſame Number of Servants and Coach Horſes were to be employed*, (*b*)

(*b*) By *this the Teſtator's Intention appears that the Land before enjoyed with the Houſe, ſhould continue to be ſo. Per Parker*, C. *Ibid.* 603. in S. C.

for

for which Purpoſe he allowed *A.* 1200 *l.* a Year. *Parker*, C. decreed, that the Land which was ſo before conſtantly enjoyed with the Houſe, and the Profits whereof were applied to the Maintenance of the Houſe, ſhould continue to be ſo enjoyed. *Hil.* 1719. *Blackborn* and *Edgley*, 1 *Will. Rep.* 600, 603.

28. One deviſes that ſuch Part of his *perſonal* Eſtate as his Wife *ſhould leave of her Subſtance*, ſhould return to his Siſter and *the Heirs of her Body*. Deviſe over good. *Trin.* 1720. *Upwell* and *Halſey*, 1 *Will. Rep.* 651.

29. *A.* has an Houſe at *London* in which he lives, and has Houſhold Goods, and alſo an Houſe at *Goſport*, which was uſed by the Government as an Hoſpital for Invalid Seamen, and *A.* provided there a great Number of Beds and Sheets, and other Furniture; and by Marriage Articles it was agreed that *A.*'s Wife ſhould not claim any Thing out of his *real* or *perſonal* Eſtate, "*provided this ſhould not extend to* "*what* A. *ſhould or might leave her by Will, nor to all or any of the* "Houſhold Goods or Utenſils, or Houſhold Stuff, *&c. of him the ſaid* "A. *at the Time of his Death*, all *which ſhe was to receive and enjoy.*" The Queſtion was, whether the Wife was intitled to theſe Beds, Sheets, *&c.* as Houſhold Goods or Utenſils or Houſhold Stuff, *&c.* within the Intent of the Articles? *King*, C. decreed the Wife to have the *Beds*, *Sheets* and *other Furniture*, uſed in the *Hoſpital*. *Mich.* 1725. *Pratt* and *Jackſon* (*a*), 2 *Will. Rep.* 302.—But upon an Appeal to the Houſe of Lords, this Decree was *reverſed*, *Feb.* 1726. *Ibid.* 304.

(*a*) *Vin. Abr.* Tit. *Deviſe*, (K. b.) *Ca.* 25. *Feb.* 1, 1726, S. C. ſtates it thus: By a Deviſe of *all my Houſhold Stuff and Materials of Houſhold*; *Goods* that were *in a Workhouſe ſeventy Miles Diſtance* from the Teſtator's Houſe, for employing Sick and Wounded Seamen, do not paſs.

30. Perſonal Eſtate cannot be intailed. *Dec.* 3, 1726. *Stratton* and *Pain*, *Vin. Abr.* Tit. *Deviſe*, (F. e.) *Ca.* 26.

31. *J. S.* by Will dated 28 *Ap.* 1708, gave ſeveral large Annuities for ninety-nine Years in the Exchequer, amounting to 320 *l. per Ann.* to Truſtees, for the Reſidue of the Term, In Truſt for *A.* for ſo many Years of the ſaid Term as ſhe ſhould live, and afterwards for the Plaintiffs for ſo many Years, *&c.* as they or the Survivor of them ſhould live; and after the Deceaſe of the Survivor, In Truſt for the Heirs of their Bodies lawfully to be begotten, for all the Reſidue of the ſaid Term, and for Default of ſuch Iſſue, In Truſt for the Defendants. Theſe Annuities were ſubſcribed into the *South-Sea* Company in 1720, and the Bill was to have the *South-Sea* Stock and Annuities, the Produce thereof, ſold, and the Money raiſed by Sale thereof to be paid to the Plaintiffs, who were the Deviſees for Life, with Remainder to the Heirs of their Bodies. Lord Chan. *King* ſaid, where a *Term is deviſed to a Man and his Heirs*, or *to the Heirs of his Body*, the whole Term veſts in the Deviſee, and any Remainder over is void; and ſo it was held *in Dom. Proc'* the laſt Seſſions, in the Caſe of Sir *John Ruſhout*. The Remainder in the preſent Caſe is void, *being after a Limitation in Tail.* Decreed that the Stock and Annuities be ſold, and the Money paid to the Plaintiffs. 13 *Geo.* 1. *Dod* and *Dickenſon*, *Vin. Abr.* Tit. *Deviſe*, (F. e.) *Ca.* 25.

32. Money limited *after a dying without Iſſue generally*, is void; but if it be *after dying without Iſſue then living*, it is good. *Trin.* 2 & 3 *Geo.* 2. *Green* and *Rod*, *Gibb. Rep.* 68.

33. *A.* ſeiſed of the Reverſion in Fee of Houſes of the yearly Value of 264 *l.* lett out on Building Leaſes at a Ground Rent of 29 *l.* a Year. *A.* had Iſſue *B.* his eldeſt Son, and *C. D.* and *E.* younger Children,

dren, and deviſed to *C.* ſo much a Year of 29 *l.* a Year Ground Rent in or near *Red-Lyon* Square, to him and his Heirs and Aſſigns for ever; and deviſed to *D.* and *E.* in the very ſame Words, which in all amounted to the 29 *l.* and deviſed to *B.* whom he called his *undutiful* Son, 5 *l.* a Year out of ſome Lottery Tickets. It was argued whether this ſhould carry the Inheritance or not. The Court thought it a new and difficult Caſe, and ſo it ſtood over to the next Term. *Trin.* 2 & 3 *Geo.* 2. *Mandy* and *Mandy*, *Gibb. Rep.* 70. — *Ibid.* 288, *Eaſt.* 4 *Geo.* 2. *ſays, that Judgment was given for the younger Children againſt the Heir at Law the laſt* Trinity *Term, per tot' Cur', and Error brought in B. R.*

34. *J. S.* ſeiſed of Lands in Fee in *A.* and poſſeſſed of a Term for Years in *B.* deviſes *all his Lands, Tenements and real Eſtate* in *A.* and *B.* to *J. S.* and his Heirs. This will not paſs the Term, eſpecially if there be another Clauſe in the Will, which diſpoſes of the *perſonal* Eſtate. *Hil. Vac.* 1729. *Davis* and *Gibbs in Dom' Proc'*, on an Appeal from a Decree made *per King*, C. which was *affirmed*, with 200 *l.* Coſts. 3 *Will. Rep.* 26.

35. *J. S.* having Lands of Inheritance in *B.* and *C.* and a Mortgage in *D.* and Lands extended in *E.* on a Statute by Will deviſed *all his Credits and Mortgages to his Executors*; and afterwards deviſes *all his Meſſuages, Lands, Tenements*, &c. *and all his real Eſtate whatſoever in B. C. D.* and *E.* to *R. W.* and *J. S. for their Lives*, and *after their Deceaſe to their Heirs*, &c. Lord Chancellor *King* decreed the Mortgage and extended Lands in *D.* and *E.* to the Executors; ſaying this Caſe differed from the Caſe in *Cro. Ca.* 292. *Roſe* and *Bartlett*; where a Man was ſeiſed of a Term for Years in *A.* and having no other Lands there, deviſed all his Lands in *H.* It was adjudged that the Term for Years paſſed; for in that Caſe *Lord Chancellor* ſaid, if the Term had not paſſed, the Will had been intirely void. Whereas here it ſtands well for Part; and therefore affirmed the Decree made at the Rolls. *Hil.* 3 *Geo.* 2. *Davis* and *Gibbs*, *Gibb. Rep.* 116, 117.

36. *A.* deviſes to his Wife *all his Houſhold Goods and other Goods, Plate, and Stock within Doors and without*, and bequeathed the *Reſidue of his perſonal Eſtate to* J. S. The Teſtator's Ready Money and Bonds do not paſs by the Word *Goods*. Decreed *King*, C. *Eaſt.* 1731. *Woolcomb* and *Woolcomb* (*a*), 3 *Will. Rep.* 112.

(*a*) It was contended that the Deviſe of all the Teſtator's Goods ſhould carry all his perſonal Eſtate, *Omnia bona* being Words of the largeſt Extent and Signification with regard to *Perſonals*. Anſwered, that if the Deviſe of all the Teſtator's Goods were to be taken in ſo large a Senſe, *it would then fruſtrate and make void the Bequeſt of the Reſiduum*, which would not be allowed. That it ſeemed reaſonable that the Words *other Goods* ſhould be underſtood to ſignify Things of the like Nature with *Houſhold Goods*, to the End the whole Will might have its Effect; and conſequently that the Teſtator's *Ready Money* and *Bonds* ſhould not in this Caſe paſs by the Word *Goods*, but ſhould go to the reſiduary Legatee. And of this Opinion was *King*, C. *MS. Rep. in* S. C.——3 *Will. Rep.* 112. in S. C. held *accord'*.

37. *J. S.* by Will gives *all his Houſhold Goods and Implements of Houſhould* to *A.* in or *about his Dwelling-houſe*; and the Reſidue of his *perſonal* Eſtate he gave to *B.* and *C.* equally to be divided between them, and made them Executors. The *Malt*, *Hops*, *Beer* and *Ale*, in the Houſe, *do not paſs*; for theſe Things are Victuals, and whoſe Uſe is in their Conſumption, and therefore cannot in their common natural Senſe be taken to be Houſhold Goods, and paſs under that Denomination, but ought to be delivered over by *A.* the Teſtator's Widow to the Executors the reſiduary Legatees.—Neither will the *Guns* and *Piſtols* that were in the Houſe, if uſed in riding, or ſhooting of Game, paſs to *A.* by the Words *Houſhold Goods*; tho' they may in ſome Senſe be ſaid to be for the Defence of the Houſe; but the

Clock, if not fixed to the Houſe, ſhall paſs. Decreed by *Talbot*, C. *Trin.* 1734. *Slanning et al'* and *Style, et econt'*, 3 *Will. Rep.* 334, 335.

38. *A.* deviſes 6000*l. South-Sea* Stock to *J. S.* and the Teſtator had but 5360*l. South-Sea* Stock. No more than the 5360*l.* ſhall paſs, and the reſt of the Teſtator's perſonal Eſtate not be obliged to make it up 6000*l.* But *it might be otherwiſe if the Teſtator had no Stock at all*; whereas the Stock he was then poſſeſſed of does in ſome Meaſure ſatisfy the Will. Decreed firſt by the *Maſter of the Rolls*, and afterwards *affirmed* by *Talbot*, C. on an Appeal. *Mich.* 1735. *Aſhton* and *Aſhton* (*a*), 3 *Will. Rep.* 384.

(*a*) *Aſhton* and *Aſhton*, 1 *Vol. Abr. Eq.* 41. *Ca.* 11. is not S. C.

39. Lord Chancellor ſaid, It is ſettled, that if there is a Limitation over of a perſonal Eſtate, after that which would have been a plain veſted Eſtate Tail, if it had been a real Eſtate, he that would have been intitled to have been Tenant in Tail, if it had been in Caſe of a real Eſtate, ſhall be intitled to the abſolute Property in the perſonal Eſtate; ſo that it ſhall go to his Repreſentatives, and the Limitation over will be abſolutely void. But in the Reaſon of the Thing, there ſeemed to his Lordſhip to be a great Difference between ſuch Sorts of Limitations that are veſted ones, and Limitations of this Sort that are contingent. In thoſe Caſes where they are veſted, the Party truſts to no Event, and nothing is put as doubtful. As if a perſonal Eſtate is bequeathed to *A.* for Life, the Remainder to *B.* and the Heirs Male of his Body; (and *B.* is a Perſon in *Eſſe*;) the Remainder to *C.* the whole Remainder in that Caſe is veſted in *B.* and *C.* by no Poſſibility can ever take any Part of this Eſtate. But where the Limitation is in its Creation a contingent one, the Party truſts to the falling out of the Contingency. And his Lordſhip's preſent Opinion was, that according to the Event of that Contingency, the Limitation over would be good or bad; namely, if that which would have been a contingent Remainder in Tail, had it been in Caſe of a real Eſtate, becomes a veſted one during the Lives of any of the Tenants for Life, or if a *poſthumous* Child would have had the Benefit of the Remainder, had it been within the Statute of *W.* 3. then the Remainder over would be bad; but if no ſuch Contingency happens, the Remainder over will be good. *Per* Lord Chan. *Hardwicke*, in the Caſe of *Gower* and *Groſvenor*, *Eaſt.* 1740. *Barnard. Chan. Rep.* 58, 59.

40. Deviſe *of my ſtrong Box and all that is therein*, and *all my Cheſts and Cabinets, and all that is therein*, to my Daughter *E.* There was a Frame fixed to the ſtrong Box, in which were Drawers that contained *Bank Notes* and *other Things of Value*; and the Frame was ſo fixed with Screws to the Box, that it could not be ſeparated without opening the Box; yet decreed that what was in the Frame ſhould *not* paſs, but the Frame with the Conſent of the Executor was given to *E.* Upon an Appeal to the Houſe of Lords, this Matter was compromiſed *March* 15, 1744. *Lord Paget* and *Duke of Bridgwater*, *Vin. Abr.* Tit. *Deviſe*, (K. b.) *Ca.* 24.

(F) What will paſs by the Word Lands.

1. IF a Man deviſeth Lands that are in Mortgage, the *Equity of Redemption* will paſs to the Deviſee; and ſo if *Copyholds* that are in Mortgage are deviſed, the *Equity of Redemption* ſhall paſs. *Trin.* 1681. *Anon.* 2 *Freem. Rep.* 65.

2. Money articled to be laid out in Lands, and to be ſettled, *&c.* ſhall in Equity be eſteemed as Land, and may be deviſed as ſuch, ſubject

ſubject in the firſt Place to the Uſes declared in the Marriage Settlement. *Per* Lord Keep. *Harcourt*, who declared it to be his preſent Opinion. *Mich.* 10 *Ann.* in the Caſe of *Shorer* and *Shorer* (*a*), *Lucas's Rep.* 39.

(*a*) *Vide* 1 *Vol. Eq. Abr.* 175. *Ca.* 5. *Lingen* and *Souray* (*a*), S. P. and ſeems to be S. C.——(*a*) *Vide* alſo the Caſe of *Lingen* and *Souray*, *Prec. in Chan.* 400. and 1 *Will. Rep.* 172.—in which laſt Book this Caſe is more fully reported, and agreeable to the Regiſter's Book, 3 *Will. Rep.* 221. in a *Note*.—It is obſervable that the Huſband might have deviſed this Money (ſubject to his Wife's Eſtate for Life) either as real or perſonal Eſtate, according as he ſhould have ſignified his Intention. Thus in his Will if he had deſcribed it as ſo much Money agreed to be laid out in Land, this would have been ſufficient to have made it paſs as perſonal Eſtate, and by a Will not atteſted by three Witneſſes; but without ſuch a particular Interpoſition of the Teſtator manifeſting his Intention, it remained as Land, and conſequently belonged to the Deviſee, or Repreſentative of the real, not of the perſonal Eſtate. Determined in the Caſes of *Croſs* and *Addenbroke*, *Hil.* 1719, *Fulham* and *Jones*, *Mich.* 1720, both by the Lord *Parker*. But more particularly in the Caſe of *Edwards* and the *Counteſs of Warwick*, 3 *Will. Rep.* 221, in a Note by the *Editor*.

3. A ſurviving Truſtee, to preſerve contingent Remainders, by his Will deviſed as follows: "*As to ſuch Eſtate as the Lord had beſtowed* "*upon him, he deviſed Part to* J. S. *and his Heirs, and all the reſt of* "*his real Eſtate* he deviſed *to his Wife and her Heirs.*" His *Honour* held, that tho' this be a *Truſt Eſtate*, yet *the legal Eſtate being in the Deviſor*, in the Eye of the Law it is *his* Eſtate and *his* Property, and therefore paſſes by the Deviſe of his Eſtate; and if the Deviſor had deviſed *all the Land which he had been ſeiſed of*, the Truſt Lands would certainly have paſſed. Neither can there be any Inconvenience in ſuch Conſtruction; for as the Teſtator himſelf was a Truſtee, ſo ſhall his Deviſee alſo be a Truſtee to preſerve the Remainders. *Mich.* 1723. *Marlow* and *Smith*, 2 *Will. Rep.* 189, 199.

Vin. Abr. Tit. *Deviſe*, (K. a.) *P.* 205. *Note to Ca.* 12. S. P. and by the Name of Lands, *Lands articled to be purchaſed*, paſs. *Ibid.*

4. A Deviſe of Lands will paſs Fee-Farm Rents *or* any other Right out of Lands. *Per Cur'*, *Mich.* 10 *Geo.* 1. *in Caſu Acherley* and *Vernon*, 2 *Mod. Ca. in Law and Eq.* 68, 78.

5. One has no Land in *A.* but has Tithes there, and deviſes *all his Lands* in *A.* The Tithes, as they are iſſuing out of the Land, and Part of the Profits thereof, ſhall paſs. *Mich.* 1735. *in Caſu Aſhton* and *Aſhton*, 3 *Will. Rep.* 386. Cites *Leon. Rep.*

(G) What will paſs a Reverſion (*b*);—And what the Reſidue of an Eſtate real or perſonal.

(*b*) If a Man *deviſes Lands to his Heir for Life*; yet *he ſhall have the Reverſion too.* *Per* Lord Keeper, *Eaſt.* 1701. *Prec. in Chan.* 163.

Rep. of Caſes in B. R. Temp. Ann. 129. S. C. and P. *Per Holt*, C. J.

1. A MAN ſeiſed of a Reverſion *expectant on an Eſtate for Life*, deviſes it, and afterwards *Tenant for Life dies*, and then the *Teſtator dies*, yet it paſſes. *Per Holt*, C. J. *Mich.* 6 *Ann. in Caſu Broncker* and *Coke*, *Holt's Rep.* 248.

—So it is of Lands in *Reverſion expectant on an Eſtate-tail*, and before his Death the Tenant in Tail dies without Iſſue, there Lands will paſs, *tho' a Reverſion only at the Time of making the Will*, becauſe *he is ſeiſed at the Time as much as he can be*, and *it is a certain preſent Intereſt*, tho' to commence *in futuro*, and all the Eſtate he could give he intended him. *Gibb.* 231, S. C. and P. *Per Holt*, J.—1 *Salk.* 237, S. C. and P. agreed *per Cur'*.

MS. Rep. S. C. *accord'.*

2. A Man ſeiſed of Lands in Fee, made his Will, and thereby *gave ſeveral Legacies*, and then bequeathed in theſe Words, "*I give the* "*reſt of my Eſtate, Chattels real and perſonal, to* J. S." Reſolved *per Harcourt*, C. that nothing but his *Chattels* paſſed by the Word *Eſtate*. *Hil.* 11 *Ann. Anon. Vin. Abr.* Tit. *Deviſe*, (O. b.) *Ca.* 7.

3. *J. S.* being ſeiſed in Fee, by Will directed his Debts and Funeral Charges to be paid, and gave *E.* his Wife Power to ſell his Lands,

&c. (if Need be) for Payment of the ſame, and then to pay ſuch Legacies as are given by his Will; among which he gives his Wife 1000*l.* to be by her detained out of the firſt Money that could be raiſed by the Profits or Sale of his Eſtate, after Payment of his Debts, and the *Reſidue of his Eſtate after Debts* and Legacies paid, he gave to her, and made her ſole Executrix, and died. *Cowper*, C. was *clear* of Opinion, that a *Fee paſſed by the Deviſe of all the reſt of his Eſtate to his Wife*, ſubject to Payment of his Debts, *&c.* His *Lordſhip* alſo held, that where a Man deviſes all his Eſtate, Goods and Chattels, and no Mention had been made before in the Will of Lands of which the Teſtator was ſeiſed in Fee, a *Fee Simple will not paſs*, but where a real Eſtate is mentioned before in the Will, and then ſuch Words follow, a *Fee paſſes*. *Mich.* 1 *Geo.* 1. *in Chan. Cliffe et alii* verſ. *Gibbons*, *Kadwell et alios*, 2 *Lord Raym. Rep.* 1324.

4. *J. S.* having a Daughter *M.* an *only* Child, married to Plaintiff, and Plaintiff having Iſſue by her three Daughters, *J. S.* by Will, after the Deviſe of ſeveral Parts of his real and perſonal Eſtates to ſeveral Perſons, deviſed the *Reſidue of his real and perſonal Eſtate to Truſtees, their Heirs, Executors and Adminiſtrators*, in Truſt *to pay and apply the Produce and Intereſt thereof for the Maintenance and Benefit of ſuch of his Grandchildren by his ſaid Daughter as ſhould be living at the Time of his Deceaſe, until they ſhould come to the Age of twenty-one*, without making any farther Diſpoſition, only directed, that *if all his Truſtees ſhould die, then in ſuch Caſe Plaintiff his Son-in-law ſhould be a Truſtee.* *Macclesfield*, C. held, that the Intention was moſt plain that the Grandchildren ſhould have the Surplus both of the real and perſonal Eſtate, *after* their Age of twenty-one; and ſaid, it is true there is a Proviſion for the Children by the Marriage Settlement, but that is not to take Place 'till after their Father's Death; that it was plain, the Teſtator gives all away from *M.* his Heir at Law by veſting the whole Eſtate in Fee, as well as the legal Property of the perſonal Eſtate, in Truſtees, which he would not have done, had he intended any Thing to remain to *M.* Not only the Intereſt but the Produce of the real and perſonal Eſtate is to be applied by ſuch Truſtees; and that to help this, the Word (*Produce*) ſhall be taken in the *larger* Senſe, and then will ſignify whatever the Eſtate will yield by Sale or otherwiſe; and this Caſe is ſtronger in regard Plaintiff is to be a Truſtee in Caſe the other Truſtees ſhall all die, but that it cannot be intended that the Plaintiff was to be a Truſtee for himſelf, or for what himſelf would be intitled to, ſhould it come to *M.* his Wife. *Mich.* 1723. *Newland* and *Shephard*, 2 *Will. Rep.* 194.

The Caſe of *King* and *Melling*, (*a*) 1 *Vent.* 230. is applicable

to the preſent Caſe, where the Court conſtrued a Will againſt the expreſs Words, in order to make it take Effect *according to the Intention.* (*a*) Cited in the Caſe of *Hewitt* and *Ireland*, 1 *Will. Rep.* 427.

5. *A.* gave *ſpecific* Legacies to his three Daughters, and having given other Legacies to others, he gave *all the Reſidue of his Eſtate to* W. R. &c. in Truſt to *increaſe his Daughters Portions.* (*b*) This gives the Daughters a Fee. Decreed *Eaſt.* 10 *Geo.* 1. *in Chan. Anon.* 2 *Mod. Caſes in Law and Eq.* 92.

(*b*) Theſe Words plainly ſhew the Teſtator intended to paſs the Inheritance *immediately*, otherwiſe the Daughters might never get any Thing by it; for which Reaſon it was decreed, that the Inheritance did paſs. *Ibid. MS. Rep.* S. C. *accord'.*

6. A *Deviſe of Lands to* B. *and his Heirs for ever*, upon Condition *to pay all my Debts, Legacies and Funerals*; and *if he do not pay them, then* I *deviſe the Premiſſes to* C. (the Defendant) *and her Heirs for ever*; and as to *all the reſt and Reſidue of my real and perſonal*

ſonal Eſtate whatever, not herein before bequeathed, I give and bequeath to the ſaid *C.* and her Heirs. The Deviſee *B.* died before the Deviſor, ſo it was a lapſed Legacy. The Court held, that *C.* could not take by theſe Words, "*All the reſt and Reſidue* of my *real and* "*perſonal Eſtate, not deviſed or unbequeathed*," the Lands deviſed to *B.* for it muſt be expounded, the *reſt and Reſidue of the Lands undeviſed at the Time of making the Will*, and *not at his Death. Eaſt.* 2 *Geo.* 2. *Roe* and *Fludd*, *C. B. Forteſc. Rep.* 184.

7. Sir *Robert Bridges* by his Will *gives ſeveral Legacies to his Daughter* and other Relations, and then follows this Clauſe: *I give the Remainder of my Eſtate*, viz. *my Bank Stock*, India *Stock*, South-Sea *Stock and* South-Sea *Annuities, to my Son* B. Bridges, *and I do hereby make him ſole Executor. Quære*, if theſe Words *all my Bank Stock*, &c. do reſtrain the general precedent Words, *the Remainder of my Eſtate? King*, C. was of Opinion, that the latter Words which came under the viz. *do not reſtrain the general Words* precedent (*the Remainder of my Eſtate*) but were *added by way of Enumeration*, or Deſcription of the main Particulars whereof his Eſtate did conſiſt, and not to reſtrain the Word Eſtate to thoſe Particulars; and the rather, becauſe immediately after follow the Words, *and I do hereby make him ſole Executor of this my Will.* And when he diſpoſes of the Remainder of his Eſtate, it is plain he did not intend to die inteſtate as to any Part of it. Decreed that the Son was intitled to all the Reſidue of the Teſtator's Eſtate. *Hil.* 2 *Geo.* 2. *Bridges* and *Bridges*, *Vin. Abr.* Tit. *Deviſe*, (O. b.) *Ca.* 13.

8. *A.* was ſeiſed of the Reverſion in Fee of Houſes of the yearly Value of 264 *l.* lett out on Building Leaſes at a Ground Rent of 29 *l.* a Year. *A.* had Iſſue *B.* his eldeſt Son, and *C. D.* and *E.* younger Children, and deviſed to *C.* ſo much a Year of 29 *l.* a Year Ground Rent in *Red-Lyon* Square, to him and his Heirs and Aſſigns for ever; and deviſed to *D.* and *E.* in the very ſame Words, which in all amounted to the 29 *l.* and deviſed to *B.* whom he called his *undutiful* Son, 5 *l.* a Year out of ſome Lottery Tickets. It was argued whether this ſhould carry the Inheritance or not. The Court thought it a new and difficult Caſe, and ſo it ſtood over to the next Term. *Trin.* 2 & 3 *Geo.* 2. *C. B. Mandy* and *Mandy*, *Fitz-Gibb. Rep.* 70.— Afterwards Judgment was given for the younger Children againſt the Heir at Law *per tot' Cur'*, and *Error* brought in *B. R. Ibid.* 288.

9. *A.* having Lands in *D.* and *S.* conveys the Lands in *D.* to *B.* in Tail, Remainder to his own right Heirs; then he deviſes all his Lands in *S.* and *elſewhere*, not formerly ſettled, to *C.* and *his Heirs for ever.* By this the Reverſion paſſes of the Lands in *D.* (*a*) Decreed *Mich.* 4 *Geo.* 2. *Cheſter* and *Cheſter*, *Gibb.* 150. If there had been any Lands or Skirts of Land, lying out of the Places mentioned in the Will, to ſatisfy the Word *elſewhere*, it might make a Difference. *Ibid. Raymond*, C. J. *Reynolds*, C. B. and *Price*, J. *Ibid.* 61.

(*a*) 3 *Will. Rep.* 56. S. C. Decreed *accord* by the unanimous Opinion of *King*, C. and the ſaid Judges.

10. The Words *Reſidue of Eſtate*, do not always *neceſſarily* imply that any Thing was before thereout diſpoſed of; for they are merely *Words of Courſe*, always inſerted by the *Penner* of the Will, whether there be any precedent Bequeſt or not, and *in Truth are never improper*, becauſe no Executor can be ſaid to take more than the Reſidue, *it being impoſſible for a Man to die without leaving ſome ſmall Debts behind him*, or *if it could be ſo, the Funeral Expences muſt always be born by the Executor. Per* his Honour, 4 *Nov.* 1738, *in Caſu Miles* and *Leigh*, *Vin. Abr.* Tit. *Deviſe*, (O. b.) *Ca.* 14.

(H) What Perſons ſhall take by the Word Heir;—Heirs Male;—Children, &c.

1. A. Deviſed a *Term for Years for his Daughter* and *her Children* (ſhe then having three Children) *and alſo to ſuch other Children as ſhe ſhould have, and the Children of thoſe Children*; ſhe having *other Children afterwards*, the Queſtion was, whether they ſhould have any Shares? And it was held, that the Woman and her *three* Children took jointly each a fourth Part, and that the *after-born Children took nothing*. And that theſe Words *were Words of Limitation*, and *not of Purchaſe*; and it is as much for the *Wife's Part*, as tho' it had been given *to her and the Heirs of her Body*. *Mich.* 1692. *Anon. MS. Rep.* 2 *Freem.* 186. *Mich.* 1692. *Alcock* and *Allen*, S. C. *in totidem verbis.*

2. Deviſe *to* J. S. *for Life*, and *if he ſhould have any Iſſue*, then *to ſuch Iſſue and their Heirs*. *J. S.* has Iſſue two Sons. *Per Treby*, C. J. the *eldeſt will take a Fee*. But *Powell*, J. ſaid, that *both would take*; becauſe *Iſſue* is a *collective Word*, and it would not have been *void* for *Uncertainty*. *Eaſt.* 9 *W.* 3. *in Caſu Luddington* and *Kime*, 1 *Lord Raym.* 203, 206.

3. And for Default of ſuch Iſſue, I *give the Remainder of my ſaid Eſtate* to the *Heirs Male of the Body of* J. L. *lawfully begotten*; E. L. *happens to be living at the Time of the Remainder taking Place*, yet the *Heir apparent ſhall take*. *May* 27, 1714. *Darbiſon* and *Beaumond*, *Vin. Abr.* Tit. *Deviſe*, (U. b.) *Ca.* 5. *E. L.* is in the *Original.*

4. By a Deviſe to Children and Grandchildren, none can take but thoſe who are in *Eſſe* at the Time of making of the Will, unleſs there are future Words which ſhew the Teſtator's Intent. Agreed *per Counſel & Cur'*. *Eaſt.* 1717. *Northey* and *Burbage* (*a*), *Prec. in Chan.* 470. (*a*) *Vide Ca. P.*

5. *J. S.* deviſed 3000*l.* to all the *natural* Children of *B.* his Son by *M. Parker*, C. inclined that a natural Child *in ventre ſa mere* could not take, for that a Baſtard cannot take 'till he has got a Name of Reputation of being ſuch a one's Child, and that Reputation cannot be gained before the Child is born. *Hil.* 1718. *Metham* and *Duke of Devonſhire*, 1 *Will. Rep.* 530.

6. *J. S.* ſeiſed in Fee, deviſes his Lands *to his Grand-daughter* (*being his Heir at Law*) *for her Life*, Remainder *to his own right Heirs Male for ever*, and dies, *leaving his ſaid Grand-daughter*, and alſo a *deceaſed Brother's Son*, being the next in the Male Line; which Nephew brought his Bill againſt the Grand-daughter *to perpetuate the Teſtimony of the Will and for the Writings, and to ſtay Waſte*. Defendant demurred, for that by the Plaintiff's own ſhewing he had *no Title to the Reverſion or Inheritance of the Premiſſes*; and allowed, for *per Macclesfield*, C. the Words (*Heirs Male*) muſt be intended *Heirs Male of the Body*, and would *never extend to an Heir Male of any collateral Line*; and it not being ſaid in the Will *Heir Male of his Body*, or *of his Name*, the Grand-daughter, who was his Heir at Law, might have an Heir Male, tho' not of his Name. ——— As to the Caſe of *Brown* and *Barkham* (*b*), cited for the Plaintiff, his *Lordſhip* ſaid that was merely of a Truſt, but the principal Caſe is that of a *legal* Eſtate, where the Rule of Law, that has ſo long prevailed and been taken for granted, muſt be obſerved, *viz.* that *he who claims as Heir Male by Purchaſe muſt be Heir as well as Heir Male*. Beſides, this differs from the Caſe of *Brown* and *Barkham*, the Remainder *being* (*b*) 2 *Vern.* 729. *Prec. in Chan.* 442, 461.

there

there limited to the Heirs Male of the Body of Sir Robert Barkham *the Grandfather*, whereas *here* the Deviſe was *to the Heirs Male*, without ſaying *of any Body*. *Eaſt.* 1722. *Dawes* and *Ferrers* (*a*), 2 *Will. Rep.* 1, 3.

(*a*) *Prec. in Chan.* 589. *Eaſt.* 1722. *Dawes* and *Ferrars*, S. C. *accord*, but ſays nothing about a Caſe being ordered to be ſtated for the Opinion of the Judges, (as after mentioned) no more than Mr. *P. Williams* does; but Lord Chancellor ſaid, this Point had been ſettled in all the Courts at *Weſtminſter-hall*, and therefore it was dangerous *now* to ſhake it, tho' his *Lordſhip* ſaid he thought *Shelly*'s Caſe not agreeable to Reaſon; and that *Anderſon*, who reports the S. C. ſays, the Judges gave no Reaſon at all for their Opinions, tho' Lord *Coke* had made ſo large a Report of their Arguments; but however *weak* it was at firſt, the Law has been taken accordingly ever ſince, and *it is dangerous to remove ancient Land Marks*; and ſaid, it was no Matter what the Law was, ſo it be known, and his Lordſhip ſaid, why don't you bring an Action of Waſte, and aſcertain the Will at Law? Demurrer allowed. *Ibid.* 592.——*Vin. Abr.* Tit. *Deviſe*, (W. b.) *P* 317. S. C. (in a Note) cites it from a MS. Rep. ſays, it was upon the Will of *G. Dawes*, who deviſed as above *to his Grand-daughter* the Lady *E. Bulkeley*, Remainder *to his own Heirs Male*. A Bill of Review was afterwards brought to reverſe the Decree, in which *D. Gwyn*, *P. Gwyn*, and *E. Williams*, Infants, by their next Friend, were Plaintiffs, and *John Hooke*, Eſq; Defendant, when the Caſe appeared to be thus: That in 1729 the Lady *Bulkeley* intermarried with Defendant *Hooke*, but before their Intermarriage, by Indentures of Leaſe and Releaſe, dated 18 and 19 *Nov.* 1729, the Lady *Bulkeley* did grant and convey the ſaid Premiſſes to a Truſtee, *to the Uſe of herſelf 'till the ſaid intended Marriage*, and *then to the Uſe of the Defendant and Lady* Bulkeley *for their Lives, and the Life of the longer Liver of them*; and *after the Deceaſe of the Survivor of them, then to the Uſe of the Defendant, his Heirs and Aſſigns for ever.*——Lady *Bulkeley died* without Iſſue 8 *May* 1736, and thereupon the Defendant entered on the real Eſtate of the ſaid *G. Dawes*.—16 *May* 1738, the Plaintiffs, the three Great Grandchildren, and Heirs at Law of *F. Dawes* the Brother of the ſaid *G. Dawes*, by their next Friend brought their Bill againſt the Defendant, ſtating the Will of the ſaid *G. Dawes* and their Pedigree, as above, and praying *(int' al')* to be let into Poſſeſſion of the ſaid Premiſſes. The Defendant by Anſwer made Title to the Premiſſes under the ſaid Indentures of Leaſe and Releaſe. 18 *Nov.* 1740 the Cauſe was heard before the Lord Chancellor *Hardwicke*, when his Lordſhip ordered that a Caſe ſhould be made for the Opinion of the Court of *King's Bench*, and that the following Queſtion ſhould be ſtated thereon, *viz.*—Whether by Virtue of the Will of the ſaid *G. Dawes*, dated 14 *Nov.* 1693, the Plaintiffs are intitled to the Eſtate in Queſtion? And *Lee*, C. J. *Chapple*, *Wright* and *Deniſon*, Juſtices, upon hearing Counſel on both Sides and Conſideration of the Caſe, were of Opinion, that the Plaintiffs were *not* intitled to the Eſtate in Queſtion by Virtue of the ſaid Will, for they conceived that *F. Dawes* the Brother of the Teſtator, *under whom the Plaintiffs claimed*, could not take by the Deſcription of the right Heir Male of the Teſtator. This Opinion was delivered *Feb.* 1, 1743.

7. Deviſe of Lands to the *Mother for Life*, Remainder *to her Children, &c.* She had then one Child; and about four Years afterwards Teſtator made a Codicil, at *which Time ſhe had two Children more.* This Deviſe is a *future* Deviſe, and takes in the Children after born. 11 *Geo.* 1. *Bateman* and *Roach* (*b*), 2 *Mod. Caſes in Law and Eq.* 104.

(*b*) *Vide P. Ca.*

8. *A.* having had ſeveral Children, ſome of whom being dead, *leaving Children*, by Will bequeathed the *Surplus* of his perſonal Eſtate *equally to his Son* James *and to his Son* Peter's *Children*, to *his Daughter* Traverſe *and to his Daughter* Webb's *Children*, and *his Daughter* Man, and made *B.* his Executor. At the making of the Will *Peter was dead, leaving ſeveral Children*; Webb *the Daughter was living*, but her Huſband being in low Circumſtances, the Teſtator by his Will made ſome Proviſion for her ſeparate Uſe. *King*, C. at firſt ſeemed inclinable that the Children (*c*) ſhould take *per Stirpes* only, yet at length he decreed that *James* and the *Children* of *Peter* and *Traverſe*, and the Children of *Webb* and *Man*, (being in all fourteen) ſhould each of them take *per Capita, as if all the Grandchildren had been named by their reſpective Names.* That the Children of *Webb* could not take according to the Statute of Diſtributions, or in Alluſion thereto, as ſhe was living, and ſo her Children could not repreſent her; and to determine, that the *Grandchildren* ſhould take *per Stirpes*, would be to go too much out of the Will, and contrary to the Words, when the Meaning of the Teſtator might be according to his Words, and that Meaning a *reaſonable* and *ſenſible* one. *Mich.* 1726. *Blackler* and *Webb & al'*, 2 *Will. Rep.* 383.

(*c*) It is *Grandchildren* in the Original.

9. *J. S.* by Will gives 500 *l.* to the Relations of *B. to be divided equally between them*; *B.* had at the Teſtator's Death two Brothers

living, and ſeveral Nephews and Nieces by another Brother. *King*, C. ſaid, that as the Teſtator had directed the 500 *l.* to be divided equally among them, he could not direct an unequal Diſtribution, and accordingly decreed them to take *per Capita*. *Mich.* 1734. *Thomas* and *Hole*, *Caſes in Eq. Temp. Talbot* 251.

(I) In Caſe of a Deviſe to an Heir, Where he ſhall take by Deviſe, and Where by Deſcent.

1. *J. S.* had Iſſue only two Daughters, one whereof was dead, and *J.* left Iſſue *B.* her Heir, and one of the Coheirs of the ſaid *J. S. J. S. deviſes the Eſtate to* B. *and his Heirs*; and if *B.* ſhould take one Moiety by *Deſcent*, and the other by *Purchaſe*, or the whole by *Purchaſe*, was the Queſtion; and it was adjudged (*on a Caſe ſtated*) that *he took the whole by Purchaſe*. *Trin.* 1703. *Rawſton* and *Reading* (*a*), *Prec. in Chan.* 222.

(*a*) 1 *Salk.* 242. *Hil.* 1 *Ann. B. R. Reading* and *Royſton*, S. C. ſtates it thus: *A.* has two Daughters *B.* and *C.* *B.* has a Son, and dies. *A. deviſes the Land to the Son and his Heirs.* The Son *takes the whole by Deviſe*, and not a Moiety by the *Deſcent* as Heir, and a Moiety by the Deviſe; for there can be *no ſuch Deſcent as the Deſcent of a Moiety to one Coparcener as Heir*, but *the Deſcent is to all.*

2. *J. S.* being *ſeiſed in Fee of Copyhold Lands*, ſurrendered to the Uſe of his Will, and afterwards deviſed theſe Lands to his Wife, and died. The Widow was admitted to her and her Heirs, *&c.* and afterwards married *Trigg*, and then ſhe ſurrendered to the Uſe of her Will, and deviſed the ſame to her Daughter *Jane Trigg*, who was her Heir at Law, and then died. The Daughter was *never admitted.* The Queſtion was, whether *Jane* the Deviſee took *by Deſcent* or *by Purchaſe?* For if by *Purchaſe*, then the Defendant *Trigg* being of her Blood hath a Right; but if ſhe took by *Deſcent*, then the Plaintiff being of the Blood of her Mother the Teſtatrix, hath the Right. Reſolved, that *Jane* was in *by Deſcent*, becauſe ſhe was Heir at Law to the Teſtatrix; and that where two Rights meet together in one Perſon (as they did in this Caſe) the one being by Deviſe and the other by Deſcent as Heir at Law, the *Deſcent is the moſt noble Means to come to an Eſtate*, and *therefore the Law adjudges that the beſt Title ſhall ſtand. Mich.* 7 *Geo.* 1. *Smith* and *Trigg*, 1 *Mod. Caſes in Law and Eq.* 23. *MS. Rep.* S. C. *accord*.

3. So where a Feoffment is made *to ſeveral Uſes*, the *Reverſion in Fee to the Heirs of the Feoffor*, in ſuch Caſe *the Heir ſhall take the Reverſion by Deſcent*, becauſe it was Part of the old Eſtate of the Feoffor; for ſo much of the Uſe of the Lands which he did not diſpoſe of by the Feoffment, ſtill remained in him as Part of the old Eſtate. ——But if a Man *deviſe any other Eſtate to the Heir at Law than what he was to take by Deſcent*, as if the Teſtator deviſeth *a leſs Eſtate to him*, or *an Eſtate in Fee to ariſe upon a Condition*, there it is otherwiſe. *Per Cur'. Ibid.* 1 *Inſt.* 22. *b.* 23. *a.*

4. *J. S.* ſeiſed in Fee of a real Eſtate as *Heir on the Part of his Mother's Side*, and being alſo ſeiſed in Fee of an Eſtate of 4 *l. per Annum*, *as Heir to his Father*, deviſes all theſe Lands to Truſtees in Fee, in Truſt *to pay ſeveral Annuities and Charities*, and the *Reſidue of the Profits* (*after Payment of the Annuities*) *to go to the right Heirs of his Mother's Side.* Proof *was admitted that at the Time of making of the Will the Teſtator declared the Heir of his Mother's Side ſhould have his Eſtate, becauſe it came from thence.* It was objected, that if the

Will ſhould be conſtrued in ſuch Manner, as to intitle the Heir of the Mother's Side to the Eſtate, ſuch Will would be void and *nugatory*, becauſe without any Will the Lands would go to the Heir of the Mother's Mother, who was the Heir at Law to this Eſtate, the Heir of the Mother's Father having none of the Blood of the firſt Purchaſer (*a*). But *Macclesfield*, C. ſaid, that the Teſtator giving ſeveral Annuities and Charities, and then ſaying *that the Reſidue of the Profits ſhould go to the right Heirs of the Mother's Side*, was only as if he had ſaid, "*ſo far I diſpoſe of my Eſtate, and let ſo much of it go from my* "*Heir, who otherwiſe would have had it; but I will not diſpoſe of it* "*any further from the Heir at Law of the Mother's Side, whence it* "*came, and where it ſhould go, in Caſe I ſhould not give it away.*" Alſo there might be Reaſon to uſe theſe Words, and they are not *nugatory*, becauſe as the Deviſe is only of *Annuities and Charities, without any particular Words, expreſſing the Deviſes to the Truſtees only*, they, had it not been for theſe latter Words, might themſelves and in their own Right have been intitled to the Premiſſes. Decreed (without any Doubt) in favour of the Heir of the Mother's Side (*b*). As to the Lands of 4 *l. per Annum*, his Lordſhip was of Opinion, that the ſame Words might be taken (*c*) *diſtributively*, (*viz.*) That the Lands which came by the Mother's Side ſhould return to the Heirs of the Mother's Mother; and that the Lands which deſcended from the Father, ſhould return to the Heirs of the Father, in the ſame Manner as if there had been no Diſpoſition made thereof, and they had been left to deſcend; at leaſt ſo far was clear, that this ſmall Eſtate muſt contribute in Proportion to the Charities and Annuities; but it being of ſo ſmall Value, the Counſel did not inſiſt upon having the Opinion of the Court about it, nor was the *Heir General of the Teſtator* a Party to the Suit. *Eaſt.* 1723. *Harris* and *Biſhop of Lincoln*, 2 *Will. Rep.* 135.

(*a*) 1 *Inſt.* 12.

(*b*) His Lordſhip obſerved, very little was to be ſaid for the *Heir of the Mother's Father*, who in this Caſe was *neither the Heir General* (for the Heir *General* muſt be *Heir of the Father's Side* and *not of the Mother's Father*) nor the Heir *quoad hoc*, (*viz.*) as to theſe Lands; for the Heir as to theſe Lands was the Heir of the Mother's Mother, from whom they deſcended; ſo that the Heir of the Mother's Father was neither Heir *ſimpliciter* nor *quoad hoc* to the Party that laſt died ſeiſed, *viz. J. S. Ibid.* 139.

(*c*) *Vide Froth* and *Chapman*, 1 *Will. Rep.*

5. Where a Deviſe was *to the Wife*, then *to* A. (*who was Heir at Law*) *and his Heirs, paying* 100 l. *when he ſhould come into Poſſeſſion.* A. *died in the Life of the Wife.* Decreed that the Heir at Law of *A.* is chargeable with the 100 *l.* he taking only by *Purchaſe* and not by *Deſcent.* 4 *Nov.* 1738 at the *Rolls.* *Miles* and *Leigh*, *Vin. Abr.* Tit. *Deviſe*, (P. c.) by way of *Note* to Caſe 3.

(K) Of executory Deviſes (a); And here of the Limitation of the Truſt of a Term.

(a) An executory Deviſe is a future Intereſt, which *cannot veſt at the Death of the Teſtator*, but depends on ſome *Contingency*, which muſt happen before it can veſt. *Gilb.* on *Deviſes*, 41.———Since the *Statute of Wills* (*a*) and *Statute of Uſes*, executory Deviſes and ſpringing Uſes have been allowed of. Theſe were firſt allowed of with reſpect to the Teſtator or Party himſelf; afterwards it came to be allowed of to other Perſons; and therefore at this Day in *Deviſes* and *Limitations of Uſes* an Eſtate may be limited over to a third Perſon, *upon the Defeaſance of a former Eſtate in Fee*, if *the Condition be not too remote in Point of Time*; and tho' there have been Words found out to ſave in Appearance the *Maxims* of the *Common* Law, yet *in Effect* and *in Truth* the very Benefit and Advantage of the Condition is paſſed over to a third Perſon, notwithſtanding the Maxim of Law, *that a Stranger cannot take Advantage of a Condition*. *Per* Lord C. *Parker*, *Mich.* 5 *Geo.* 1. in the Caſe of *Marks* and *Marks*, *Lucas's Rep.* 423.——— (*a*) 32 *Hen.* 8. Executory Deviſes were grounded on the *Common Law*. *Vide Goodcheap's* Caſe, 49 *Ed.* 3. 16. *a.* Cited in Lord *Stafford's* Caſe, 8 *Rep.* 6. *b.* 7 *Rep.* 9. *a.* 11 *Hen.* 6. 73. *a.* *Br. Deviſe*, and the Words of the Statute of Wills are not that he deviſes to any Perſon or Perſons, but "*at his Will and* "*Pleaſure*," and cited *Cro. Jac.* 394. *Blandford* and *Blandford*. *Per Bridgman*, C. J. and adjudged *accord'*, Sir *T. Raym. Rep.* 83. *Mich.* 15 *Car.* 2. *B. R. in Caſu Bate* and *Amhurſt* and *Norton*.——— *Vide P. Ca.* of this Work.

1. *J. S.* having *a Son and four Daughters*, and being *ſeiſed of Lands in Fee*, and *of a long Term*, deviſes *all his Eſtate in* D. where the Freehold lies, and likewiſe *in S.* where the Term is, *to his Son and his Heirs*, and *if he dies without Iſſue unmarried*, then *to his four Daughters*; and *if he marries, and dies without Iſſue then living*, and *having a Wife*, then *after the Death of ſuch Wife likewiſe to his four Daughters*. *Holt* for the Plaintiff in the Writ of Error made *two* Points: *Firſt, whether hereby an Eſtate in Tail of the Freehold Lands paſſed to the Son*, and *the Remainder to the four Daughters*; or *whether the Eſtate to the Son was a Fee*, and *it came to the Daughters by way of executory Deviſe*. And that it was a *Fee to the Son*, and *good to the Daughters by way of executory Deviſe*, he cited 2 *Cro.* 590. *Roll.* Tit. *Eſtate*, 835, 836. and this Point was yielded by the Counſel on the other Side.—But to the *ſecond Point*, if *this Remainder of the Term was good to the four Daughters*, he argued that it was, and cited *Dy.* 74, 358. *Com.* 590. 2 *Cro.* 460. and ſaid, that the Reaſon of the Reſolution in *Child* and *Bayley's* Caſe, was for the *Repugnancy*; for having *firſt deviſed it to the Deviſee and his Aſſigns*; this was oppoſed by the Counſel on the other Side, and *Child* and *Bayley's* Caſe relied on, as alſo *Roll.* Tit. *Deviſe*, 611. *Leventhorp* and *Aſhley's* Caſe. Time was given for further Argument. *Holt cited Com.* 590. *and Lowe* and *Windham's Caſe*, 22 *Car.* 2; reported in *Mod.* 50. *Mich.* 35 *Car.* 2. *B. R. Sommers* and *Gibbon*, *Skin. Rep.* 144.

2. It was agreed, that an *executory* Deviſe need not veſt as a Remainder muſt *eo inſtante*, that the particular Eſtate determines; but that the Law would ſupport it without a particular Eſtate, and expect 'till it could take. And cites *Snow* and *Cutler*, 19 *Car. B. R.* But *North* anſwered, that then there muſt be an apparent Intent of the Deviſor, that it ſhould not 'till a certain Time, notwithſtanding the particular Eſtate determines; and that, he ſaid, was the Caſe of *Snow* and *Cutler*, for there the Deviſe was *to the Heir of* J. S. *when he comes to the Age of fourteen Years*. But if there be no ſuch apparent Intent, it muſt *ſtand* and *fall* by the Rules of Law (*b*). *Hil.* 1677, in the Caſe of *Taylor* and *Bydall*, 1 *Freem. Rep.* 244. (*b*) *Vide* 1 *Vol. Abr. Eq. P.* 188. *Ca.* 11.

3. Favourable Diſtinctions have been always admitted to ſupply the Meaning of Men in their laſt Wills. *Ergo* a Deviſe *to* A. *'till he be of Age, then to* B. *and his Heirs*; this *is an Eſtate for Years in* A. *with a Remainder in Fee to* B. And *if ſuch a Deviſe to* A. *who is alſo made Executor*, or *for Payment of Debts*, it ſhall be for a certain Term

of Years, *i. e. for ſo long as according to Computation he might have attained that Age had he lived.* Contingent Remainders *are at the Common Law*, and *ariſe upon Conveyances* as *well as Wills*; one may *limit an Eſtate to* A. *the* Remainder *to another*, and *ſo it may be by Deviſe, if the Intent of the Parties will have it ſo*; but as at the Common Law *all contingent Remainders ſhall not be good*, ſo *in Wills no ſuch Latitude is given as if none ſhould be bad*; they are ſubject to the ſame Fate in *Wills* as in *Conveyances*. An *executory* Deviſe *needs no particular Eſtate to ſupport it*, for *it ſhall deſcend to the Heir 'till the Contingency happen*; it is not like a *Remainder at the Common Law, which muſt veſt* eo inſtanti, *that the particular Eſtate determines*, but the Learning of *executory* Deviſes ſtands upon the Reaſons of the *old* Law, wherein the Intent of the Deviſor is to be obſerved; for when it appears by the Will that he intends *not* the Deviſee to take, but *in futuro*, and *no Diſpoſition being made thereof in the mean Time*, it ſhall *then deſcend to the Heir 'till the Contingency happens*; but *if the Intent be that he ſhall take* in præſenti, and *there is no Incapacity in him to do it, he ſhall not take* in futuro *by an executory Deviſe. Per North*, Ch. J. *Hil.* 29 & 30 *Car.* 2. *C. B.* in the Caſe of *Taylor* and *Biddal*, (*a*) 2 *Mod.* 291, 292.

(*a*) This Opinion of *North*, C. J. does not appear in the 1 *Vol. Abr. Eq.* 188. *Ca.* 11.

4. *J. S.* having *three Sons* deviſed *his Lands to them all, and if either of them ſhould die*, then *the Lands to be equally divided amongſt the Survivors*. *J. S.* dies, and then *C. his eldeſt Son died, leaving Iſſue*, and the Queſtion was, whether the *ſurviving Brothers of* C. or *his Iſſue* ſhould have that Part of the Lands which came to *C.* by the Deviſe? And the Court held, that theſe are croſs Remainders *veſted*; for tho' they are contingent as to the Enjoyment, (becauſe it is uncertain who ſhall ſurvive) yet they veſt preſently. Secondly, it ſhall be intended Socage Tenure, tho' it be not found, cites 2 *Roll.* 697. Judgment *pro quer'*, *Trin.* 1679. *Forteſcue* and *Abbot*, (*b*) 1 *Freem. Rep.* 481.

(*b*) 2 *Lev.* 202. *Trin.* 29 *Car.* 2. *B. R.* S. C. ſtates it, that *J. S.* had three Children, and deviſed Lands to each *without Limitation of any Eſtate*, and ſays, *if any of them dies his Part to remain* to the others. *A. the Heir* dies. The Queſtion was, what is to be done with his Part? For the Deſcent of the Fee upon *A.* deſtroyed this particular Eſtate to him, and conſequently the Remainder to the other, but it will be good by way of *executory* Deviſe.——*Pollexf.* 479. S. C. adjudged for the Plaintiff.——2 *Jo.* 79. S. C. adjudged *pro quer'*, who claimed under the *Survivor*.

5. A Will ſhall never operate by way of *executory* Deviſe, if it may take Effect by way of *Remainder*, *i. e.* if there is a particular Eſtate ſufficient to ſupport it. *Per Cur'*, *Trin.* 1 *W. & M. in B. R. Reeve* and *Long*, *Carth. Rep.* 310.

6. *A.* ſeiſed in Fee had three Brothers, *A. B.* and *C.* and deviſes the Lands *to* A. *for Life*, Remainder *to* A.*'s firſt Son in Tail Male, and ſo to the ſecond and third Sons*; and *for Default of ſuch Iſſue to* B. *for Life, and to his firſt, ſecond Son*, &c. *in like Manner*. Deviſor dies; then *A.* marries, and *dies without Iſſue born*; but the Wife was *privement enſeint* with a Son, who is born after. Judgment in *C. B.* was, that the *poſthumous* * *Son had no Title*; and it was affirmed in *B. R.* on a Writ of Error. And they held, that the Remainder to the firſt Son of *A.* was a *contingent* Remainder, and ſo muſt take Effect according to the Rule in *Archer*'s Caſe; but at the Time of the Death of *A.* there was a Default of Iſſue Male, on which the Eſtate veſted in the Poſſeſſion of *B.* and ſhall not be removed again

* *Vide* 10 & 11 *W.* 3. *c.* 16. Proviſion for *poſthumous* Children.

by the Birth of a Son after. And this is *no* executory Deviſe upon the Rule laid down 2 *Sand.* 380, 388. (*a*)——Where a *contingent Eſtate is limited to depend on a Freehold capable to ſupport the Remainder, it ſhall never be conſtrued an executory Deviſe.* But this Judgment was reverſed *in Dom. Proc'*, (*b*) *Eaſt.* 1694. *Reeve* and *Long*, *Caſes in B. R. Temp. W.* 3.

(*a*) *Pureſoy* and *Rogers.*

(*b*) 3 *Lev.* 408. S. C. 4 *Mod.* 282.

S. C.——1 *Salk.* 227, S. C. all accordingly.——*Carth.* 309. S. C. held in *B. R.* that the Contingency not happening 'till after the particular Eſtate was determined, the Remainder is deſtroyed as in *Archer*'s Caſe.——*Skin. Rep.* 430. S. C. ſays, that the Judgment in *C. B.* was affirmed *per totam Curiam* of *B. R.* upon the firſt Argument, without any Difficulty; and afterwards it was *reverſed in the Houſe of Peers.*——And by 3 *Lev.* and 1 *Salk.* it appears that all the Judges were very much diſſatisfied with this Opinion of the Lords, and did not change their Opinions thereupon, but blamed Baron *Turton* very much for permitting a ſpecial Verdict to be found, where the Law was ſo clear and certain.——*Comb. Rep.* 252. *Reve* and *Long*, S. C. ſays, the Judgment was reverſed *in Dom. Proc'*, the Lords having more Regard to the Equity of the Caſe than to the ſettled Rules of Law and the Opinions of the Judges.

7. In Caſe of *executory Deviſes there can be no Limitation over. Hil.* 5 *W. & M. in B. R. Goodright* and *Corniſh*, 4 *Mod.* 259.

8. One deviſes all his Lands *after the Death of his Executors* to *A.* and *his Heirs for ever*, but *if he dies leaving no Son*, then to *B.* This is a good *executory* Deviſe to *B.* if *A.* dies without Iſſue, *becauſe the Contingency muſt happen within the Compaſs of a Life*, and ſo no Danger of a Perpetuity. *Per Lord Keeper, Hil.* 1696. *Fairfax* and *Heron*, *Prec. in Chan.* 67.

9. An *executory* Deviſe to ariſe within the Compaſs of a reaſonable Time, is good; twenty, nay thirty Years have been thought a reaſonable Time. So in the Compaſs of a Life or Lives; for let the Lives be never ſo many, there muſt be a Survivor, and ſo it is but a Length of that Life, (for *Twiſden* uſed to ſay, *the Candles were all lighted at once*;) but they (*Cur'*) were not for going one Step farther, becauſe theſe Limitations make the Eſtates unalienable, every *executory Deviſe being a Perpetuity as far as it goes*, viz. *an Eſtate unalienable, tho' all Mankind join in the Conveyance. Per Cur', Trin.* 9 *W.* 3. *C. B.* in the Caſe of *Scattergood* and *Edge* (*c*), *Salk.* 229.

(*c*) *Vide* this Caſe 1 *Vol. Abr. Eq.* 189. *Ca.* 15. but this Opinion does not appear there.

10. In Inheritances there may be *two Sorts of executory Deviſes.* Firſt, when the *Deviſor parts with the whole Fee out of him, and after qualifies the Eſtate of the Deviſee*, and *limits contingent Remainders over*; and this is repugnant to the Rules of the Common Law, to have *one Fee depend upon another.* 1 *Inſt.* 18. By Act of *Party* one Fee cannot depend upon another, tho' it may by Act in Law, as it is often ſeen ſince the Statute of 26 *Hen.* 8. And the firſt of theſe Deviſes that we find is *Wellock* and *Hammond*'s Caſe, cited 3 *Co. Boraſton*'s Caſe.——*Cro. Eliz.* 204. 2 *Leon.* 114. and was *firſt countenanced in favour of Proviſion for younger Children, and of Land deviſeable by Cuſtom. Vide Cro. Eliz.* 532, 525, 360, 497. 2 *And.* 22. *More* 422, 464. *Pell* and *Brown*'s (*d*) Caſe;—*Doderidge* did oppoſe the Opinion of the other three Judges as to the Point of its not being barred by Recovery, and the Opinion in 1 *Roll. Rep.* 835, 836. and *Sty.* 274. went down with the Judges like chopped Hay; but ſince it has been ſo often paſſed over it muſt not be queſtioned now, becauſe the Eſtates of many depend upon it. The ſecond Sort is when the Deviſor does not part with the whole out of himſelf, but gives future Eſtates to riſe upon Contingencies, and leaves the Inheritance to deſcend in the mean Time; and this is not diſagreeable to the Common Law; as in Caſe of Deviſe, that *Executor ſhall* ſell Land, where the Lands deſcend in the mean Time; and when the Executor doth ſell it, *Vendee is in from the firſt Teſtator*, and *in* Pleading muſt claim under him;

(*d*) *Cro. Jac.* 590, 592. *Mich.* 18 *Jac. B. R. Bridgman* 1. S. C. under the Name of *Petts* and *Brown.*

and by ſelling, the Freehold and Inheritance is, by Act in Law, deveſted out of the Heir or Lord by Eſcheat; even out of the King, if he were Lord by Eſcheat, without Petition, or * *Monſtrans de Droit. Per Powell*, J. *Eaſt.* 11 *Wil.* 3. 1699. in the Caſe of *Scattergood* and *Edge* (*a*), *Caſes in B. R. Temp. W.* 3. 281.

* *Vide* 29 *Ed.* 3. 16.

(*a*) 1 *Salk.* 229, 230, S. C. ſtates the *Dictum* of *Powell*, J. thus:—There are *three Sorts of executory Eſtates*, one where the *Deviſor parts with his whole Fee Simple*, but *upon ſome Contingency qualifies that Diſpoſition, and limits another Fee upon that Contingency*, which is *altogether new in Law*, as appears by 1 *Inſt.* 18. *a Fee cannot be limited upon a Fee.*——The ſecond Sort is, where *he gives a future Eſtate to ariſe upon a Contingency, and does not part with the Fee at preſent*, but retains it, *theſe are not againſt the 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.*——A third Sort of *executory* Deviſes is *of Terms*, which are well ſettled in *Manning*'s *(a)* Caſe, and it is dangerous to extend the Boundary of *theſe* executory Deviſes, which at preſent is a Life or Lives. *Per Powell*, J. *Ibid.* *(a) Vide Caſes in B. R. Temp. W.* 3. 281, 282. S. C. cited.

Vin. Abr. Tit. *Deviſe*, (L. 2.) *Ca.* 32. S. C. *in totidem verbis.*

11. *J. S.* being *Tenant for Life*, with *Remainder to his Wife for Life*, Remainder *to his own right Heirs*, 20 *Oct.* 1683 made his Will thus, *viz.* "Item, *my Land at* W. *my Wife* Mary *is to enjoy for her* "*Life, after her Death it of Right goes to my Daughter* Elizabeth "*for ever, provided ſhe has Heirs*, but if *my ſaid Daughter dies before* "*her Mother or without Heirs, and my ſaid Wife* Mary *ſhall marry* "*again, and ſhould have Heirs Male, I bequeath all my ſaid Right* "*in* W. &c. *to her Heirs Male by her ſecond Huſband*, thinking I "can never ſufficiently reward her Love. *Provided if my ſaid Wife* "*ſhould marry again, and fail of Heirs Males, and my Daughter* "*ſhould fail of Heirs, then I deviſe* 50 l. *Annuity out of* W. &c. *to* "*my Brother* D. S." *And deviſed ſeveral other Annuities charged on the Lands to ſeveral Perſons, who were his Heirs at Law.* But he made no Deviſe of the Land to any one. The *Wife married a ſecond Huſband, and had Iſſue Male, but died before* Elizabeth *the Daughter*, who died without Heirs. In Ejectment the Leſſors of the Plaintiff were Heirs at Law, and the Defendant was the Heir Male of the Wife by the ſecond Huſband. On the Trial a Caſe was made for the Opinion of the Court. Firſt Objection was, that the firſt Clauſe was a Deviſe to the Daughter in Fee, but yet that was afterwards controuled and qualified by ſubſequent Words, and it was intended to be to her and the Heirs of her Body only. *Per Cur'*, The Perſon to whom the Deviſe over is, *i. e. Heirs Male of the Body of the Wife by a ſecond Huſband*, he is *a Stranger*, and where the *Deviſe over is to a Stranger*, that will not alter the Conſtruction of the Will from what it would have been without it; ſo that *it will continue a Deviſe to* E. *in Fee-ſimple.* So is (*b*) 2 *Cro.* 415. and it is Law now, and not to be drawn in Queſtion, tho' it was once diſputed. A *Deviſe to a Stranger will not alter a poſitive Deviſe to a Perſon and his Heirs.*— But when this Deviſe is *over* of a *Rent Charge*, or Annuities charged on the Land to the Heirs at Law, and ſhews what was meant by Heirs in the firſt Place, then it will be a *Deviſe to* Elizabeth *and the Heirs of her Body*, Remainder *to the Heirs Males of the Body of the Wife*, with a Deviſe over to theſe Annuitants, and there is *no Difference whether the Deviſe over be of the Lands* or *of an Annuity charged on them*, becauſe in the laſt Place he could never intend the Lands themſelves ſhould paſs to the Perſons to whom he had given the Annuities. Secondly, *per Cur'*, the firſt Clauſe is *not* a Deviſe to the Wife or to *Elizabeth*, for they were ſettled upon her for Life; and what is ſaid as to the Daughter is only a Declaration of the Deviſor what the Eſtate and Condition of the Eſtate was, and how ſhe was to enjoy it; and he could not ſay of Right (*we*) who was to enjoy them, if ſhe claimed under

(*b*) *Hil.* 14 *Jac. B. R. Webb* and *Herring.*

(*we*) in the Original.

under the Will. The Conſequence of this is, that the *Lands deſcended to* Elizabeth *as Heir at Law*, and *the Deviſe to the Heirs Males of the Wife by a ſecond Huſband will be contingent.* Firſt, Whether *Elizabeth* ſhould die in the Life-time of the Wife, which muſt happen within the Compaſs of a Life; *next Contingency*, if the Wife ſhould marry, *&c.* and have Heirs of her Body by a ſecond Huſband.—— But tho' as in *Lloyd* and *Cary*'s Caſe, ſhe might have Heirs after his Death, and not within the Compaſs of a Life, yet ſo near as there could be no Inconvenience if it ſhould take Effect (*as*) an *executory* Deviſe in ſuch a Caſe. But this is not ſo *here*; for if the Words are taken *disjunctively*, (*if my Daughter dies in the Life-time of her Mother*, or *without Heirs*) the Contingency never happened, becauſe the Daughter ſurvived the Mother; ſo the Deviſe could never take Effect, but will be void;—if taken *copulatively*, and (*or*) taken for (*and*) here it will be hard to turn Words out of the natural Senſe and Import, unleſs there be a plain Intimation of the Intent of the Deviſor ſo to do. How doth the Deviſor intend it *copulatively?* What Occaſion is there for it? For if the Daughter ſurvived the Mother, he might intend it for her in Fee; why ſhould it be taken, if my *Daughter* dies without Heirs in the Life-time of *Eliz.* (*a*)? Thirdly, But if it were ſo, the Deviſe over cannot take Effect, *becauſe the Contingency never happened.* Fourthly, But the Death of the Daughter without Heirs is too remote, and the Deviſe *over is void.* The Deviſe *of the Annuities is to take Effect in Nature of a Remainder*, and if the firſt cannot take Effect, all that comes after cannot take Place, it being not to take Effect but as a Remainder, and then not at all. Next, If the Wife ſhould marry again and have a Son, and ſhould die without Heirs Males, this is alſo *too remote*, and ſo the *Deviſe over is void*, becauſe *to commence upon a Contingency too remote*; and if it cannot be good by way of *executory* Deviſe, then it muſt be by way of *Remainder.* And it *cannot be good as a Remainder*, becauſe *there is no particular Eſtate to ſupport it to any one*; for there was no particular Eſtate at all, what went before being only a Declaration of what did belong to the Daughter; and as this *contingent Remainder had no particular Eſtate antecedent to it*, *it* is void. Not good as an *executory* Deviſe, becauſe the Contingency never happened; or if it did happen, it was *too* remote, and ſo void, and therefore the Heirs at Law have a good Title. Fifthly, If the Son of the Wife by the ſecond Huſband could take, he would take a Fee-ſimple, ſo that the Teſtator was miſtaken in the Law; for he thought he had deviſed to him but an Eſtate-tail. Judgment for the Plaintiff, *Eaſt.* 7 *Geo.* 1. *B. R. Wright* and *Hammond*, *MS. Rep.*

(*as*) not in the Original.

(*a*) *Eliz.* in the Original.

12. *William Gore* had ſeveral Sons, *Thomas*, *Edward*, *&c.* and ſeveral Daughters, and being ſeiſed in Fee deviſed *his Lands to Truſtees for five hundred Years*, in Truſt to pay 50 *l. per Annum* to his eldeſt Son *Thomas* for Life, with Power of Diſtreſs, and on ſeveral other Truſts, and after the Determination of that Term *to the firſt Son of his* eldeſt *Son* Thomas (then a Batchelor) *to be begotten in Tail Male*, and *ſo to every other Son of the Body of* Thomas *to be begotten in Tail Male ſucceſſively*; Remainder *to the Teſtator's ſecond Son* Edward *for Life*, Remainder *to the firſt*, &c. *Son in Tail Male ſucceſſively*, with divers Remainders over. The Teſtator died leaving *Thomas* then a Batchelor, who afterwards married and had a Son. The Cauſe came on before *Macclesfield*, C. who directing it to be referred to the Judges of *B. R.* for their Opinion, the firſt Queſtion was, whether the Deviſe to the firſt Son of *Thomas* was good? Secondly, in whom the

Freehold

Freehold of the Premiſſes did veſt at the Death of the Teſtator? And *Pratt*, C. J. *Powis*, *Eyre* and *Forteſcue A.* Juſtices, certified their Opinions, "That the Deviſe to the eldeſt Son of *Thomas* was void; that it "could not be good as a Remainder, for want of a Freehold to ſup- "port it; and that it could not take Effect as an *executory* Deviſe, "becauſe it was too remote, (*viz.*) after five hundred Years; and that "the Freehold of the Premiſſes veſted in *Edward* the ſecond Son."— But Lord *Macclesfield* expreſſed ſome Diſſatisfaction at this Opinion, ſaying, that tho' the Law might be ſo, yet the Term of five hundred Years *being but a Truſt Term*, and *to be conſidered in Equity as a Security only for Money*, was not to be ſo far regarded (at leaſt in Equity) as to make the Deviſe over void. After which, *Thomas* and his Brother *Edward* came to an Agreement, which was confirmed by the Court. Afterwards, on *Thomas*'s Death, his Son bringing this Matter over again in Chancery, *King*, C. ſent it a ſecond Time to the Court of *King's Bench*, and Lord *Hardwicke*, C. J. *Page*, *Probyn* and *Lee*, Juſtices, certified their Opinions againſt the Opinions of their Predeceſſors, (*viz.*) "That this was a good executory Deviſe, and not too remote, for that "it muſt in all Events one Way or other happen upon the Death of "*Thomas Gore*, whether he ſhould have a Son or not, and either upon "the Birth of the Son, or upon his Death without Iſſue Male, the "Freehold muſt veſt."——Lord *Raymond* was of this laſt Opinion. *Trin.* 1722. (*Edward*) *Gore* and *Gore* (*a*), 2 *Will. Rep.* 28 to 65.

(*a*) 2 *Mod. Ca. in Law and Eq. Trin.* 1722. S. C. but not ſo fully reported as in *P. Williams's Rep.*——*Vide Vin. Abr.* Tit. *Deviſe*, *P.* 370, where Mr. *Viner* by way of Note to Ca. 14, ſays, that afterwards *Edward dying without Iſſue*, D. *a next Remainder Man* brought this Matter yet once more into Chancery in Lord *Talbot*'s Time, whereupon his *Lordſhip* referred it again to the Judges of *B. R.* who certified, "*That they thought the Remainder good*, "*and that an Interim Eſtate* 'till the Birth of the Son of *Thomas*, (who is ſince born) *deſcended to* B. and ſo "the contingent Remainder ſupported."—The two Certificates above-mentioned in *P. Williams*, were in the Words following:—"We have heard Counſel on both Sides on the Queſtion above ſpecified, and having con- "ſidered the ſame, We are of Opinion, that the Deviſe of the Manors above-mentioned to the firſt Son of "*Thomas Gore* is void, becauſe he cannot take by way of Remainder, for that there is no Freehold to ſup- "port it; nor can he take by way of executory Deviſe, becauſe it is not to take Place within that Compaſs "of Time which the Law allows; and We are alſo of Opinion, that the Freehold of the ſame Manors on "the Death of the Deviſor veſted in *Edward* the ſecond Son.

——1722.

John Pratt,
Littleton Powis,
R. Eyre,
J. Forteſcue Aland.

"Upon hearing Counſel on both Sides, and Conſideration of this Caſe, We are of Opinion, that the De- "viſe of the Manors of *B.* and *S.* to the firſt Son of *Thomas Gore*, is good by way of executory Deviſe; "and that the Freehold of the ſaid Manors veſted in his Heir at Law.

Jan. 26, 1733.

Hardwicke,
F. Page,
E. Probyn,
W. Lee.

13. *A. deviſed a Term for Years to his Wife for Life*, Remainder *to his Son* and *Daughter*. This is an *executory* Deviſe. *Vide* 11 *Geo.* 1. *Theobalds* and *Duffoy*, 2 *Mod. Caſes in Law and Eq.* 101.

14. *A.* ſeiſed in Fee, and *having three Sons*, G. E. *and* R. *deviſed* Blackacre *to* G. his eldeſt Son, and *to his Heirs*, and Whiteacre *to* E. his ſecond Son, *and his Heirs*, and a *Rent-charge of* 50 l. per Annum *iſſuing out of* Whiteacre *to* R. *and his Heirs*; proviſo, that *if either of his Sons ſhould die without Iſſue, the other two living, ſo as his Eſtate in Lands ſhould come to the other two Sons*, then the Rent ſhould ceaſe. *G.* died, leaving Iſſue the Defendant, and *R.* died *ſans* Iſſue; ſo that this Contingency could never happen, becauſe *G.* had Iſſue, and he being dead, and *R.* alſo without Iſſue, *their Eſtate in Lands could never come to two*, where *E.* alone was *ſurviving*; *ergo* the Rent-charge muſt deſcend to Defendant *as Heir at Law*, being the Son of *G.* the eldeſt Son of the Teſtator; for this is an *executory* Deviſe to two on the Con-

tingency of one dying in the *Life-time of the other two*, which *Contingency muſt ariſe within the Compaſs of one Life*, otherwiſe *it is void*; for it is plain that the Teſtator intended this Benefit of Survivorſhip during his Sons Lives only. The Court being of that Opinion, Judgment for Defendant. *Hil.* 11 *Geo.* 1. *Parſons* and *Peacock*, 1 *Mod. Caſes in Law and Eq.* 347.

15. Deviſe of a *perſonal* Eſtate to A. *the Wife of* J. S. *for Life*, and *after her Death the Yearly Intereſt and Produce thereof to be for the Maintenance and Education of ſuch Children as ſhe ſhould have by the ſaid* J. S. *until the Sons ſhould be twenty-one and the Daughters eighteen, at which reſpective Ages their reſpective Portions were to be paid them*; and *for want of ſuch Iſſue* then to *B.*—*A.* died without Iſſue. *King*, C. held that the Words (*for want of ſuch Iſſue*) muſt be intended (*for want of ſuch Children*); and whether *A.* ſhall leave ſuch Children will be known at her Death; if *ſhe* ſhould leave Children, then they are to have the Proceed and Produce of the Eſtate for their Maintenance until they come to Age, before which Time they cannot diſpoſe of it by reaſon of their Infancy, if they had the abſolute Intereſt therein; but as ſoon as they come to the ſaid Age they are to have the intire Property, and *therefore* this a very good *executory* Deviſe. *Trin.* 1727. *Maddox* and *Stains* (*a*), 2 *Will. Rep.* 421.

(*a*) *Gibb.* 318, 319. S. C. cited as decreed at the *Rolls* and *affirmed* by Lord Chancellor, and *both* Decrees *affirmed* in *Dom. Proc.*—*Vide* the Caſe of *Maſinburgh* and *Aſh*, 1 *Vern.* 234, 257, 304. and 2 *Chan. Rep.* 8vo. 275. where the like *executory* Deviſe *of a Term for Years* was decreed to be good by *North*, L. K. by Advice of all the Judges of *C. B. viz. Jones*, C. J. *Levinz*, *Charlton* and *Street*, Juſtices, who certified the ſame under their Hands the 17th of *Feb.* 1684.

16. *A.* deviſed Lands to *B.* and *his Heirs for ever*, *upon Condition to pay all the Teſtator's Debts*, *Legacies* and *Funerals*, and *if he do not pay them*, then *he deviſed the Premiſſes* to the *Defendant and her Heirs for ever*, and gave the *Reſidue of his Eſtate real and perſonal to Defendant and her Heirs.* (*B. died before the Deviſor*, ſo it was a *lapſed* Legacy), and one Queſtion was, whether this was an *executory Deviſe to Defendant*? And *per Eyre*, C. J. and *tot' Cur'*, this *cannot be an executory Deviſe* to Defendant, unleſs it were an original Deviſe. Here is no *firſt Deviſee*, for he is dead, and that Deviſe is void. *Eaſt.* 2 *Geo.* 2. *Roe* and *Fludd*, *Forteſc. Rep.* 184, 185.

17. *J. S.* (having the Reverſion in Fee of Lands, ſettled upon the Marriage of *B.* his Son in the uſual Manner) deviſed *all his Lands* in that Settlement, *on Failure of Iſſue of the Body of* B. and *for want of Heirs Male of his own Body*, *to his Daughter* C. and the Heirs of her Body. This does not give an Eſtate-tail by Implication to *B.* The Deviſe to *C.* is *executory* and is *void*, as being on *too remote a Contingency*. *Eaſt.* 1733. *Lanesborough* and *Fox*, *Caſes in Eq. Temp. Talbot* 262.

18. A Conſtruction in favour of *executory* Deviſes to ſupport the Intent of the Teſtator, will be made either in the Courts of *Law* or *Equity*, if it may be done *conſiſtently with the Rules of Law*. *Mich.* 1734. *Hopkins* and *Hopkins*, *Caſes in Eq. Temp. Talbot* 44.

19. *A.* deviſes his *Freehold*, *Copyhold* and *Leaſehold*, and *all his real* and *perſonal Eſtate*, not before deviſed, *to three Truſtees*, *their Heirs*, In Truſt *to pay* B. *his Son an Annuity*; and *if he ſhould have any Child*, or *Children*, *the Reſidue of his Rents*, *during* B.'s *Life*, *for the Education and Benefit of ſuch Child or Children*, and after *B.'s Deceaſe a Moiety of the Truſt Eſtate to ſuch Child or Children as he ſhould leave*, *their Heirs*, &c. *the other Moiety to his Grandſon* C. *every other Child*

or Children of his Daughter D. *their Heirs*, &c. *and if* B. *die without Iſſue, the firſt Moiety to* C. *and other Child or Children of* D. *and their Heirs*, &c. and directs an annual Payment to ſuch Wife as *B.* ſhall marry. *A.* died. *B.* married and had Iſſue a Son and a Daughter, and died; afterwards *C.* married and had Iſſue a Daughter, and died. The *Limitation to the Daughter of* C. *is well ſupported by the Eſtates in the Truſtees*; or *if not, is good as an executory Deviſe*; and the Profits ſhall go to the Children of *B. Mich.* 1735. *Chapman* and *Bliſſet*, *Caſes in Eq. Temp. Talbot* 145.

20. An *executory* Deviſe of an Eſtate of Inheritance *to a Grandſon unborn when he ſhall attain the Age of twenty-one Years*, is good, and there is no Danger *of a Perpetuity*. *Mich.* 1736. *Stephens* and *Stephens*, *Caſes in Eq. Temp. Talbot* 228.

21. Teſtator deviſed *to* A. *and his Heirs, and if he die before twenty-one, then to* B. *and his Heirs.* A. *died before twenty-one*, but B. *died before him.* The Queſtion was, whether *B.*'s Heirs ſhould take? And the Court held clearly, that tho' *B.* died in the Life of *A.* yet his Heirs might well take under the *executory* Deviſe, for that ſuch a Deviſe is not to be conſidered as a *mere Poſſibility*, but as an *Intereſt veſted* (tho' not in Poſſeſſion) in the ſame Manner as a *contingent Remainder*, and conſequently is *tranſmiſſable*. Adjudged upon a Caſe made at the Aſſizes, and reſerved for the Opinion of the Court. *Trin.* 13 & 14 *Geo.* 2. *Gurnel* and *Wood* (*a*), *Vin. Abr.* Tit. *Deviſe*, (L. 2.) *Ca.* 38.

(*a*) In this Caſe the Chief Juſtice cited the Caſe of *King* and *Withers*, 11 *July* 1735, where *a contingent Deviſe of a perſonal Eſtate* was held to be not a *Poſſibility* only, but an *Intereſt veſted* and *tranſmiſſable*, *per* Lord *Talbot*, and the Decree *affirmed*, after long Hearing, *in Dom. Proc'*, 15 *March* 1735. *Ibid.*

(L) Of Deviſes by Implication.

1. *A.* HAD three Sons, *B. C.* and *D.* and deviſes *Lands to* C. *and* D. and *if* C. *dies without Heirs* D. *ſhall have his Part*, and *if* D. *dies without Heirs*, B. *ſhall have it.* The Queſtion was, what Eſtate *D.* had in this Moiety? For it was agreed that *C.* had an Eſtate-tail by *Implication* by Force of the Words *ſubſequent* to the Deviſe, *i. e. and if* C. *die without*, &c. *Nudigate* argued, that if the Teſtator had gone no farther but only ſaid, *I deviſe theſe Lands to* C. *and* D. neither of them had had but an Eſtate for Life; and then when the Teſtator by ſubſequent Words enlarges the Eſtate of one of them, and reſtrains it to the Part of one of them, (by ſaying *B. ſhall have it*) this Word *it* ſhall relate only to *C.*'s Part that was before deviſed to *D.* if *C.* dies without Heirs. And the Court inclined to this Opinion, that *D.* had but an Eſtate for Life in his Moieties, becauſe *Implications that carry Eſtates ought to be plain and ſtrong*, and ſo gave Judgment *Niſi. Eaſt.* 1673. *Allen* and *Spendlove*, 1 *Freem. Rep.* 85.

Vide P. Ca.

2. Where an *Eſtate is created by Implication*, it muſt be a *neceſſary Implication*, (*b*) as a *Deviſe to the Heir after the Death of the Wife*, the Wife takes an Eſtate for Life by *Implication*, becauſe it is plain his Intent was, that the Heir ſhould not have it 'till after her Death. *Per Lord Keep. Trin.* 1703. 2 *Freem. Rep.* 270.

(*b*) It has been ſettled by many Authorities in the Books, *viz.* the 13 *Hen.* 7. 17.—*T. Jones's Rep.* 98.—2 *Lev.* 207.—1 *Vent.* 203.—*Vaugh Rep.* 259. *(Gardiner* and *Shelden)* that *nothing leſs than a neceſſary Implication* could intitle the Wife to an Eſtate for Life, and the known *Diverſity* is, where *I deviſe Lands to my Heir* after *the Death of my Wife*, this is a Deviſe by Implication to her for Life; but if I deviſe Lands to my ſecond or third Son *after the Death of my Wife*, this is no Deviſe by *Implication* to her, but the Lands during her Life ſhall deſcend to the eldeſt Son as *Heir*. *Trin.* 1718. Said *arg'* in the Caſe of *Willis* and *Lucas*, 1 *Will. Rep.* 473. *Vide Ca.* 5. *P.* 343.

3. An *Implication* in a Deviſe to *diſinherit the Heir*, muſt even at Law *be a neceſſary Implication*; cited *arg*' and agreed to by *Lord Chancellor in Caſu Boutell* and *Mohum Tilden et al'*, *Eaſt.* 1714, *Prec. in Chan.* 481, 484. *Gilb. Eq. Rep.* 41. S. C. *accord*'.

4. Where an Entail is created by *Implication*, it is *ever in favour of the Heir at Law*; to whom no Eſtate being given by the Will, ſo as to enable him to take by Purchaſe, and there being a Neceſſity, if he takes at all, of his taking by Deſcent, therefore to ſupport the Intention of the Teſtator that the Heir ſhould take, the Law creates by Implication an Eſtate-tail in the Anceſtor, to veſt it in the Iſſue by Deſcent. *Per Parker*, C. *Eaſt.* 4 *Geo.* 1. in the Caſe of *Target* and *Grant*, *Lucas's Rep.* 403.———But where there is a Proviſion how it ſhall go to the Iſſue, this Reaſon entirely ceaſes. (*a*) *Per* Lord *Parker*. *Ibid.* (*a*) As in the Caſe of *Target* and *Grant*, 1 *Vol. Abr. Eq.* 193. *Ca.* 11.

5. *A.* had three Sons, *B. C.* and *D.* and being ſeiſed in Fee of Lands, Part whereof was *Gravelkind*, deviſed *it to* D. *his youngeſt Son* (*Defendant's Huſband*) *for his Life, he or his Heirs paying out of the Rents*, &c. 10 l. *a Year to* B. *for his Life*, and *alſo* 10 l. *a Year to* C. and *alſo* 10 l. *a Year to the Teſtator's Daughter* M. *for her Life*, and alſo paying his Legacies; and *that after the Death of ſaid* D. *and Defendant* M. *his Wife*, then *the Son or Sons of the ſaid* D. *ſhould have all the ſaid Premiſſes, equally between them, they or their Brothers paying the Legacies*; and *if no ſuch Sons, then the Daughter or Daughters of* D. *to have the Premiſſes equally amongſt them, paying*, &c. The Teſtator died, then *C.* died leaving Iſſue, then *B.* the eldeſt Son died leaving Iſſue a Daughter, after which *D.* died leaving Defendant his Widow and three Infant Children; whereupon the Daughter and Heir of *B.* brought an Ejectment for the Recovery of the Premiſſes againſt *D.*'s Widow, who giving in Evidence *an old ſubſiſting Term* of the Premiſſes, *B.*'s Daughter preferred her Bill againſt Defendant for an Account of the Rents, *&c.* and to ſet aſide the *old Term*, *&c.* The only Queſtion was, whether the Defendant had an Eſtate for Life *by Implication*, the Premiſſes being deviſed to *D. for Life*, and *after the Death of him and Defendant his Wife*, then to the Sons of *D?* Or whether, during the Life of the Wife of *D.* the Premiſſes ſhould deſcend to the Plaintiff as Heir at Law of the Teſtator, as an Eſtate undiſpoſed of by the Will during the Life of *D.*'s Wife? *King*, C. was ſtrongly inclined for Defendant *D.*'s Widow, that ſhe took an Eſtate for Life by *Implication*. However, it *being Matter of Law*, and an ill-penned Will, the Court ordered that a *Caſe ſhould be made of it*, and *that it ſhould be referred to the Judges of* B. R. *Trin.* 1718. *Willis* and *Lucas*, 1 *Will. Rep.* 472, 476. *Lucas's Rep.* 416. *Trin.* 4 *Geo.* 1. S. C. and P. ſays, Lord Chancellor was of Opinion the Wife ought to have an Eſtate for Life *by Implication*, the *Heir at Law being excluded by the Annuity*; but this *being Matter triable at Law*, he *directed an Iſſue accordingly*; where the Wife was ordered to *inſiſt only on her Title at Law*. *Ibid.* 418. *MS. Rep.* S. C. and P. decreed *accord*.

6. "*It is my Will, that if* W. *my Son ſhall happen to die, and* "*leave no Iſſue of his Body lawfully begotten, that then, in that Caſe,* "*and not otherwiſe, after the Death of the ſaid* W. *my Son*, I *give* "*and bequeath all my Lands of Inheritance in* L. *unto* R. *my Son, to* "*have and to hold the ſame after the Death of the ſaid* W. *to him and* "*his Heirs.*" *Price*, B. gave his Opinion, that *W.* took an Eſtate-tail by this Will; for the *Words ſhall not be conſtrued to give an Eſtate by*

by Way of executory Deviſe, but *where the Deviſee cannot take any other Way.* But here *W.* took by the Will; for it is a neceſſary Implication that he ſhall have it to him and the Heirs of his Body, for the *Heir ſhall take by the Will tho' he is not expreſly named*, or *there be no Deviſe to him by expreſs Words.* It was *adjudged W.* took an Eſtate-tail. *Trin.* 9 *Geo.* 1. *Walter* and *Drew et al'*, *Comyns's Rep.* 372, 375.

(M) Deviſes; who ſhall take by Survivorſhip. (*a*)

(*a*) *Vide Davers et al'*, and *Folkes et al'*, and *Helmes* and *D'Avers*, *P. Ca.*

1. A. HAVING three Daughters, *deviſed to them* 300 l. *apiece, payable at twenty-one or Marriage, which ſhould firſt happen*, and *if either ſhould die before twenty-one or Marriage*, then *her Portion to be equally divided between the Survivors.* The eldeſt marries and hath her Portion, and dies, leaving Iſſue; the youngeſt dies before twenty-one and unmarried. The *ſurviving Siſter ſhall have the whole*, *per Ellis*, *Windham* and *Lord Chancellor*; and tho' it was objected that the Words *equally to be divided*, did *imply that they ſhould be Sharers*, yet that is to be underſtood *reddendo ſingula ſingulis*, in Caſe two of them had ſurvived. *Mich.* 1673. *Anon.* 1 *Freem. Rep.* 301, 302. *Ca.* 365.

2. *J. S. bequeaths to* A. 500 l. *to* B. 500 l. and *ſo gives* 500 l. *apiece to five others*, and *if any die, then her Legacy*, and *alſo the Reſidue of his perſonal Eſtate, to go to ſuch of them as ſhall be then living*, equally to be divided betwixt them all. *Per Cur'*, the Words "*ſhall go to* "*ſuch of them as ſhall be then living*," muſt refer to a certain Time, and that is *when the Legacies become payable*, which *is at the Death of the Teſtator*; (*b*) ſo that the Death of any of the Legatees after would not carry it to the Survivors. *Mich.* 1687. *Trotter* and *Williams*, *Prec. in Chan.* 78.

(*b*) If *a Time of Payment had been limited*, that might have made it have another Conſtruction than now it will. *Per Rawlinſon*, who cites the Caſe of *Clerk* and *Bridges*.

3. *J. S. deviſes the* Surplus *of his perſonal Eſtate unto four Perſons, equally to be divided between them*, Share and Share alike, and made *B.* his *Executor in Truſt.* One of the four *died in the Life-time of the Teſtator*, and then the Teſtator died; and the Queſtion being to whom the *fourth Part*, deviſed to ſuch deceaſed reſiduary Legatee, ſhould belong? *Macclesfield*, C. after Time taken to conſider of it, delivered his Opinion, That the Teſtator having deviſed his *Reſiduum* in Fourths, and one of the reſiduary Legatees dying in his Life-time, the Deviſe of that fourth Part became void, and was as ſo much of the Teſtator's Eſtate (*c*) undiſpoſed of by the Will; and that it could not go to the ſurviving reſiduary Legatees, becauſe *each of them had but a Fourth deviſed to them in Common*, and the Death of the fourth Legatee could not avail them, as *it would have done had they been all joint Legatees*; for then the Share of the Legatee dying in the Life of the Teſtator *would have gone to the Survivors* (*d*). But here the *Reſiduum* being deviſed *in Common*, it was the ſame as if a Fourth had been deviſed to each of the four, which could not be increaſed by the Death of any of them.——This Share cannot go to the *Executor*, *he being but a bare Executor in Truſt*; and conſequently it muſt belong to the Teſtator's next of Kin, according to the Statute, as ſo much of the perſonal

(*c*) *Vide* the Caſe of *Lord Bindon* and *Earl of Suffolk*, *P. Ca.*

(*d*) *Shaw.* 91. *Salk.* 238.

Vide Page and *Page*, *P. Ca.* the ſame Determination.

perſonal Eſtate remaining undiſpoſed of by the Will; and that as to this the Executor was a Truſtee for ſuch next of Kin. *Trin.* 1721. *Barkwell* and *Dry*, (*a*) *MS. Rep.*

(*a*) 1 *Will. Rep.* 700.

S. C. *ſi dem verbis.*——*Prec. in Chan.* 567. S. C. cited *Trin.* 1721. (as the Caſe of *Barkwell* and *Dry*) thus: One deviſed his real and perſonal Eſtate to his four Daughters and their Heirs, Executors and Adminiſtrators; one of the Daughters died; and the Queſtion was, who ſhould have her Share? And it was decreed to go in the ſame Manner as a real Eſtate, to the ſurviving Daughters.——But in 1 *Will. Rep.* 701. (in a Note) it is ſaid, that the Report of this Caſe in *Prec. in Chan.* is *not* warranted by the Regiſter's Book.

4. *No Words are to be rejected which may be reduced to bear any legal Conſtruction*; it is true, *if any Words are contrary to Law*, or *inſenſible*, thoſe muſt be rejected, as where *a Deviſe of Land is to two*, or *the Survivor* and *Survivors of them*, there the Word (*Survivors*) ſhall be rejected, there being *two* and no more to take. *Per Cur'. Trin.* 11 *Geo.* 1. *in Caſu Barker* and *Eyles* and *Smith*, 2 *Mod. Caſes in Law and Eq.* 159.

5. I *deviſe* 100 l. per Annum *to my Son* A. and *his Wife, for their reſpective Lives*; 60 l. *whereof to be paid to the Wife for the Support of herſelf and her Daughter, the remaining* 40 l. *to my Son.* The Son dies; his Wife ſhall have the whole 100 *l. per Annum. Hil.* 1731, 3 *Will. Rep.* 121.

(N) Deviſe of perſonal and real Eſtate, with Remainder, &c.

1. THE Huſband deviſed his *Goods to his Wife for Life*, and *after her Deceaſe to* T. S. who ſued in the Court of Equity of the *Marchers* in *Wales* to ſecure his Intereſt in Remainder; but a Prohibition was granted, becauſe a *Deviſe of the Goods themſelves*, with *a Remainder over, is void*; but not where *the Uſe and Occupation of of them is firſt deviſed. Trin.* 17 *Car. C. B. Anon. March's Rep.* 106. *Sed Vide P. Ca.*

2. *J. S. deviſed* 500 l. *to his Daughter*, and *if ſhe died before thirty Years of Age unmarried*, then *to be divided between three.* She *receives the Money*, and *dies before that Time.* And *reſolved*, that the Money ſhould be *divided*, and her Executor chargeable, as poſſeſſed *in Truſt for the Deviſees in Remainder.* 27 *Oct.* 1672. *Anon.* 2 *Freem. Rep.* 137. *Ca.* 172.

3. A Deviſe *of Goods to* A. *for Life*, with Remainder *after* A.'s *Deceaſe, to* B. It is now *clearly* ſettled, that *it is a good Deviſe to* B. and that *B.* may exhibit a Bill againſt *A.* to compel him to give Security that the Goods ſhall be forth-coming at his Deceaſe; and *it is all one whether the Goods*, or *the Uſe of the Goods, be deviſed for Life. Mich.* 1695. *Anon.* 2 *Freem. Rep.* 206. *Ca.* 280. *Prec. in Chan.* 323. *Hil.* 1711. Mr. *Vernon* in the Caſe of *Gibbs* and *Barnardiſton, in Chan.* ſaid, the Reaſon that a Deviſe over of *ſuch perſonal Eſtate* upon a Life *barely* was good, was, becauſe in Conſtruction of this Court the *firſt Deviſee* had but *the Uſe of it*, and not the *entire* Property. But in the ſaid Caſe of *Gibbs* and *Barnardiſton*, it was held *clearly* and *decreed*, that a *Deviſe of a perſonal Eſtate to one* and *his Iſſue*, or *to one, and if he die without Iſſue*, (*b*) Remainder *over to another*; the Remainder over is void; and the whole Intereſt veſted in the firſt Deviſee. *Ibid.*——*Gilb. Eq. Rep.* 79. S. C. (*b*) *Vide P. Ca.*

4. Deviſe of a *perſonal Eſtate for Life*, with Remainder *over*, is good. *Vide* the Caſe of *Cowper* and *Williams*, *Eaſt.* 1697. *P. Ca.*

5. A *perſonal* Eſtate was *deviſed to* A. and *in Caſe ſhe died without Iſſue*, then *to* B. Reſolved, that the *Deviſe over to* B. *is void*; and the whole decreed to *A. Eaſt.* 1705. *Anon.* 2 *Freem. Rep.* 287. *Ca.* 357.

6. *J. S. deviſed to* A. and *if he die without Iſſue* then living to *B.* Lord Chancellor decreed this to be a good Remainder; for the Words *then living* relate to the Time of his Death. *Weake*'s Caſe, *Trin.* 8 *Anne.*

7. *J. S. deviſed that all his Money in the Government Funds ſhould be laid out in the Purchaſe of Lands of* 3 *or* 400 l. per Annum, and *ſettled on* A. *his eldeſt Son*, and *the Heirs Male of his Body*, Remainder *to* C. *his ſecond Son*, and *the Heirs Male of his Body*, &c. and *bequeathed the reſt* (*a*) *of his perſonal Eſtate to the ſaid* A. *and the Heirs Male of his Body*; Remainder *over in the ſame Manner.* *Per Cowper*, C. it is *clear* the *perſonal Eſtate cannot be intailed* (*a*); but the *whole Property thereof veſts in A.* the eldeſt Son. Bill diſmiſſed. *Mich.* 1715. *Seale* and *Seale* (*b*), 1 *Will. Rep.* 290.

(*a*) *Prec. in Chan.* 421. *Mich.* 1715. S. C. the *Deviſes over* were agreed by *Counſel* on *both* Sides to be void, and that the whole veſted in *A. Ibid.* 422.

(*b*) *Vide P. Ca.*

8. *Money* limited *after a dying without Iſſue generally*, is void; *ſecus* if *it be after a dying without Iſſue* then *living*. *Trin.* 2 & 3 *Geo.* 2. *Green* and *Rod*, *Fitz-Gibb. Rep.* 68.

9. *A.* deviſes *to H.* his Wife, *all his Debts*, *Goods*, *&c.* provided *that if* H. *died without Iſſue by him*, he appointed *that* 80 l. *ſhould remain to his Brother* J.——*A.* dies, then *J. dies in the Life-time of* H. *and then* H. dies *without Iſſue by* A. Firſt Queſtion, Whether this was a good Deviſe to *J.* Secondly, Whether he dying before the Contingency happened, it was ſo veſted in him that his Executor ſhould have it, or only intended as a perſonal Benefit to *J.* *Cowper*, C. ſaid, There is a *Difference between this Deviſe*, which *is upon a Condition precedent*, and where it is *upon a Contingency over*, as *to one for Life, and if he die without Iſſue*, or *Heirs of his Body*, then *over to another.* Here the Wife has nothing in this Money, but this is an Appointment of ſo much Money when the Contingency happened. In the former Caſe the Eſtate-tail *abſorbs* the whole Intereſt. The Word (*remain*) is obſervable if ſuch an Accident happened, then ſo much was to remain to him. If this had been a Deviſe over, there had been no Queſtion. May not this be conſtrued, *if* H. *died without Iſſue living by him?* This Legacy was to ariſe upon a Condition *precedent*, which makes the Legacy the worſe; but all the Caſes put are of a Deviſe over, and the Fund *here* is deviſed to the Wife.—As to the other Point, if the Deviſe be good, it muſt go to the Executor of the Deviſee; but he ſaid he would conſider of it. *Hil.* 4 *Geo.* 1. *Anon. Vin. Ab.* Tit. *Deviſe*, (F. e.) *Ca.* 24.

Prec. in Chan. 528. S. C. *in totidem verbis.*

10. *A.* deviſes Portions to his four Children *payable at their reſpective Ages of twenty-one* or *Marriage*, and *in Caſe any of them ſhould die before the Time of Payment* or *without Iſſue*, then *his or their Share to go to the Survivors* and *Survivor* of them, and *his Heirs.* One of them died under Age, and without Iſſue and unmarried, and the Plaintaiff who was one of the ſurviving Brothers and married, tho' under Age, brought this Bill for a third Part of the dead Brother's Share; and the Queſtions were, Firſt, Whether the Deviſe in Caſe of Death without Iſſue, *being of a perſonal Eſtate*, was good? Secondly, Whether, admitting it were, the dead Brother's Share was not ſtill liable to the Contingency of Survivorſhip 'till it came to the laſt of the four Brothers? His *Honour* decreed, that the *Limitation being to the Survivors* and *Survivor* and *his Heirs*, that it could not be intended a *dying without Iſſue generally*, which *would make it void*; but a *dying without Iſſue* in ſuch Manner *as that the Survivors* or *Survivor might take*

take it, which muſt be *during their Lives*, and conſequently *good*.—Secondly, That it was liable to the Contingency of ſurviving 'till it came to the laſt, and therefore the Plaintiff could not have his Share of the Principal of his dead Brother; but in regard *no Diſtinction was given in the Will concerning the Intereſt*, it was decreed he ſhould have a *proportionable Part of the Intereſt during his Life*, elſe the *Intereſt muſt lie dead 'till it come to the laſt*, which would be very inconvenient; tho' in Caſes *not ſo circumſtanced*, the *Legatee* has *not* been allowed the *Arrears* or *growing Intereſt*, for want of a Direction in the Will concerning it, but it has fallen into the *Reſiduum* of the Teſtator's perſonal Eſtate. *Eaſt.* 1719. *Nicholls* and *Skinner*, *MS. Rep.*

11. One deviſes *that ſuch Part of his perſonal Eſtate as his Wife ſhould leave of her Subſiſtence* ſhall go to his Siſter. Deviſe over good. Decreed by the *Maſter* of the *Rolls*, *Trin.* 1720. *Upwell* and *Halſey* (*a*), 1 *Will. Rep.* 651.

(*a*) *Lucas's Rep.* 441.

Trin. 5 *Geo.* 1. S. C. decreed accordingly.——*Vide P. Ca.* S. C. more fully abridg'd.

12. *J. S.* by Will gave all his Money and Securities for Money to Defendants *A.* and *B. In Truſt* to pay 200 *l.* to his Wife abſolutely, and to pay the Intereſt of all the reſt of the Money to his Wife for Life, and after her Death he gave the *Intereſt of* 400 l. Part of the Reſidue, *to* A. *for Life*, and *then to his firſt Son, payable to him until he ſhould attain his Age of twenty-one, at which Time he was to be paid the Principal Sum of* 400 l. But *if ſuch eldeſt Son ſhould die before twenty one*, then the Teſtator deviſed the *Intereſt of the* 400 l. *to* A.'s *ſecond* Son in like Manner, and ſo on to the third, fourth, *&c.* Sons of *A.* in the ſame Manner. And deviſed *another* 400 l. *to* B. and *his firſt*, &c. *Son* in like Manner; but *if either* A. *or* B. *ſhould die without Iſſue, his Share was to go to the Teſtator's right Heirs.* His *Honour* decreed, that as to the ſaid Sums of 400 *l.* and 400 *l.* if *A.* and *B.* ſhould die without Iſſue *living at their Death*, then the Share of him or them ſo dying ſhould *belong to the Teſtator's right Heirs*, and *not* to Plaintiff *his Wife* and *Executrix*; but that if they ſhould die *leaving Iſſue*, and *ſuch Iſſue ſhould die before twenty-one*, then that theſe Shares ſhould ſink into the *Reſiduum* of Teſtator's perſonal Eſtate. ——*Macclesfield*, C. upon an Appeal, took a *Difference between a Limitation of a Truſt of a Term for Years in ſuch Manner* as that *all Power of Alienation might be reſtrained*, and *conſequently a Perpetuity introduced*, and a *Limitation of a Truſt of a Sum of Money which may be ſubject to more remote Contingencies*; for his *Lordſhip* thought a *Bond to pay Money upon the Death of* A. *without Iſſue of his Body would be good* (*b*), and for the ſame Reaſon the Truſt of Money ſo limited would be allowed alſo. However, the Proviſo in this Caſe muſt be underſtood of a *dying without Iſſue then living*, which is the common Meaning of this Expreſſion (*c*). But whether this Remainder ſhould go to him that *is* (*d*) *now* right Heir of the Teſtator, or to ſuch as *ſhould be ſo* at the Time when either of the Defendants *A.* and *B.* ſhould die *without Iſſue then living*, his *Lordſhip* ordered that the Conſideration thereof be reſpited 'till that Contingency happens, when it will be proper to make ſuch Heir a Party to *this* Bill. *Mich.* 1721. *Pleydell* and *Pleydell*, 1 *Will. Rep.* 748.

(*b*) *Vide* the Caſe of *Pinbury* and *Elkin*, 1 *Will. Rep.* 566. where it is ſaid *per* his *Lordſhip*, that a *Covenant to pay a Sum of Money when there ſhould be a Failure of Iſſue of the Body of* B. would *ſurely* be good.

(*c*) *Vide* 1 *Vern.* 35. *Danvers* and *Earl of Clarendon*. And 1 *Vel. Eq. Abr.* 202. *Ca.* 21. S. C. abridged.

(*d*) Tho' in Caſe of a Deviſe of Land to a Man, and *if he die without Iſſue*, then *to J. S.* this would give an *Eſtate-tail (viz.)* to *the Iſſue of the Deviſee*, and *ſo ſucceſſively to the lateſt Poſterity*; yet ſuch Conſtruction is *contrary* to the *natural* Import of the Expreſſion, and made purely to comply with the Intent of the Teſtator, which ſeemed to be, that the Land deviſed ſhould go to the Iſſue and their Iſſue, to all Generations. But notwithſtanding *this*, it would be very ſtrange

ſtrange to put a forced Conſtruction upon Words *contrary* and *repugnant* to their uſual Import, and only to defeat the Deſign of the Teſtator, by fruſtrating that Eſtate which he intended to give. *Per* his Lordſhip in the ſaid Caſe of *Pleydell* and *Pleydell*. *Ibid.* 750.

13. A *perſonal* Eſtate *cannot be intailed.* 3 *Dec.* 1726. *Stratton* and *Pain*, *Vin. Abr.* Tit. *Deviſe*, (F. e.) *Ca.* 26.

14. *J. S.* by Will *gave ſeveral long Annuities for ninety-nine Years* in the Exchequer, amounting to 320 *l. per Annum*, to Truſtees for the Reſidue of the Term, *In Truſt for* E. Dod *for ſo many Years of the ſaid Term as ſhe ſhould live*, and *afterwards for the Plaintiffs for ſo many Years of the ſaid Term as they* or *the Survivor of them ſhould live, and after the Deceaſe of the Survivor, In Truſt for the Heirs of their Bodies lawfully to be begotten for all the Reſidue of the ſaid Term*; and *for Default of ſuch Iſſue, In Truſt for the Defendants.* Theſe Annuities were ſubſcribed into the *South-Sea* Company in 1720, and the Bill was *to have the* South-Sea *Stock and Annuities ſold, and the Money ariſing by Sale thereof to be paid to the Plaintiffs, who were the Deviſees for Life*, with Remainder *to the Heirs of their Bodies*, &c. *King*, C. ſaid, where a *Term is deviſed to a Man and his Heirs*, or *to the Heirs of his Body*, the *whole Term veſts in the Deviſee*, and *any Remainder over is void*; and ſo it was held *in Dom. Proc'* the laſt Seſſions in Sir *John Ruſhout's* Caſe. The Remainder in the preſent Caſe is void, *being after a Limitation in Tail.* Decreed that the Stock and Annuities be ſold, and the Money thereby raiſed to be paid to the Plaintiffs (*a*). *Mich.* 13 *Geo.* 1. *Dod* and *Dickenſon*, *Vin. Abr.* Tit. *Deviſe*, (F. e.) *Ca.* 25.

(*a*) Caſes cited for the Plaintiffs were 3 *Lev.* 22. *Gibbons* and *Somers*.—1 *Lev.* 290. *Lowe* and *Windham et al'*.——Cited *cont'*, *Pinbery* and *Elkins*, *Temp. Macclesfield*, C.—*Peacock* and *Spooner in Dom. Proc'*. *Ibid.*

15. *J. S.* ſeiſed in Fee-ſimple, and poſſeſſed of a Church Leaſe for twenty-one Years in the Poſſeſſion of *A.* and *B.* deviſed *all his Lands which he then ſtood ſeiſed* or *poſſeſſed of*, or *any ways intereſt in*, and which were in the Poſſeſſion of the ſaid *A.* and *B. unto* C. *his Wife for Life*, Remainder *to* D. *and the Heirs of his Body*, if then living, (of which the Teſtator much doubted) Remainder if *D.* were then dead, or ſhould die without Iſſue, *to Plaintiff for Life*, with a Power to make a Jointure, Remainder *to Truſtees during the Life of the Plaintiff*, In Truſt *to ſupport contingent Remainders*, Remainder *to the firſt*, &c. *Son of the Plaintiff in Tail Male ſucceſſively, with* Remainders over. And deviſed *all his Goods* and *Chattels*, *Money* and *perſonal Eſtate, to his Wife* and Executrix. *King*, C. decreed that the Leaſehold Premiſſes ſhould paſs by this Will to Plaintiff, who was the Remainder Man for Life, as well as the Freehold (*b*). *Eaſt.* 1728. *Addis* and *Clement*, 2 *Will. Rep.* 456, 459.

(*b*) His *Lordſhip* owned the *Limitations were improper*, but then he ſaid the Words of the Will were very ſtrong, *all the Lands which the Teſtator was ſeiſed* or *poſſeſſed of*, or *any ways intereſted in*; which Words *poſſeſſed of or intereſted in*, properly refer to a *Leaſehold* Eſtate, and diſtinguiſh the preſent Caſe from that of *Roſe* and *Bartlet*, where the Words *poſſeſſed of or any ways intereſted in*, are not to be found. And as this Leaſe for twenty-one Years was held of the Church, and *always renewable*, the Leſſee who was the Teſtator might look upon himſelf from the Right he had to renew, as having a perpetual Eſtate therein, a kind of Inheritance; and therefore his *Lordſhip* thought it ought to paſs. *Ibid.* 459.

16. *J. S.* gave and bequeathed *all his real* and *perſonal Eſtate to his Son* F. *and to the Heirs of his Body, to his and their Uſe, to be paid to him in three Years after his Death, and during the Time he made* D. *his Executor*; and *after the ſaid three Years expired, he appointed that his Son* F. *ſhould be his Executor*, and *if his ſaid Son ſhould die leaving no Heirs of his Body living*, then *he gave ſo much of his*

his ſaid real and perſonal Eſtate as his ſaid Son F. *ſhould be poſſeſſed of at his Death, to the* Goldſmiths *Company in* London, *In Truſt* for ſeveral charitable Uſes. But *his Will was, that the Company ſhould not give his ſaid Son any Diſturbance during his Life.* *J. S.* dies. The Son after three Years takes the Execution of the Will, *ſuffers a Recovery of the real Eſtate*, and *dies without Iſſue*, leaving his Wife Executrix. *King*, C.—His *Honour*, and *Reynolds*, C. B. were *unanimous*, That the Limitation over was void (*a*). *Trin.* 5 *Geo.* 2. *Attorney General* and *the Goldſmiths Company*, *Fitz-Gibb. Rep.* 314, 321. *Vide P. Ca.*

17. *J. S.* by Will reciting that a Marriage is propoſed between his Niece *A.* and his Couſin *B.* deviſes *to Truſtees* his *real Eſtate* and *Bank Stock*, and *Money in Orphans Fund*, and *the Produce of the ſame*, In Truſt to *pay the Rents and Profits to* A. *during Life*, or *to ſuch Perſon as ſhe by Writing ſhould appoint, with* or *without the Conſent of any Huſband.* But *if ſhe ſhould marry* B. *then after the Deceaſe of* A. In Truſt *for* B. *during Life*, and *after his Deceaſe* In Truſt *for the firſt and other Sons ſucceſſively of* A. *and* B. *and their Heirs Male*, and *for want of ſuch Iſſue*, In Truſt *for the Daughters of* A. *and* B. *equally to be divided between them*, and *for want of Iſſue of that Marriage*, In Truſt *for the Iſſue of the Survivor of them*; and *if neither of them leave Iſſue*, In Truſt *for* C. *for Life*, with Remainder *for ſuch Child and Children as his Brother* D. *ſhould leave living at his Deceaſe*, or *that* D.'s *Wife* ſhould be *enſeint of, that ſhould attain the Age of twenty-one*, and *to the Heirs, Executors*, &c. *of ſuch Child* or *Children*, equally to be divided between them, as they ſhould reſpectively attain the Age of twenty-one Years; and *if no ſuch Child attain that Age*, then *to his own right Heirs.* But *if* A. *ſhould not marry* B. *then* In Truſt *after her Deceaſe for* C. *for Life*, Remainder *to the Child* and *Children of* D. (as before) *and if none attain the Age of twenty-one*, then *to his own right Heirs*; and *deviſed the Reſidue of his Ready Money, Plate*, Mortgages, *&c.* and *all other his Eſtates, real and perſonal, to* A. *and* C. equally to be divided between them, their Heirs, Executors, *&c.* and made *C.* and *A. joint reſiduary Legatees*, and *G.* and *H.* Executors, and died. *A.* and *B.* intermarried; *B.* died *ſans* Iſſue. *C.* married, and alſo died *ſans* Iſſue. *A.* died without Iſſue, having made her Will, and appointed an Executor. D. *died before* A. *leaving Iſſue two Sons*, E. *and* F. *above twenty-one Years of Age.* E. *died before* A. *inteſtate, leaving* M. *a Daughter an Infant now living.* F. *is alſo living.* The *Orphans Fund* and *Bank Stock were not transferred*, but *remained as at the Teſtator's Death.* *King*, C. held the *Limitations after the Eſtate-tail void*, and diſmiſſed the Bill. 22 *Nov.* 1734. *Sabbarton* and *Sabbarton*, *Caſes in Eq. Temp. Talbot* 55.——But 15 *Nov.* 1736, upon hearing *two* other Cauſes upon the *ſame* Will, a Reference was made to the Judges of *B. R.* for their Opinions *How a Bequeſt of a Term for Years in* Lands *upon the like Limitations* as above *to the Child* and *Children of* D. *would be conſidered.* And they declared their Opinions, " That as this Caſe has happened (*by the* " *others dying all of them without Iſſue*) the Limitation of a Term for " Years in like Manner would have been good." *Ibid.* 249.

(O) Where a Deviſe ſhall be in Satisfaction of a Thing certain (a).

(a) As Debts, Legacies, &c. ——*Vide* 1 *Vol. Eq. Abr.* (L.) *P.* 203.

Prec. in Chan. 5. S. C. *in totidem verbis.*

1. *J. S.* by *Fine* and *Recovery*, and Deed dated 10 *May* 12 *Car.* 2. ſettled the Manor of *Y. &c.* on himſelf for Life, and afterwards on Truſtees for twenty-one Years, to commence from his Death; and after that Term on *W. S.* his Son in Tail, with Remainder to his own right Heirs, and the Truſt of the Term is declared to be for *raiſing* 5000 l. *for Daughters Portions*, viz. 2000 l. *for the eldeſt Daughter of* J. S. *that ſhould be unmarried at the Time of his Death*, and to be paid at her Age of eighteen or Marriage, which ſhould firſt happen, and the other 3000 *l.* to be equally divided amongſt his three other Daughters, payable as aforeſaid. And in the Deed there was a *Proviſo*, that if *W. S.* or any Iſſue Male of his Body ſhould *pay* or *ſecure* the 5000 *l.* according to the Deed, then the *Leaſe to be void.* Afterwards *W. S.* died, and *J. S.* having no other Sons, by Will deviſed the Manor of *Y. &c.* to his Wife for Life, for the Increaſe of her Jointure, and ſhe to pay 100 *l. per Annum* to his Siſter, *&c.* and then comes this Clauſe, "*And I hereby declare that I leave my Lands of In-* "*heritance to deſcend to my Daughters as my Heirs at Law, on account* "*of my dying without Iſſue of my Body; and that the Lands hereby given* "*to my Wife, or ſettled in Jointure on her formerly, ſhall not be charged* "*with any Portions or Sums of Money to my ſaid Daughters, by virtue* "*of any former Marriage Settlement made by me.*" *J. S.* dies leaving Iſſue four Daughters all unmarried, the eldeſt afterwards married the Plaintiff, and the Bill was brought againſt *J. S.*'s Widow and the other three Daughters and their Huſbands, and the Truſtees, to have the Benefit of this Term, and to have the 2000 *l.* paid to the Plaintiff. The *Lords Commiſſioners* were all *clearly* of Opinion, That the Plaintiff muſt have 1000 *l.* more than her Siſters; and that if the other Siſters did not agree to pay her three fourth Parts of that 1000 *l.* out of their Shares of the Land, then the Truſtees were to raiſe the Money according to their Power, and *J. S.*'s *Widow* was to be reimburſed out of the Inheritance, what her Eſtate for Life ſhould be damnified in this Matter. *Hil.* 1689. *Lord Viſcount Teviot* and *Lady Spencer et al', &c. econt', MS. Rep.*

2. *J. S.* was *indebted* 50 *l.* to *A.* and afterwards left him *a Legacy of* 500 *l.* and *made him Executor*, and *after the making of the Will ſhe borrowed of him* 150 l. *more*, and died. Decreed *per* his Honour, that this 500 *l.* Legacy to *A.* ſhould be a Satisfaction of both the Debts that were contracted after the Will, as well as that contracted before. But *Harcourt*, C. *reverſed* the Decree, becauſe a Court of Equity *ought not to hinder a Man from diſpoſing of his own as he pleaſes*; and when he ſays he gives a Legacy, we *cannot contradict him*, and *ſay he pays a Debt*; and as to the *Debt contracted afterwards, he ſaid there was no Pretence to make this to be a Payment of that* (a). If a Legacy be *leſs* than the Debt, it was *never held to go in Satisfaction*; ſo *if the Thing given was of a different Nature*, as *Land*, it ſhould *not go in Satisfaction of Money* (b). So *if the Legacy be upon Condition*, for by the Breach he may be a Loſer, whereas the Will intended it for his Benefit.——Note; *In all theſe Caſes the Intention*

(a) *Vide P. Ca. Chancey's Caſe.*
(b) *Vide P. Ca.*

Intention of the Party ought to be the Rule. *Trin.* 13 *W.* 3. *Cranmer's Caſe*, 2 *Salk.* 508. 3 *Will. Rep.* 227. S. C. cited *per* Sir *J. Jekyll, Maſter of the Rolls*, as decreed *per* Lord *Harcourt*, that a Legacy, *tho' it exceeded the Debt*, could not be intended as a Satisfaction thereof; and indeed it may be preſumed, that if the Teſtator intended to *pay* or *ſatisfy a Debt*, he would certainly have taken Notice of it. *Per* his Honour. *Ibid.*

3. *A.* was Father to *Plaintiff*'s Wife, and had in his Hands a Legacy of 150 *l.* which had been given her by a *collateral* Anceſtor. Afterwards, on her Marriage with Plaintiff, *A.* (the Defendant) *gave her* 1000 l. *Portion*, and after *ſettled a Church Leaſe on her and her Huſband*, and *maintained them fourteen or fifteen Years* at his own Houſe, and no Notice was ever taken of the Legacy, nor did it appear that the Huſband knew any thing of it; yet after ſome Differences between them, and on a Bill brought, the Legacy was decreed, with Intereſt and Coſts; and his *Honour* ſaid, He could not diſcharge it, tho' he diſliked the Suit. *Hil.* 1703. *Anon. MS. Rep.* *Prec. in Chan.* 228. *Hil.* 1703. *Chidley & Ux'* and *Lee*, S. C. *in totidem verbis.*

4. The *Court* of *Chancery goes on Preſumptions in Family Settlements*;—and if one *gives a Daughter* 1000 l. *Legacy*, and afterwards *on Marriage gives her* 1000 l. *Portion*. This ſhall (in Equity) be *a Satisfaction of the* 1000 l. *Legacy*.——So if one *owes his Child a Sum of Money*, and by *Will gives him a greater*, this ſhall be alſo taken for a *Satisfaction*. *Per Dobyns*, *Hil.* 1704. in the Caſe of *Clavering* and *Clavering* (*a*), *Prec. in Chan.* 236. (*a*) 1 *Vol. Abr. Eq.* 24. *Ca.* 6. S. C. but not S. P.

5. *A.* agreed with *B.* to give him 2000 *l.* Portion to be laid out by *A.* He purchaſes Lands with 1000 *l.* and mortgages them, and then ſettles purſuant to the Articles, excepting only in one Limitation. *A.* deviſed *theſe Lands to his Wife for Life*, and *alſo a Legacy in Money, and gave Legacies to* B. *and his Children*, and *dies without Iſſue of his Body, leaving* B.'s *Children his Heirs at Law*. The Lands ſettled according to the Articles is a good Performance ſo far as the Value is over and above the Mortgage, *per Cowper*, C. Then it was urged that the *Legacy to the Children was a Bounty*, and *not a Satisfaction of the Demand of the Heir*, becauſe at the Time of the Legacy it was not known whether he would be Heir, or take any Thing by the Settlement; and alſo it was a Legacy given to him in Company with others; and the Diſpute is not between the Executor Defendant and a Creditor, but between the Executor and *B.* and his Son and Daughter; and there are Aſſets enough to anſwer any Thing. Yet his *Lordſhip* directed, that the Maſter enquire what *Aſſets by Deſcent in Fee* and *other perſonal Eſtate came into his Hands*, and that to be as Part of the Satisfaction of his Demand. *Eaſt.* 6 *Ann. Letchmere* and *Blagrave*, *Gilb. Eq. Rep.* 64.

6. *A. received* 1000 l. *to the Uſe of* B. and *makes* B. *Executor*, and dies. That ſhall go in Satisfaction. *Per Cowper*, C. in S. C. *Ibid.*

7. *A. deviſes* 10 l. per Annum *to* B. *for Life*, charged on two Houſes held by a Leaſe, and made *A.* his Wife *ſole Executrix*. A. *deviſed* 10 l. per Annum *to* B. *for Life*, and made *C.* Executor, and C. *ſettled Lands of his own*, and *charged them with Payment of* 20 l. per Annum *to* B. *for Life*. Lord Chancellor *Cowper* thought the two 10 *l.* Annuities given by the ſeveral Wills were ſeveral Deviſes of two ſeveral 10 *l.* But whether the 20 *l.* by the Settlement ſhould be additional or only in Satisfaction was not decreed, tho' it was ſworn by two Perſons to be intended in Satisfaction. *Eaſt.* 7 *Ann. Daviſon* and *Goddard*, *Gilb. Eq. Rep.* 66.

8. *A.*

8. *A.* had two Daughters, *M.* and *N.*—A Legacy of 100 *l.* was left to *M.* by *J. S.* and another of 50 *l.* by *W. R.* and both Legacies were in the Father's Hands as Executor of *J. S.* and *W. R.* Afterwards *A.* by Will, by Virtue of a Power, charges his Lands with 2000 *l.* and *alſo left* M. *and* N. 250 l. *apiece.* This is *not* a Satisfaction of the two Legacies to *M.* *Eaſt.* 1711. *Meredith* and *Wynn*, *Prec. in Chan.* 314.

1 *Vol. Eq. Ca. Abr.* P. 70. *Ca.* 15. S. C. but *not* S. P.

9. *A. Father gives Legacies to his Children*, and *makes his Wife Executrix*; ſhe *not having paid the Legacies*, gives *them Legacies* likewiſe; *one of which was the ſame Sum*, and *the other a greater.* Decreed they ſhall not have *both*, and the *latter* is a Satisfaction of the *former.*——And where there was a Deviſe of the Lands with which one of the firſt Legacies was chargeable, it was decreed that this was a Deviſe of the Money which is payable out of the Lands. 1712. *Barkham* and *Dorwine*, *Vin. Abr.* Tit. *Deviſe*, (T. c.) *Ca.* 37.

10. If one being indebted to another, does by his Will give him *as great* or (*a*) *greater Sum than the Debt amounts to*, without taking any Notice at all of the Debt, this ſhall nevertheleſs be in Satisfaction of the Debt, ſo that he ſhall not have both the Debt and Legacy; but if ſuch a Legacy were given upon a Contingency (*b*), which if it ſhould not happen, the Legacy would not take Place in that Caſe, tho' the Contingency does actually happen, and the Legacy thereby becomes due; yet it ſhall not go in Satisfaction of the Debt, becauſe a Debt, which is certain, ſhall not be merged or loſt by an uncertain and contingent Recompence; for whatever is to be a Satisfaction of a Debt, ought to be ſo in its Creation, and at the very Time it is given, which ſuch contingent Proviſion is not. Cites the Caſe of *Pollexfen* to be ſo adjudged by Lord *Harcourt*, and affirmed *in Dom. Proc'*; and as it is in the Caſe of a Will, ſo it will likewiſe if the Proviſion were by Deed; if the Proviſion be abſolute and certain, it ſhall go in Satisfaction of the Debt; but if it be uncertain and contingent, it can be no Satisfaction, becauſe it could not be ſo in its Creation, and the happening of the Contingency afterwards will not alter the Nature of it; ſaid by Mr. *Vernon*, and agreed to by the *Maſter of the Rolls.* *Mich.* 1714, in the Caſe of *Sir John Talbot* alias *Ivory*, and *Duke of Shrewſbury et al'*, *Prec. in Chan.* 394.

(*a*) S. P. *Per Cowper*, C. in the Caſe of *Daviſon* and *Goddard*, *Gilb. Eq. Rep.* 66.
(*b*) 1 *Vol. Eq. Abr.* 205. *Ca.* 9. S. P.

11. *A. covenants to leave his Wife* 620 l. The Huſband dies *inteſtate*, and the Wife's *Share* by the Statute of Diſtribution comes to above 620 *l.* This is a Satisfaction. Firſt decreed by Sir *John Trevor*, Maſter of the Rolls, 15 *Feb.* 1715, and in *Trin.* 1716, affirmed by *Cowper*, C. *in Caſu Blandy* and *Widmore*, 1 *Will. Rep.* 324.

2 *Vern.* 709. *Ca.* 631. S. C. and P.

12. *Annuities* given by a *Codicil*, tho' given to the ſame Perſons that were *pecuniary Legatees in the Will, and tho' of greater Value*, yet ſhall not be taken to be a Satisfaction for the pecuniary Legacies given by the Will, becauſe the Annuities are not *ejuſdem generis*, and the Annuitants might die the next Day after the Death of the Teſtatrix, and nothing being more uncertain than Life, conſequently the *latter* Gifts, inſtead of being a Bounty, might be a Prejudice if taken to be in Satisfaction of the Legacies by the Will. The Codicil is Part of the Will, and *proved* as Part thereof, and the greater *pecuniary* Legacy given by the Codicil to the ſame Perſon that was a *pecuniary* Legatee in the Will, ſhall not be taken to be a Satisfaction, unleſs ſo expreſſed; and it is as if both the Legacies had been given by the ſame Will; and it ſeemed a Circumſtance tending to prove that the Teſtatrix intended *additional Bounties*, inaſmuch as ſhe after the making the Will and before her making the Codicil, had an additional

Eſtate

Eſtate come to her from her Mother. *Per* the Maſter of the Rolls, *Eaſt.* 1718. *Maſters* and *Harcourt Maſters*, 1 *Will. Rep.* 421, 423.

13. *J. L.* deviſed Lands *to his Wife for her Life*, and deviſed other *Lands to the Plaintiff* his Brother, *and his Heirs.* The Defendant, Wife of the Teſtator, entered into the *Lands deviſed to her, which were of more Value than her Dower*, but *not deviſed to her expreſly in Lieu and Satisfaction of Dower*; and afterwards brought Dower againſt the Deviſee of the other Lands, and recovered againſt him with Coſts; who thereupon brings his Bill to be relieved againſt the Judgment, the Lands deviſed to her by her Huſband being of greater Value, and ſhe in Poſſeſſion of them. The Caſe of *Lawrence* and *Lawrence in Dom. Proc'* was cited for the Defendant, as a Caſe in Point that the Wife ſhall have Dower notwithſtanding a Deviſe to her for Life of Lands by her Huſband, unleſs *declared to be in Lieu and Satisfaction of Dower.* Lord *Parker* ſaid, this Point is determined already by the *Houſe of Lords*, and there is no Relief in this Caſe in Equity, therefore the Bill muſt be dimiſſed. *Trin.* 5 *Geo. Lemon* and *Lemon*, *Vin. Abr.* Tit. *Deviſe*, (T. c.) *Ca.* 45.

14. Mrs. *T.* having three Daughters, *A. B.* and *C.* bequeathed to *A.* 1000 *l.* to *B.* 800 *l.* and *C.* 500 *l. payable at Age* or *Marriage.* Afterwards *on a Treaty of Marriage of* A. *with Plaintiff*, ſhe approving the Match, *gave Plaintiff a Note to pay him* 500 l. *in ſix Months, if the Marriage took Effect, in Augmentation of her Fortune.* The Marriage took Effect; the *Mother fell ſick on the Day of Marriage*, and *died ſix Days after.* The Executors inſiſt that the 500 *l.* on Note was given in Satisfaction of the 1000 *l.* Legacy, or at leaſt ſo much of it as the Note was given for. (N. B. *Theſe Daughters had Portions of* 1500 l. *by the Father's Will.*) The Defendants inſiſted that the Mother, after giving the Note, declared, That ſhe only intended to give *A.* 1000 *l.* and was uneaſy during her Sickneſs that her Will was not altered, and gave Directions for that Purpoſe, but died before without altering the Will, and they made Proof thereof, and inſiſted, that the Words (*in Augmentation of her Portion*) was to be applied to the Portion left her by her Father. Alſo that the Mother's Aſſets would not ſatisfy all the Legacies in the Will if this Note ſhould be paid. *Objected*, That the Will gives a Legacy of 1000 *l.* and the Evidence is to controul it; it is not to prove any Thing conſiſtent with the Will, or to explain it, and *where two are of a Name where a Legacy is given*, and *afterwards the Teſtator becomes indebted to the Legatee, that cannot be ſuppoſed to be given in Satisfaction of the Debt which was not then contracted.* But in regard the proper Queſtion was, Whether the Mother hath not, by giving a Note, advanced Part of the 1000 *l.* in her Lifetime, with Intent to make the 500 *l. irrevocable?* So the Evidence which was to explain but bare Declarations of a Teſtator ſhall not be given in Evidence, for that would be to make a Will in Writing alterable by *Parol.* The Teſtatrix died before ſhe had altered her Will or finiſhed; but no Witneſſes going to the Value, Lord Chancellor ſent it to a Maſter to ſtate the Value, and reſerved the farther Direction. The 500 *l.* had been paid, and the Defendants agreed to let the Plaintiff have another 500 *l.* admitting the 1000 *l.* to be due in all Events. *Hil.* 6 *Geo.* 1. *Pepper* and *Weyneve*, *Vin. Abr.* Tit. *Deviſe*, (T. c.) *Ca.* 46.

15. If a Man gives a Legacy to his Creditor to the *Amount of his Debt*, this has been conſtrued a *Payment* or (*a*) *Satisfaction* of the

(*a*) Notwithſtanding this general Doctrine, yet where the Teſtator has *left Wherewithal*, and ſhewed his Intentions ſo to be, he has been conſtrued to be both *juſt* and *bountiful. Vide* 1 *Vol. Eq. Abr.* 204. *Ca.* 8. and *this* Work, *Chancey's Caſe, P.* 354. *Ca.* 18.

Debt, becauſe a Man muſt be ſuppoſed to be *juſt* before he is *bountiful*. But there can be no Pretence to ſay, that becauſe a Teſtator gives a Legacy of 500 *l.* to *W.* his Debtor, that therefore this is an Argument or Evidence that he intended to *remit W.* his Debt. *Per* his *Honour*, *Eaſt.* 1723, in the Caſe of *Jeffs* and *Wood*, 2 *Will. Rep.* 128, 132.

16. Teſtator gives a Legacy of 500 *l.* to his *Executor*, and *afterwards* the Teſtator contracted a Debt of 25 *l.* with the Executor, (who was an Attorney) for Fees and Buſineſs done. Lord Chancellor *King* reſolved without Difficulty, that this Debt *being contracted ſubſequent to the Will*, the Legacy could be (*a*) no Satisfaction for the ſame. *Hil.* 1725. *Thomas* and *Bennet*, 2 *Will. Rep.* 341, 343.

(*a*) *Vide* 1 *Vol. Abr. Eq.* 204. *Ca.* 8.—*Vide* alſo *Chancey's Caſe*, *poſt.*

17. 500 *l.* bequeathed to a Creditor for 300 *l.* who was alſo *Executrix to the Deviſor*, and *ſubmitted to account for the Surplus* (*b*), was decreed *per* Lord C. *Parker* not to go in Satisfaction of the 300 *l.* but ſhe to have her Legacy over and above her Debt. *Eaſt.* 10 *Geo.* 1. ——— and *Mortimer Powell*, *Lucas's Rep.* 398 to 400.——*Vide* 1 *Vol. Abr. Eq.* 243. Letter (D.)

(*b*) His *Lordſhip* ſaid, he had the more Compaſſion for this Executrix, becauſe *ſhe ſubmitted to account for the Surplus*; and ſaid, he was not ſatisfied with that Notion that a Legacy to an Executor excludes him from the Surplus; and therefore, without her Submiſſion, he did not know whether he ſhould have decreed her to account for it. *Ibid.* 400. *Vide* Tit. *Executors and Adminiſtrators*, *P.*

18. *A.* being indebted to his Maid Servant who had lived with him for a conſiderable Time, gave her a Bond for 100 *l.* as due for Wages, and afterwards by Will gives her 500 *l.* and it was mentioned in the Will to be *for her long and faithful Services*. His *Honour* obſerved that the Bond was *for Service*, and the 500 *l.* Legacy alſo *for Service*, ſo that it is a *greater Reward* and *Satisfaction for the ſame Thing*; and ſo decreed; but held *clearly*, that ſuch a *Legacy is not a Satisfaction for Service done to the Teſtator after the making of the Will* (*c*). *Hil.* 1717. *Chancey's Caſe*, 1 *Will. Rep.* 408.—But *Trin.* 1725, this Decree was afterwards *reverſed* by *King*, C. upon the particular Circumſtances varying it from the common Caſe, *viz.* That the Teſtator by the expreſs Words of his Will had deviſed "that all his Debts and Legacies ſhould be paid." And this 100 *l.* Bond being then a Debt, and the 500 *l.* being a Legacy, it was as ſtrong as if he had directed that both the Bond and Legacy ſhould be paid. That when the Teſtator gave a Bond for the 100 *l.* Arrear of Wages, it was the ſame Thing as paying it, and as if he had actually paid it, and had afterwards given the Legacy of 500 *l.* the Executor could not have fetched back the 100 *l.* and made Defendant refund; ſo neither ſhould the Bond in this Caſe be ſatisfied by the Legacy. His Lordſhip obſerved, that the Executor did not himſelf take this 500 *l.* Legacy to be a Satisfaction of the Bond, as appeared by his having voluntarily paid the 100 *l.* So decreed the Servant both her Debt and Legacy (*d*). *Ibid.* 410.

(*c*) *Vide P. Ca. Cranmer's Caſe.*

(*d*) *Sel. Caſes in Chan.* 44. *Trin.* 11 *Geo.* 1. *Chancy* and *Wootton*, S. C. Decreed accordingly *per King*, C.

19. One on the Marriage of his Wife, gave a Bond to her Truſtee (Penalty 4000 *l.*) conditioned, *That if he at any Time within four Months ſhould ſettle and aſſure Freehold Lands of* 100 l. per Annum *on his Wife for her Life*, or *if his Heirs*, *Executors or Adminiſtrators*, *ſhould within the Space of four Months after his Death pay unto his ſaid Wife* 2000 l. *then the Bond to be void.* The Huſband ſoon after the Marriage made his Will, deviſing thereby Freehold and Copyhold Lands of 88 *l. per Annum to his* loving *Wife* and *her Heirs*, having ſurrendered all his Copyhold to the Uſe of his Will, and *died within four Months after the Marriage.* Whereupon the Wife now inſiſted to retain theſe Lands of 88 *l. per Annum*, and that in regard her Huſband

band had not ſettled the 100 *l. per Annum* for her Life, ſhe was alſo at Liberty to elect the 2000 *l.* out of his Aſſets. Decreed *per* his Honour, that this 88 *l. per Annum* ſhall not be taken in Part of the 100 *l. per Annum*, but only as a *Benevolence*. *Trin.* 1731. *Eaſt-wood* and *Vinke*, or *Styles*, 2 *Will. Rep.* 613, 614, to 617. This Decree was, on an Appeal *Eaſt.* 1732, affirmed by Lord Chancellor *King*. *Ibid.* 617.

Money and *Land* being Things of a different Kind; the one ſhall not be taken in Satisfaction of the

other (*a*).——Whatever is given by a Will is *primâ facie* to be intended a *Bounty* and *Benevolence*; and it is remarkable that in the preſent Caſe the Deviſe is to his *loving* Wife, which is a Word of Affection, *per* his *Honour*, who ſaid he looked upon it *as a Stretch* that where a Man has owed *J. S.* 100 *l.* and *afterwards given* him a Legacy of 100 *l.* this latter has been taken in Satisfaction of the former, ſince at that Rate nothing is *given*. But tho' the Court has gone ſo far, *it never yet conſtrued a Deviſe of Land to be a Satisfaction for a Debt of Money*; much leſs has it decreed that a *Legacy of a leſs Sum than the Debt* ſhall be deemed a Satisfaction *pro tanto*.——In the principal Caſe, the Deviſe of ſuch of the Land as is Copyhold cannot poſſibly go towards Satisfaction of the 100 *l. per Annum*, which was to be *Freehold*; nay, ſuppoſing the whole 88 *l. per Annum* were *Freehold*, it would not go towards Satisfaction of the 100 *l. per Annum*, *not being ſo expreſſed*; but if there be not enough to anſwer the *reſt* of the Charges laid upon the Land, or the *Bond* Creditors, *who may come upon the Land*, then indeed ſo much of the 88 *l. per Annum* deviſed as is Freehold might be *taken towards Satisfaction*, becauſe otherwiſe the Teſtator's Will would be diſappointed; *tho'* ſuppoſing there are Aſſets to pay all the Bond *Debts*, and likewiſe the Charges laid by the Will upon the Land, (which was afterwards admitted) *in ſuch Caſe the* 88 l. per Annum *ſhall be enjoyed as a Bounty* and *Benevolence*; refers to 4 *Co. Vernon*'s Caſe, and alſo to that of *Lawrence* and *Lawrence*, 2 *Vern.* 365. *Ibid.* 616.——*Note*; The Huſband's Executors were decreed to pay the incurring Profits of the 100 *l. per Annum* from the Death of the Huſband to the Wife, and to ſettle upon her the 100 *l. per Annum*, *they not being bound to pay the* 2000 l. to her. *Ibid.* 617. By this Part of the Decree we may obſerve that the Huſband's Executors were at Liberty to elect whether to ſettle the 100 *l. per Annum* or to pay the 2000 *l.* (*a*) *Money* and *Land* being of a quite different Nature, the one ſhall never be taken as a Satisfaction for the other. See many Caſes to this Purpoſe, but *particularly* the Caſe of *Chaplin* v. *Chaplin*, *P. Ca.* and *P. Ca.*

20. 30,000 *l.* is covenanted to be laid out in Land. The Money need not be laid out all together upon one Purchaſe, but if laid out at ſeveral Times it is ſufficient; and if the Covenantor dies, having purchaſed ſome Lands, which are left to deſcend, this will be a Satisfaction *pro tanto*. *Per Talbot*, Lord C. *Mich.* 1733. in the Caſe of *Lechmere* and *Earl of Carliſle*, 3 *Will. Rep.* 228.

21. Robert Styles *borrowed of his Wife* 100 l. *which ſhe had ſaved out of the Money allowed her for Houſe-keeping*, and by his Will *gave her a pecuniary Legacy of* 30 l. and *alſo* 40 l. *a Year during the Life of her Mother*, and *all his Houſhold Goods for her Life*, and *gave the Reſidue of his Eſtate to his three Siſters*. And in a *Croſs-bill* brought by the Widow for the 100 *l.* and the Legacies, the Executors inſiſted that the Legacies and Annuity ſhould be looked upon as *a Satisfaction* of the Debt; but Lord Chancellor *Talbot* held that the 30 *l.* cannot be a *Satisfaction*, becauſe a leſs Sum, and as to the ſpecific Things deviſed, and the Annuity of 40 *l.* a Year, theſe Sort of Deviſes are never held to be in *Satisfaction* of a Debt, unleſs ſo expreſſed in the Will; and ſo he decreed. *Stanway* and *Styles*, *et econtra Mich.* 8 *Geo.* 2. *MS. Rep.*

22. Huſband on Marriage ſettles 100 *l. per Annum* Pin-Money, In Truſt for his Wife, for her ſeparate Uſe, which becomes in Arrear, and then the Huſband by Will gives the Wife a Legacy of 500 *l.* after which there is a farther Arrear of the Pin-Money; and then the Huſband dies; this Legacy *being a greater Sum than the Debt*, decreed (even in the Caſe of a Wife) to be a Satisfaction of the Arrears of Pin-Money *due before the making of the Will*. *Per Talbot*, C. *Eaſt.* 1735. *Fowler* and *Fowler*, 3 *Will. Rep.* 353.

There is no Reaſon to except the Wife out of the Satisfaction of might poſſibly

general Rule, *per Talbot*, C. *Ibid.* 355. But the Legacy could *not* be pretended to be a the Arrears of Pin-Money *incurred after the Date of the Will*, and which at that Time never become due. *Ibid.* *Vide Salk.* 508.—1 *Vol. Will. Rep.* 409.—2 *Vol. Will. Rep.* 343.

23. *A.* made his two Brothers Executors, and *gave a Legacy of* 100 l. *to* B. the *Daughter of one of them.* The Executors ſettled an Account, and divided the Aſſets, and then the Uncle Executor by his Will gave *B.* 200 *l.* And on a Bill for theſe Legacies, it was held by Sir *J. Jekyll*, That as the 100 *l.* Legacy was the Debt of both the Executors, the Gift of 200 *l.* by the dead Executor could not be intended to diſcharge it, there being no Reaſon to ſuppoſe that he deſigned to make Satisfaction for the Debt of his Co-Executor. *Garrat* and *Garrat*, at the *Rolls* after *Hil.* 1735. *MS. Rep.*

24. *A.* by Will gave his Wife 150 *l. per Annum* in long Exchequer Annuities during her Widowhood. And the ſame Day *by a Codicil he gave her* a further Exchequer Annuity *of* 600 l. *in Money*, to be paid her immediately after his Death, and *on his Death-bed he ordered his Servant to deliver to her* (ſhe then being preſent) *two Bank Notes amounting to* 600 l. *ſaying he had not done enough for her.* She declined taking the Notes, having, as ſhe ſaid, enough already; and for that it would injure their Son, who was the *reſiduary* Legatee. At length ſhe was prevailed on by her Huſband to accept of the Notes. Tho' the Sum be the ſame with the 600 *l.* Money Legacy given by the *Codicil*, yet the Manner of giving theſe Notes, together with the Expreſſions then made uſe of by the Huſband, *declaring that he had not ſufficiently provided for his Wife*, manifeſtly ſhew them to have been deſigned as *additional. Per Jekyll*, Maſter of the Rolls, *Trin.* 1735. *Miller* and *Miller* (*a*) *et al'*, 3 *Will. Rep.* 356.

(*a*) *Vide P. Ca.*

(P) Of void Deviſes (*b*) (or Limitations in a Will); —and here of lapſed Deviſes.

(*b*) *Vide* (A). *P.* 290, *Caſes.*

1. IF Lands be deviſed *to* A. *and his Heirs*, and A. *dies before the Teſtator, the Heirs ſhall take nothing*; for *Heirs* is a Word of *Limitation* and *not of Purchaſe.* Agreed *per tot' Curiam, Trin.* 1677. in the Caſe of *Steede* and *Benier*, *C. B.* 1 *Freem. Rep.* 293.

2. Upon a ſpecial Verdict the Caſe was, *J. S.* was ſeiſed of two Meſſuages in Fee after the Death of his Brother, and had Iſſue two Sons, *R.* his elder and *N.* his younger Son, and had alſo four Daughters, *E. M. O.* and *A.* and deviſed his two Meſſuages to *N.* and *he to have* 30 l. per Annum *for his Maintenance for ten Years after the Death of his Grandfather, and the Reſidue of the Profits to be applied for raiſing Portions for his Daughters*; and if *N. die*, then he gives the Eſtate that *N. had* to *his four Daughters, Share and Share alike*; and adds, *and if it ſhall pleaſe God all my Sons and Daughters die without Iſſue*, then he deviſes *it to his Siſter and her Heirs*, &c. *J. S.* dies; the Grandfather dies; and after *N.* enters, and dies without Iſſue. The four Daughters enter and are ſeiſed, and *one takes an Huſband, and has Iſſue, and dies.* And the Queſtion was, Whether her Huſband ſhould be Tenant by the Curteſy? *Herbert*, C. J. ſaid, *They would favour Wills in their Expoſition as far as they could*, but *where Wills are ſo incertain that the Intention may not be collected, they ought to fall for their Incertainty.*—And he ſaid, That here the Teſtator might have ſeveral Intentions; for he might intend, that the Daughters ſhould have but for Life, and then that the Sons ſhould have it, and upon their Death without Iſſue, that the Daughters ſhould have it; *or* he might intend, that the Sons might have an Eſtate-tail after an Eſtate-tail in the Daughters; *or*, that after the Death of the Daughters, it ſhould deſcend to the Sons in Fee; and if

they die without Iſſue, to the Iſſue of the Daughters; and if his Sons and Daughters die without Iſſue, that he might limit a Fee after to his Siſter; tho' there was a Fee before, he might ſo intend; and therefore he ſaid, it was quite incertain what he intended, and therefore that this Clauſe is void for the *Incertainty*; and that there was no Eſtate-tail in the Daughters, *& per conſequens* no Tenancy by the Curteſy. And it was ſo adjudged *per tot' Cur'*, *Hil.* 2 *&* 3 *Jac.* 2. *B. R. Price* and *Warren*, *Skin. Rep.* 266.

3. A Termor of one thouſand Years without Impeachment of Waſte, deviſed the *ſame to Defendant*, and *if he die without Iſſue, then to Plaintiff.* The Plaintiff had got an Injunction to ſtop Waſte, unleſs Cauſe, and it was alledged for Cauſe, that the Plaintiff upon his own ſhewing had no Title, becauſe the Deviſe *to him after the Death of the Defendant without Iſſue was void.*——It was objected, that the *Deviſe was not to the Defendant and the Heirs of his Body*, as it was in the Duke of *Norfolk*'s Caſe; and that the Words *if he died without Iſſue*, ſhould be conſtrued *without Iſſue living at the Time of his Deceaſe*; which was agreed to be good in Caſe it had been ſo expreſſed.—— But here it was held *per Lord Keeper*, that this being a Deviſe *after dying without Iſſue generally*, is void, and thereupon the Cauſe was allowed, for that it appeared the Plaintiff could have no Title, but that it went to the *Defendant*, his *Executors* and *Adminiſtrators*. *Hil.* 1696. *Anon. MS. Rep.* 2 *Freem. Rep. Hil.* 1696. S. C. *in totidem verbis.*

4. A perſonal Eſtate was deviſed to *J. S.* and in Caſe ſhe ſhould die without Iſſue, then to *B.* Reſolved, that the Deviſe over to *B.* is void, and the whole decreed to *A. Eaſt.* 1705. *Anon.* 2 *Freem. Rep.* 287. *Ca.* 357. *b.*

5. If a Man be *non compos*, and not in his right Senſes at the Time of making his Will, tho' he afterwards never ſo long before his Death becomes a Man of Underſtanding, and ſound Judgment and Memory, yet the Will is a void Will, and will by no Means be made good; becauſe *he wanted the diſpoſing Power* at the Time of Diſpoſition, which was the Time of making his Will.——So the Law is the ſame of a *Feme Covert*; if a married Woman makes a Will, tho' ſhe becomes a *Widow* and unmarried before her Death, yet ſuch is a void Deviſe without Republication; for the Law here regards the Time of making only.——So it is the Caſe of an *Infant*; if he makes a Will, tho' he be of Age, nay tho' he be never ſo old when he dies, yet it is a void Deviſe, becauſe he had not Diſcretion, nor a diſpoſing Mind, at the Time of making; for it is that which the Law regards in theſe Caſes, and not the Time of the Death of the Teſtator. *Per Trevor*, C. J. *Hil.* 6 *Ann. C. B.* in the Caſe of *Archer* and *Bockingham*, *Rep. of Caſes Temp. Q. Ann.* 157.

6. A Deviſe *to* A. *with ſeveral Remainders*, and a *Remainder over to the Heirs Male of the Deviſor.* The *Deviſor had no Heirs Male of his Body at his Death.* It is a *void Limitation*, and a *collateral* Male cannot take by this Deviſe.———In the *King's* Caſe a *Grant to Heir Male is void*, but in that of a *common Perſon it is a Fee*, and the Word *Male is idle*; but *Heirs Male*, &c. *in a Will are always intended of the Body*, and *implies an Eſtate-tail. Mich.* 7 *Ann. B. R. Ford* and *Oſſulſton*, *Rep. of Caſes Temp. Q. Ann.* 189. 3 *Salk. Rep.* 336. S. C. a *Deviſe of a Remainder to his right Heirs Male* muſt be intended *right Heirs* Male of his Body, and *no collateral Heirs Males* ſhall take by ſuch a Limitation by way of Remainder.

7. A Deviſe of a perſonal Eſtate *to* B. *and his Iſſue*, or *to* B. *and if he die without Iſſue*, Remainder over to *C.* is void, and the whole *Prec. in Chan.* 323. S. C. and P.

Intereſt veſted in *B.* *Hil.* 1711. *Gibbs* and *Barnardiſton*, *Gilb. Eq. Rep.* 79.

8. Ejectment and ſpecial Verdict. A Man poſſeſſed of a *long Term for Years in Lands*, deviſed them *to Sir St. Andrew St. John* and *his two Brothers ſucceſſively*; provided, *that neither of them ſhall take 'till after they are married.* *Rowland* the *third Brother dies*, Sir *St. Andrew dies*, the *ſecond Brother is Leſſor of the Plaintiff.* The Queſtion upon this ſpecial Verdict was, Whether this was a good Deviſe to Sir *St. Andrew St. John* and his Brothers? It was objected, That this was a void Deviſe, for the *Uncertainty who ſhould take firſt by reaſon of the Word ſucceſſively*, and *Windſmore* v. *Hobart*, *Hob. Rep.* 313. was cited (*a*) and *relied upon.* But was reſolved *per tot' Cur'*, That the Plaintiff ſhould have his Judgment, becauſe the Deviſe is not void for the Uncertainty. This Caſe differs from the Caſe of *Windſmore* and *Hobart.* Firſt, In this Will the Teſtator names Sir *St. Andrew St. John* firſt, and it appears that he was the eldeſt Son; the Deviſe is to him and his Brothers ſucceſſively, Sir *St. John* was to take firſt, for he was particularly named, and the Word *ſucceſſively* implies that the Eſtate was to go to the next Brother after him.——It is plain the Teſtator had Reſpect to the Seniority of the Brothers, and therefore named Sir *St. John* firſt. In the Caſe in *Hob.* tho' the Leaſe was to the Father and his three Sons, yet it does not appear whether the eldeſt Son was named firſt.———Secondly, If the Intention of the Teſtator can be found, *that ought to prevail.* Now the Intent here is plain, by naming the eldeſt Son firſt, that he had Regard to Seniority; it is no more than that the eldeſt Son ſhould have it for Life, and that his two Brothers ſhould take after him; it is plain Evidence of the Intention; tho' in a *Deed* or *Leaſe* it muſt be in more legal Words than in a *Will*, yet the Law in ſuch Caſe will not make the Will void.———Thirdly, If the Word *ſucceſſively* be ſo imperfect that it cannot be learned who ſhould take firſt, yet rather than that the Will ſhould be void, *ſucceſſively* ſhall be rejected, as being a Word of an *imperfect* Signification, and the Brothers ſhall take jointly; had that come to be the Queſtion, and we could have learned the Intention of the Teſtator; when there are ſufficient Words without that Word to give them a joint Intereſt, that Word ſhall be rejected, the Intention being ſufficiently certain before; and no Body can here ſay, but that Sir *St. John* and his Brothers had a joint Eſtate given them before this Word came, and ſo the Plaintiff has a good Title this Way, and nothing appears to ſever the Jointure.———Here it is ſufficiently expreſſed by naming the elder Brother firſt, to ſhew that the Eſtate was to go according to Seniority, and ſo the *ſecond Brother has a good Title for Life*, and the Plaintiff muſt have his Judgment. *Per totam Curiam*, 10 *Ann.* *C. B. Ungly* and *Peale* (*b*), *Vin. Abr.* Tit. *Deviſe*, (D.) *Ca.* 19.

(*a*) Alſo in the *Argument* were cited the Caſes of *Greenwood* and *Tyler.*—*Bro. Leaſe* 54.——1 *Lev.* [117 *Pl.*] 446. *Scowell* and *Caſel's* Caſe. *Vin. Abr. Ibid.*

(*b*) *Lucas's Rep.* 103. *Mich.* 11 *Ann.* *Ongly* and *Peed*, S. C. in *B. R.* on a Writ of Error to reverſe a Judgment in *C. B.* ſays, the Caſe was no more than this: A Man deviſes *his Lands to* A. *and his two Brothers ſucceſſively*; *but not to be entered upon or enjoyed by any of them until after Marriage.* *A.* was by the Verdict found to be the eldeſt Brother. And whether this Will was void by reaſon of the Uncertainty *who ſhould take* was the Queſtion? The Court were all of Opinion, That the Will was good, and certain enough; for being in the Caſe of *Brothers*, the *Common Law* was a Guide to the Expoſition of the Word *ſucceſſive*, *viz.* that the eldeſt ſhould after his Marriage enjoy it *firſt* for his Life, *then* the *ſecond*, and *then* the *third*, eſpecially when *he* who was named in the Will is by the Verdict found to be the eldeſt Brother.——Had the Deviſe been to *A. B.* and *C.* to take *ſucceſſive*, it would have been *void* for the *Incertainty*.———Caſes quoted in the Argument were *Co. Lit.* 377.—*Hob.* 313.—*Raym.* 82, 83.—*Styles* 434, 435.—*Moore* 636.—2 *Lord Raym. Rep.* 1312. *Ongley* and *Peale*, *Mich.* 11 *Ann.* S. C. ſtates the Will to this Effect, *viz.* That the Teſtator gave to Sir *St. Andrew St. John*, and to his Brothers ſucceſſively *for their Lives*, his *Houſe* at *Ludgate*, (the Houſe in Queſtion) but not to be entered upon and enjoyed 'till within a Month after their Marriages. Says the Caſe was argued, and the Court agreed that the Clauſe about *Marriage* made no Alteration in the Expoſition of the Will, only added a Reſtriction to the Deviſe, which before was general; and therefore if the ſecond Son married before the eldeſt, yet he could not take by this Deviſe; and *They* took it to be a plain Caſe, and

and affirmed the Judgment *Niſi Cauſa, &c.*—But Mr. Attorney General, who was to have ſhewn Cauſe, taking it to be clearly againſt him, never did ſhew Cauſe, and ſo the Judgment was affirmed againſt Mr. *Ongley*, who was a Purchaſer for a valuable Conſideration by the Advice of Mr. Serjeant *Pemberton* and Mr. *Richard Webb* of the *Inner Temple:* And the Reporter ſays, his Client told him, that Mr. *Webb* on a further and later Conſideration adhered to his former Opinion, That the Deviſe was void for *Uncertainty*. *Ibid.* 1314. The Reporter by way of Note ſays, That *St. John* took but an Eſtate *for Life* by the Will, and ſo the Sale to Mr. *Ongley* will be good as to the Fee. *Ibid.*———*MS. Rep.* S. C. *accord'*.

9. Deviſe of Lands to *A.* and afterwards Deviſor deviſes the ſame Lands to *B.* who was a Papiſt. Both Deviſes are void; for tho' the laſt is void as a Will, yet it is good as a Revocation. *July* 11, 1713. *Roper* and *Conſtable*, *Vin. Abr.* Tit. *Deviſe*, (R. 3.) in the Margin of Ca. 2.

10. It has been ſaid, that if an Eſtate has been given to a *Man and his Iſſue*, it is *void* for the *Uncertainty*, becauſe it not appearing whether *Male* or *Female*; but that has been *held* and *determined* ſince not to be Law; and that it is well enough in a Deviſe. *Per Cur'*, *Eaſt.* 1 *Geo.* 1. *in B. R. in Caſu Shaw* and *Weigh*, *Gilb. Eq. Rep.* 28. *Vide* 1 *Vol. Abr. Eq.* 212. *Ca.* 3. where ſuch Deviſe was held *void for Uncertainty*. *Sed Vide* the Note there.

11. Teſtator deviſed 550 (*omitting Pounds*) to his Daughter *M.* (the Plaintiff) and alſo deviſes 550 *l.* to his Daughter *B. &c.* And *per Cowper*, C. the ſubſequent Deviſe to *B.* makes this extremely clear that the Teſtator meant 550 *l.* and it is as certain and good as if the Word (*Pounds*) had been expreſſed. *Mich.* 3 *Geo.* 1. *Freeman* and *Freeman*, *Vin. Abr.* Tit. *Deviſe*, (D.) *Ca.* 22.

12. The Father in his Will taking Notice that his Son *J.* had much diſobliged him, declares thus, *I do hereby reſolve not to give him any more than* 20 l. *a Year for Life, to be paid him Quarterly. N. B.* This was a Baſtard Son, to whom the Father *had by a former Will given* 80 l. *a Year*, but *in the ſecond Will he took Notice of his ill Behaviour* at the Univerſity, and *deviſes that Eſtate to his legitimate Son. Per* the *Maſter of the Rolls*, the *Baſtard* Son ſhall take *nothing* by this Will, the *Words not amounting to a Deviſe. Hil.* 1717. *Holder* and *Holder*, *Vin. Abr.* Tit. *Deviſe*, (D. b.) *Ca.* 8.

13. Deviſe *to* A. *and his Iſſue*, Remainder *to* B. *and his Iſſue*, Remainder *to the Heirs of* A. *A.* died without Iſſue, living the Teſtator, and *B.* died, living the Teſtator, leaving Iſſue *C.* who was alſo the Heir of *A.* The Iſſue ſhall not take an Eſtate-tail as Iſſue of *B.* nor the Remainder in Fee as Heir of *A. Hil.* 1717. *Goodwright* and *Wright*, *in B. R.* 1 *Will. Rep.* 397. *Lucas's Rep.* 369. *Hil.* 3 *Geo.* 1. *Woodright* and *Right*, *B. R.* S. C.—*Vide P. Ca.*

14. Two Schools in the ſame Town, one a *Free School*, and the other a *Charity School* for *Boys* and *Girls*. *A.* deviſes 500 *l.* to the *Charity School*; tho' both be *Charity Schools*, yet only the *Charity School* for *Boys* and *Girls* ſhall take. Decreed *per Parker*, C. *Mich.* 1720. *Attorney General* and *Hudſon* (*a*), 1 *Will. Rep.* 674. (*a*) *Vide P. Ca.* S. C. more fully abridg'd.

15. One poſſeſſed of a Term *deviſed it to* A. *and* B. *and if either of them died, and leave no Iſſue of their reſpective Bodies*, then *to* C. His *Honour* held that the Deviſe over was void, and ſaid, That had the Words been, *if* A. *or* B. *ſhould die without Iſſue, the Remainder over*, this plainly would have been void, and exactly the Caſe of *Love* and *Windham*, 1 *Sid.* 450. 1 *Vent.* 79. 1 *Mod.* 50. And *he* ſaid, There is no Diverſity betwixt a Deviſe of a Term to one for Life, and if he die without Iſſue, Remainder over, and a Deviſe thereof to one for Life, with ſuch Remainder, if he die leaving no Iſſue; for both theſe Deviſes ſeem equally relative to the Failure of Iſſue at any Time after the Teſtator's Death. And cited, and much relied upon, 1 *Leon.* 285, *Lee*'s Caſe.—*Mich.* 1720. *Forth* and *Chapman*, 1 *Will. Rep.* 664. Afterwards in *Trin.* Term 1720, Lord *Parker* upon an Appeal *reverſed* this Decree, and ſaid, That if *J.* deviſe a Term *to* A. *and if* A. *die without leaving Iſſue*, Remainder *over*, in the *vulgar* and *natural* Senſe this muſt be *intended*

if

if (a) A. *die without leaving Iſſue at his Death*, and then the Deviſe over is good, and that the Word *(die)* being the laſt antecedent, the Words *(without leaving Iſſue)* muſt refer to that. Beſides the Teſtator, who is *inops Concilii*, will, under ſuch Circumſtances, be ſuppoſed to ſpeak in the *vulgar*, *common* and *natural*, and not in the *legal* Senſe of the Words. And that the Reaſon why a Deviſe of a Freehold to *one for Life*, and *if he die without Iſſue*, then *to another*, is determined to be an Eſtate-tail, is in favour of the (*b*) Iſſue, that ſuch may have it, and the Intent take Place, but that there is the plaineſt Difference betwixt a Deviſe of a Freehold and a Deviſe of a Term for Years; for in the Deviſe of the latter *to one*, and *if he die without Iſſue*, then *to another*, the Words *(if he die without Iſſue)* cannot be ſuppoſed to have been inſerted in favour of ſuch Iſſue, ſince they cannot by any Conſtruction have it. *Ibid.* 666, 667. (*a*) *Vide Nicholls* and *Hooper*, 1 *Will. Rep.* 198.—And *Target* and *Grant*, 1 *Will. Rep.* 432.—1 *Vol. Eq. Abr.* 193. *Ca.* 11. S. C.—*Lucas's Rep.* 402. S. C.—And *Pinbury* and *Elkin*, 1 *Will. Rep.* 563. (*b*) *Vide* the Caſe of *Target* and *Grant*, 1 *Will. Rep.* 432. And 1 *Eq. Abr.* 193.

16. Deviſe of Lands *to* S. *and the Heirs of his Body.* S. *died in the Life-time of the Deviſor.* It is in the Nature of a *lapſed* Legacy, and the Heir of *S.* ſhall take nothing. 9 *Mar.* 1725. *Wynne* and *Wynne*, *Vin. Abr.* Tit. *Deviſe*, (W. c.) *Ca.* 18.

17. *A.* deviſed all that *his Meſſuage and Tenement in* E. *to* F. and *his Heirs*, and *all the reſt*, &c. *of his Meſſuages*, *Lands*, &c. in *E.* and *elſewhere to* J. L. *in Fee.* *F.* the Deviſee *died in the Life-time of the Teſtator*, ſo that this became a lapſed Deviſe by his Death. In Ejectment the ſole Queſtion was, Whether this latter Clauſe of the Will would carry over the lapſed Deviſe to *J. L.* the reſiduary Deviſee; or whether it ſhould deſcend to the Teſtator's Heir at Law? Held *per Cur'*, That the Deviſe of *all the reſt and Reſidue of my Meſſuages*, *Lands*, &c. did not convey what was expreſly deviſed before, for the Teſtator's Intent appears to be to give his whole Eſtate to *F.* and his Heirs in that Meſſuage, and that at the Time of the Will made he had no Reſt and Reſidue in that Houſe, and the Deviſe to *F.* being void, the Houſe will go to the Heir at Law. *Eaſt.* 11 *Geo.* 1. *C. B. Wright* and *Hall*, *Forteſc. Rep.* 182.

18. *A.* bequeathed to her Grandchildren *B.* and *C. ſome of her beſt Linen.* His *Honour* held this a void Legacy for the *Uncertainty*, and if it had been the *beſt Linen* it had been uncertain, tho' not ſo uncertain as the other; if it were *ſuch* or *ſo much of my beſt Linen* as *they ſhould chuſe*, or *as my Executors ſhould chuſe for them*, this would be good, and by the *Choice* of the *Legatees* or *Executors* is reducible to a Certainty. However, as theſe were *Grandchildren*, and *having no other Legacy by the Will*, and *ſince it was plain the Teſtatrix intended ſome Linen*, his Honour did by the decretal Order *recommend it* to the *reſiduary* Legatee to give ſome of the beſt of the Teſtatrix's Linen to *B.* and *C.* which *Recommendation* in like Caſes (he ſaid) the Court had ſometimes made. *Mich.* 1726. *Peck* and *Halſey*, 2 *Will. Rep.* 387, 388.

(Q) Of Deviſes upon Condition, Contingency, and until, &c.—And here What is a Condition, What is a Limitation, and What is a Truſt under a Will.

1. *John Wheeler* having five Daughters, deviſed *his Land to* William Wheeler *his Son*, *and the Heirs Male of his Body*, Remainder *to Sir* William Wheeler *and his Heirs*, upon Condition that *he ſhould pay* 500 l. *to ſuch of his Daughters as ſhould be then living*, and *if Sir* William Wheeler *ſhould refuſe to pay the* 500 l. then *he deviſed it to his Daughters and their Heirs.* Sir *William Wheeler died leaving* William Wheeler *the Son*, who was *Tenant in Tail*, and *deviſed this Reverſion to* William the *eldeſt Son* of his Couſin *John Wheeler of B.*

whereas his *eldeſt Son was named* Andrew.——William Wheeler *the Son died without Iſſue.*——*Andrew* the *laſt* Deviſee *refuſed to pay the* 500 l. *to the Daughters for three Years*, but *now profered to pay it*, provided *he might have the Land. Lord Chancellor* held that this Condition being for paying of Money, altho' in Strictneſs of Law the Eſtate was forfeited by the Nonpayment of the Money, and altho' there was an *expreſs Limitation to the Daughters*, yet *this was but as it were a Mortgage* or *Security of Money* (*a*), and the Daughters being paid the Money and Damages, they were at no Damage; and ſo decreed that *Andrew*, paying the ſame, ſhould have the Land. *Mich.* 1676. *Wheeler* and *W. Whitehall et al'*, 2 *Freem. Rep.* 9, 10.

(*a*) *Sed Vide Man's Caſe, P. Ca.*

2. If a Man deviſes his Land to his Daughter, *upon Condition that ſhe marry* J. S. *at her Age of twenty-one*, and if *ſhe refuſe*, that *then the Land ſhall be to* B. and *J. S.* dies before her Age of twenty-one, yet *B.* may not enter 'till the Daughter is twenty-one. *Trin.* 4 *W. & M. in B. R. Thomas* and *Howell*, *Skin. Rep.* 320.——1 *Salk.* 170. S. C. ſays, after *J. S.*'s Death the Daughter having never refuſed to marry *J. S.* married *W. R.* at her Age of ſeventeen. Adjudged that the Condition was not broke, it being become impoſſible by the Act of God; and Judgment affirmed (*b*) in Error in *B. R.*

(*b*) 4 *Mod.* 66. S. C. three Judges were for affirming the Judgment, but *Gregory*, J. *contra.*

3. *J. S.* deviſed *ſeven ſeveral thirty-ſixth Shares in the* New River *Water to his ſeveral Children*, (by two ſeveral Venters) *in Fee*, provided that *if any of them die under Age* or *unmarried*, then *the Part* or *Share of him* or *her ſo dying to be divided among the Survivors*, *Share and Share* alike. *One of the Deviſees dies.* Adjudged that the *Survivors were Tenants in Common of that Part for Life only*, for the Word *Share* doth not denote the *Intereſt* but the *Quantity.*——(Says *Vide* 3 *Cro.* 52. *Pettiwood* v. *Cooke*, 3 *Leon.* 180. S. C. *Roll.* 835, 836. *Hanbury* and *Cockerell.*) *Eaſt.* 5 *W. & M. Middleton* and *Swail* (*c*) *in B. R. Comb. Rep.* 201.

(*c*) 2 *Skin. Rep.* 339.

Eaſt. 5 *W. & M. in B. R. Middleton* and *Swain*, S. C. ſtates it thus: *J. S.* being ſeiſed in Fee of thirty-five Shares in the *New River* Water, and having a Son by the firſt Venter and five Children by the ſecond Venter, deviſed to theſe five Children five Shares, *i. e. to* A. *and his Heirs one Share, to* B. *and her Heirs another Share*, provided that if any of his ſaid younger Children die before they ſhall have attained his or her Age of twenty-one, or be married, that then the Share of ſuch Child ſo dying ſhall go to the reſt of the ſaid younger Children, Share and Share alike. *A.* died unmarried before twenty-one; and after *B.* dies, being unmarried. And adjudged upon a ſpecial Verdict that the *Part of* A.'s *Share which was in* B. *ſhall go to the Heir*, viz. *B.*'s Brother of the ſame *Venter* and whole Blood, and not to the Son and Heir of *J. S.* by the firſt *Venter.*——*Show. Parl. Ca.* 211. *Swain* and *Lane* and *Faulkner*, S. C. affirmed *in Dom. Proc'.*

4. A Deviſe of Lands was made to the *eldeſt* Daughter, *paying* 100 l. *to the ſecond Daughter*, and 100 l. *to the third Daughter*, &c. and if the *eldeſt Daughter did not pay the* 100 l. *to the ſecond Daughter by ſuch a Day*, then *he deviſed the Lands to the ſecond Daughter*, *ſhe paying her Siſters Portions by ſuch a Day*; and *if ſhe did not pay*, then *he deviſed the Lands to the third Daughter*, &c. Reſolved that *this was not in the Nature of a Mortgage*, to be redeemable *after* the Time of Payment was over, but that the *eldeſt* Daughter, not paying at the Time appointed, the ſecond Daughter ſhould have the Land, and the *eldeſt* had no Relief. *Mich.* 1695, cited by his Honour as Sir *Thomas Man*'s Caſe, 2 *Freem. Rep.* 206. *Ca.* (280. *b.*)

5. A Man poſſeſſed of a Term deviſed it to an Infant *en Ventre ſa mere*, if it ſhould be a Son; and if it ſhould be a Son, and die during his Minority, then he deviſed it to his Grandſon, after which he died, leaving his Wife Executrix, and the Child was after born and proved a Daughter; and it was adjudged upon a ſpecial Verdict, without Argument, that the Executrix, and not the Grandſon, ſhould have the

Term, becauſe the Grandſon was not to have but upon a *precedent Contingency*, viz. the Birth of a Son and his dying in his Infancy, which Condition muſt be firſt performed, and it appears plainly that the Intent of the Teſtator was, that he ſhould not have it otherwiſe. *Trin.* 1697. *Graſcot* and *Warren*, *Caſes in B. R. Temp. W.* 3.

Prec. in Chan. 173. *Mich.* 1701. *Neal* and *Hanbury*, S. C. *accord'.*

6. *J. S.* deviſes 5 *l. per Annum* to his Nephew *A.* (without adding *to his Executors or Adminiſtrators*) to be paid Half-yearly during the Life of the Teſtator's Wife, on Condition he behave himſelf civilly to her, for he was a very lewd diſſolute Man, and made his Wife Executrix, and died. The Nephew died, and his Wife (the Plaintiff) was his Adminiſtratrix, and brought this Bill *in forma pauperis*, to have the Payment of the 5 *l. per Annum* during the Life of the Teſtator's Widow. But *per* his *Honour*, this is a *perſonal Bequeſt to* A. and it is *upon Condition he demean himſelf civilly to the Teſtator's Wife*, which cannot be after he is dead. Bill diſmiſſed. *Mich.* 1701. *Anon. MS. Rep.*

7. Land was *deviſed to the Heir at Law*, paying *a Sum of Money to* B. Held in this Caſe *that* paying *did not make a Condition*, becauſe *no one could enter for the Condition broken, but the Deviſee* himſelf; but this would be a *Truſt upon the Land for raiſing the Money*; and in this Caſe it was ſaid, that in Caſe the Deviſe were to a *Stranger, paying* 100 l. *to* A. that *this makes a Condition*, and that the *Heir may enter for the Breach of it*; but *when he hath entered, he ſhall be a Truſtee*, ſo far as to ſecure the 100 *l.* *Hil.* 1704. *Anon.* 2 *Freem. Rep.* 278.

8. Deviſe *to* A. and *the Heirs Male of her Body*, upon *Condition that ſhe intermarry* with *and have Iſſue Male by one ſurnamed* Searle, and in Default of *both* Conditions, he *deviſed over to* B. *in the ſame Manner*, and in Default thereof he deviſed to *C.* for ſixty Years, if he ſo long live, Remainder over to the *Heirs of the Body of* C. and their Iſſue Male for ever. Adjudged that this is a good Eſtate-tail; that the Words of Condition amount to a Limitation; and that the Eſtate of *A.* or *B.* does not ceaſe, *tho' ſhe marries one of another Name*, for the *Remainder is in Default of both Conditions*; and in the mean Time it is limited *to her and the Heirs Males of her Body*, and ſhe may ſurvive ſuch Huſband and marry a *Searle*, and ſo there is a *Poſſibility* as long as ſhe lives. *Trin.* 3 *Ann. B. R. Page* and *Hayward*, 2 *Salk. Rep.* 570.

9. Words of an expreſs Condition ſhall not *ordinarily* be conſtrued as a Limitation; but where an Eſtate is to remain over for Breach of a Condition, which is by expreſs Words of a Condition, yet it ought to be intended as a Limitation. *Per Holt*, C. J. *Rep. of Caſes in B. R. Temp. Ann.* 61.

10. *J. S.* was ſeiſed of *Blackacre in Fee* and *Whiteacre in Tail*, and having two Sons, deviſed the *Tail Acre to his youngeſt Son* and the *Fee Acre to his eldeſt Son*; the eldeſt entered upon the *Tail Acre*; the youngeſt Son brought his Bill, either to enjoy the *Tail Acre*, or to have an Equivalent out of the *Fee Acre*.—This Deviſe being deſigned as a Proviſion for the youngeſt Son, the Deviſe of *Blackacre* to the eldeſt Son muſt be underſtood to be with a *tacit Condition*, to ſuffer the youngeſt Son to enjoy quietly, or elſe that the youngeſt Son ſhould have an Equivalent out of the *Fee Acre*. *Per Cowper*, C. who decreed accordingly. *Hil.* 7 *Ann. Gilb. Eq. Rep.* 15.

11. *A.* by *Marriage Articles engages himſelf to leave his Wife a Moiety of his perſonal Eſtate at his Death*, and being poſſeſſed of an Annuity in the Exchequer, diſpoſed of it by Deed Poll in his Life-time.—Afterwards he made his Will, and thereby *deviſed to his Wife*

certain Lands for Life, upon Condition that ſhe ſhould not make any Demand upon the Articles againſt his Executor, and after her Deceaſe deviſed the Lands to *B.* and gives ſeveral Legacies, and dies. The Wife *waives the Deviſe*, and inſiſts upon the Articles. The Queſtion was, *Whether the Wife ſhould have one Moiety of the perſonal Eſtate which the Huſband had at the Time he entered into the Articles*, or *only a Moiety of the perſonal Eſtate he died poſſeſſed of?* Lord Chancellor: The Annuity muſt be accounted a Part of the perſonal Eſtate the Wife is to have a Moiety of, for were ſhe to have but a Moiety of the Eſtate the Huſband ſhould have at his Death, it would be in the Power of him to defeat the Articles by Alienation or Gift; the Reaſon of inſerting at his Death, was to explain he meant only a Moiety of his Eſtate at his Death, which has eſcaped Misfortunes and Loſſes. *Trin. 7 Ann. Webſter* and *Milford, MS. Rep.*

The Wife's *waiving* the Deviſe, and being let in upon the perſonal Eſtate, wrought a Deficiency in the Legacy. Lord Chancellor thought of which he what he was benefited by the Waiver towards raiſing a Fund for Payment of the Legacies, and his Lordſhip thought 4000 *l.* in Reverſion worth but 3000 *l.* in Poſſeſſion, and decreed, that according to this Eſtimate, the Value of the Lands being ſettled by the Maſter, ſhould be charged if the Legacies require it. *Ibid.*

it the higheſt Equity that *B.* who had by the *Waiver* gained the Poſſeſſion of an Eſtate would have had but a Reverſion if the Wife had accepted the Deviſe, ſhould contribute

12. *J. S.* gives his Son a Legacy of 40 *l. upon Condition that he does not diſturb his Truſtees.* On the *Truſtees applying for an Execution of the Truſt*, the Son was decreed either to join with them in a Sale of the Premiſſes, or elſe to forfeit his Legacy. *Per* Lord *Harcourt, Hil.* 2710. *Webb* and *Webb*, 1 *Will. Rep.* 136.

13. A Man deviſes *Lands to his Wife until his Son ſhall attain the Age of twenty-one Years*, and *then to his Son and his Heirs. The Son dies at the Age of thirteen.* The Queſtion was, If the Eſtate deviſed to his Wife did determine by the Son's Death, *or* ſhould continue 'till the Son might have attained his Age of twenty-one Years by the *Effluction* of Time? *Harcourt*, C. was of Opinion that the *Wife's Eſtate did determine by the Death of the Son*, and differs from *Boraſton's* Caſe (*a*), 3 *Co.* 19. for *there* the Deviſe was to Executors for Payment of Debts otherwiſe unprovided for, but *here* the *Wife comes in for her Thirds*, and that is a ſufficient Proviſion for her in the Eye of the Law. Decreed *accord' Hil.* 12 *Ann. Mansfield* and *Mansfield, Vin. Abr.* Tit. *Deviſe*, (N. b. 2.) *Ca.* 13.

(*a*) *Vide* 1 *Vol. Abr. Eq.* 190. *Ca.* 16.

14. *J. L.* had three Sons, *A. B.* and *C.* and *deviſed all his Lands to* C. (Defendant's Huſband) *for his Life, he* or *his Heirs, paying out of the Rents of the Premiſſes* 10 l. *a Year to* A. *for his Life, and* 10 l. *a Year to* B. *for Life*, and *alſo* 10 l. *a Year to the Teſtator's Daughter* M. (now the Wife of *W.*) *for her Life*; and *alſo paying his Legacies*; and *that after the Death of* C. *and Defendant his Wife*, then the *Son* or *Sons of* C. *ſhould have all the ſaid Premiſſes equally between them, they* or *their Brothers, paying the Legacies aforeſaid*; and *if no ſuch Sons*, then *the Daughter or Daughters of* C. *to have the ſaid Premiſſes equally among them, paying*, &c. *Parker*, C. held, that theſe Rents were not to ſink upon the Death of *C.* and during the Life of his Wife, (*who had an Eſtate-tail for Life by Implication, as his Lordſhip held* (*b*), they being expreſly given to the ſeveral Annuitants (three in Number) for their Lives, and were plainly intended as a certain Proviſion for them in all Events during their Lives; ſo that it was as if theſe ſeveral Annuities were given in the firſt Place by the Will to theſe Annuitants, and the Lands afterwards given ſubject to the ſaid Annuities; from whence it ſeemed to have been the Teſtator's Intent, that whoſoever took the Land ſhould pay the Annuities; and that *C.*'s Wife ſhould be liable to the Annuities; which appeared to have been all along paid

(*b*) *Vide P. Ca.*

by

by her ſince her Huſband's Death. *Trin.* 1718. *Willis* and *Lucas*, 1 *Will. Rep.* 472.

15. Tho' *a Condition be not in Strictneſs of Law deviſable*, yet ſince the *Statute of Uſes*, *the Deviſee may take Benefit of it* by an *equitable Conſtruction upon that Statute*. *Per* the *Maſter of the Rolls* and *Lord Chancellor*, *Eaſt.* 1718, in the Caſe of *Marks* and *Marks*, *Prec. in Chan.* 487.

16. *A.* deviſes *to* H. *his Wife all his Debts*, *Goods*, &c. provided *that if* H. *die without Iſſue by him*, he appointed *that* 80 l. *ſhould remain* to his Brother *J. D.*——*A.* dies, then *J. D. dies in the Life-time of* H. and *then* H. *dies without Iſſue by* A.—Firſt Queſtion, Whether this was a good Deviſe to *J. D?*—Secondly, Whether he dying before the Contingency happening, it was ſo veſted in him that his Executor ſhould have it, or only intended as a *perſonal Benefit* to *J. D?* *Cowper*, C. ſaid, there is a *Difference between this Deviſe* here which is *upon a Condition precedent*, and where it is *upon a Contingency over*; as *to one for Life*, *and if he die without Iſſue or Heirs of his Body*, *then over to another.*——Here the Wife has nothing in the Money, but this is an Appointment of ſo much Money when the Contingency happened.——In the former Caſe, the Eſtate-tail abſorbs the whole Intereſt.——The Word (*remain*) is obſervable, if ſuch an Accident happened, then ſo much was to remain to him.——If this had been a *Deviſe over*, there had been no Queſtion, May not this be conſtrued *if* H. *die without Iſſue living by him?* This Legacy was to ariſe *upon a Condition* precedent, which makes the Legacy the worſe; but all the Caſes put are of a *Deviſe over*, and the Fund *here* is deviſed to the Wife.——As to the Point, if the Deviſe is good, it muſt go to the Executor of the Deviſee. But his Lordſhip ſaid, he would conſider of it. *Hil.* 4 *Geo.* 1. *Anon. Vin. Abr.* Tit. *Deviſe*, (F. e.) *Ca.* 24.

17. *A.* deviſes Portions to his four Children, payable at their reſpective Ages *of twenty-one* Years *or Marriage*, and *in Caſe any of them ſhould die before the Time of Payment*, or *ſhould die without Iſſue*, then *his* or *their Share to go to the Survivors* or *Survivor of them and his Heirs*. One of them died *under Age*, and *without Iſſue*. This tho' a Limitation of a perſonal Eſtate is good, but liable to the Contingency of Survivorſhip 'till it comes to the laſt of the four Children. *Eaſt.* 1719. *Nichols* and *Skinner* (*a*), *Prec. in Chan.* 528.

(*a*) *Vide P. Ca.*

18. *A.* gives *B.* a Legacy, on Pain of Forfeiture of it in Caſe *he ſhould give his Wife any Trouble in relation to his Eſtate*; and makes his Wife Executrix. *B.* brings a Bill againſt the Wife, for which there was very little Colour, and amongſt other Particulars *demands the Legacy*. Lord Chancellor *King* was of Opinion, that the Suit was very frivolous; and tho' he would not make the Legacy forfeited, yet declared, if *B.* did not pay the Executrix the Coſts ſhe had been out of Purſe, he would diſmiſs the Bill. 1724. *Nutt* and *Burrell*, *Sel. Caſes in Chan.* 1.

19. I *give to my Wife all my Leaſe at* S. *and all my Houſhold Goods*, *ſhe maintaining my Children*; but *if ſhe ſhould marry*, then *a Moiety of it among my Children*. The Children ſhall have no more than a Maintenance, unleſs ſhe marries. *Feb.* 25, 1725. *Seagrave* and *Euſtace*, *Vin. Abr.* Tit. *Deviſe*, (N. b. 2.) *Ca.* 15.

20. *A.* ſeiſed in Fee has a Son *B.* and a Siſter *C.* &c. and deviſes his Lands to his Son *B.* in Tail general, and if his Son *B.* ſhould die without Iſſue, and his Wife ſhould ſurvive him, then the Wife to have the Premiſſes for Life, Remainder to *C.* in Fee. *B.* the Son

dies

dies without Iſſue before, but Teſtator's Wife dies before him. *C.* is not intitled to the Remainder in Fee, becauſe the Contingency is annexed to all the Deviſes. *Per* the Opinion of *Reynolds*, J. who tried the Cauſe at *Chelmsford* Aſſizes, and who afterwards on taking Time to conſider of it, retained his former Opinion, and the *Poſtea* was delivered, *&c.* *Mich.* 1726. *Davis* and *Norton*, 2 *Will. Rep.* 390.

21. *J. S.* by Will gives to his Executors ſome *South-Sea* Stock and Annuities, *In Truſt to apply the Dividends thereof for the Maintenance of the Plaintiff* his Grand-daughter *until ſhe ſhould attain the Age of twenty-one or be married*; and *to the Intent that they ſhould transfer the ſaid Stock and Annuities to the Plaintiff when ſhe ſhould attain twenty-one, or be married with the Conſent of* A. *and* B. But that in Caſe ſhe ſhould *marry without the Conſent of* A. *and* B. the Executors to pay her the Dividends during her Life, and after her Death transfer the ſaid Stock and Annuities to her Children; and if ſhe die without Iſſue, then to go over. The *Plaintiff having attained twenty-one*, brought her Bill to have the Stock and Annuities transferred to her, which was oppoſed by the Remainder Man, who inſiſted, that in regard the Plaintiff was *not married*, and if ſhe married without the Conſent of *A.* and *B.* (which might happen to be the Caſe) then ſhe was only to have the Dividends for her Life, therefore the Stock ought not to be abſolutely veſted in her. But *King*, C. held that the Plaintiff *being* twenty-one, ſhe had an abſolute Intereſt veſted in her, and that the *Forfeiture muſt be intended only of Marriage without ſuch Conſent before twenty-one*; and decreed the Stock and Annuities to be transferred to her. *Trin.* 1729. *Deſbody* and *Boyville*, 2 *Will. Rep.* 547.

22. Deviſe *to my Daughters and to their Heirs, until my Son ſhall attain his Age of forty Years, hoping by that Time my Son will have ſeen his Folly.* The Son dies before forty. The Deviſe to the Daughters ceaſes. *Hil.* 1732. *Lomax* and *Holmeden*, 3 *Will. Rep.* 176.

(R) Who ſhall be the Taker where there is an uncertain (*a*) Deſcription of the Perſon.

(*a*) Or *imperfect.*

1. A DEVISE was to *Margaret* the Daughter of *W. K.* The Daughter's Name was *Margery*. Held that *Margery* ſhould take *quia conſtat de perſona* by the Deſcription; cites 11 *Co.* 21. *Trin.* 1677. *Gynes* and *Kemſley*, *in C. B.* 1 *Freem. Rep.* 293.

2. A Deviſe of *Goods was made to* A. *for Life*, and *after his* Deceaſe to the *Poſterity* of *B.* And the Queſtion was, Whether by the Word (*Poſterity*) only Deſcendants from the Body of *B.* ſhould take, (*viz.*) Children and Grandchildren, or whether he having no Iſſue, it ſhould go to the *collateral* Relations? And *Lord Keeper* was of Opinion, That it went only to the Iſſue of the Body. And that if a Deviſe were *to* A. *and his Poſterity*, it would be only an Eſtate-tail.—But the *Maſter of the Rolls* thought that a Deviſe *to a Man* and *his Poſterity* would create a Fee. Precedents ordered to be ſearched. *Per Lord Keeper, Mich.* 1703. *Attorney General* and *Bamfield*, 2 *Freem. Rep.* 268.

3. Deviſe to *A. B. Father* and *Son are named* A. B. *Per Holt*, C. J. *prima facie A. B.* the *Father* ſhall be intended, but if the *Deviſor did not know the Father*, it will go to the Son. *Hil.* 2 *Ann. B. R. in Caſu Lepiot* and *Brown*, 1 *Salk. Rep.* 7.

6 *Mod.* 199. S. C. and P. *Per Holt*, C. J. *quod fuit conceſſum.*

4. One deviſes the Surplus of his perſonal Eſtate to his Relations, without ſaying what Relations. Only ſuch ſhall take who are ca-

(a) *Vide Roach* and *Hammond, Prec. in Chan.* 401. but more particularly the Caſe of *Carr* and *Bedford*, 30 *Car.* 2. 2 *Chan. Rep.* 146. where the Teſtator deviſed the Reſidue of his Eſtate *among his Kindred according to their moſt Need*; this ſhall be conſtrued according to the Statute of Diſtributions.

pable of taking *within the Statute of Diſtributions* (a), elſe it would be uncertain; for the Relations may be infinite. *Per* the Maſter of the Rolls, and admitted by Mr. *Vernon* and others. *Trin.* 1716. *Anon.* 1 *Will. Rep.* 327.—*Vide this Page, Ca.* 6.

1 *Will. Rep. Hil.* 1717. *Goodright* and *Wright*, S.C.

5. Deviſe *to* A. *in Tail*, Remainder *to* B. *and the Iſſue of her Body lawfully begotten*, Remainder *to the right Heirs of* A. *for ever*. A. *dies without Iſſue, living the Teſtator*; B. *after making of the Will had Iſſue* C. (who was alſo *Heir at Law to* A.) and *dies, living the Teſtator*. Reſolved *per Cur'*, That the Heir at Law to the Teſtator, and not *C.* ſhould have the Land. *Hil.* 3 *Geo.* 1. *B. R. Woodwright* and *Wright*, *Lucas's Rep.* 369.

Vide Ca. 4. *P.* 366. and the Notes there.

6. The Teſtator deviſed the Surplus of his perſonal Eſtate to his *poor Relations*; and the Counteſs of *Winchelſea* being as near a Relation as any to the Teſtator, claimed a Share; and it was decreed that ſhe was intitled thereto, in regard the Word (*Poor*) was frequently uſed as a Term of *Indearment* and *Compaſſion*, rather than to ſignify an *indigent* Perſon; as one ſpeaking of his Father, after ſays my *poor Father*; or of his Child, my *poor Child*. *Trin.* 1716, at the Rolls. *Anon.* 1 *Will. Rep.* 327.——But the *Reporter* ſays, this ſeems to have been a ſtrained Conſtruction in Favour of the Earl and Counteſs of *Winchelſea*, who *had not an Eſtate any ways proportionable to their Quality*. *Ibid.*

7. *J. S.* by Will gives a Legacy of 200 *l.* to Mrs. *Sawyer*, when there was no ſuch Perſon ever known to her; but it was alledged that ſhe meant one Mrs. *Swopper*. His *Honour* ordered the Maſter to examine who the Teſtatrix meant thereby, and whether ſhe meant Mrs. *Swopper*, who was the Perſon that contended for the ſame; and if the Maſter ſhould find that ſhe was the Perſon intended, then ſhe to receive her Legacies in Proportion with the other Legatees. *Eaſt.* 1718. *Maſters* and *Harcourt*, *Maſters* at the Rolls, 1 *Will. Rep.* 421, 425.

Vide P. Ca.

8. *A.* by Will deviſed a Legacy of 500 *l.* to *Catherine Earnley*. The Perſon's Name who claimed this Legacy was *Gertrude Yardley*. It was inſiſted for her and admitted, that no Perſon named *Catherine Earnley* claimed this Legacy. It was proved, that the Teſtator's Voice when he made his Will, was very low, and hardly intelligible; that the Teſtator uſually called the Legatee of this 500 *l. Gatty*, which the Scrivener, who took Inſtruction for drawing the Will, might eaſily miſtake for *Katy*; and that the Scrivener not well underſtanding who this Legatee of the 500 *l.* was, or what was her Name, the Teſtator directed him to *J. S.* and his Wife to inform him further, who afterwards declared that *Gertrude Yardley* was the Perſon intended. It was alſo proved, that the Teſtator in his Life-time had declared that he would do well for her by his Will. At the *firſt* Hearing his *Honour* inclined to think that the Legacy was *void*. But at another Day he gave his Opinion, That the Legacy was a good Legacy to *Gertrude Yardley*, tho' the ſame was given by the Will to *Catherine Earnley*; and his Honour ſaid, *If this had been a Grant*, nay *had it been a Deviſe of Land, it had been void, by reaſon of the Miſtake both of Chriſtian* and *Surname*. *Eaſt.* 1723. *Beaumont* and *Fell*, 2 *Will. Rep.* 141, 142.

In this Caſe the *Name* and *not the Perſon* is miſtaken; and it is very material, that there is no ſuch Perſon as *Catherine Earnley* claiming this Legacy; which, together with the Proofs of the Teſtator's having a very low Voice when he made

made his Will, and of his having uſually called the Plaintiff *Gatty* inſtead of *Gertrude*, and often declared he would do well for her, is ſufficient to intitle her to this Legacy. *Per* his *Honour*. *Ibid.* 143.

9. *J. S.* being ſeiſed in Fee of a real Eſtate as *Heir on the Part of his Mother's Side*, deviſes the Lands to Truſtees in Fee, In Truſt to pay ſeveral Annuities and Charities, and the *Reſidue of the Rents and Profits of the Premiſſes to go to his the Teſtator's own right Heirs of his Mother's Side for ever.* Decreed *per* Lord *Macclesfield* in Favour of the *Heir of the Mother's Mother's Side*, from whom the Eſtate came (*a*). *Eaſt.* 1723. *Harris* and *Biſhop of Lincoln* (*b*), 2 *Will. Rep.* 135.

(*a*) *Note*; In this Caſe a *parol* Evidence was admitted to prove which Heir was intended, *(viz.)* Whether the *Heir of the Mother's Mother's Side*, or the *Heir of the Mother's Father's Side*. *Ibid.* 136. (*b*) *Vide P. Ca.*

10. *J. S.* ſeiſed of a Church Leaſe for the Life of *A.* deviſed an Annuity out of it to *B.* for Life, and directed that if *B.* ſurvived *A.* (the *Ceſty que vie* in the Leaſe) then the Teſtator's *Executor* ſhould *purchaſe the Leaſehold Premiſſes for the Life of* C. *the Teſtator's Kinſman*, and *then* deviſed that his Executor out of the *Surplus* of the *Leaſehold* and *Perſonal* Eſtate ſhould keep the Premiſſes in Repair; but if the Leaſehold Premiſſes could not be ſo purchaſed, *then* he deviſed the *Surplus of the Eſtate to the Plaintiff*, and made *D.* his *Executor*, In Truſt *only*, giving him a ſmall Legacy. The *Executor purchaſed the Leaſehold for the Life of* C. And the Queſtion was, Whether the Plaintiff or the Defendant *C.* was intitled to the Surplus of the Profits thereof? And *King*, C. held, that the Plaintiff could not have this Leaſe, the Deviſe to him being upon a Contingency which never happened, *(viz.) if the Leaſehold Premiſſes could not be purchaſed for the Life of* C. whereas ſuch Purchaſe has been made by the Executor. And decreed that *C.* was intitled to the Leaſehold Premiſſes. And his *Lordſhip* ſaid, This appears to have been a *beneficial* Deviſe, becauſe in the deviſing Clauſe the Teſtator calls *C. his Kinſman*, and *here* ſlighter Words will ſerve to give the Leaſehold Premiſſes to *C.* foraſmuch as no other Perſon can take them; and it is a dark Will. *Hil.* 1725. But *July* 6, 1726, upon a Rehearing, his Lordſhip *reverſed* this Decree; and held that by this Will the Plaintiff was intitled to the Leaſe. *Stephens* and *Stephens*, 2 *Will. Rep.* 323.

11. Teſtator *bequeaths his perſonal Eſtate to his Wife*, and adds, *I do not doubt but my Wife will be kind to my Children.* The Court thought that theſe Words gave a Right to no Child in particular, or a Right to any particular Part of the Eſtate, but that this Clauſe was *void* for *Uncertainty*. *Hil.* 11 *Geo.* 1. *Biggins* and *Yates*, 2 *Mod. Caſes in Law and Eq.* 122.

12. *J. B.* Citizen and Founder of *London*, having a Wife and one Daughter *Mary*, married to Defendant *Thomas Taylor*, by Will deviſes as follow: "*I do give to my dear Wife all my worldly Goods, Houſe* "*at* Iſlington, *Stock, Money, Bonds, Notes in the* Eaſt India *or elſe-*"*where, and ninety-nine Years Annuity in the Exchequer*, with all the "Profits which may come upon them or by them, *with this Condi-*"*tion*, to *give to my three Siſters* 5*l. Yearly for their Lives, or the* "*longeſt Liver*, preſently after my Deceaſe, if God permits you to "continue in this Capacity, not elſe; *and after my Wife's Deceaſe, the* "*ſame I give to my Siſters, and then after my Daughter's Deceaſe, to the* "*Fruit of her Body*; but *for want of ſuch Iſſue or Fruit, to my Brothers* "*and Siſters then living, and after them to their Children, and the Chil-*"*dren of my Brother* Richard *now deceaſed*, except a Note of 50 *l.* "in Mr. *Taylor's* Hands, and Goods and Plate that I give to him."

And

And appointed his Brothers *P.* and *W.* and Mr. *Taylor* Executors, to ſee his Will performed, and died. And the Defendant *Taylor* proved the Will, and poſſeſſed the perſonal Eſtate. Then *Mary Taylor the Daughter died without Iſſue*, leaving Defendant her Huſband. Then the *Teſtator's Widow died*, having made her Will, and thereof Defendant *Taylor* Executor, who proved the Will, and alſo took out *Adminiſtration to* Mary *his Wife.* The *Plaintiffs are all the Teſtator's Brothers* and *Siſters that were living at the Death of both the Widow and the Daughter.* The Queſtion was, Whether the ſubſequent Limitations after the want of Iſſue of the ſaid Daughter's Body, or any, and which of them (the Wife and Daughter of the Teſtator being dead without Iſſue) are good, and to whom the Eſtate does belong? On a Caſe from Lord Chancellor; Lord *Raymond*, C. J. *Page*, *Reynolds* and *Probyn*, Juſtices, were of Opinion, That the Teſtator's Wife being dead, and *Mary* his Daughter being alſo dead, without Iſſue living at her Death, the ſubſequent Limitations are good, and that the Eſtate in Queſtion belongs to the Plaintiffs. And Lord Chancellor decreed accordingly (*a*). *Brooks* and *Taylor*, *Vin. Abr.* Tit. *Deviſe*, (T. b.) *Ca.* 33.

(*a*) *Quære*, What Term and Year?

13. *H.* by Will gave 500 *l. to the Relations of* E. H. *to be divided equally between them. E. H.* had at the Teſtator's Death two Brothers living, and ſeveral Nephews and Nieces by another Brother. It was ſaid, that in the Caſe of *Brown* and *Brown*, Lord *Macclesfield* had determined, that the Word *Relations* ſhould be confined to ſuch Relations as were within the Statute of Diſtributions, becauſe of the *Uncertainty* of the Word *Relations*; and upon this Authority, *King*, C. in the preſent Caſe, determined, that no *Relations* ſhould take by this Deſcription that could not take by the Statute of Diſtributions. *Mich.* 1734. *Thomas* and *Hole*, *Caſes in Eq. Temp. Talbot* 251.

(S) Where the Words are in the disjunctive Who ſhall take.

1. THE Teſtatrix deviſed *Money*, In Truſt *for ſuch of her Daughters* or *Daughter's Children as ſhould be living at her Son's Death.* Some of the Daughters were living at the Son's Death, and had alſo Children, and others were dead, leaving Children. Sir *Joſ. Jekyll*, *Maſter of the Rolls*, after having taken Time to conſider of it, decreed that all the Children, as well of the living as of the dead Daughters, ſhould come in for their Shares. For that the Word (*or*) ſhould be taken (*b*) for (*and*), otherwiſe the whole Deviſe would be void for *Incertainty*; and that it was the ſame as if the Deviſe had been *to ſuch of my Daughters, and their Children as ſhall be living at my Son's Death* (*c*). *Eaſt.* 1718. *Richardſon* and *Spraag*, 1 *Will. Rep.* 434.

(*b*) *Vide* the Caſe of *Keylway* and *Keylway*, *P. Ca.* —— Alſo 2 *Vern.* 388, 389.— *Godb.* 363.— 2 *Sid.* 54.——

(*c*) The Word (*or*) might be of Uſe in regard *all* the Daughters might die in the Son's Life-time; and then the Teſtatrix might not think it proper to ſay, Daughters *and* their Children, when there might not be ſome of each Species, but (*or*) in ſuch Caſe would be the proper Word; and that the Word (*or*) is uſually put for (*and*), appears by very many Inſtances in the Caſe of *Price* and *Hunt*, in *Pollexfen's Rep.* 645. *Per* his Honour in the above Caſe of *Richardſon* and *Spraag*. *Ibid.*—— It ſeems as if it might have been agreeable to the Senſe of the Teſtatrix to have underſtood the Deviſe thus: "*To my Daughters, and to the Children of ſuch of them as ſhall be dead*, &c." *Ibid.* 435. in a Note by the *Editor*.

2. So if the Deviſe had been *to my Children* or *Grandchildren*, *my Children* and *Grandchildren* would have taken. *Per* his *Honour* in the above Caſe. *Ibid.*

(T) Where

(T) Where Lands are deviſed in Truſt, or to be ſold for, or charged with, the Payment of Debts (*a*), — Legacies (*b*); With Remainder over.

(*a*) *Vide* Tit. *Heir.*
(*b*) *Vide* Tit. *Legacies.*

1. AS to the Diſpoſal of my Eſtate, I deviſe the ſame as follows: *I give and deviſe*, &c. And then deviſes his Lands *to* B. *his eldeſt Son in Tail*, Remainder *to his three other Sons in Tail Male ſucceſſively*, with Remainder to his own right Heirs, and deviſes *Copper Mines* and other Eſtates *to* B. *to be ſold to pay Debts*; and then gives to his Daughter 30 *l. per Annum* 'till twelve Years old, and afterwards 50 *l. per Annum* 'till Marriage, and gives her 1500 *l.* to be paid by *B.* within three Months after Marriage, and makes *B.* Executor, and dies. The perſonal Eſtate fell ſhort. Lord Chancellor *Cowper* ordered Precedents to be ſearched, but thought the Lands not charged. *Mich.* 1617. *Lord Pawlet* and *Parry*, *Prec. in Chan.* 449. See *Vin. Abr.* Tit. *Charge*, 461. *Ca.* 16. S. C.

2. A Man that had ſeveral Creditors, makes his Will, and recites, that for the Payment of his Legacies and Debts, he deviſes ſuch Lands to his Executors; then he gives 800 *l.* to his Wife, and 800 *l.* to his Daughter, *&c.* and ſays, *That his Will is, that theſe ſeveral Sums ſhould be paid out of Money raiſed upon the Sale of his Land.* And the Value of the Land falling ſhort of the Debts and Legacies, *Finch* Lord Keep. held, that the Debts ſhould be paid before the Legacies. *Eaſt.* 1675. *Hickſon* and *Witham*, 1 *Freem. Rep.* 305. *Lord Keeper* took a *Difference where Lands were conveyed by Deed, In Truſt for the Payment of Debts and Legacies*; there they ſhould go *in Pari Paſſu*, and ſhould have *proportionable* Satisfaction; and the Debts ſhould have no Preference; but where *Lands* were *deviſed to an Executor for the Payment of Debts and Legacies*, this ſhall be intended that he ſhall have them as Aſſets; becauſe the Teſtator ſhall not be ſuppoſed, without expreſs Words, to be ſo *unconſcionable* as to give his Eſtate in Legacies, and leave his Debts unpaid.——But if he *deviſes Lands for the Payment of Legacies only*, this ſhall *not* be liable to Debts, becauſe it was in the Teſtator's Power to diſpoſe of it under what Conditions and to what Purpoſes he pleaſed; and if he would make ſo *unconſcionable* a Will, his Lordſhip ſaid, He would not make a better Will for him. And he agreed, that if he had *deviſed that his Legacies ſhould be firſt ſatisfied, and that then the Remainder of the Profits ſhould go to the Satisfaction of his Debts*, that then the Legatees ſhould be ſerved before the Creditors; but the naming of *Legatees* firſt (*as to ſay Legatees and Debts*) gives no Preference; but *here* his Intention being *apparently* to provide for his *Debts and Legacies*, tho' the Legacies are ſpecified, and his Deſire that they ſhould be ſatisfied, yet it ſhall be intended in Courſe of Law, and that Way that was moſt *conſcionable* for the Teſtator. But here his *Lordſhip* ſaid, That there being a Proviſion for the Payment of his Debts, there ſhould be no Difference between Bonds and Debts upon Contract, but they ſhould be equally ſatisfied; for being juſt Debts, there ſhould not be that Difference betwixt them, upon a Nicety of Law, that ſome ſhould have all and others none. *Ibid.* 305, 306.——See 1 *Chan. Ca.* 248. *Finch Rep.* 196.

3. If a Man *deviſes Lands to his Executors for Payment of his Debts and Legacies generally*, it ſhall be *Aſſets*, and *Debts muſt have the Preference*, according to the Rules of Law. Agreed *per Cur'* and Counſel. *Eaſt.* 1675, in the Caſe of *Hickſon* and *Witham*, 1 *Freem. Rep.* 305, 306.

4. *A.* bequeaths 20 *l. to* B. *whom he makes his Executor*, and *deviſes his real Eſtate to* C. *and his Heirs*, upon Condition that *he pay his Debts and Legacies, the Debts within two Months* after his Deceaſe, *and the Legacies* within three Months; and if the Debts and Legacies were not paid accordingly, *then the Creditors* and *Legatees might enter.* Decreed *per Lords Commiſſioners*, that the *perſonal* Eſtate ſhall be *firſt* applied to diſcharge the Debts and Legacies (*c*). *Hil.* 1689. *Gower* and *Mead*, *Prec. in Chan.* 2. *MS. Rep.* S.C. *accord'.*

(*c*) And *per Maynard*, Commiſſioner, If a Man deviſes his *real* Eſtate to another, *upon Condition to pay his Debts*, and does *not diſpoſe of his perſonal Eſtate*, that ſhall be *firſt* applied in Eaſe of the real Eſtate, and in the principal Caſe the Condition annexed to the Deviſe is not a Condition to avoid the whole Eſtate, but only to give an Entry to the Creditors and Legatees. *Prec. in Chan.* 2. in S. C.——And *per Keck*, Commiſſioner, The *Creditors* have

have a Bill now at Hearing, and have a Demand *primarily* againſt the *perſonal* Eſtate, and may certainly take their Remedy againſt that if they pleaſe. Suppoſe in *this Caſe* there had been *no Executor named*, the *Adminiſtrator* muſt certainly have applied the *perſonal* Eſtate in Eaſe of the real, and the *Executor does take no more to his own Uſe than an Adminiſtrator*; therefore the *perſonal* Eſtate muſt be applied.——And *per Rawlinſon*, Commiſſioner, There is a *Diverſity* between *Hæres Factus* and a *Deviſee of particular Lands*; for a Deviſee of particular Land ſhall not have the Benefit of the *perſonal* Eſtate, but *Hæres Factus* of the whole ſhall. *Prec. in Chan.* 2, 3. *in* S. C.——*MS. Rep.* S. C. *accord*.

Rawlinſon admitted, That if the Teſtator had only deviſed the Profits 'till his Son ſhould be twenty-one, towards Payment of Debts, and had gone no farther, that it ſhould have been carried no farther than 'till the Son would have attained to that Age. But *Hutchins* was of Opinion, That even in that Caſe the Profits ſhould be applied to pay the Debts beyond the Age of twenty-one, if thoſe to that Time were not ſufficient to diſcharge them all. *Ibid.* 35.

5. *Deviſe of the Rents and Profits of Lands 'till his Son attain twenty-one, towards Payment of Debts*; and if my Son die before twenty-one, *the Debts being paid*, then to *A.* The Son dies before twenty-one; yet the Rents and Profits, not only 'till he would have attained twenty-one, but alſo beyond, 'till the Debts be paid, ſhall be applied for that Purpoſe. *Mich.* 1691. *Martin* and *Woodgate*, *Prec. in Chan.* 34.

6. Deviſe of Lands *to* A. *and his Wife for their Lives*, Remainder *to ſuch of their Children as ſhould be living at the Death of the Survivor of them*, and *to their Heirs, equally to be divided between them*, A. *paying* 40 l. *to the Plaintiff*, &c. at a certain Time. Decreed that the Lands be ſold for Payment of the Money; and then the Defendants to have ſuch a Proportion of the Overplus of the Purchaſe Money, as is anſwerable to their Intereſt for Life in the Land; for the Money deviſed is a Charge upon *all* the Eſtates. *Trin.* 1691. *Sadd* and *Carter*, *Prec. in Chan.* 27.

7. If a Man *deviſes his Lands to* J. S. *and deſires that the ſaid* J. S. *ſhould pay his Debts*, *or* if it be *the ſaid* J. S. *paying his Debts*; *or if immediately after the Deviſe of his Lands, he does appoint or deſire that his Debts ſhould be paid*; *or if he uſeth any Expreſſion in his Will whereby it appears that he had any Intent to charge his Lands with his Debts*; in ſuch Caſe his Land will ſtand charged. *But in the Caſe at Bar, where the Teſtator* had in the Beginning of his Will ſaid, that he *deſired that all his juſt Debts ſhould be paid, and afterwards* in the ſaid Will he *gave ſeveral Legacies, and deviſed Lands*; it was held that his Deviſee was not charged with the Payment of the Debts; for if that ſhould be ſo, the Debts of every Teſtator would be charged upon his Lands; for there are few Wills but have ſome ſuch Expreſſion whereby the Teſtator deſires his Debts to be paid. *Mich.* 1693. *Anon.* 2 *Freem. Rep.* 192.

8. Deviſe of *Lands after Debts paid*, (and then ſays, my Debts are only theſe contained in the Schedule); Deviſor afterwards contracts *new Debts*. The Payment of the *firſt* Debts is what is required by the Will. *Mich.* 7 *W.* 3. *C. B.* 3 *Lev.* 433.

9. The *perſonal* Eſtate, tho' deviſed, ſhall pay off a Mortgage, tho' there is *no* Covenant for Payment of it in the Mortgage Deed. Decreed *per Lord Chancellor*, *Trin.* 1696. *Meynell* and *Howard*, *Prec. in Chan.* 61.

10. *J. S.* deviſes his real Eſtate, In Truſt for Payment of his Debts, and the Surplus to his Siſters; and deviſes all his perſonal Eſtate to his Wife, whom he makes his Executrix. The Wife ſhall have the *perſonal* Eſtate exempt from Debts, *the Debts being more than the perſonal Eſtate* amounted to. Decreed *per* Lord Chancellor, *Mich.* 1699. *Bamfield* and *Wyndham*, *Prec. in Chan.* 101.

11. One being in an *undue* Manner drawn in to execute a Conveyance of his Eſtate, after makes his Will, and thereby deviſes *all his*

his Lands in the firſt Place for Payment of his Debts, and the Surplus to other Perſons. His Creditors may ſet aſide the Conveyance, *having a Right in Nature of an Equity of Redemption*, as the Teſtator himſelf had; tho' urged, that it was but in Nature of a *Choſe en Action*, and *therefore* not aſſignable. *Hil.* 1700. *Blake* and *Johnſon* (*a*), *Prec. in Chan.* 142. (*a*) *Vide P. Ca.*

12. Lands were deviſed *to* Truſtees *and their Heirs, to lett* and *ſet*, and out of the *Rents*, (without ſaying, *and Profits*) to *pay Teſtator's Debts.* Lord Keeper *Wright* held that theſe Words were not ſufficient whereon to ground a Decree for a Sale; but that the ſubſequent Words, that *after his Debts and Legacies paid, it ſhould be to the Truſtees*, were ſufficient. *Hil.* 1701. *Cook* and *Parſons* (*b*), *Prec. in Chan.* 184, 185. (*b*) 1 *Vol. Eq. Abr. P.* 280. *Ca.* 4. S. C. (cites 2 *Vern.* 429.) but is not S. P.

13. Where *Lands were deviſed for Payment of Debts and Legacies*, the Debts being ſuch as had no Lien upon the Land, as Debts by ſimple Contract, *&c.* the Debts ſhall have no Preference; but if there be not ſufficient to pay all, they ſhall be paid in Proportion, altho' it was otherwiſe held in Lord *Nottingham*'s Time, who uſed always to ſay, that *a Man ought to be juſt before he was bountiful*; and ſo the Court of Equity ſince that Time ſeems to be ſettled. 2 *Freem. Rep.* 270. *Pl.* 339. *Trin.* 1703. Cited by *Dobbins* as a Caſe ſettled upon Conſideration had of all the former Caſes by *Lord Keeper*, in a Cauſe of *Herbert* and *Herbert.*

14. As to my temporal Eſtate wherewith God has bleſſed me, I give and diſpoſe thereof as follows: " Firſt, I will that all my Debts " be juſtly paid which I ſhall owe at my Death to any Perſon or Per- " ſons whatſoever; alſo I deviſe all my Eſtate in *G.* to *J. S.*" This was all the real Eſtate the Teſtator had. *Per* Lord Keep. *Wright*, This is a Charge on the real Eſtate for Payment of Debts. *Mich.* 1706. *Bowdler* and *Smith*, *Prec. in Chan.* 264.

15. *J. S.* ſeiſed of Lands in Fee, gives 1000 *l.* to *A.* and deviſes the Lands to *B.* and *C.* for their Lives, Remainder to *D.* in Tail, with ſeveral Remainders over, Remainder to his own right Heirs, provided *that his Executrixes and Executor, and Tenants in Tail, ſhould pay the ſaid Sum of* 1000 l. *within ſix Months after his Death*, and makes *B. C.* and *D.* Executors. *J. S.* dies not leaving perſonal Aſſets to pay this 1000 *l.* *Cowper*, C. decreed that the Intereſt from the Time the 1000 *l.* became due, ſhould be paid by the Tenants for Life, and their Eſtate to be rated at a third Part of the 1000 *l.* and he in Remainder to liable to the other two Thirds; for which Purpoſe they were all three to join in ſuffering a Recovery to dock the Eſtates-tail and Remainders, and then to make a Security of the Eſtate for raiſing this 1000 *l.* according to the ſaid Rate. *Hil.* 1709. *Jones* and *Selby*, *Prec. in Chan.* 288.

16. As for (*and*) concerning my Eſtate with which God hath bleſſed me, I give as followeth: Imprimis, *I will that all my Debts and Funeral Charges be paid and ſatisfied*, and *then makes a particular Diſpoſition of the Eſtate.* This was *decreed no Charge*, as it would be when *Teſtator* ſays, *I will my Debts be paid in the firſt Place*; or *where he gives away the Eſtate after Payment of Debts and Legacies*; for *here* was a Clauſe in the Will, that *after Payment of Legacies and Funeral Charges*, the *Overplus was to go to ſuch* and *ſuch Uſes*, which declare the Intention to be, that the ſame was *to anſwer only Legacies* and *Funeral Charges*, and *not Debts. Per* the *Maſter of the Rolls*, *Trin.* 9 *Geo. Parker* and *Wilcox*, *Vin. Abr.* Tit. *Deviſe*, (Z. d.) *Ca.* 25.

17. *J. S.* deviſes that his Executors ſhall ſell his Lands, and with the Money and Surplus of his perſonal Eſtate *purchaſe an Annuity of* 100 l.

100l. per Annum *for* A. *for her Life, out of which ſhe was to maintain her Children*; and gave 30 *l.* to each Child, to be raiſed out of the ſaid Annuity and the perſonal Eſtate he ſhould die poſſeſſed of. *J. S.* dies, and the *Annuitant* dies three Months after him. *J. S.*'s Executors renouncing, Adminiſtration with the Will annexed was granted to *B.* who was alſo the Adminiſtrator of *A.* the Annuitant. *B.* ſhall compel a Sale, and ſhall have the Money ariſing therefrom as *perſonal* Eſtate, he paying the Childrens Legacies. *Mich.* 1725. *Yates* and *Compton*, 2 *Will. Rep.* 308.

Vide P. Ca.

18. " *All my perſonal Eſtate of what Nature, Kind or Quality* " *ſoever, I give to my Siſter* A. *whom I make my Executrix*; *and all* " *my real Eſtate, of what Kind, Nature or Quality ſoever, I give unto* " *my Sons* B. *and* C. *chargeable with my Debts.*" Held at the *Rolls* about 1731 or 1732, and afterwards by *King*, C. That the perſonal Eſtate ſhould be firſt liable. Cited *arg'* in the Caſe of *Stapleton* and *Colville* (*a*), as the Caſe of *Bromhall* and *Wilbraham* (*b*). *Vide Caſes in Eq. Temp. Lord Talbot* 204.

(*a*) *Vide P. Ca.*

(*b*) *Ibid.* 209.

S. C. cited by *Lord Talbot*, who ſaid, That in this Caſe the *real* and *perſonal* Eſtates were pretty much of the ſame Value, and the Debts muſt have exhauſted the one or the other Fund; ſo that had the Judgment of the Court been otherwiſe, the Man's Children would have been left without any Proviſion.

19. As to my wordly Eſtate, I give it in Manner following: Imprimis, *I will that all my Debts ſhall be diſcharged.* This is a good Deviſe to charge the *Land. Eaſt.* 5 *Geo.* 2. *Lord Warrington* and *Leigh*, *MS. Rep.*

20. " *For the juſt and true Performance of this my laſt Will, and* " *for the Payment of all my Debts, I give and deviſe all my real* " *Eſtate*; *and as to the perſonal Eſtate, which at the Time of my Death* " *I ſhall be poſſeſſed of and intitled to, I give the ſame unto my Exe-* " *cutrix, to defray my Funeral Charges and Expences*; *and if my* " *perſonal Eſtate ſhall fall ſhort to diſcharge the ſame, then the Re-* " *mainder to be paid to my Executors out of the firſt Rents and Profits* " *of my real Eſtate, as they ſhall become due after my Deceaſe, until* " *Payment be made of all my Legacies, Debts and Funeral Expences* " *as aforeſaid*; *and if there be any Surplus of my perſonal Eſtate, that* " *then my Executors pay the ſame to my dear and loving Wife.*" Held that the *perſonal* Eſtate ſhould go to the Wife diſcharged from the Payment of Debts. Cited *arg'* as the Caſe of the *Attorney General* and *Barkham* (*c*), about 1734, in the Caſe of *Stapleton* and *Colville*, *Caſes in Eq. Temp. Talbot* 207.

(*c*) *Ibid.* 210. S. C. cited by Lord *Talbot*; who ſaid, That in this Caſe the Teſtator had laid the Charge upon the *real* Eſtate; and then taking up his perſonal Eſtate, mentions particular Things which he charges it with; ſo that the *Surplus* there meant muſt be the *Surplus* after the particular Charges which he had there ſpecified; and therefore this Caſe being *very particular, muſt ſtand upon its own Bottom* and *Reaſon*, and cannot be compared to the Caſe of *Stapleton* and *Colville.*

Caſes in Eq. Temp. Talbot 1736. S. C. ſtates it thus: *J. S.* deviſed his Lands to *A.* his Wife for Life, *charged* and chargeable

21. *A.* by Will *gave his Lands for Life* (*chargeable with the Payment of his Debts*, and *chargeable with the Payment of the Annuities given by the Will*) *to his Wife*, and thereby alſo gave her *Power* or Authority *by Sale or Mortgage of ſuch Part as ſhe ſhou'd think proper, to raiſe ſuch Sum as ſhould be neceſſary for the Payment of his Debts*, and *gave her all his Goods and perſonal Eſtate*, and made her ſole Executrix.

with two Annuities for the Lives of *B.* and *C.* and with a Legacy of 1000 *l.* and gave *his* Wife a Power by Mortgage or Sale of any Part of the Inheritance, to raiſe Money ſufficient to diſcharge the Debts he ſhould owe at his Death; and then reciting the great Satisfaction he had of his Eſtate's having continued ſo long in his Family, and the great Deſire he had to perpetuate, as far as he could, his Name and Eſtate, he deviſed all his real Eſtate after his Wife's Death to *D.* his Nephew for Life, Remainder to his firſt, *&c.*

cutrix.——By his Will he takes Notice, that the Eſtate had been in the Family for ſeveral Generations.——Sir *Joſeph Jekyll*, *Maſter of the Rolls*, held the perſonal Eſtate to be diſcharged of the Debts, and decreed for the Defendant the Wife. [The Caſe of *Harewood* and *Child*, 1734, was cited *arg'*, which was a Deviſe of Lands, and it was directed that the Truſtees ſhould raiſe Money ſufficient to pay all his Debts, and the Intereſt thereof; and after the Payment of his ſaid Debts, the Teſtator gave his Lands to and for ſuch Perſons, and for ſuch Uſes, as the Manor of *A.* was before ſettled; and adds theſe Words, "*And if any Money remains after the Payment of my Debts* "*and the Truſtees Charges, then it ſhall be paid to my Daughter* Ca- "tharine, *or to ſuch Perſons as ſhall be intitled to my ſaid Manor*," which he had given before.—Afterwards he gave all his perſonal Eſtate of what Nature ſoever to *Catharine*, and made her Executrix.—Held by *Talbot*, Lord Chancellor, That the perſonal Eſtate was *not* exempted (*a*). *Bromhal* and *Wilbraham* was alſo cited (*b*).]——On an Appeal from the Decree at the Rolls, *Talbot*, Lord Chancellor, in the *preſent* Caſe ſaid, The Queſtion is, Whether the Debts ought to be paid out of the real or perſonal Eſtate? The *general* Rule is, that the *perſonal Eſtate is liable to Debts of all Kinds*, but a Man may ſubſtitute another Fund for this Purpoſe, if he thinks fit; and if ſo, if any of the Creditors take their Remedy againſt the perſonal Eſtate, then the Court will give it the Deviſee out of the real Eſtate. That the Teſtator may exempt his perſonal Eſtate from the Payment of his Debts; and that this may be done by expreſs Words, or by other Words that *implicitly* declare ſuch Intention from the whole Form and Tenor of the Will.——When a *Teſtator makes an Executor, and gives nothing but what the Law gives him, and charges the Lands with Debts, there the perſonal Eſtate ſhall be firſt applied.*——Where the *Truſt is to ſell Lands, and the Party leaves a perſonal Eſtate*, there the *perſonal Eſtate may be liable.*——Where he *deviſes his real Eſtate abſolutely to be ſold for the Payment of Debts, and directs the Surplus of the Money to be given to another Perſon*, there is no Reaſon to believe but he *intended to have the Purchaſe Money of the Lands the Fund to*

Son in Tail, &c. upon Condition of taking and uſing his Name and Arms for ever. And in the Cloſe of the Will, he gives all his Goods, Chattels and perſonal Eſtate, to his Wife, and makes her ſole Executrix. On an Appeal from the Rolls Lord Chan. *Talbot* obſerved, That after the Gift of the Annuity and Legacies wherewith he charged his real Eſtate, he gives his real Eſtate to his Wife for Life; and ſaid, that tho' it does not neceſſarily follow that the coupling both together ſhews he intended both to be payable out of one and the ſame Fund, the *perſonal Eſtate being the proper Fund for Debts, tho' no Proviſion had been*

made by the Teſtator; but that the Annuities having none but what is particularly provided for them, yet that muſt have ſome Weight; that he did not think the uſing the Words *charged* or *chargeable* will make any Difference, ſince they are uſed indifferently; and then coming the Power given to the Wife, it ſeemed to him clearly to manifeſt his Intent of her taking what he gave her by his Will to her own Uſe; for his Intent being to perpetuate his Eſtate, he thought it not to be ſuppoſed, that after having given her the whole Power over his perſonal Eſtate by making her Executrix, he would likewiſe impower her to diſpoſe of ſo much of the Inheritance, and conſequently of defeating the Deviſe (not of ſo much as the perſonal Eſtate ſhould prove deficient, but) of what ſhould be neceſſary for Payment of his Debts: That his Intent ſeems clear to give her this Power of diſpoſing of ſo much of the Inheritance as would ſatisfy his Debts, in order to ſecure to her the full Enjoyment of her Eſtate for Life, and of the perſonal Eſtate, free from all Charges whatſoever. And ſo affirmed the Decree made by Sir *Joſeph Jekyll* in Behalf of the Wife. (*a*) *Caſes in Eq. Temp. Talbot* 204. S. C. cited *arg'* in the Caſe of *Stapleton* and *Colville*, thus: "*I deviſe all my Manors to* A. *and* "B. *and their Heirs*, In Truſt *that they and their Heirs out of the Rents and Profits, or by Leaſe or Mort-* "*gage, or Sale thereof, or of any Part thereof, ſhall raiſe ſo much Money as I ſhall owe at my Death, and* "*after Payment of my Debts, and reimburſing themſelves*, upon further Truſt, *that they and their Heirs ſhall* "*ſtand ſeiſed of ſuch Part of the Premiſſes as ſhall remain unſold, to and for ſuch Perſons and Uſes as the* "*Manor of* C. *is already ſettled; and if any Money remain after Payment of my Debts, it ſhall be paid to my* "*Daughter, and ſuch as are intitled to the ſaid Manor by the Limitation aforeſaid.*" Teſtator *before* the making of his Will had *given the Manor of* C. *to his Daughter in Tail*, with *Remainder to his Nephew*, and then gave *all his perſonal Eſtate of what Nature or Quality ſoever, to his Daughter, whom he made Executrix.* And held by *Talbot*, C. that notwithſtanding this expreſs Deviſe to the Truſtees, the perſonal Eſtate ſhould be firſt applied in Diſcharge of the real.——*Ibid.* 209. Lord Chancellor ſaid, That the Opinion of the Court in the Caſe of *Harewood* and *Child* was founded upon the Complexion of the Will, which being taken together manifeſted the Intention to be, that the Daughter ſhould take the *perſonal Eſtate, liable to the Payment of his Debts, ſhe herſelf being Deviſee of the whole*; and that it would be abſurd to imagine the Teſtator to have intended his *perſonal* Eſtate to be *exempted* from Payment of his Debts, when he had expreſly provided that the Surplus of the Produce of what ſhould be raiſed out of the *real* Eſtate, ſhould go to the very ſame Perſon who was Deviſee in Tail of the real Eſtate. (*b*) *Vide Ca. P.*

pay Debts.——*Vide* the Caſe of *Peach* and *Chicheſter*, a ſtrong Caſe for affecting the real Eſtate. But I believe there were other Circumſtances in the Caſe beſides what was ſtated.——In the Caſe of an Executor, the Eſtate veſts in him in *auter droit*;—if he converts it, it ſhall go to his Repreſentatives; if not, it ſhall go to the Adminiſtrator *de bonis* of the firſt Teſtator.——If there is an *Executor*, and he is made *reſiduary* Legatee, and then he dies inteſtate, *his next of Kin ſhall be intitled to Adminiſtration*, and *not the next of Kin to the firſt Teſtator*; for *there was an Intereſt veſted in the Executor as reſiduary* Legatee. In the Caſe of *Harewood* and *Child* (*a*), that was becauſe Dr. *Harewood* was to take the real Eſtate in Tail, and it could not be conceived that he intended when the real and perſonal Eſtate was to go to the ſame Perſon, that he ſhould charge the real Eſtate before the perſonal. This was chiefly the Reaſon of the Caſe of *Doleman* and *Smith*, 2 *Vern.* In the Caſe of *Bromhall* and *Wilbraham*, there the Children of the Teſtator muſt be diſinherited in Caſe the Court had made the Lands liable in the firſt Place. *Bramfield* and *Windham*, *in Chan.* 101. *Attorney General* and *Burham* (*b*).———One general Inference may be drawn from theſe Caſes, that where there is no expreſs Exception of the perſonal Eſtate, it muſt be collected from the general Frame of the Will. ———In this Caſe, *he gives to his Wife all the reſt of his Lands for her Life, chargeable with the Payment of his Debts and Annuities.* ———Some obſerve on the Word (*chargeable*), that it is not ſo ſtrong as if the Deviſe was for the *particular Purpoſe of the Payment of his Debts*.—With regard to the Annuities, it muſt be taken as charged, and therefore cannot have two different Significations in the ſame Clauſe.——The Words which follow are, *That ſhe ſhould have Power and Authority to ſell as much of the Eſtate as ſhould be ſufficient to pay all my Debts*, and then *gives all his Goods and perſonal Eſtate to his Wife, and makes her Executrix.*——If the Teſtator had only made his Eſtate *chargeable* with the Payment of his Debts, this would not have exempted the perſonal Eſtate.——The Queſtion is, Whether the Teſtator did not intend ſhe ſhould have all he gave her.——If he had intended not to have given her the perſonal Eſtate *abſolutely*, then he would not have given Power to ſell as much as would be ſufficient to pay all his Debts, but ſo much as would have paid ſuch Part of them as his perſonal Eſtate would not extend to pay. Upon theſe Circumſtances, I think, it was the Intention of the Teſtator to exempt his perſonal Eſtate.——So the Decree was affirmed, *Trin.* 1736. *Stapleton* and *Colville*, *MS. Rep.*

(*a*) *Vide P. Ca.*

(*b*) *Vide Ca. P.*

22. Bill by the Heir at Law againſt the Executors, to have an Account of the perſonal Eſtate of the Teſtator, and that it might be applied in Exoneration of the real Eſtate deviſed to Truſtees, to be ſold for Payment of Debts and Legacies. The Caſe was this: *W.* by Will deviſed ſeveral *Lands to Truſtees, to be ſold for Payment of his Debts and Legacies*, and deviſed *all the Reſidue of his perſonal Eſtate to his Wife*, and *gave her alſo* 600*l. out of the Money to be raiſed by Sale of the Truſt Eſtate*, and *makes her Executrix. Harcourt*, C. ſaid, Here is not only a Deviſe over of the Reſidue of his perſonal Eſtate to his Executrix, but he gives her further the Sum of 600 *l.* out of the real Eſtate; ſo that he did not think the Reſidue of the perſonal Eſtate ſufficient for her, but gave her 600 *l.* out of his real Eſtate; which is the ſtrongeſt Preſumption imaginable of the Intent of the Teſtator, that his Wife ſhould have the Reſidue of his perſonal Eſtate. And this makes it differ from the Caſe of *Garroway* and *Chriſt's Hoſpital*;

for

for there was no Deviſe unto his Executors out of his *real* Eſtate. Bill diſmiſs'd, *quoad* an Account of his *perſonal* Eſtate. *Mich.* 12 *Ann. Waiſe* and *Whitfield* (*a*), *Vin. Abr.* Tit. *Deviſe*, (Z. d.) *Ca.* 19.

(*a*) This Caſe is miſplaced in point of Time; and alſo the following Caſes until you come to (U).

23. One deviſes Lands *to his Executors, for and until Payment of his Debts.* This is but a Chattel Intereſt. 22 *May* 1717. *Carter* and *Barnardiſton*, 1 *Will. Rep.* 505, 509.

24. *J. S.* being ſeiſed in Fee of a real Eſtate, and poſſeſſed of a perſonal Eſtate, deviſed one third Part of *all his Eſtate whatſoever* to *M.* his Wife, and deviſed to his Son *B.* and to his Heirs *two Thirds of all his real and perſonal Eſtate, upon Condition to pay his Debts.* The *Judges* and *Maſter of the Rolls* (on Time taken to conſider of it) were *all* of Opinion, That *M.* the Widow ſhould have her Thirds, *not liable to the Debts*, they being by the expreſs Words of the Will fixed upon the other two Thirds; by which the Deviſe to the Wife was rendered *clear*; and upon this Point was cited *Dy.* 59. *b.* 164. *a. Goldſb.* 149. *Hil.* 1725. *Cheſter* and *Painter*, upon an Appeal to the King in Council from a Decree in the Court of Chancery in the *Iſland* of *Antigua*, 2 *Will. Rep.* 335, 337.

25. One ſeiſed of Lands in Fee in *G.* that were in Mortgage, and alſo ſeiſed in Fee of other Lands, deviſed his Lands in *G.* to *J. S.* at her Age of twenty-one, *ſubject to the Incumbrances that were thereupon*; and ordered, that the Rents and Profits of the Premiſſes ſhould, during the Infancy of the ſaid *J. S.* be paid to her Father, for her ſole Uſe; and *deviſed other Lands to Truſtees, In Truſt to pay the Teſtator's Debts.* The *Maſter of the Rolls* held that this Mortgage ſhall be diſcharged by Moneys ariſing from the Sale of the Truſt Eſtate. *Mich.* 1726. *Serle* and *St. Eloy*, 2 *Will. Rep.* 386.

26. *A.* ſeiſed in Fee of a *real* Eſtate, and poſſeſſed of a *perſonal* Eſtate, by Will directs that his Legacies be paid out of his *real* Eſtate, and deviſes his *perſonal* Eſtate to his Children. His Children ſhall have the perſonal Eſtate free from the Legacies, *but charged with the Debts*; and the *real* Eſtate only ſhall be charged with the Legacies. *Trin.* 1726. *Heath* and *Heath*, 2 *Will. Rep.* 366.

27. Deviſe of the Rents and Profits of Lands 'till his Son attains twenty-one, towards Payment of Debts; and if my Son die before twenty-one, my Debts being paid, then to *A.* and the Son dies before twenty-one; yet the Rents and Profits, not only 'till he would have attained twenty-one, but alſo beyond, 'till the Debts be paid, ſhall be applied for that Purpoſe. *Mich.* 1691. *Martin* and *Woodgate*, *Prec. in Chan.* 34.

28. In Caſe of a *Deviſe of Lands to pay Debts*, if the Creditors bring a Bill to compel a Sale, the Heir is generally to be made a Party; *ſecus* in Caſe of a *Truſt created by Deed to pay Debts* (*b*). *Trin.* 1730. 3 *Will. Rep.* 92.

(*b*) *Vide* Tit. *Bills*, *P.* 169. *Ca.* 22.

(U) Where Money is deviſed to be inveſted in Lands to be ſettled, &c. how conſtrued.

1. *A.* BY Will gave 8000 *l.* to *B.* to be laid out by her in a Purchaſe of Lands, to be ſettled to the Uſe of herſelf for Life, Remainder to *C.* and his Heirs; and in Caſe *C.* died in the Life-time of *B.* Remainder over to *D.* his Heirs, Executors and Adminiſtrators. —*C.* died in the Life-time of *B.*—*D.* alſo died in *B.*'s Life-time, having made his Will, and thereof Plaintiff his Wife Exeutrix, and having

Prec. in Chan. 543. S. C. *accord'.*

ving given ſeveral Legacies to the other Plaintiffs, and leaving Defendant *F.* his only Daughter and Heir at Law, an Infant.——Then *B.* died, and the Money had been never laid out; the Bill was brought againſt *F.* and againſt *B.*'s Executors to have the Money for the Benefit of the Executors and Legatees of *D.* and that no Purchaſe might be made for the Benefit of *F.* the Defendant, the Heir at Law of *D.* *Lord Chancellor* clearly decreed, that the Money belonged to *F.* as the Lands would have done, if a Purchaſe had actually been made, as it ought to have been by *B.* the Truſtee. Tho' the Truſt for laying out the Money was *perſonally* confined to *B. without nominating Executors*, yet *her* Executors were implied and included in it; and this Caſe is the ſtronger, becauſe the Heir at Law of *D.* was an Infant; and as *B.* ſurvived *D.* two Years, the Infant Heir might have brought her Bill againſt *B.* herſelf. The Truſtee to have had the Purchaſe made, and her *Laches* in not doing it, is not to turn to her Prejudice, *being an Infant.* The Caſes cited were *Lingen* and *Souray* (*a*), in Lord *Harcourt*'s Time, and a Caſe lately decreed of *Jones* and *Powell.* *Mich.* 1720. *Scudamore et al'* and *Scudamore*, *MS. Rep.*

(*a*) 1 *Vol. Abr. Eq.* 175. S. C.—— 1 *Will. Rep.* 172. S. C.— *Prec. in Chan.* 400. S. C.

2. If Money be deviſed to be laid out in the Purchaſe of Lands *to be ſettled on one and his Heirs*, the Perſon himſelf, for whoſe Benefit the Purchaſe was to be made, may pray to have the Money; 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 preferred; and it ſhall, for his Benefit, be conſidered in Equity, as if the Purchaſe had been actually made in the Life-time of the *Anceſtor.* Firſt, Becauſe the *Heir is to be favoured in all Caſes rather than the Executors*, who, by the *Old* Law, were to have nothing to their own Uſe. Secondly, If the *Executor* ſhould have it, it would be againſt the Words of the Will, which gave it to the Heirs. Agreed by Lord Chancellor, to be a declared Rule of this Court in the ſaid Caſe of *Scudamore* and *Scudamore.* *Ibid.* 544.

Prec. in Chan. 544. *accord'.*

(W) Where a Contingency in a Will ſhall extend to all the Deviſees.

1. *A.* Seiſed in Fee, has a Son *B.* and Siſter *C.* and *deviſes his Lands to* B. *in Tail general*, and *if* B. *ſhould die without Iſſue*, and *M.* the Teſtator's Wife ſhould ſurvive *B.* then ſhe to have the Premiſſes for Life, Remainder to *C.* in Fee. *B.* dies without Iſſue, but Teſtator's Wife dies before him; *C.* is not intitled to the Remainder in Fee, becauſe the Contingency is annexed to all the Deviſes over. *Mich.* 1726. *Davis* and *Norton* (*b*), 2 *Will. Rep.* 390.

(*b*) *Vide P. Ca.* S. C. more fully abridg'd.

CAP.

CAP. XXXIV.

Diſcovery, Bills of (a).

(a) *Vide* Tit. *Bills* (C) *P.* 171.

(A) Caſes in general relating to Bills of Diſcovery (b).

(b) Max. *Diſcovery draws with it Relief.* *Gilb. Eq. Rep.* 227.

1. TO a Bill for Diſcovery of *Symony* the Defendants demurred, and Demurrer was allowed. *Per Cur'*, *Hil.* 1702. *Attorney General* at the relation of *Hindley* and *Sudell et al'*, *Prec. in Chan.* 214.

2. Plaintiff not intitled to a Diſcovery without verifying his Title at Law. 1713. *Duke of Hamilton* and *Fleetwood*, *Vin. Abr.* Tit. *Diſcovery*, (A) *Ca.* 7.

3. Perſons *who claim Lands by a Will*, or *any other voluntary Diſpoſition*, having the Law on their Side, *are intitled as againſt an Heir at Law to a Diſcovery in Equity of Deeds relating to the Eſtate*, and *to have them delivered up*, otherwiſe the Heir might defend himſelf at Law, by ſetting up *prior* Incumbrances, and by that Means hinder trying the Validity of the Will. *May* 19, 1713. *Dutcheſs of Newcaſtle* and *Lord Pelham*, *Vin. Abr.* Tit. *Diſcovery*, (M) *Ca.* 12.

4. Bill for the *Diſcovery of the Conſideration of a promiſſory Note for* 275 l. ſuggeſting that it was given *ex turpi Cauſa*, to ſmother and make up a Felony, *&c.* *Demurrer* to that Part of the Bill which ſeeks a Diſcovery *if the Note were not given to make up a Felony*, which is of a criminal Nature, *&c.* and the Demurrer allowed. *Mich.* 4 *Geo.* 1. *in Canc.* *Guiborn* and *Fellows et al'*, *Vin. Abr.* Tit. *Diſcovery*, (C) *Ca.* 6.

5. *A.* obtained Judgment, and lodged a *Fieri Facias* in the Sheriff's Hands, to which *Nulla bona* was returned. *A.* afterwards may bring a Bill againſt the Defendant or any other, to diſcover any of the Goods or perſonal Eſtate of the Defendant, and by that Means to affect the ſame; but he muſt firſt go as far as he can at Law by delivering his Writ of *Fieri Facias*, and getting it returned. Cited by Mr. *Vernon*, *Trin.* 1718, in the Caſe of *Balch* and *Waſtall*, to have been ſo held by Lord *Nottingham*. *Vide* 1 *Will. Rep.* 445.

6. Will concerning perſonal Eſtate proved in the Spiritual Court; Reſpondent having a former Will in his Favour, brings his Bill to diſcover by what Means the latter Will was obtained, and to have an Account of the perſonal Eſtate, and whether the Teſtator was not incapable, and impoſed upon. Defendant *demurred*, Becauſe *it belonged to the Spiritual Court only to prove the Validity of Wills*, and the *former* Will was not proved in the Spiritual Court, as the Will in his Favour was. Demurrer over-ruled. *Feb.* 6, 1723. *Andrews* and *Powers* or *Powis*, *Vin. Abr.* Tit. *Diſcovery*, (G) *Ca.* 9.

7. *J. S.* deriving his Title under a Settlement, conſulted Counſel whether he could ſuffer a Recovery and bar the Remainders; and Counſel being of Opinion that he could, he ſuffered a Recovery, and made a Will in Prejudice of the Perſons claiming under the Settlement. The

Validity of which being controverted, and alſo whether, ſuppoſing it to be a good Will, he was enabled by the Recovery to defeat the Remainders, and diſpoſe of the Eſtate, to which Purpoſe it would be neceſſary to have all Deeds, Writings and Family Settlements brought into Court, to ſee whether he had ſuch Power. *King*, C. held it moſt natural to ſee whether *J. S.* could diſpoſe; to examine whether he has made a Will, before it be known whether he had a Power, would be unneceſſary and really impertinent; and therefore his *Lordſhip* decreed that all Deeds ſhould be produced, and the *Counſel*'s Opinions; *not as they will be a Guidance to the Court*, but for the Caſe on which they might be founded, for Papers may in thoſe Caſes be mentioned which otherwiſe might be ſuppreſſed, and not come to Light. 29 *Oct.* 1724. *Floyer* and *Sydenham*, *MS. Rep.*

Sel. Caſes in Chan. 2. S. C. *accord'.*——2 *Mod. Caſes in Law and Eq.* 99. *Mich.* 11 *Geo.* 1. *Floire* and *Sidenham*, S. C. ſtates it thus: Plaintiff exhibited his Bill as one of the *Coheirs* of *A.* and claimed a Moiety of the Eſtate under a Settlement made by *B.* the Great Grandfather of the Plaintiff and of the Defendant, who having ſet up a Will made by *A.* in Favour of the Defendant, and it being ſuggeſted in the Bill, that the Will, if any, was fraudulently obtained, it was prayed that the Deeds and Writings concerning the Lands in Queſtion might be brought into Court, and the rather becauſe the Defendant in his Anſwer owns the Settlement as ſet forth in the Bill, and that Plaintiff is one of the *Coheirs* of *A.* but ſays, that the Father of *A.* ſuffered a Recovery of all or the greateſt Part of theſe Lands, and declared the Uſes to *A. and his Heirs*, ſo that he might deviſe the ſame. And *per Cur'*, The Right of the Plaintiff at Law cannot be tried without the Deeds, and there can be no Reaſon why the Plaintiff ſhould conteſt the Will, before he knows whether the Teſtator had Power to make it, which cannot be known without the Settlement, and the Deed to lead the Uſes of the common Recovery; for if the Plaintiff hath any Right, 'tis by Virtue of this *Settlement* made by his Great Grandfather. And as this Conteſt is between *Coheirs*, where one ſets up a Will made in his Favour, and inſiſts that he is not obliged to produce the *Settlement* until the Will is ſet aſide, certainly that cannot be a Reaſon for not producing it, becauſe the Plaintiff hath no better Right to ſee it then, *(viz.)* after the Will is ſet aſide, than he hath now; therefore the beſt Method is to have the Deeds brought before the Court. And Plaintiff to have the *Coſts* of this Suit.

MS. Rep. S. C. *accord'.*

8. Bill brought to ſet aſide a Purchaſe, and to have a Diſcovery of the Site and Profits of the Eſtate. Defendant by Anſwer inſiſts that he is a Purchaſer, and that he is not obliged to make a Diſcovery. To which Exception was taken for not anſwering, and allowed *per King*, C. In Support of the Exception was cited the Caſe of *Stephens* and *Stephens* before Lord *Macclesfield*, which was, A Bill was brought for a Diſcovery of the Rents and Profits of an Eſtate, which Plaintiff claimed by Will from a common Anceſtor. Defendant ſays, he is intitled to the Eſtate, and therefore 'till the Right is determined he was not obliged to give an Account of the Rents and Profits. Lord *Macclesfield* ſaid, this might have been good by way of Plea, but having anſwered, muſt anſwer the Charge of the Bill.——So lately in the Caſe of *Edwards* and *Freeman*; Bill brought for an Account; the Defendant controverted the Right, and ſaid he was not obliged to give an Account before that was ſettled; and *King*, C. was of Opinion, that having anſwered, the Charge of the Bill muſt be anſwered. *Mich.* 11 *Geo.* 1. *Richardſon* and *Mitchel*, *Sel. Caſes in Chan.* 51.

Comyns's Rep. 664. S. C. cited *arg'.*

9. A *Copyholder cut down more Timber than he could juſtify*, and a Bill being brought againſt him for a *Diſcovery*, he *demurred*, *Becauſe it would ſubject him to a Forfeiture as being Waſte*, and the *Demurrer* was *allowed*. 11 *Geo.* 1. *Attorney General* and *Vincent*, *MS. Rep.*

Another MS. Rep. Anon. S. C. *accord'.*—— *Comyns's Rep.* 665. *Eaſt.* 12 *Geo.* 2. S. C. cited *arg'* in the Caſe of *Jones et Ux'* and *Meredith et al'*, *in Scac'*, ſtates the Caſe thus:——On Marriage of Mrs. *Payne* with Mr. *Smith*, a Settlement was made *to the Uſe of the Huſband and Wife for their Lives, and after to the firſt and other Sons of that Marriage in Tail*, Remainder *to Mrs.* Payne *in Fee*, who deviſed it to the Defendant; and the Bill was to diſcover if the Deviſor was not a Papiſt, in which Caſe the Deviſe would be void; and on a Plea to this Bill, *Lord Chan. Hardwicke* held that Defendant was not obliged to anſwer.

10. Upon the Marriage of Mr. *Payne* with Mrs. *Gage*, *Lands were ſettled to the Uſe of the Huſband* and *Wife for their Lives*, and *the Life of the Survivor of them*, then *to the Uſe of the firſt and every*

other Son in Tail Male, Remainder *to the right Heirs of the Huſband.* The Marriage took Effect, but the *Huſband died in the Life-time of the Wife without leaving any Iſſue, having deviſed all his Lands to his Wife and her Heirs.* In 1730 *the Wife deviſed all her real Eſtate to the Defendant*, ſubject to a few Legacies, *but lived and died a Papiſt*; but that being difficult to prove at Law, the Plaintiff, who had married *Elizabeth Payne*, *Heir at Law* to Mr. *Payne* and his Wife, filed their Bill againſt the Defendant *to ſet aſide the Marriage Settlement* and *Will of Mr.* Payne, *under which Mrs.* Payne *claimed*, and in particular prayed *that the Defendant might diſcover whether Mrs.* Payne, *under whom the Defendant claimed, was a Papiſt or not.* As to ſo much of the Bill as ſought a Diſcovery whether Mrs. *Payne* was at any Time, and how long before her Marriage with Mr. *Payne*, a Papiſt, and profeſſed the Popiſh Religion, and continued ſo 'till her Death; and whether, as ſuch, ſhe was incapable and diſabled by the Laws of the Realm to purchaſe either in her own Name, or in the Name of any to her Uſe, or in Truſt for her, any Manors, *&c.* The Defendant pleaded the Deeds of Settlement made upon the Marriage of Mr. *Payne* and his Wife, and alſo the Will of Mr. *Payne* under which his Wife claimed, as alſo the Will of Mrs. *Payne*, under which the Defendant claimed; and for Plea further ſaith, that by the Act made the 11 & 12 *W.* 3. it was amongſt other Things enacted, *That every Papiſt, or Perſon making Profeſſion of the Popiſh Religion*, ſhould be diſabled, *&c.* See ſaid Act Sect. 4. And *Lord Chan. Hardwicke* was of Opinion, That the Defendant was not obliged to diſcover whether Mrs. *Payne* was a Papiſt or not; and that there was *no Rule better eſtabliſhed* in this Court, than that a *Man ſhall not be obliged to anſwer to what may ſubject him to the Penalty of an Act of Parliament.* No Perſon can doubt whether this be a penal Law, and whether the Clauſes relating to Papiſts are not Penalties impoſed on all Perſons exerciſing that Religion. It is objected, That this is not the Caſe of a Forfeiture, becauſe the Eſtate was never veſted, and therefore can never be deveſted; yet it all falls under the ſame Reaſon; and an *Incapacity* or *Diſability to hold at all, created by Act of Parliament, is certainly as much a Penalty as the Forfeiture of an Eſtate by a Perſon who had a Right to enjoy it before that Forfeiture.* That this is not like the Caſe of an *Alien* or *Baſtard*, who *are incapable, by the general Laws of the Realm, to inherit*; for this is a Diſability created by an Act of Parliament. That what ſwayed with him moſt was the great Inconvenience that would follow, ſhould this Plea be diſallowed, for that there would be nothing but Bills of *Diſcovery* whether ſuch and ſuch Perſons were Papiſts or not, and no Body knows what Confuſion would follow.——His *Lordſhip* held that as Mrs. *Payne* was not obliged to diſcover whether ſhe was a Papiſt or not, ſo likewiſe the Defendant, who claimed under her, was not; and that in that Reſpect there was no Difference between the Party herſelf and the Perſon who derived his Title from her. Plea allowed. *March* 19, 1736. *Smith* and *Read*, *Vin. Abr.* Tit. *Diſcovery*, (B) *Ca.* 21.

Maxim.

11. Chancery never allows a Bill of Diſcovery in Aid of the *Eccleſiaſtical* Juriſdiction. *Per* Lord *Hardwicke*, *Mich.* 1738, *Dunx* and *Balguy*, *Vin. Abr.* Tit. *Diſcovery*, (A) *Ca.* 19.

12. The Plaintiff's Bill ſet forth, That *J. S.* died ſeiſed of Lands of 100 *l. per Annum*, leaving Iſſue only one Son *A.* and three Daughters, *B. C.* and *D.* ſince married to *W.* (a Proteſtant) and who are the Defendants. And the Plaintiff married *Mary* the only Siſter

Comyns's Rep. 661. S. C. *accord.*

Siſter of *J. S.* and who on Failure of Iſſue of the ſaid *J. S.* is his Heir at Law. That *A.* the Son entered and died ſeiſed; that his Siſters *B. C.* and *D.* were educated in the Popiſh Religion, whereby the Plaintiff *Mary*, their *Aunt*, being the next Proteſtant Kin, is intitled to enjoy the Rents and Profits of the Eſtate by Virtue of the Stat. 11 & 12 *W.* 3. until the Defendants take the Oaths and conform. That the Plaintiff brought an Ejectment, but *Roberts* (another Defendant to the Bill) cauſed himſelf to be added a Defendant in the ſaid Ejectment, and inſiſted on a Mortgage of the ſaid Eſtate, made to him by the other Defendants for a Term of Years, for Security of 400 *l.* Therefore the Bill prays a Diſcovery, Whether *J. S.* the Father, and *A.* the Son, did not die ſeiſed, and when; and that *Roberts* may diſcover whether *B. C.* and *D.* were not educated in the Popiſh Religion, and now profeſs it; and whether they were not of the Age of eighteen Years and ſix Months and upwards, at the Death of *A.* the Son, or of what Age; and whether they have not refuſed to take the ſaid Oaths, and are thereby incapacitated to hold the ſaid Eſtate. Whether Plaintiff *Mary* is not the next Proteſtant Kin to the ſaid *J. S.* and to the ſaid *A.* and alſo to the Defendants *B. C.* and *D.* and thereby, and by the ſaid Act, intitled to the Premiſſes during ſuch Incapacity; and what Incumbrance *Roberts* has, and that Plaintiffs may redeem, *&c.* To ſuch Part of the Bill as ſought a Diſcovery whether the Defendants were not educated in, and did not then, and at the filing of the Bill, profeſs the Popiſh Religion; and whether they were not at the Death of *A.* the Son of the Age of eighteen Years and ſix Months, or what Age; and whether they had not refuſed to take the Oaths in the ſaid Statute, and had not thereby incurred the Incapacities of the ſaid Act; and whether the Plaintiff *Mary* is not their next of Kin, *&c.* the Defendants plead the ſaid Statute, in regard that ſuch Diſcovery might ſubject them to the Penalties, Forfeitures or Diſabilities of the ſaid Act.——Plea allowed. *Eaſt.* 12 *Geo.* 2. *Jones et Ux'* and *Meredith et al', in Scac', MS. Rep.*

13. By the *ancient* Courſe of the Court, a Perſon was *allowed to bring his Action at Law againſt the Repreſentative of the deceaſed*, and *at the ſame Time to bring his Bill here, in order to have a Diſcovery of Aſſets*; tho' *now* it is *eſtabliſhed* that if the *Party proceeds in Equity againſt ſuch Repreſentative, his Bill muſt be both for a Diſcovery of Aſſets and a Satisfaction for his Debt. Per* Lord Chan. *Hardwicke* in the Caſe of *Barker* and *Dumeres*, 1740. *Barnard. Rep. in Chan.* 278.

Barnard. Chan. Rep. 39. *Eaſt.* 1740. S. C. *accord'*, of which this MS. Caſe ſeems to be a Tranſcript; —ſays, the Authority cited in Support of the *Plea* was 3 *Cro.* 310. and 1 *Lev.* 92. and on the other Side 1 *Vern.* 398. *Ibid.* 40, 41.

14. The Plaintiff's Bill ſet forth, That *J. S.* being appointed Caſhier to the Commiſſioners of *Hawkers* and *Pedlars*, Defendant applied to the Plaintiff to be Security with him for *J. S.* in the Sum of 6000 *l.* and promiſed to indemnify him. *J. S.* abſconding, an Extent was threatened to be taken out againſt the Plaintiff, in order to prevent which he paid 3000 *l.* and ſeveral other conſiderable Sums on that Account, and in order to reimburſe himſelf the ſaid Monies, he exhibited his Bill againſt the Defendant, and alſo proceeded at Law. That Plaintiff being obliged to make his Election, he elected to go on at Law, and recovering 4500 *l.* againſt the Defendant, he ſued out an *Elegit*, which was delivered to the Sheriff in 1734, and *ſubſequent* to ſuch Delivery the Defendant ſecreted great Part of his Goods, in order to defraud Plaintiff of the Benefit of his Execution. However the Plaintiff executed the Writ, and the Sheriff took what Goods he found remaining, and ſeiſed a *Moiety* of the Defendant's Lands. That this Writ was *returned and filed*, and a *Liberate* ſued out, and thereupon *this* Bill was brought to compel Defendant to diſcover *whether he did*

not make ſuch Concealment as aforeſaid, and *that he might diſcover in whoſe Hands thoſe Goods were placed*, and that he might ſet forth what Incumbrances there were upon the Land, that were ſeiſed under the *Elegit*. To ſo much of the Bill as prayed a *Diſcovery of the Concealment of the Goods*, he *pleaded in Bar the Subſtance of the Matter as ſet forth in the Bill*; and *inſiſted, that as the* Elegit *was executed, and the Return filed, the Plaintiff's Remedy was gone*, and *that he was not intitled to a Diſcovery*; and as to the *other* Part of the Bill, *relating to the Incumbrances*, &c. he *demurred in Law*. And *per* Lord Chan. *Harwicke* the Demurrer muſt be over-ruled. This is a Demurrer to that Part of the Bill wherein a Tenant by *Elegit* ſeeks to diſcover Incumbrances upon the Eſtate, in order to bring an Ejectment under *Liberate*, and ſuch Perſon may come into this Court for ſuch a Diſcovery. *Such a Tenant is intitled to hold the Premiſſes* quouſque *he has ſatisfied his Debt*, and *an Ejectment is neceſſary for to get into Poſſeſſion*. The Difficulty in the preſent Caſe ariſes upon the Plea, and 'tis really a new Point on which this Queſtion ariſes. But his *Lordſhip* allowed the *Plea*, ſaying, It would be of no Uſe to the Plaintiff to go on as to this Part of the Caſe, which is covered by the Plea. If the Plaintiff will be *benefited* by a Diſcovery of the Concealment of the Goods, either by going afterwards into a Court of Law, or elſe by having Relief *here*, he may certainly come into this Court for that Purpoſe; but if he cannot, he will not be intitled to ſuch a Diſcovery. Now the Ground on which the Plaintiff inſiſts, that by having a Diſcovery, *&c.* he will thereby be benefited in one or other of theſe Ways, is, that by the *Statute of Frauds* the *Goods are bound from the Time the Writ is delivered to the Sheriff*, and from that Time, it has been ſaid, that the Plaintiff is intitled to *jus in re* or *jus ad rem*. By having this Diſcovery, it has alſo been ſaid, that the Plaintiff will be intitled to apply for a *new* Writ of *Elegit*, and that the *former one may be taken off the File*. But his *Lordſhip* was of Opinion, That that could not be done. *Before* the ſaid Statute, the *Defendant's Goods were bound in his Hands from the* Teſte *of the Writ of Execution*. To avoid this the Statute was made, whereby it is enacted, *That the Goods ſhall* only *be bound from the Delivery of the Writ to the Sheriff*. But neither *before this Statute* nor *ſince*, is the *Property of the Goods altered, but continues in the Defendant 'till the Execution executed*. The Meaning of theſe Words, "*That the Goods ſhall be bound from the Delivery of the* "*Writ to the Sheriff*," is, that *after the Writ is ſo delivered*, if *the Defendant makes an Aſſignment of his Goods, unleſs in* Market-overt, *the Sheriff may take them in Execution*.——If this Court could require a Diſcovery and give Relief, it would be to extend the Writ of *Elegit* farther than the Courts of Law will do. His *Lordſhip* ſaid, He did not know that a Writ of *Elegit* (after the Return is expired and the Writ filed) had been ever taken off the File, and a *new* Writ granted in a Caſe of this Nature.———Indeed *where a Man has not known in what County the Defendant's Lands have lain*, and *he executes his* Elegit *only in that County where Part of the Lands has laid*, his *Lordſhip* ſaid he did not know but afterwards, upon Diſcovery of the Miſtake, the Courts of Law have allowed the Writ to be taken off the File, and a *new* one granted; and he believed the ſame had been done in this Court upon *Statutes* and *Recognizances*; but that could not be done in the principal Caſe. *Eaſt.* 1740. *Lowthal* and *Tonkins*, *MS. Rep.*

CAP. XXXV.

Dower and Jointure.

(A) Of what Eſtate the Wife ſhall be endowed.

(B) What ſhall be a Bar of Dower,——And in what Caſe a Dowreſs ſhall have Relief in Equity, et econt'.

(C) Of Jointures, and in what Caſes a Jointreſs ſhall be favoured or reſtrained.

(A) Of what Eſtate the Wife ſhall be endowed (a).

(a) Dower *cannot be aſſigned in Chancery*, (becauſe *a Decree there cannot carry any Eſtate*) unleſs where the Heir of the King's Tenant is in Ward; and in ſuch Caſe it is aſſigned in Court, which is more uſual, or a Writ iſſues to the *Eſcheator* to do it. *Per Holt*, C. J. on pronouncing the Reſolution of the Court of *B. R.* in the Caſe of *Smith* and *Angell*, 13 *W.* 3. 2 *Lord Raymond's Rep.* 785.——In 1 *Inſt.* 33. *(b.)* Lord *Coke* ſays, That all Kinds of Dowers were inſtituted for the Subſiſtence of the Wife during her Life; which *Right* of Dower is not only a *legal* but a *moral Right*, and as it was held by Sir *John Trevor* *the late Maſter of the Rolls*, in the Caſe of Lady *Dudley* and Lord *Dudley*, *Prec. in Chan.* 244.———The Relation of *Huſband* and *Wife*, as it is the *neareſt* ſo it is the *earlieſt*, and therefore the *Wife* is the *proper Object* of the *Care* and *Kindneſs* of the *Huſband*; the *Huſband* is bound by the *Law* of *God* and *Man* to provide for *her* during *his* Life, and after *his* Death the *moral Obligation* is not an End, but *he* ought to take Care of *her* Proviſion during *her* own Life. ———This is the more reaſonable, as during the Coverture the Wife can acquire no Property of her own; —if *before* her *Marriage* ſhe *had a real Eſtate*, *this by the Coverture ceaſes to be* her's, and the Right thereto, whilſt *ſhe* is married, veſts in the *Huſband*;—*her* perſonal Eſtate becomes *his* abſolutely, or at leaſt is ſubject to his Controul; ſo that unleſs *ſhe* has a *real Eſtate of her own* (which is the Caſe but of few) *ſhe* may by his Death be deſtitute of the Neceſſaries of Life, unleſs provided for out of the Eſtate, either by a *Jointure* or *Dower*.———As to the *Huſband*'s perſonal Eſtate, unleſs reſtrained by ſpecial Cuſtom (which very rarely takes Place) *he* may give it all away from her; ſo that *his* real Eſtate (if *he* had any) is the only Plank ſhe can lay hold of to prevent *her* ſinking under *her* Diſtreſs: Thus is the Wife ſaid to have a *moral Right* to Dower. ———Dower is alſo a *legal Right*, created by Law, which ſettles the *Quality* of the Eſtate out of which the *Wife*'s Dower ariſes, and likewiſe aſcertains the *Quantum* thereof.———The Common Law ſays, a third Part is *rationabilis Dos*, and a ſpecial Cuſtom (which is *lex loci)* inlarges or abridges the Common Law of Dower, and gives the whole, half, or leſs than a Third. 1 *Inſt.* 33. *b.* The Common Law likewiſe aſcertains Dower, with reſpect to the *Nature* and *Quality* of the *Huſband*'s Eſtate; it ſays, the *Wife*'s Dower muſt come out of ſuch an Eſtate as would deſcend to the Iſſue of the *Huſband* by that Wife; and gives Dower of the *Huſband*'s Seiſin tho' not actual, or reduced into Poſſeſſion.——It annexes *Privileges* to Dower; as not to be liable to Diſtreſs for the *Huſband*'s Debt to the *King*, much leſs for any due to the Subject; with ſeveral other *Privileges*. ——Again, the Law fixes *the Age* when a *Woman* is dowable; and (by the way) fixes it at ſuch a Time as by the Courſe of Nature (at leaſt in this Part of the World) it ſeems impoſſible *ſhe* ſhould have *Iſſue*, or be *pregnant*, *(viz.)* at *Nine Years old:* But it is not ſo favourable to a Tenancy by the Curteſy; which is allowed only in Caſe of a Seiſin in Deed; it annexes no *Privileges* thereto; and tho' the *Huſband* may be Tenant by the *Curteſy* of a *common ſans Number*, of which the *Wife is not dowable*, yet that is becauſe of its *Indiviſibility*; in which Caſe, if Dower were allowed, it would be injurious to other Perſons, and the Lands doubly charged. Thus the Law, where it can juſtly do it, prefers the Title of Dower to that of the Curteſy.———Dower is alſo an *equitable Right*, and ſuch a one as is a Foundation for Relief in a Court of Equity; it ariſes from a Contract made upon a valuable Conſideration; Marriage being in its Nature a *civil*, and in its Celebration a *ſacred* Contract; and the Obligation is a Conſideration moving from each of the contracting Parties to the other; from this Obligation ariſes an Equity to the Wife in ſeveral Caſes, without any previous Agreement. ———By the Common Law, where the *Huſband* had an inheritable Eſtate, it was Part of the Marriage Contract, that the Wife ſhould have her Dower; one *Species* of which was *ad oſtium Eccleſiæ*. *Litt. Sect.* 39. "*when* "*the Huſband comes to the Church-Door to be married, after Aſſiance or Troth plighted between the Huſband* "*and Wife, he endows her,*" which implies, that ſuch Endowment is *before* the Marriage is compleatly ſolemnized; and tho' Lord *Coke* ſays, ſuch Dower is *after* the Marriage ſolemnized, this is a Miſtake.———Alſo by the *Romiſh* Ritual uſed *here* before the Reformation, it appears that all Marriages were celebrated *ad oſtium Eccleſiæ*; ſo that it ſhould ſeem to be incumbent on the Huſband, if he could do it, to endow his Wife, and to ſpecify the Dower upon the Marriage; inſtead of which, the general Words of endowing *with all his worldly Goods*, in the Office of Matrimony, now in Uſe, came in; from whence it is to be inferred, that Dower is, and Time out of Mind has been, a Part of the Marriage Contract when it came to be publickly ſolemnized; and if ſo, *a Right of Dower is founded in Contract*, and *is therefore an equitable Right*, to which a Te-

a Tenant by the Curteſy has no Pretence. *Per* Sir *J. Jekyll, Maſter of the Rolls, Hil.* 1732, in the Caſe of *Banks et al'*, and *Sutton et al'*, 2 *Will. Rep.* 634 to 638. And his *Honour* ſaid, He could not but wonder how it ever came to be thought that a Tenant by the Curteſy was intitled to Relief in Equity more, or farther, than a Dowreſs; and particularly that a Tenancy by the *Curteſy might be of a Truſt Eſtate*, but *not of Dower*, which is no leſs than a direct Oppoſition to the Rule and Reaſon of the Law, *allowing Dower of a Seiſin in Law*, but *not a Tenancy by the Curteſy*, becauſe the *Wife cannot gain an actual Seiſin*, but the *Huſband may*; which Reaſon holds in a *Truſt Eſtate*, for the *Wife cannot compel a Truſtee to convey the legal Eſtate to the Huſband*, but the *Huſband himſelf may*; therefore if any Diſtinction is to be made, Dower (one would think) ought to be preferred to Curteſy. *Ibid.* 638.———His Honour admitted that the Lord *Somers* decreed, in *Snell* and *Cray*'s Caſe, 2 *Vern.* 324. that a *Tenant by the Curteſy ſhould have the Benefit of a Truſt Term attendant on an Inheritance*, and *denied it to a Dowreſs* in the Caſes of Lady *Bodmin* and *Vendebendy*, and *Brown* and *Gibbs*, which occaſioned the *above* Diſtinction to be advanced.—But it hath been exploded, or declared unreaſonable, as often as mentioned ever ſince; and the Lord *Somers*, when the Caſe of *Snell* and *Cray* was urged in that of *Brown* and *Gibbs*, as an Authority for a Dowreſs, it being taken for granted that there was *no Difference in Reaſon between the Caſe of Dower* and *that of Curteſy*; and Lord *Somers* ſeems to admit there was no Difference; for he avoided the Authority of *Snell* and *Cray*, by ſaying, that Point of a Tenant by the Curteſy's having the Benefit of a *Truſt Term*, was not *debated* in that Cauſe. *Ibid.*

1. THE Bill was to be relieved againſt the Defendant's Dower, *her Huſband being only a Truſtee*; and *and it appearing that the Huſband was but a Truſtee*, the Defendant was barred of her Dower, contrary to the Opinion in the Caſe of *Naſh* and *Preſton* (*a*), 1 *Cro.* 191. And ſo it was ſaid is the *conſtant Practice of the Court now. Mich.* 1678. *Noel* and *Jevon*, 2 *Freem. Rep.* 43.

(*a*) *Vide* this Caſe 1 *Vol. Abr. Eq. P.* 217. *Ca.* 1.

2. A Woman was never endowed in *Equity* of a *Truſt* Eſtate, *arg'* in the Caſe of the *Counteſs of Radnor* and *Vandebendy* (*b*), *Parl. Caſes* 69, 70, 72.——All agree that a Woman *cannot* be endowed of the *Truſt* of an Inheritance, as ſhe may of the Inheritance itſelf. *Per* Lord Chan. *Somers* in S. C. *Mich.* 1696. *Prec. in Chan.* 65.

(*b*) *Vide* 1 *Vol. Abr. Eq.* 219. *Ca.* 3. S.C.

3. A Dowreſs has a Right to redeem a Mortgage, paying her Proportion of the Mortgage Money, and to hold over for the reſt; and diſtinguiſhed this Caſe from Lady *Radnor*'s, *for there was a ſatisfied Term*, and the *Huſband had a Power to bar her by aſſigning over the Term*, which he did, but *here* it's *only a Mortgage*, and *againſt the Heir. Per* Lord Keeper's Opinion, *Hil.* 1700. *Palmes* and *Danby*, *Prec. in Chan.* 137.

S. C. cited *per* Lord Chan. *Talbot, Mich.* 1734 in the Caſe of *Attorney General* and *Scot, Caſes in Eq. Temp. Talbot* 140.

4. Where the Truſt of an Inheritance is created by the Huſband himſelf, Sir *J. Jekyll*, in the Caſe of *Sutton* and *Sutton*, *Hil.* 1732, ſaid, He took it to be ſettled that the Wife ſhall *not* have Dower. 2 *Will. Rep.* 640.

5. The *Widow of a Tenant in Tail of a Truſt*, to *whom the legal Eſtate is by the Will of the* Dower *directed to be conveyed at his Age of twenty-one*, and *he living to that Age*, ſhe is intitled to Dower. *Per* Sir *J. Jekyll, Maſter of the Rolls*, in the Caſe of *Sutton* and *Sutton*, *alias Banks* and *Sutton*, *Hil.* 1732. 2 *Will. Rep.* 647.

Donor

6. The Widow of a *Ceſtui que Truſt* of a Copyhold Eſtate ſhall have her *cuſtomary Dower* as if the Huſband had the *legal* Eſtate in him. *Hil.* 1732, in the Caſe of *Sutton* and *Banks*, 2 *Will. Rep.* 644.

7. A Dowreſs ſhall have the *Benefit of a Truſt Term againſt an Heir* or *Deviſee*, but not againſt a Purchaſer. *Hil.* 1732, in *Sutton* and *Banks*, 2 *Will. Rep.* 639.

8. If *A. be ſeiſed of a Truſt Eſtate of Inheritance*, 'tis generally true that the Wife ſhall *not* be dowable of it, for *Dower is a legal Demand*, and *as a Woman was not dowable of a Uſe before the Stat.* 27 Hen. 8. ſo *neither of a Truſt after*, and *this has been the received Opinion of all Conveyancers*, in the Caſe of the *Attorney General* and *Lockley*, *Mich.* 9 *Geo.* 2. *MS. Rep.* (*c*).

(*c*) But if the Huſband was intitled to a Conveyance of the *legal* Eſtate at a certain Time, and neglects to call for it, there it ſeems Equity will aid the Wife, for *Things to be done, in Equity are to be conſidered as done* (*d*). *Banks* and *Sutton*, at the Rolls 1733 (*e*). *MS. Rep.*

(*d*) Maxim. *Vide Grounds and Rudi. in Law and Eq.* 75.

(*e*) *Quære*, If it ſhould not be *Hil.* 1732.

9. The

No Dower out of an Eſtate in Truſt, 16 *Car.* 2. *fol.* 749 *, *Colt* and *Colt (a)*, 1 *Chan. Rep.* 254.——2 *Will. Rep.* 640. *Colt* and *Colt* cited *per* Sir *J. Jekyll, Maſter of the Rolls, Hil.* 1732, in the Caſe of *Sutton* and *Sutton*, to be a Claim of Dower of a Truſt created by the Huſband himſelf. *Vide* the Caſe of *Bottomley* and *Fairfax (b)*, 1 *Vol. Abr. Eq.* 217. *Ca.* 2. S. P.——And *Ambroſe* and *Ambroſe*, *P. Ca.* *this Work.* * This ſhould be 15 *Car.* 2. *fol.* 794. *(a) Octavo Edit.* *(b)* 2 *Will. Rep.* 640, 641, S. C. cited by his *Honour*.—And S. C. alſo cited by Lord *Talbot Mich.* 9 *Geo.* 2.—And ſays, That if a Woman ſhould be endowed of a *Truſt*, the received Practice of inſerting to bar Dower would be of no Signification. *Vide Caſes in Eq. Temp. Talbot* 139.

9. The Wife of a *Ceſty que Truſt* is not intitled to Dower. *Per Talbot*, C. *Hill.* 1733. 3 *Will. Rep.* 229.

10. *A.* the Grandmother of *B.* being ſeiſed in Fee of Lands, conveyed the ſame to the Uſe and Intent that certain Truſtees in the Deed named, ſhould receive and enjoy a Rent-charge of 30 *l. per Annum* to them and their Heirs, with Power to diſtrain and to enter, and hold the Lands, on Nonpayment for forty Days, and then the ſaid Rent was to be *to the Uſe of* B. *in Tail Male*, Remainder to the Uſe of the ſame Perſons that had the Land in Fee. *B.* to whom the Eſtate-tail was limited in the Rent died, leaving Iſſue *C.* who married Plaintiff, and afterwards died without Iſſue Male, whereupon one Queſtion was, Whether the Plaintiff was *dowable* of this Rent of which her Huſband died ſeiſed in Tail Male? And Lord *Talbot* held that ſuppoſing this was a Rent created *de novo*, the Remainder in Fee whereof was extinguiſhed by a Limitation of it to thoſe that had the Land, ſuch Rent being determined by the Death of the Huſband Tenant in Tail, and *having no longer any Exiſtence*, the *Wife cannot be endowed of that which is not in Being*;—but that it is *otherwiſe* where Tenant in Tail of *Land* marries and dies without Iſſue, whereby that Eſtate-tail is determined: For the *Wife* in that Caſe *ſhall be endowed* notwithſtanding, becauſe the *Land is in Being*, tho' the Eſtate-tail therein is determined, and the Dower is in ſome reſpect a Continuance of the Eſtate-tail.——So if a Rent in *Eſſe* be granted to *A.* in Tail, *Remainder to* B. *in Fee*, and *A.* marries and dies *ſans* Iſſue, the Wife ſhall be endowed;—or if a Rent *de novo* be granted *to* A. *in Tail*, Remainder *to* B. *in Fee*, (which has been (*c*) adjudged a good Remainder) and *A.* marries and dies without Iſſue, his Wife ſhall be endowed. *Hil.* 1733. *Chaplin* and *Chaplin*, 3 *Will. Rep.* 229.

(*c*) For tho' the Objection is, that there can be no Remainder of that whereof there is no Reverſion, yet the Intent of the Party gives the Rent *de novo* firſt a Being for the whole, and then the leſſer Eſtates are carved out of it. By *Holt*, C. J. 3 *Will. Rep.* 230, in a *Note* by the *Editor*. And cites *Salk.* 577. *Weeks* and *Peach.*

11. Afterwards it was diſcloſed to the *Court*, that the *legal* Eſtate of the Rent in Fee was in Truſtees, *In Truſt for* B. *in Tail*, and that on his dying, the Truſt of this Eſtate-tail deſcended to his only Son *C.* in Tail, Plaintiff's Huſband, who (*inter al'*) brought her Bill for her Dower of this Rent; and then the Point was, Whether the Wife of a *Ceſtui que Truſt* in Tail ſhould be endowed? And after much Debate and Conſideration, Lord Chan. *Talbot* was of Opinion againſt the Plaintiff, ſaying, That the Caſe of a Truſt Term ſet up in Oppoſition to Dower, was nothing like the preſent, for there the Judgment is, that the Plaintiff in Dower ſhall recover, but that *ceſſet Executio* during the Term; and if the Truſts of ſuch Term are ſatisfied,

His *Lordſhip* ſaid, As to the Caſe of *Sweetapple* and *Bindon*, (2 *Vern.* 536, and 1 *Vol. Abr. Eq.* 394. *Ca.* 6.) that it might be right to allow an Huſband to be Tenant by the Curteſy of *Money to be laid out in Land*, ſince *Money agreed to be laid out in Land is as Land* in Equity, *where every Thing directed by a Will* or *agreed by Articles to be done is looked upon as done. Ibid.* 232.———This will ſerve to warrant the Reſolution of his *Honour* in the Caſe of *Banks* and *Sutton*, (*Vide P. Ca.* of this Work) for however that learned Argument may be conſidered, as tending to prove in general that a *Woman ought to be endowed of a Truſt*, yet in that *particular* Caſe, the legal Eſtate was by the Will of the *Donor* directed to be conveyed to the *Ceſtui qui Truſt*

fied, and at an End, the *Term ought not to ſubſiſt in Equity to ſtop a favourite Right at Law, as Dower is.* Whereas in the *Caſe of a Truſt, there is no Judgment at Law that the Wife ſhall recover her Dower*; for the *Huſband* had no *legal* Eſtate, nor conſequently any Thing of which the Wife is dowable.——And in the Caſe *of a Purchaſer, even with Notice*, the Court would not relieve a Dowreſs againſt a Truſt Term that ſtood in her Way (*a*). *Hil.* 1733. *Chaplin* and *Chaplin*. *Ibid.* 230 to 233.

Truſt at his Age of twenty one, and he living to that Age, *according to the Principle* (*or Maxim*) *above mentioned*, his Widow was well intitled to Dower. 3 *Will. Rep.* 232, by way of Note.

(*a*) His *Lordſhip* took Notice, that by the Preamble of the Stat. of Uſes (27 *Hen.* 8. *c.* 10.) it is recited, that by means of theſe Uſes the Wife was defeated of her Dower; by which it appears, that the *Wife* of *Ceſtui que Uſe* was *not dowable at Common Law*; and if ſo, then, as at *Common* Law, an *Uſe was the ſame as a Truſt is now*, it follows, that the *Wife can no more be endowed of a Truſt now*, than at Common Law; and *before* the Statute, *ſhe could be endowed of an Uſe*; ſo that *here* was the Opinion of the whole Parliament in the Point: That it had been the common Practice of *Conveyancers*, agreeable thereto, to place the *legal Eſtate in Truſtees, on Purpoſe to prevent Dower*, wherefore it would be of the moſt dangerous Conſequence to Titles, and throw Things into Confuſion, contrary to former Opinions, and the Advice of many eminent and learned Men, *to let in the Claim of Dower upon Truſt Eſtates*; that he took it to be *ſettled* that the *Huſband* ſhould be *Tenant by the Curteſy of a Truſt*, tho' the *Wife could not have Dower thereof*; for which *Diverſity*, as he could ſee no Reaſon, ſo neither ſhould he have made it; but ſince it had prevailed, he would not now alter it; that there did not appear to be one Caſe, whereby, abſtracted from all other Circumſtances, it had been determined there ſhould be *Dower of a Truſt*; for which Reaſon his *Lordſhip* diſmiſſed the Bill as to ſuch Part of it as *claimed Dower of the Truſt of this Rent*. *Ibid.* 233, 234.

12. All Eſtates-tail are Eſtates of Inheritance, to which Dower is incident, and muſt be within the Stat. *de donis*. Said *arg'* and agreed to *per Cur'*, but a Limitation of an Eſtate *pur auter vie* to *A.* and the Heirs of his Body, makes no Eſtate-tail in *A.* and there can be no Dower of it, it being no Inheritance, but only a deſcendible Freehold. *Eaſt.* 1734, in the Caſe of *Low* and *Burron*, 3 *Will. Rep.* 262, 263.

13. An Eſtate was conveyed *to* A. *and his Heirs*, to the *Uſe of him and his Heirs*, In Truſt *to permit* B. *and* C. *to receive the Rents and Profits during their Lives*, and *the Life of the Survivor of them*, with *Power to* B. *to charge it with* 400 l. and ſubject thereto *A. to ſtand ſeiſed to the Uſe of the Survivor of them*. *B.* died in 1713; *C.* died in 1723, and *deviſed his Eſtate to* D. *and his Heirs*, who *before had married* M.——*D.* mortgaged the Eſtate, and if *M.* would upon *D.*'s Death be intitled to Dower, ſo as to affect the Mortgage, was the Queſtion. And *Talbot*, C. decreed that *M.* could not be intitled to Dower of this *Truſt* Eſtate. *Mich.* 1738. *Attorney General* and *Scot*, *Caſes in Eq. Temp. Talbot* 138.

(B) What ſhall be a Bar of Dower,—And in what Caſes a Dowreſs ſhall have Relief in Equity (*b*), et econt'.

(*b*) *Vide* the Caſe of *Chaplin* and *Chaplin*, *Ca. P.*

1. A *Wife* joined with her *Huſband* in a Fine, in order to make a Mortgage, which afterwards was not made; the Huſband died, and the Wife brought a Writ of Dower, and got Judgment by Default; and the Heir could not be relieved againſt it *here*, as he would have been, if Fine had been a Bar of her Dower in Equity as it was at Law. *Anon. MS. Rep.*

Prec. in Chan. S. C. *accord'*. Cited *arg'* *Mich.* 1691 as Mrs. *Danby*'s Caſe.

2. *J. S.* made a Settlement of Lands to the *Uſe of himſelf for Life*, Remainder *to Truſtees* for ninety-nine Years, *Upon Truſt to raiſe* 200 l. *apiece for the two Daughters of* M. *his Son*, Remainder *to the ſaid* M. *and the Heirs of his Body*, &c. Remainder *to his own right Heirs*, provided, that if the Heirs of the Body of *M.* ſhould pay the two

Daughters 200*l.* apiece at twenty-one or Days of Marriage, then the Term to be void. *M.* died, leaving no Iſſue but thoſe two Daughters. *M.*'s Widow brought a Writ of Dower, and had Judgment, but could have no *Benefit at Law 'till the Determination of the Term*; therefore ſhe brought her Bill *to be relieved for Dower againſt the two Daughters*, and Heirs of *M.* and *to ſet aſide the Term*, inſiſting that the Defendants, the Daughters, were now Heirs of the Body of *M.* and the Eſtate veſted in them, which was equal to the Payment of the Money; and ſo the Truſt of the Term being ſatisfied, the Term ought not to ſtand in the Way; and it was now all one as if the Money had been paid at the Time; and that by the expreſs Proviſo it ought to have been void. But Lord Chan. *Somers* would give no Relief (*a*), but diſmiſſed the Bill *without Coſts*. *Mich.* 1799. *Browne* and *Gibbs et al'*, 2 *Freem. Rep.* 233.

(*a*) And *Lord Chancellor* ſaid, He did not know any Caſe where a *Dowager* had had Relief in ſuch a Caſe as this, but that *Dower being an Intereſt that did not ariſe by any Contract* but *by Implication of Law*; and *it ought to ſtand or fall according to the Right at Law, without any Aſſiſtance of a Court of Equity*; but ſaid, he did not know how it might be in the Caſe of a Mortgage. *Ibid.* 234.———The Reporter adds, *Sed Semble a Moy*, there is no Difference between that Caſe and this, ſays the Reporter. *Ibid.*———*Prec. in Chan.* 97. *Mich.* 1699. *Brown* and *Gibbs*, S. C. ſays, the Widow recovered Dower at Law with a *Ceſſat Executio* during the Term, and on a Bill by her to ſet aſide the Term, and to have the Benefit of the Judgment, *Somers*, C. ſaid, the Queſtion here is, Whether a Court of Equity ſhall make a new Rule? The Judgment that the Plaintiff has is with a *Ceſſet Executio*, and therefore to ſet aſide the Term would be to *relieve her againſt the very Judgment upon which ſhe founds her Right of Relief*, and Plaintiff being a *Dowager* muſt be contented with the Eſtate as the Law gives it. Bill diſmiſſed, but ſays nothing about the Coſts. *Ibid.* 99.——*Vide* the Caſe of *Dudley* and *Dudley*, 1 *Vol. Abr. Eq.* 219. *Ca.* 5. where it was decreed that a *Dowreſs* ſhould have the *Truſt of a ſatisfied Term removed againſt the Heir at Law.*———2 *Will. Rep.* 639. *Dudley* and *Dudley*, cited *per* his *Honour Hil.* 1732, in the Caſe of *Sutton* and *Sutton.*———*Caſes in Eq. Temp. Talbot* 140. S. C. cited *per* Lord Chan. *Talbot Mich.* 1735, in the Caſe of *Attorney General* and *Scott.*

3. Adminiſtration (granted to another) in Caſe of a Divorce *a Menſa & Thoro* during the Coverture. The Maſter of the Rolls would not aſſiſt the Wife as to Dower, but bid her go to Law to try her Title, there being no Impediment. *Eaſt.* 1700. *Shute* and *Shute*, *Prec. in Chan.* 111.

4. A *Dowreſs has a Right to redeem a Mortgage, paying her Proportion of the Mortgage Money*, and to *hold over for the reſt*. *Per Lord Keeper*, who diſtinguiſhed it from Lady *Radnor*'s Caſe, for there was a *ſatisfied Term*, and the Huſband had a Power to bar her, by *aſſigning over the Term*, which he did; but *here* it's *only* a Mortgage, and *againſt the Heir*. *Hil.* 1700. *Palmes* and *Danby*, *Prec. in Chan.* 137.

2 *Will. Rep.* 648, 649, S. C. cited by his *Honour*, *Hil.* 1732, in *Sutton* and *Sutton*, and he ſaid, That it was a Mortgage for Years, (tho' not ſo reported in *Prec. in Chan.*) but that the Queſtion is there ſtated generally, *Whether a Dowreſs had a Right to redeem a Mortgage?* And that *Lord Keeper Wright* declared that ſhe had; and his *Honour* ſaid, that he ſaw no Reaſon for a *Difference* between a Mortgage in *Fee* and for *Years* as to the Dowreſs's redeeming in a Court of Equity.

5. Deviſe of Land *durante Viduitate* is no Bar of Dower. *May* 16, 1717. *Lawrence* and *Lawrence* (*b*), *Vin. Abr.* Tit. *Dower*, (Q. 3.) *Ca.* 15.

(*b*) *Vide* S. C. 1 *Vol. Abr. Eq.* 218. *Ca.* 2.

6. *A.* was the *Mother* and *Guardian of the Infant Heir*, and received the Rents and Profits of the Eſtate, (then in Mortgage for a Term of Years, the Intereſt whereof ſhe had paid) of which *ſhe was intitled to Dower*, *but it was never aſſigned*, and the *Mortgagee had never entered upon the Premiſſes*. Lord Chan. *Cowper* held that there ought to be an Allowance of the third Part of the Profits for Dower to the Mother, or her Repreſentative; for here, when the Mortgagee never inſiſted to enter for his Mortgage, it would be hard that the Heir ſhould inſiſt upon it to prevent the Dower; beſides, the Mother (had there been Occaſion) could have redeemed the Mortgage;

and as to the *want of a formal Aſſignment of Dower*, that is nothing in *Equity*, for ſtill the *Right in Conſcience* is the ſame; and if the Heir brings a *Bill againſt the Mother for an Account of Profits*, it is moſt juſt that a Court of Equity ſhould, in the Account, *allow a Third of the Profits for the Right of Dower*. *Eaſt.* 1710. *Duke of Hamilton & Ux'*, and *Lord Mohun* (*a*), 1 *Will. Rep.* 118. The *Reporter* ſays, 2 *Chan. Ca.* 157. *Oſborn* and *Chapman* was cited as a ſtronger Caſe. *Ibid.* 122.

(*a*) 1 *Vol. Abr. Eq. P.* 9. *Ca.* 6. S. C. but *not* S. P.

7. The Queſtion was, If *Aſſignees of Commiſſioners of Bankrupts, by taking an Aſſignment of a Mortgage Term prior to the Title of Dower, ſhall protect their Eſtate from Dower?* It was inſiſted that Creditors and Aſſignees of Commiſſioners of Bankrupts ſtand only in the Place of the Bankrupt; and ſince ſuch an Aſſignment to the Bankrupt himſelf or his Heirs, would not protect the Eſtate from Title of Dower in the Hands of the Heir, neither will it protect the Eſtate in the Hands of the Bankrupt's Creditors, or the Aſſignees of the Commiſſioners. And this differs the preſent Caſe from the Caſe of Lady *Radnor* and *Vandebendy* in *Dom. Proc'*, where it was held that ſuch a *prior Term ſhould protect the Eſtate from Dower in the Hands of a Purchaſer*.——(*Nota Differentiam.*)——Decreed that Plaintiff be let in to her Dower, keeping down the Intereſt of a *third* Part of the Mortgage. *Eaſt.* 10 *Geo.* 1. *Squire* and *Compton*, *Vin. Abr.* Tit. *Dower*, (G) *Ca.* 60.

8. Jointure *before* Marriage is a Bar of Dower, if the Wife was *a Party* to the Settlement and of *Age*, and it is expreſſed that it ſhall be in Bar of her Dower; but if it is *not ſo expreſſed*, it ſhall never be *averred to be in Bar*; and ſo is *Vernon*'s Caſe. *Per Cur'*, *Trin.* 11 *Geo.* 1. 2 *Mod. Caſ. in Law and Eq.* 152.——And tho' the Settlement was in Conſideration of a Portion in Marriage, yet it not appearing that the *Parties intended it to be in Bar of Dower*, which is a different Conſideration from that of a Marriage Portion, it was held that nothing but a *plain* and (*b*) *expreſs Intention of the Parties ſhall bar the Right of Dower*. *Per Cur'*, *Ibid.* Cites it as the Caſe of *Lawrence* and *Lawrence* (*c*), in the Houſe of Lords, *Anno* 1717.

(*b*) *Vide Finch Rep.* 368. *Exton* and *St. John.*

(*c*) *Vide* 1 *Vol. Abr. Eq.* 218. *Ca.* 2.

9. *A.* before Marriage, for the Maintenance and Livelihood of his Wife, entered into Bond to pay her 14 *l.* a Year during Life. *A.* died ſeiſed of an Eſtate of 45 *l.* and the Wife claimed *Dower* out of that, and alſo her *Annuity*, which the *Maſter of the Rolls* thought ſhe was intitled to. But upon an *Appeal* to Lord Chan. *King* he held the *Bond* was to be conſidered as a *Jointure*, and to be intended to be in *Satisfaction of Dower*, and decreed that the Woman ſhould abide by the 14 *l.* a Year. *Bozett* and *Longdon* (*d*).

(*d*) *Quære*, Term and Year?

10. *A.* deviſed Lands to Truſtees to pay out of the Rents and Profits 30 *l. per Annum* to his Wife for her Life, *without any Deductions in Satisfaction of her Dower*. The Queſtion was, Whether there was to be an Allowance for the Land-Tax; and the *Maſter of the Rolls* held that there ought, for that this Deviſe was to be conſidered as a *Rent-charge* to the Wife. *Mich.* 1727. *Green* and *Marygold* (*e*), *Vin. Abr.* Tit. *Deviſe*, (M. d.) *Ca.* 3.

(*e*) *Vide* Tit. *Annuity and Rent-Charge*, (A) *P.* 64. *Ca.* 8. S. C. with the Reaſons. *Vide* alſo *King* and *Weſton*, *P.* 62. *Ca.* 2. and the *Notes* there.

11. *A.* ſeiſed in Fee of Lands, mortgaged the ſame to *B.* afterwards *A. deviſed his real Eſtate* in Fee *to* C. *In Truſt to pay his Debts and Legacies*, and *to educate* D. *until twenty-one* or *Marriage*, and *then to ſettle a Moiety of this Eſtate upon him* and *the Heirs of his Body.*

Body. *A.* died. The Truſtee entered, paid off the Mortgage, and took an Aſſignment of it to a Truſtee for himſelf; *D.* attains twenty-one, married *M.* and lived ſome Years afterwards. The Truſtee did not ſettle a Moiety of this Eſtate on *D.* in Tail according to the Will, but received Part of the Mortgage Money by Perception of Profits. *D.* died, and then *M.* his Widow brought her Bill *to redeem the Mortgage, to be let into her Dower,* and *to be paid her Arrears ſince her Huſband's Death, offering to pay or keep down a Third of the Intereſt of the Mortgage Money remaining unſatisfied.* Sir *Joſeph Jekyll, Maſter of the Rolls,* ſaid, That he did not know, nor could find any Inſtance, where a *Dower of an Equity of Redemption was controverted and adjudged againſt the Dowreſs*; and as there were Authorities in Caſes leſs favourable, therefore his *Honour* declared that the Plaintiff being the Widow of the *Perſon intitled to the Equity of Redemption of this Mortgage,* (which was a Mortgage in Fee) hath a Right of Redemption; and accordingly decreed her the Arrears of her Dower from the Death of her Huſband, ſhe allowing the Third of the Intereſt out of the Mortgage Money unſatisfied at that Time, and her Dower to be ſet out, if the Parties differ (*a*). *Hil.* (*b*) 1732. *Sutton* and *Sut-*

(*a*) Tho' his Honour's learned Argument in the above Caſe of *Sutton* and *Sutton, &c.* may be conſidered as tending to *prove in general* that a *Woman ought to be endowed of a Truſt,* yet pleaſe to obſerve that in that particular Caſe the *legal Eſtate by the Will of the Donor was directed to be conveyed to* D. *the* Ceſtui que Truſt *at his Age of twenty-one,* and *he living to that Age, his Widow was well intitled to Dower.* 3 *Will. Rep.* 232, in a Note.——

(*b*) *Vide* the Caſe of the *Attorney General* and *Scot & al'*, 12 *Nov.* 1735, (*P. Ca.*) when upon a Bill for the Sale of an Eſtate, the Lord *Talbot* determined that a *Wife ſhould not have Dower of an equitable Eſtate deviſed to her Huſband, who had mortgaged it to the Defendant.* 2 *Will. Rep.* 651, in a Note by the *Editor.*

ton, alias Banks and *Sutton,* 2 *Will. Rep.* 632, 651.

12. A *Dowreſs ſhall be aided* in Equity *againſt a Truſt Term attendant on the Inheritance. Per* his *Honour, Hil.* 1732, in the above Caſe of *Sutton* and *Sutton, alias Banks* and *Sutton. Ibid.* 646, 647.

13. A *Dowreſs ſhall have the Benefit of a Truſt Term againſt an Heir* or *Deviſee,* but *not againſt a Purchaſer,* for a *Purchaſer ought to be ſafe. Per* his *Honour, Hil.* 1732, in ſaid Caſe of *Sutton* and *Sutton. Ibid.* 639.

14. Nothing but a plain and expreſs Intention of the Parties ſhall bar the Right of Dower, as where a Settlement was made in Conſideration of a Portion in Marriage, but it did not appear that the Parties intended it ſhould be in Bar of Dower. Cited *per Cur'*, in the Caſe of *Charles* and *Andrews, Trin.* 11 *Geo.* 1. 2 *Mod. Caſes in Law and Eq.* 152, as the Caſe of *Lawrence* and *Lawrence,* to be ſo held *in Dom. Proc', Anno* 1717.

15. Tenant for Life, Remainder in Fee, *&c.* The *Tenant for Life makes a Leaſe to him in Remainder for ſo many Years as he* (the Remainder Man) *ſhould live*; then *Tenant for Life died,* and *ſo did the Remainder Man.* It was adjudged that the *Wife ſhould not be Tenant*
45 *Ed.* 3. 16. *in Dower,* becauſe the *Poſſibility which the Tenant for Life had* that the Eſtate might revert to him, *had barred her of all Right of Dower. Per Cur', Trin.* 11 *Geo.* 1. 2 *Mod. Caſes in Law and Eq.* 151. Cites the Year Book 1 *Ed.* 3. 14, 15.

16. No Chattel Intereſt can bar Dower at Law or within the Statute; but where a Term for Years was ſettled in Jointure in Bar of Dower, in regard the *Wife expreſly conſented to accept ſuch an Intereſt for her Jointure,* the Court would not admit her to have both. *Per Cur', Trin.* 11 *Geo.* 1. *Charles* and *Andrews,* 2 *Mod. Caſes in Law and Eq.* 152.

17. A.

17. A *Feme Infant, having a Jointure made to her before Marriage,* may elect to abide by it or not when of Age, unleſs after her coming of Age ſhe enters. Account was directed of the real Eſtate, and after taking thereof ſhe to elect *Jointure* or *Dower.* 14 *May* 1734, at the *Rolls, Cray* and *Willis, Vin. Abr.* Tit. *Dower,* (Q. 3.) *Ca.* 18.

18. *Deviſe of Lands to a Wife, who was intitled to Dower, is no Bar of Dower,* but a voluntary Gift, unleſs it be ſaid *to be in Recompence or in Satisfaction of her Dower. Per Lord Keeper, Mich.* 1700. *Hitchin* and *Hitchin, Prec. in Chan.* 133.

19. Lands in *Coparcenary* deſcended upon *A.* and *B. A.* died about eight Months after, before any Receipt of Rent or Partition made, whereupon his Widow brought a Bill againſt *B.* (*et al'*) charging that Defendants had got *Poſſeſſion of all the Title Deeds, whereby ſhe was diſabled to ſue for Dower* at Law, and therefore *prayed to have Dower aſſigned her* here.——Defendants *demurred,* Becauſe *Dower is a Right merely at Law,* and *triable by a Jury,* and *that no Impediment was ſuggeſted why ſhe could not recover there*; and inſiſted that for *Detainer of Dower Damages were to be aſſeſſed by a Jury,* and *that ſhe was not intitled to the Poſſeſſion of the Deeds,* but that they belonged to the Defendants. But *Lord Chancellor* over-ruled the Demurrer, ſaying, That in this Caſe *A. dying before Receipt of Rent* or *Partition, ſhe could not recover without the Deeds*; and that as *A.*'s *Eſtate was complicated ſhe muſt come* here *for a Partition,* or *elſe ſhe muſt at every ſix Months End ſue for her Share as for Damages for Detainer,* which his *Lordſhip* thought *abſurd* and unreaſonable. *Trin.* 1735. *Moor* and *Black, Caſes in Eq. Temp. Lord Talbot* 126.

(C) Of Jointures, and in what Caſes a Jointreſs ſhall be favoured or reſtrained.

1. *H.* Being ſeiſed in Tail of ſome Lands, with Remainder over, and alſo for Life of other Lands, with a Power to make a Jointure *in Bar of Dower,* with Remainder over, *&c.* during his Minority, in Conſideration of a Marriage to be had with *U.*'s Daughter, and 1000 *l.* paid, and 3000 *l.* more to be paid by *U.* to *H.* at his Age of twenty-one, doth covenant by his Guardian to ſettle a Jointure of 500 *l. per Annum* when he comes of full Age, upon his intended Wife. The Marriage took Effect, and afterwards *U.* the Plaintiff's Father, pays *H.* the 3000 *l.* Reſidue of the Portion when he came of full Age, and then *H.* in Purſuance of his Guardian's Covenant ſettles 500 *l. per Annum* upon his Wife, the Plaintiff. Some Years after *H.* makes his Wife an additional Jointure of 250 *l. per Annum* upon her Father's dying and leaving her the Value of 9000 *l.* and at the ſame Time perſuades his Wife to join with him in a Fine of all the Reſidue of his Eſtate. Afterwards *H.* dies, and by his Will deviſes a Houſe and Lands to his Wife for her Life, to the Value of 270 *l.* and gives her a Legacy of 4000 *l.* and his Plate and Jewels to the Value of 2000 *l.* more, and makes her Executrix, and gives her the Moiety of the Reſidue of his perſonal Eſtate, *&c.* It happened that the Jointure made purſuant to the Marriage Articles proved defective both in Title and Value, and thereupon ſhe brought a Bill againſt the Remainder Man to have a Satisfaction out of the real Eſtate for the Deficiency of her Jointure. Decreed that the Remainder Man do ſettle 500 *l. per Annum* upon Plaintiff for Life out of the Lands which

came to him upon *H.*'s Death, and that the Lands contained in the additional Jointure, or deviſed to Plaintiff, ſhall not come in Aid of the other Lands *pro rata*, to make a Satisfaction for the Marriage Articles, but the whole 500*l. per Annum* ſhall entirely come out of the other Lands in Remainder, notwithſtanding the Fine levied by *H.* and his Wife, the now Plaintiff, of thoſe Lands, tho' that be a Bar and Eſtoppel of her Dower at Common Law; and that Plaintiff have a Satisfaction for the ſaid 500*l. per Annum* from her Huſband's Death. Defendant directed to account for the Rents and Profits of the additional Jointure of 250*l. per Annum* from *H.*'s Death. But the Counſel for the Defendant moved, that the additional Jointure was made out of the Lands of which *H.* was only Tenant for Life, with a Power to make a Jointure, *&c.* and that the Power not being well executed, and being a voluntary Settlement, it ought not to be aided in Equity; and it being inſiſted on that there is no Precedent in this Court of ſupplying a defective Execution of a Power in Caſe of a voluntary Settlement, his *Lordſhip* gave Leave to try the Validity of the Execution of the Power at Law, and retained the Bill *quoad* that Part 'till *there* determined. Decree affirmed *in Dom. Proc'*, *Mich.* 12 *Ann. Lady Hooke* and *Grove et al'*, *Vin. Abr.* Tit. *Condition*, (E. d.) *Ca.* 40.

Tho'his Lordſhip ſaid, He ſaw no Reaſon why a defective Execution of a Power for the Benefit of the Wife, tho' otherwiſe provided for, ſhould not be aided in a Court of Equity, as well as want of a Surrender of a Copyhold in Caſe of a Deviſe to a Child, who had another Proviſion by the Will. *Ibid.*

2. Bill to be relieved and indemnified againſt an Annuity of 100*l. per Annum*, charged upon the Plaintiff's Jointure, and payable to the Defendant *Oldfield* for his Life, *&c.* upon this Caſe.——Mr. *Ramſden* (the Plaintiff's late Huſband) treating with the Plaintiff's Friends and Relations about a Marriage with the Plaintiff, did propoſe to ſettle certain Lands in Jointure upon her; it was objected, upon looking into the Title, that the *Lands propoſed to be ſettled were ſubject to a Rent-charge of* 100 l. per Annum *to Defendant* Oldfield *for Life*, and the Plaintiff's Counſel did inſiſt that Mr. *Ramſden* ought to give Security to indemnify the Plaintiff's Jointure from this Charge, and thereupon Mr. *Ramſden* gave a Bond for that Purpoſe; but that not being thought a ſufficient Security, he offered to get Defendant *Appleyard* (a Man of a conſiderable Eſtate) to be bound with him, and upon his Application to Mr. *Appleyard*, Mr. *Appleyard* by Letter directed to Mr. *Ramſden*, writes thus, (*viz.*) "*That he is willing to be bound with* "*him*, (viz. Ramſden) *to indemnify the Lady's Jointure from the ſaid* "*Annuity, and doth, by this his Letter, oblige himſelf ſo to do.*" Upon this the Settlement was made, and the Marriage took Effect, and a *Bond was drawn purſuant to this Agreement, which was executed by Mr.* Ramſden, *but never by Mr.* Appleyard. Mr. *Ramſden* died inſolvent in 1717; and Mr. *Oldfield*'s Annuity being ſecured by Demiſe and Redemiſe of Part of the Jointure Lands, he brought an Ejectment againſt the Plaintiff to recover his Rent-charge; and thereupon Plaintiff brings her Bill *againſt her Huſband's Executors* and *againſt Mr.* Appleyard's *Executors*, and *alſo againſt his Heir at Law, to whom he deviſed all his real Eſtate, ſubject to the Payment of his Debts.* The principal Point was, If the Heir at Law and Deviſee, ſubject to the Payment of Mr. *Appleyard*'s Debts, ſhould be liable to indemnify the Plaintiff's Jointure from this Rent-charge, by Virtue of *this Letter to Mr.* Ramſden, *without having executed the Bond to indemnify, Mr.* Ramſden *the Plaintiff's Huſband dying inſolvent*, and *Mr.* Appleyard's *Executors having no Aſſets.* Inſiſted for Defendant (*int' al'*) that Mr. *Ramſden*'s *Heir at*

Law, as well as his Executors, ought to have been Parties to this Suit; for if he had Aſſets by *Deſcent,* he would be liable to ſatisfy the whole: Mr. *Appleyard* being only a Surety (ſuppoſing his Heir to be bound by this Letter) ought not to be charged. Lord Chan. *Parker:* It is not ſo much as ſuggeſted in all the Pleadings, that Mr. *Ramſden* left Aſſets real or perſonal to ſave the Defendant harmleſs from this Rent-charge; and the *Exception for want of proper Parties, ought to have been made before the Cauſe was at Hearing*; and therefore over-ruled the Exception: He held that there was a ſufficient Conſideration for this Promiſe or Undertaking of Mr. *Appleyard, viz.* the Marriage; and ſuch a Conſideration is good at Law; for tho' no Profit accrues to the *Promiſer,* yet the other Party, without this Promiſe, would be liable to a Loſs or Damage, and that is a ſufficient Conſideration to ſupport an *Aſſumpſit* at Common Law. That this Promiſe of Mr. *Appleyard* is direct and poſitive in the preſent Tenſe, and writ with an Intent to ſhew to Plaintiff's Counſel, to ſatisfy him that the Lady's Jointure ſhould be indemnified from the Rent-charge, and upon which the Match was made. Tho' *this Letter of Mr.* Appleyard's *would not bind his Heir at Law,* being *by ſimple Contract only,* yet *it* will bind him *as Deviſee of the real Eſtate, ſubject to the Payment of Debts*; for thereby the Lands are liable to the Payment of all Debts whatſoever; and decreed an Account to be taken of what is due to the Defendant Mr. *Oldfield* for the Arrears of his Annuity, to be paid by an appointed Day, otherwiſe the Injunction to be diſſolved. That the Plaintiff be reimburſed what ſhe ſhall ſo pay, by the Defendant the Deviſee of Mr. *Appleyard,* who is to give Security as the Maſter ſhall approve, to indemnify the Plaintiff from all future Payments. *Mich.* 7 *Geo. Ramſden* and *Oldfield,* and *Appleyard et al', Vin. Abr.* Tit. *Charge,* (B) *Ca.* 5.

3. *B.* on Marriage with *M.* ſettles a Jointure on her, with the Approbation of *A.* his Father, and who witneſſed the Deed. The Son died, afterwards *A.* diſcovered that *B.* was only Tenant for Life, and that the Fee was in himſelf, and recovered at Law. Upon a Bill by the Wife, *King,* C. ſaid, He ſhould make no Difference whether *A.* knew of his Title or not at the Time, conſidering the near Relation of Father and Son, and that it was plain it was thought the Son had the Fee; and that as the Father knew of the Settlement, he ſhall not take Advantage againſt it; and tho' there was a Covenant in the Deed, and the Son left Aſſets ſufficient, his Lordſhip ſaid he would complete her Jointure, and would not oblige her to have Recourſe to the Covenant. *Mich.* 1726. *Teaſdale* and *Teaſdale, Sel. Caſes in Chan.* 59 (*a*).

(*a*) In a Note to this Caſe it is ſaid, that by the Settlement the Huſband was made Tenant for Life, and the Wife Tenant in Tail, which the Court would not decree, but ordered an uſual Jointure to be made on her, *i. e.* an Eſtate for Life impeachable of Waſte. *Ibid.* 60.

4. The Remainder Man brings a Bill to be relieved againſt a Jointure made by the Tenant for Life even upon his Death-bed, in Conſideration of, and previous to, his Marriage, by Virtue of a Power reſerved to him; but Lord *Parker,* aſſiſted by *Pratt,* C. J. and the Maſter of the Rolls, denied Relief. Cited by the Maſter of the Rolls, *Trin.* 1731, as the Caſe of *Wicherly* and *Wicherly,* 2 *Will. Rep.* 619.

5. The Reaſon why Chancery does not relieve againſt Marriage Contracts for Settlements, *Jointures,* or other Proviſions, tho' they may be *very unequal* in Favour of the Wife, is, becauſe it cannot ſet the

the Wife *in ſtatu quo*, or *unmarry the Parties. Per* his *Honour Trin.* 1731, *in Caſu North* and *Anſell*, 2 *Will. Rep.* 618.

6. *Robert Pitt*, in *Conſideration of Marriage*, agreed to lay out 10,000 *l.* in Land to ſeveral Uſes, one of which was *to the Uſe of Plaintiff* Harriot *for Life, for her Jointure. Robert*'s Father, *after* the Marriage, gave him an Eſtate for Life, with *Power to grant a Rent-charge of* 400 l. *a Year out of it to any Woman for her Jointure. Robert*, in Purſuance of this Power, *grants that Rent to* Harriot *after his Death, in Satisfaction of Part of her Jointure.* Three Days after, he *conveyed a Leaſehold Eſtate of* 200 l. *a Year, In Truſt for his Wife*, and by his *Will he confirmed the Grant of the Rent-charge*, and *Conveyance of the Leaſehold Lands*, ſettled on the Plaintiff *Harriot* by way of *Addition* or *Augmentation*, and *in full Completion of her Jointure.* And held that this was a *Satisfaction of the Jointure provided by the Articles*, according to the Intention of *Robert*, and that the Lady ſhould be put to her *Option* whether to have the *Rent* and *Leaſes*, or *the Money laid out. Hil.* 7 *Geo.* 2. *Earl of Grandiſon* and *Harriot Pitt*, Widow and Executrix of *Robert Pitt*, and *Thomas Pitt et al'*, *MS. Rep.*

7. A *Dowreſs* ſhall have *Emblements*, becauſe *Dower* is conſidered as an *Excreſence* or *Continuance* of the Eſtate of the Huſband, but a *Jointure* is not. *Trin.* 1734. *in Chan. Fiſher* and *Forbes*, *Vide* Tit. **Emblements**, *in this Page.*

Vide the Caſe of *Mills* and *Eden*, Tit. **Creditor and Debtor**, (A) *P.* 251. *Ca.* 6.

CAP. XXXVI.

Emblements.

1. *A Tenant for Life*, Remainder *to* B. *his Wife for her Life, for her Jointure*, Remainder *to* A. *in Fee.*——A. *deviſes his Remainder in Fee to* B. and *died in* May, *leaving Hops in the Ground* which *were cultured at great Charge in* February, and *gathered in* Auguſt. Queſtion, Whether *they belonged to* B. *or to* A.'s *Executor?* The *Maſter of the Rolls* at firſt inclined to think the *Hops* belonged to *B.* in Right of her Rent and Emblements; but in regard of Caſes cited, adjudged that in Caſe of *Dower* ſhe ſhall have the Emblements, becauſe *Dower is conſidered as an Excreſcence* or *Continuance of the Eſtate of the Huſband*, but *a Jointure is not*; he afterwards declared that the *Hops* and *Corn growing at the Teſtator's Death were Emblements*, and *ought to be accounted for as Part of the Teſtator's Eſtate. Trin.* 1734. *Fiſher* and *Forbes*, *Vin. Abr.* Tit. *Emblements*, (A) *Ca.* 82.

Error. Vide **Writs**, P.

CAP. XXXVII.

Eſtate.

(A) Of legal and equitable Eſtates.
(B) Of an Eſtate pur auter vie.
(C) Of an Eſtate-tail by Deed.

(A) Of legal and equitable Eſtates.

1. A *Legal* and *equitable* Intereſt cannot be *incorporated* together. *Hil.* 1735, in the Caſe of *Sir John Robinſon* and *Comyns*, *Caſes in Eq. Temp. Talbot* 166.

2. *A.* deviſed *all his Lands to* B. *and his Heirs*, In Truſt *to pay Debts, and then* In Truſt *for* C. *and the Heirs of her Body*, Remainder *to* B. *and his Heirs*, upon Condition that he marry *C. and gave* B. *his perſonal Eſtate*, In Truſt *for* C. *until ſhe attain twenty-one*, and *made* B. *Executor*, and *died. C.* refuſed to marry *B.* and married *J. S.* and afterwards at her Age of twenty-one *C.* and *J. S.* made a Bargain and Sale to *W.* to make him Tenant to the *Præcipe*, in order to ſuffer a Recovery, in which *C.* and *J. S.* was vouched, and the *Uſes were declared to the Iſſue of the Marriage*, Remainder *to* C.*'s own right Heirs. Quære, What Sort of Eſtate the Remainder in* B. *is?* Whether *it be a Truſt* or *a Legal Eſtate?* It is *obſervable* that the *whole* Eſtate is given to *B. and his Heirs, to the Uſe of him and his Heirs*, which is a *compleat Diſpoſition of the whole legal Eſtate*, and *being in Caſe of a Will would be ſo of the equitable Intereſt* likewiſe, unleſs the *Teſtator's Intent appears to the contrary*, as in this Caſe it *manifeſtly* does; for it is given in Truſt for Payment of his Debts, *&c.* and ſo far is a Limitation of an *equitable* Eſtate, the *Remainder of which* (had the Teſtator gone no farther) *would, after the Purpoſes ſerved, return to the Heir at Law*, as was determined upon Serjeant *Maynard*'s Will. But then there comes a *Remainder to* B. *and his right Heirs*, &c. It is true that the Word *Remainder* (properly ſpeaking) *ſignifies only a Continuance of the ſame Kind of Eſtate as is before limited*, which *here* was only a *Truſt* Eſtate; for when the whole *legal* Eſtate is diſpoſed of, and Part of the *equitable* Intereſt likewiſe, there the *Remainder* muſt be an *equitable Remainder*; in this Caſe indeed it is not an *abſolute* one, but *conditional*, which, when the *Condition is performed*, will *veſt the Eſtate in him*, and if the *Condition be not performed*, it will *then deſcend to the Heir.* The Teſtator therefore has conſidered it as an *equitable* Intereſt, and yet it is likewiſe true that this *equitable* Intereſt, when veſted in the *ſame* Perſon with the *legal* one, muſt as to ſome Purpoſes be conſidered as a *legal* Intereſt. *Hil.* 9 *Geo.* 2. *Sir John Robinſon* and *Comyns*, *Caſes in Eq. Temp. Lord Talbot* 165.

(B) Of an Eſtate pur auter vie.

1. *A.* Seiſed of an Eſtate *for three Lives*, deviſed the ſame *to* M. *his Daughter for Life*, Remainder *to her Iſſue Male*, and for want thereof, Remainder *to* L. *M.* by Leaſe and Releaſe conveyed the Premiſſes in *Conſideration of her Marriage with* E. B. *to the Uſe of herſelf* and *her intended Huſband*, and *the Heirs of their Bodies*, Remainder *to the Heirs of her Huſband*. M. *died without Iſſue*, and the Plaintiff claiming under *L.* the Perſon in Remainder, brought his Bill for an Account of the Rents and Profits. One Queſtion was,—One having an *Eſtate for three Lives*, and *deviſing it to* A. *in Tail*, Remainder *to* B. whether this Remainder was good? Said *arg'* and agreed *per Cur'*, That the Limitation of an Eſtate *pur auter vie to* A. *and the Heirs of his Body*, makes no Eſtate-tail in *A.* for *all Eſtates-tail are Eſtates of Inheritance, to which Dower is incident*, and muſt be within the Statute *De Donis*; whereas in this Kind of Eſtate, which is no Inheritance, there can be no Dower, neither is it within the Statute, but a *deſcendible* (*a*) Freehold only. And Lord Chancellor *Talbot* held plainly that this was a good (*b*) Remainder to *B.* on *A.*'s Death without Iſſue, it being no more than a Deſcription (*c*) who ſhould take as *ſpecial* Occupants during the Lives of the three *Ceſtui que vies*. As if the *Grantor* had ſaid, inſtead of a wandering Right of (*d*) *general* Occupancy, *I do appoint that after the Death of* A. *the Grantee, they who ſhall happen to be Heirs of the Body of* A. *ſhall be* (*e*) *ſpecial Occupants*

(*a*) For which Reaſon it has been determined, that where a *Leaſe for three Lives* has been *granted to a Man* and *his Heirs*, and ſuch *Grantee* died, leaving an *Infant* Heir, the *Parol ſhould not demur*. By Lord *Talbot*, in a Branch of the Caſe of *Chaplin* and *Chaplin*, 18 *July* 1735, cited 3 *Will. Rep.* 263. in a Note.

(*b*) The Objection againſt the Remainder being good, is, For that when the *Leſſee had deviſed the Premiſſes in Tail*, he then had *nothing left in him but a Poſſibility, which he could not deviſe* or *limit over*; as if a Man were *ſeiſed in Fee-ſimple*, and at Common Law had *granted Lands to one, and the Heirs of his Body*, this was a *conditional Fee*; and foraſmuch as the *Donor* had *only a Poſſibility of Reverter, he could not limit it over.*—— Now if at Common Law an *Eſtate in Fee could not be limited over after an Eſtate given to one, and the Heirs of his Body*, much leſs ſhould an *Eſtate for three Lives be limited over after ſuch a Failure of Iſſue.* And as to the Notion that in this Kind of Limitations the *Heirs of the Body of* A. *take only as ſpecial Occupants*, and that a Man may name as many *ſpecial* Occupants as he pleaſes; by the ſame Reaſon it may be argued, that *this Eſtate for Lives may be limited to* A. *and his Heirs*, and *if* A. *die without Heirs*, then *to* B. *and his Heirs*; which certainly would be a *void* Limitation to *B.* and, *in Preſumption of Law*, the *Continuance of the Iſſue of a Man's Body may be for ever.* From whence it ſhould ſeem, that after the *Leſſee for three* Lives *has granted* or *deviſed* the Premiſſes *to* A. *and the Heirs of his Body*, he (the Leſſee) has nothing but a *Poſſibility which he cannot grant or limit over. Note*; This appears from the Reporter's MS. to have been the Opinion of Mr. *Webb*, an eminent Conveyancer, late of the *Inner Temple*. However, the Law is ſettled as above. *Ibid.* 263. in a Note by the *Editor*.

(*c*) See the Caſe of *Chaplin* and *Chaplin*.

(*d*) It is obſervable, that at Law there could be no *general* Occupant of a Rent: As if *J.* had granted a Rent to *A.* for the Life of *B.* and *A.* had died, living *B.* the Rent would have determined. 2 *Roll. Abr.* 150. *Salk.* 189. But there might have been a *ſpecial* Occupant of a Rent: As if *J.* had granted a Rent to *A.* and his *Heirs*, for the Life of *B.* and *A.* had died, living *B.* and leaving an *Heir*, ſuch *Heir* would have been a *ſpecial* Occupant; yet if a Man had granted a Rent to *A.* his *Executors* and *Aſſigns*, during the Life of *B.* and afterwards the *Grantee* had died, leaving an *Executor*, but *no Aſſignee*, the *Executor* ſhould not have had the Rent; in regard of it being a Freehold, the ſame could not deſcend to an *Executor*. *Mo.* 664. 2 *Vol. Abr.* 152.———3 *Car. Sir Richard Buller et al'* v. *Chiverton*, agreed and admitted by *Jones*, J. and *Cur'*, and by the Counſel on both Sides, that the Rent is extinct; *tho' there ſeems to have been no ſound Reaſon for this Diſtinction.* But as to Rents granted *pur auter vie*, the Statute of Frauds has made an Alteration; for by that Statute any Eſtate, *pur auter vie*, is made *deviſable*, and *if not deviſed away*, ſhall be *Aſſets in the Hands of the Heir, if limited to the Heir*; if *not ſo limited*, it ſhall go to the *Executors* or *Adminiſtrators* of the *Grantee*, and be *Aſſets in their Hands*. So that, if ſince that Statute, a Rent be granted *to* A. *for the Life of* B. *and* A. *die, living* B. A.'s *Executors* or *Adminiſtrators* ſhall have it during the Life of *B.* for that Statute is not only made to prevent the Inconvenience of ſcrambling for Eſtates, and getting the firſt Poſſeſſion after the Death of the *Grantee*, but likewiſe for *preſerving* and *continuing* the Eſtate during the Life of the *Ceſtui que vie*. And it is reaſonable, ſince the *Grantee* might by Deed have diſpoſed of the Rent during the Life of the *Ceſtui qui vie*, that, tho' by his dying without having made any ſuch Diſpoſition, in *Nicety* of Law this Eſtate would have determined, yet by that Statute the Intereſt which paſſed from the *Grantor* ought to be preſerved, and ſhall go to the *Executors* or *Adminiſtrators* of the *Grantee*, during the Life of the *Ceſtui que vie*. And the Statute in this Caſe does not enlarge, but only preſerve the Eſtate of the *Grantee*. *Per* the Lord Keep. *Harcourt* in the Caſe of *Rawlinſon* v. *Dutcheſs of Montague et al'*, 4 *Dec.* 1710, tho' this was not the principal Point. *Ibid.* 264. in a *Note*.

(*e*) *Vide Chaplin* and *Chaplin*.

of

of the Premiſſes; and if there ſhall be no Iſſue of the Body of A. *then* B. *and his Heirs ſhall be the ſpecial Occupants thereof*; and that *here* can be no Danger of a *Perpetuity*, for all theſe Eſtates will determine on the Expiration of the three Lives.—So, if inſtead of *three* there had been *twenty* Lives, *all ſpending at the ſame Time, all the Candles lighted up at once*, it would have been good; for, in Effect, it is only for *one* Life, (*viz.*) that which ſhall happen to be the Survivor. For which Reaſon it were very improper to call this an Eſtate-tail, ſince at that Rate it would not be liable to a Forfeiture, or puniſhable for Waſte, the contrary whereof is true. *Eaſt.* 1734. *Low* and *Burton*, 3 *Will. Rep.* 262, 263, 264, 265.

(C) Of an Eſtate-tail by Deed.

1. *A.* By Marriage Settlement, after the Limitations to his Son in Tail Male, limited the Remainder to *B.* for Life, and after his Deceaſe, to the Heirs Male of his Body *hereafter to be begotten*. *Talbot*, C. held, that *B.* took an Eſtate in Tail, and that the Words *hereafter to be begotten*, do not confine it to the Iſſue born after, as *Procreatis* and *Procreandis*. *Co. Lit.* 20 and 24 *E.* 3. 15. And this, his *Lordſhip* ſaid, was to prevent the great Confuſion which would otherwiſe be in Deſcents, by letting in the Younger before the Elder. *Eaſt.* 1734. *Hebbethwaite* and *Cartwright*, *Caſes in Eq. Temp. Lord Talbot* 31, 32.

CAP. XXXVIII.

Evidence and Witneſſes.

(A) Of the Sufficiency and Diſability of a Witneſs.

(B) What will be admitted as Evidence;—And here of preſumptive Evidence.

(C) In what Caſes parol or collateral Evidence ſhall be admitted.

(D) Of examining Witneſſes in Chief, and De bene eſſe, and eſtabliſhing their Teſtimony in Perpetuam rei Memoriam;—Of publiſhing, reading, amending, and ſuppreſſing their Depoſitions.

(A) Of the Sufficiency and Diſability of a Witneſs.

1. LORD Keeper was *clearly* of Opinion, That tho' by the Statutes of 3 & 4 *Ed.* 6. *cap.* 4. and 13 *Eliz. cap.* 6. an Exemplification of *Part* of a Patent be made ſufficient to make a Title under, or to be pleaded in any Court where the other Side will have Time to reſort to

the Patent, and to be adviſed whether the Exemplification be of all that is material, and if it be not, they may take Advantage of it; yet they did not extend where the other Side could have no Time to conſult the Patent Roll, and ſo might be ſurpriſed and loſe his Right by an imperfect Exemplification. *Per Lord Keeper*, who cited a Caſe wherein he had known it ſo held in *B. R. Mich.* 1695. *Attorney General, &c.* and *Taylor, Prec. in Chan.* 59.

2. A Witneſs *incompetent* being intereſted, may, on a Releaſe given by him, whereby he becomes diſinherited, be examined again. — So a Witneſs at the Hearing rejected to be read becauſe intereſted, yet, on a Releaſe given, was examined again before the Maſter on the Account, and allowed good, on Exceptions to the Maſter's Reports. *Eaſt.* 1704. *Callow* and *Mince* (*a*), *Prec. in Chan.* 234.

(*a*) *Vide* 1 *Vol. Abr. Eq.* 223. *Ca.* 2.

3. A Bankrupt's Servant was produced in Behalf of Creditors, to prove ſome Dealings between his Maſter and his Debtors, but excepted againſt, becauſe the Bankrupt had paid him his Wages *poſt* Bankruptcy, ſo that is no Payment in Law. *Lord Chancellor* overruled this Exception, taking the Payment to be good, and conſequently that the Evidence was unbiaſs'd, and ſaid, It was *unreaſonable that a Servant ſhould come with the reſt of the Creditors. Eaſt.* 7 *Ann. Humphrys's Caſe, MS. Rep.*

In this Caſe *Lord Chancellor* ſaid, Fair Book-keeping, while the Trade is in Repute and Credit, is good Evidence; but Razures will abate the Credit; and Book-keeping about the Time the Bankruptcy is committed, is not Evidence.

4. If a Man *unneceſſarily* makes any one a Defendant, he thereby cuts himſelf off from the Benefit of his Evidence, for it is his own Fault. — But where ſeveral are made Defendants, it will not hinder any one of the *Defendants* from the Benefit of the Evidence of any *others* that are made ſo. *Eaſt.* 10 *Ann. Gibſon* and *Albert in Canc', Lucas's Rep.* 19.

5. In a Suit to eſtabliſh a *former* Will, *A.* is examined by the then Plaintiff, as a Witneſs to prove the ill Practices made uſe of in obtaining a *latter* Will; after which, and before the Hearing of the Cauſe, *A.* becomes intereſted, (*by having a Rent-charge deviſed to him out of the Lands in Queſtion by the Perſon claiming under the* former *Will*) and Plaintiff in the Cauſe, and becauſe *A.* was a *good Witneſs*, and *diſintereſted at the Time of the Depoſitions taken*, and the preſent Bill being in Nature of a Bill of Revivor of the Proceedings in which the now Plaintiff was examined, Lord *Cowper* admitted the *now* Plaintiff's *own* Depoſitions to be read (*b*). *Mich.* 1715, in the Caſe of *Groſs* and *Tracey* (*c*), 1 *Will. Rep.* 288.

(*b*) See the Caſe of *Callow* and *Mince*, *Ca.* 2, in this Page; where a Witneſs was examined before the Hearing while ſhe was intereſted, but after the Hearing ſhe releaſed her Intereſt, and was examined again before the Maſter, and her Depoſitions before the Maſter were allowed to be read. (*c*) 2 *Vern.* 287. S. C.

6. In the above Caſe of *Groſs* and *Tracey* it was declared, that a *Grantee*, when he appears to be a *bare* Truſtee, is good Evidence to prove the Execution of the Deed to himſelf. *Ibid.* 290.

7. If a Corporation would examine any of their Members as Witneſſes, they muſt (and ſo is the Courſe) *diſfranchiſe* them, and then they may make uſe of their Teſtimony, *per Parker*, C. *Mich.* 1719. *Mayor and Aldermen of Colcheſter* and ———, 1 *Will. Rep.* 595.

The Method of *diſfranchiſing* is, by an Information in the Nature of a *Quo Warranto* againſt the Member, who confeſſes the Information, on which the Plaintiff obtains Judgment to diſfranchiſe. *Ibid.* 596.

8. Pariſhioners are no good Evidence to prove a Charity given to the Pariſh, becauſe they are intereſted, as being eaſed in the Poor Rates; *ſecus* if only a Lodger, and one that does not pay to the Poor. —But a Witneſs examined (being deſcribed to be of —— to the Poor of which Pariſh a Charity was given) muſt be intended an *Houſekeeper*, and one liable to pay Pariſh Rates, unleſs the contrary be made appear. *Per* Lord Chan. *Parker*, *Hil.* 1719. *Attorney General* and *Wyburgh et al'*, 1 *Will. Rep.* 599.

Note; This was in the Caſe of a Sum of Money given for the Cloathing of ſix poor Perſons of the Pariſh of *Endfield.*

9. Bankrupt's Wife cannot be examined againſt her Huſband to prove his Bankruptcy; but may (*by Statute*) touching diſcovering his Effects. *Per* Lord Chan. *Parker*, *Hil.* 1719. *Ex parte James*, 1 *Will. Rep.* 611.

Vide Tit. *Bankrupts*, C. P.

10. But the Bankrupt himſelf may be examined touching his own Bankruptcy, by Statute 5 *Geo.* 1. *per* Lord Chan. *Parker*. *Ibid.*

Vide Tit. *Bankrupts*, C. P.

11. *J. S.* makes his Will, and (*int' al'*) deviſes *Lands to* A. *and his Heirs*, In Truſt *to pay the Teſtator's Heir at Law* 200 l. and there are *three* Witneſſes to the Will, one of which is *A.* the Deviſee. The Heir brings his Bill to impeach the Will for want of three credible Witneſſes, in regard *A. the Deviſee of the Land* is a Party intereſted; and the Queſtion was, Whether *A.* was not a good Witneſs, if he aliens the Land without *Covenant* or Warranty? But the Court ſaid nothing as to this Point, but that the *Heir* ought to have conteſted the Will at Law, and if it had been adjudged againſt *him* there, *viz.* that the Will was good, then he might have come *here* for the 200 *l.* wherefore Lord Chan. *Parker* retained the Bill for a Year, that the Plaintiff might have two Aſſizes to try the Will, but the Plaintiff to pay *A.* (the Defendant) his Coſts. *Trin.* 1719. *Baugh* and *Holloway*, 1 *Will. Rep.* 557.

12. A *bare* (*a*) Truſtee is a good Witneſs for his *Ceſtui que Truſt*, but *not* an Executor *In Truſt* (*b*), as he is liable to be ſued by Creditors, and liable to pay Coſts, and conſequently differs from a common Truſtee. *Eaſt.* 1733. *Croft* and *Pyke*, 3 *Will. Rep.* 181.

(*a*) *Vide Barnard. Eq. Rep. P.* 416. *Hil.* 1740, when a Truſtee is to account, he ſhall not be allowed to be examined as a Witneſs in that Cauſe.

(*b*) But if an Executor *In Truſt* renounces the Executor's Part, and lets another take out Adminiſtration with the Will annexed, he may be a Witneſs. *Ibid.* in a Note which ſeems to be added by the *Reporter* at the Top of *P.* 182.

13. It is a good Rule at Law, that when the Plaintiff has made many Perſons Defendants, and the *principal* Defendant calls one of the Co-Defendants to be a Witneſs; if the Plaintiff cannot give ſome (*c*) material Evidence againſt him, he is allowed to be a good Witneſs, *elſe* it would be in the Power of the Plaintiff to take off all the Defendant's Witneſſes in the Action. The ſame Rule is in Equity. *Trin.* 1734. *Piddock* and *Brown et al'*, 3 *Will. Rep.* 288.

(*c*) See *Skin. Rep.* 673. *The King* and *Sir Thomas Culpepper.*

14. A *Witneſs appeared to be intereſted*, but *ſwore he had received Satisfaction*; and *per Cur'*, he is not a *competent* Witneſs; the *Law* will not truſt him to ſwear thus, but the *Releaſe* or *other Act deſtroying his Intereſt, muſt be proved. Mich.* 11 *Geo.* 2. *Anon. MS. Rep.*

15. The Queſtion of *Evidence* before the *Lord Chancellor* (in the Determination of which he deſired the Aſſiſtance of *Lee* and *Willes*, C. J. and *Parker*, C. B.) ariſing on the following Caſe, (as opened by Plaintiff's Counſel): —Mr. *Barker*, Governor at *Pataras* in the *Eaſt-Indies*, before he went to his Government, entered into an Agreement with the Plaintiff *Omichund* of the Town of *Calcutta* in the Kingdom of *Bengal*, that *Omichund ſhould buy* and *pay for Merchandizes to be ſent to* Barker, *who was to allow him Intereſt for the Money*

diſburſed for them, and *to ſell them for their joint Advantage*; and *in this Trade they were to be Partners.* When *Barker* was got to *Pataras*, he ſent a Letter to the Plaintiff, *pretending that the Goods were ſold at a very ſmall Sum, for little or no Profit.* This obliged the Plaintiff to file a Bill in the Court erected at *Calcutta* (*by Letters Patent from this Kingdom*) to have an Account of theſe Goods. Upon this *Barker* took the Opportunity of a *French* Ship and ran away juſt when Judgment was going to be given againſt him, and died in the Voyage home. The Plaintiff obtained in the Mayor's Court at *Calcutta* a Decree againſt *Barker* by Default, but could have no Advantage from it, himſelf and his Effects being removed, and was therefore forced to purſue his Repreſentatives in *England* by a Bill brought here *May* 25, 1748. An Anſwer was put in, and a Croſs-bill filed againſt *Omichund* to have a Diſcovery and an Account from him, to which they required his Anſwer upon Oath; but *he being an Infidel, and therefore incapable of ſwearing upon the Goſpels*, a Commiſſion went to take his Anſwer *in that Manner in which he was able to give it.* Many of the *Witneſſes being alſo Infidels*, another Commiſſion iſſued *to take their Evidence ſubject to the Opinion of the Court whether it ſhould be received*, and *whether this Evidence could be received in this Kingdom was the preſent Queſtion*; in which, after having heard the Cauſe ſolemnly argued at the Bar laſt *Michaelmas* Term, the Judges gave their Opinion *ſeriatim* in the following Manner.——— *Parker*, C. B. This Bill is brought for an Account of a Tranſaction in the *Eaſt-Indies*, and a Satisfaction of a Demand ariſing upon it, upon 4 *Dec.* 1739; upon the Motion of the Plaintiff's Counſel, one of the Witneſſes, not being a Chriſtian, but of the *Gentou* Religion, your Lordſhip was pleaſed to order that a Commiſſion ſhould iſſue, and the Words '*Corporal, and the Holy Evangeliſts*,' be left out, and the Words '*in the moſt ſolemn Manner*' inſerted in their Room, and *that the Commiſſioners ſhould certify in what Manner the Oath was adminiſtered*, and *of what Religion the Witneſſes were.* 12 *Feb.* 1742, the Commiſſioners made a Return *that they had examined five Chriſtian Witneſſes ſworn upon the Holy Evangeliſts, and that the others being Perſons of the* Gentou *Religion were ſworn in the Manner moſt uſual and ſolemn among them**, *and received in the Courts of Juſtice at* Calcutta *erected there by Letters Patent from this Kingdom, which direct the Judges there to proceed upon Evidence taken in the moſt ſolemn Manner.* The Plaintiff's Counſel offering to read theſe Depoſitions as Evidence, the Defendant's Counſel objected to it, becauſe theſe are *Infidels*, or at leaſt their Religion is very imperfectly certified, and they cited in Support of this Objection 1 *Inſt.* 66. and 4 *Inſt.* 279. where it is laid down *that Infidels are no Witneſſes.* If Lord *Coke* had meant (as I ſhall ſhew he did not) a *profeſſed Atheiſt*, and *any ſuch Perſon does exiſt*, I ſhould think he ought not to be admitted as a Witneſs, *becauſe he cannot take an Oath upon a Religious Sanction.* I ſhall firſt ſhew from the common Conſent of Mankind, and from Authors who have treated of this People, that thoſe of the *Gentou* Religion do believe in a God. For the common Conſent of Mankind, ſee *Tully de Nat. Deorum, lib.* 2. *cap.* 7. *Tuſcal. Quæſt. lib.* 1. *c.* 13. *De Legib. lib.* 1. *c.* 8. For Authors who have *travelled* and given an Account of their Religious Ceremonies, *Vol.* 3. 357, 277, 381, 398. *Lord's Diſcovery of the* Banian (which is the ſame as the *Gentou*) *Religion*, &c. It appearing therefore that the Perſons profeſſing this Religion do believe in God, the Creator and Governor of the World, I ſhall now conſider whether their Depoſitions ought to

* *Viz.* There was a Bramin or Prieſt preſent; the Oath being interpreted to each Witneſs, the Laymen did touch the Feet of the Bramin, and two being Bramins or Prieſts, did touch his Hand.

be read; and as *Hale* has profeſſedly examined what Lord *Coke* ſays upon this Head, and his Reaſoning will be the *Baſis* of what I ſhall offer, I ſhall particularly conſider the Paſſage in him ſo often referred to; he ſays (2 *Hal. Hiſt. Pl. Cr.* 279.) it is ſaid by Lord *Coke*, (*ubi ſupra*) That an *Infidel is not to be admitted as a Witneſs*; the Conſequence whereof would alſo be, that a *Jew*, who owns the Old Teſtament, could not be a Witneſs. This Conſequence was rejected by the Defendants Counſel as not juſt, becauſe the Old Teſtament is a Sacred Book, and the Goſpel or Good News to the *Jews*, for which they cited 2 *Keb.* 314. To this I anſwer, That the Ritual or Ceremonial Part of the Law of *Moſes* is not binding upon Chriſtians, but the Moral Part is indeed; in the Old Teſtament there are ſeveral Predictions of *Chriſt*, but the Goſpel is the Good News that he is come; Chriſtians believe *Jeſus* to be the *Chriſt*, and the *Jews* have no ſuch Belief, but ſtill expect his Coming; and therefore the Old Teſtament can with no Propriety be called the Goſpel, notwithſtanding the ſudden Opinion in *Keble*. They ſay, *Hale* miſunderſtood Lord *Coke*, but I think his Aſſertion is applicable, not believing in Chriſtianity, ſee 2 *Inſt.* 507. 3 *Inſt.* 165. and therefore, I think, Lord *Hale*'s Conſequence is well founded. The next Paſſage in *Hale* is, 'But I take 'it that altho' the regular Oath, as it is allowed by the Laws of *Eng-* 'land, is *tactis Sacroſanctis Dei Evangeliis*,' which ſuppoſes a Man to be a Chriſtian, yet in Caſes of Neceſſity, as in Foreign Contracts between Merchant and Merchant, which are many Times tranſacted by *Jewiſh* Brokers, the Teſtimony of a *Jew tacto libro legis Moſaicæ* is not to be rejected, and is uſed, as I have been informed, among all Nations. The Books cited to ſhew that by the Law of *England* no Oath can be admitted but upon the New Teſtament (*Bract.* 116. *Brit. Ch.* 53. *f.* 135, *&c.*) prove no more than that theſe Oaths are in general adapted to the eſtabliſhed Religion of the Kingdom. Several Books were cited to prove that *Jews* were anciently ſworn in our Courts of Juſtice, *Madd. Hiſt. Exch.* 174. *Wilk. Saxon Law* 348. *Seld. f.* 1. *tom.* 2. 1469. *f.* 3. *c.* 2. 1460. There was ſomething very particular in Trials between Chriſtians and *Jews*; the *Venire facias* was *Sex legales Judæos*, therefore they were ſworn as Jurors; at that Time a Doubt aroſe after the Reſtoration in what Manner a *Jew* ſhould put in his Anſwer in this Court, (1 *Vern.* 263.) and it was ordered, That he ſhould be ſworn upon the *Pentateuch*; in *Francia*'s Trial (6 *St. Trials* 87.) a *Jew* was admitted to be ſworn, and it is the eſtabliſhed Practice to ſwear them; this Practice has received the Parliamentary Sanction, for *Jews* are directed by Parliament to take the Abjuration Oath in like Manner as they are admitted to be ſworn to give Evidence in Courts of Juſtice. 10 *Geo.* 1. *c.* 4. §. 18. This overturns Lord *Coke*'s Opinion ſo far as *Jews* are concerned. The next Paſſage in *Hale* is, 'Yea the Oaths of idolatrous Infidels have been admitted 'in the Municipal Laws of many Kingdoms, eſpecially *ſi juraverunt* '*per verum Deum Creatorem*,' and ſpecial Laws are inſtituted in *Spain* touching the Form of the Oath of *Infidels*.—It may be proper ſhortly to ſtate the Circumſtances of the preſent Caſe, to ſee whether this falls within the Reaſon of Lord *Hale*. The Matters in Queſtion are Commercial Matters ariſing in a Foreign Country, where the *Gentou* Religion prevails; it was objected the Plaintiff ſhould have proved there were no Chriſtians there to be Witneſſes, whereas the contrary appears. To this I anſwer, That the Neceſſity need not be abſolute or natural, but only moral or preſumed, as appears from the admitting the

Plaintiff

Plaintiff upon the Statute of Hue and Cry, when yet he might have told ſomebody of the Money, *&c.* he had about him. The next Queſtion is, Whether ſuch Neceſſity is not here apparent; the Plaintiff was negociating with a Perſon reſident in that Country and amenable to the Laws there; it appears he did commence a Suit in the Court of *Calcutta*, and obtained a Decree there for his preſent Demand; and it appears that the Defendant's Teſtator did inſiſt that he ſhould be examined whether he was of the *Gentou* Religion, and ſhould take ſuch Oath as they uſe, and has therefore given Judgment againſt himſelf. I therefore think, upon the Principle of Neceſſity, theſe Witneſſes ought to be read; and I think there are Caſes that warrant this. 2 *Cro.* 541, 542. 2 *Roll. Rep.* 346. 1 *Salk.* 283. I cannot ſee what ſhould hinder the admitting the Plaintiff's Witneſſes; they are admitted as Witneſſes by the Civil Law, by the Law of Nations, and by the Laws of all Countries, as far as I find. There were mentioned *Duarenus*, *Covarruſias*, *Grotius*, *Puffendorf*, *Stair's Inſtitutes*. I don't mention the Inſtance of General *Sabine**, becauſe I underſtand that was not debated, but given up. It is objected, Theſe Witneſſes do not ſwear by the true God, and that this is required by Scripture; and they have cited *Deut.* vi. 13. and two or three other Paſſages; on the other Side were cited others, but the right Anſwer is, That this is not well founded in point of Fact, becauſe theſe Perſons do believe in God the Creator of Heaven and Earth, and therefore, I think, do ſwear by the *true* God. That will anſwer the Objection founded upon that Paſſage in *Hale*, eſpecially *ſi juraverunt per verum Deum Creatorem*. It is ſaid that there is a particular Proviſion for the Oath of an Infidel in *Spain*. It is in *Spaniſh*, I have got it tranſlated, and it appears to be an Oath adapted to the Faith of the *Mahommedan*. This brings me to the laſt Paſſage I ſhall mention from *Hale*, 'And it were a very hard Caſe if a Murder committed here 'in *England*, in Preſence only of a *Turk* or a *Jew*, that owns not 'the Chriſtian Religion, ſhould be diſpuniſhable becauſe ſuch an 'Oath ſhould not be taken, which the Witneſs holds binding, and 'cannot ſwear otherwiſe, and poſſibly might think himſelf under no 'Obligation if ſworn according to the uſual Stile of the Courts of '*England*.' But then it muſt be agreed, That the Credit of ſuch a Teſtimony muſt be left to the Jury, whether a *Turk*, or a Perſon profeſſing the *Gentou* Religion, would be a competent Witneſs to prove a Murder committed here. I deſire to be excuſed from giving any preciſe Opinion, becauſe I would not anticipate the Opinion of the abſent Judges in a Matter that may come before us all, yet I deſpair of having any more Light thrown upon that Queſtion; but I declare I have no Doubt with reſpect to the other Inſtance, but that the Teſtimony of a *Jew* is very competent and good Evidence to prove a Murder. I ſhall now conſider the Ceremony uſed in adminiſtring the Oath to theſe Perſons. I am far from ſaying it is ſo ſolemn and ſignificant a Form as is uſed in *England*, but I ſay it is ſufficient to denote the Act of conſenting to the Oath. Upon this Occaſion Scripture was appealed to, and as it was, I will mention the Senſe of a very great Man, Archbiſhop *Tillotſon*, in a Sermon preached by him at *Kingſton* Aſſizes, *Vol.* 1. *P.* 245, 246. To prove that the Ceremonies in taking an Oath are Matter of Liberty, he obſerves, That in Scripture there are mentioned but two Manners of Swearing, and there is not the leaſt Intimation that either of them was preſcribed and appointed by God, but voluntarily inſtituted and taken up by Men. Tho'

* Before the Privy Council *Dec.* 9, 1738. Among other Witneſſes againſt him there was one who was a *Turk*, who was ſworn upon *Al-Koran*.

Tho' the Inſtance of ſwearing Mr. *Jaquel*, in *Love*'s Trial (*a*), was not Authority as being before the High Court of Juſtice, yet the ſame has occurred at a Trial at Bar, 2 *Sid.* 6. That the Form is various according to the different Perſuaſions of Perſons and Countries, does appear from *Voet. Comm. Pandect. Book* 12. *Tit.* 2. 639. and *Seld. v.* 1. *t.* 2. 1467. From what has been mentioned it is plain that by the Policy of all Countries Oaths are to be adminiſtred in ſuch Terms and in ſuch Manner as the Swearer thinks moſt binding upon his Conſcience; and it appears both from *Voet* and *Selden*, that the Manner of laying the Hand upon the Book was borrowed from the *Pagan* Cuſtom of touching their Myſteries. It has been objected, That the Commiſſioners were not authorized to adminiſter this Oath; and for this were cited 2 *Inſt.* 719. and 3 *Inſt.* 165. that a new Oath cannot be impoſed without Act of Parliament. I anſwer, This is no new Oath, and what Lord *Coke* ſays does not ſeem to reſpect the Manner of adminiſtring the Oath; and ſuppoſing, as I have ſhewn before, theſe are competent Witneſſes, they muſt be ſworn in their own Manner. But it was objected, That they ought not to be admitted on account of the *Enmity* there is between *Chriſtians* and *Infidels*, and *Calvin*'s Caſe was cited, 2 *Co.* 17. All Infidels are in Law perpetual Infidels, for the Law preſumes not that they will be converted, that being a remote Poſſibility; for between them, as with the Devils, whoſe Subjects they be, and the Chriſtian, there is perpetual Hoſtility, and can be no Peace; for, as the Apoſtle ſaith, 2 *Cor.* vi. 15. *Quæ concordia Chriſti cum Belial? aut quæ portio fideli cum infideli?* Theſe Words of St. *Paul* are to be underſtood of a Spiritual Diſcord only, and not of a Temporal one, for there is really no Foundation for any ſuch Thing. *Littleton*, afterwards Lord Keeper, had Occaſion to conſider this Matter in his reading upon Stat. 27 *Ed.* 3. 1 *Salk.* 46. and in that there are Sentiments (*b*) worthy a Chriſtian Man; the ſame is ſaid 1 *Lord Raymn.* 282, 283. It is objected, That the admitting theſe Witneſſes is a Novelty, and what has not been done cannot be done. Whether this ever exiſted before, or came into Queſtion, I know not, but I never heard or read of Perſons in theſe Circumſtances being refuſed, except in one Caſe. The Law of *England* is not confined to particular Precedents and Caſes, but conſiſts in the Reaſon of them, *ratio legis eſt anima legis, & ubi eadem eſt ratio idem eſt jus* are known Maxims; Judges indeed cannot alter the Law; the true Notion of this is laid down in *Vaughan* 37, 38, 285. but in giving my preſent Advice I have no Occaſion to contradict any Judgment, but the bare Opinion of my Lord *Coke*, which has already been denied over and over again, ſo far as it concerns *Jews*. As to what was mentioned of the *Quakers* (*c*), your Lordſhip's Anſwer, that receiving them would have been admitting Perſons without Oath, not introducing a new one, is ſatisfactory to me, and therefore I ſhall ſay no more about it.—I now come to the Precedents (*d*) which have been left me; that of *Lee* and *Lee* in the Arches Court and Court of Delegates in 1699 and 1700 may be laid out of the Caſe. As for the Note of a Caſe in the Exchequer from Mr. *Bunbury*, (an Information againſt Admiral *Matthews*) he is a very worthy Man, but Memory is a very treacherous Thing, and the Reaſon given there would exclude *Jews*, and is a very bad one.

(*a*) Mr. *Jaquel*, when the Oath was read to him, did not ſwear in that Manner as the other Witneſſes did, but only put his Hand upon his Buttons. 2 *St. Tr.* 114.

(*b*) *Turks* and Infidels are not *perpetui inimici*, nor is there a perpetual Enmity between them and us; but this is a common Error, founded upon a groundleſs Opinion of Juſtice *Brooke*; for, tho' there be a Difference between our Religion and theirs, that does not oblige us to be Enemies to their Perſons; they are the Creatures of God, and of the ſame Kind as we are, and it would be a Sin in us to hurt their Perſons.

(*c*) It was urged at the Bar, that the Affirmation of *Quakers* could not be received by the Judges without the Interpoſition of the Legiſlature, to which therefore it was thought neceſſary to have Recourſe.

(*d*) It was directed by the Court, at the Argument of this Cauſe, that the Crown-Office ſhould be ſearched for Indictments of *Jews*, and Inquiry be made in the Courts of Admiralty, and the Eccleſiaſtical Courts, whether *Jews* or Heathens had been examined, and the Precedents laid before the Judges.

—The laſt Objection mentioned is, that theſe Infidels are not liable to Proſecution for Perjury. This is not warranted in Fact, for Numbers of Witneſſes are examined and read here who are under the ſame Circumſtances, and cannot be proſecuted, as *all Chriſtians examined abroad*, becauſe *Perjury is local.* All Witneſſes examined *de bene eſſe*, becauſe *their Depoſitions are never publiſhed 'till after the Death of the Witneſſes.* But really, as to myſelf, I do think that if any of theſe Witneſſes had been examined in this Manner in *England*, he might have been proſecuted, and a ſpecial Indictment formed againſt him for Perjury; for I take it, that the Words *ſuper ſacroſancta Dei Evangelia*, are not eſſential in Indictments for Perjury, and Numbers of Old Books ſhew they are not, *Weſt's Symboleog. fo.* 119. *b.* 120. §. 160, 161. and other Books the Indictments are; that the Party was either ſworn generally or *debito modo jurat'*, nor is that ſimilar to *Cro. Eliz.* 165. where the Words were in the common Form, but it did not appear that the Party was ſworn at all. The Precedents of Indictments againſt *Jews* are ſo various, that I can infer very little from them.—Upon the whole, therefore, the rejecting theſe Witneſſes would be deſtructive of Trade, and, I think, ſubverſive of Juſtice, and attended with infinite other Inconveniences; and therefore I ſubmit it as my humble Opinion and Advice, that as this Caſe is circumſtanced, the Depoſitions of theſe Perſons ought to be read.———*Willes*, C. J. As the Subject has been already quite exhauſted by the Argument of the *Lord Chief Baron*, I ſhould very willingly content myſelf with only ſaying, that I am of the ſame Opinion; but as this Caſe is of very great Importance, in great Meaſure new, and ſo many Things of great Weight have been ſaid upon it, it will, I doubt, be expected I ſhould give my Reaſons why I am of the ſame Opinion, tho' in ſo doing I muſt neceſſarily touch upon many Things much better ſaid by my *Lord Chief Baron*, otherwiſe I am ſure I muſt ſay nothing.—In order the better to come at this Queſtion, I ſhall ſay ſomething in reſpect to the general Queſtion, Whether any Infidel in any Caſe, or under any Circumſtances, may be a Witneſs. If I were of the ſame Opinion as my Lord *Coke*, and thought an Infidel (I mean, and he meant one who did *not believe Chriſtianity*) could never be admitted a Witneſs, I muſt be of Opinion, that theſe Depoſitions could not be read. On the other hand, if I thought every Infidel admiſſable, I muſt be for their being read without inquiring any farther. But if I ſhould be of Opinion, (and I ſhall go no farther) that ſome Infidels in ſome Caſes, and under ſome Circumſtances, may be admitted, it will remain to be conſidered whether theſe Infidels in the preſent Caſe are ſo circumſtanced, and can be received as legal Witneſſes. The general Queſtion Lord *Coke* has reſolved in the Negative, and it is plain that by this Word 'Infidels' he meant *Jews* as well as Heathens, all who did not believe the Chriſtian Religion; the Paſſages referred to in his other Works plainly ſhew this; therefore *Hawkins*, tho' a very Pains-taking Man, is, I think, plainly miſtaken in his 2 *Pl. Cr.* 434. where he underſtands him otherwiſe. I ſhall therefore take this for granted, and this, I think, will greatly leſſen the Authority of Lord *Coke*. The Counſel for the Defendant ſeemed to miſtake his Reaſon, for he did not go upon that Reaſon, becauſe an Infidel could not take a Chriſtian Oath, and the Oath could not be altered but upon this Reaſon, tho' a much worſe that an Infidel is not *Fide dignus*, as appears from what he ſays in *Calvin's* Caſe, 'between them as with the Devils, whoſe Subjects 'they be, and the Chriſtian, there is a perpetual Hoſtility, and can 'be no Peace.' This Notion, I think, is contrary not only to Scripture

but to common Senſe and common Humanity; and even the Devil himſelf, whoſe Subjects, he ſays, the Heathens are, cannot entertain worſe Sentiments than theſe; we are commanded not only to do Good to thoſe of the Houſhold of Faith, but unto all Men, and St. *Peter* ſays *Acts* x. 34 and 35. *Of a Truth I perceive that God is no Reſpecter of Perſons, but in every Nation he that feareth him and worketh Righteouſneſs is accepted of him.* *Coke* was certainly a very great Lawyer, but I think our Saviour and St. *Peter* in theſe Matters much better Authorities. It is a very narrow Notion, that no one but a Chriſtian can be an honeſt Man; God has imprinted in the Minds of all Men true Notions of *Juſtice* and *Injuſtice*, *Virtue* and *Vice*; and St. *Peter* ſays, that in every Nation there are Men that fear God and work Righteouſneſs, are certainly *Fide digni*. I will not repeat what is ſaid of this Aſſertion of Lord *Coke* by Sir *George Treby* in the *State Trials*, *Vol.* 7. 502 (*a*), tho' I think it deſerves every Epithet he has beſtowed upon it; and I will add, I think when he talks in this Manner, he appears more like a Jeſuit than a Lawyer. I will ſay very little of the Old Books *Bracton*, *Britton*, *&c.* ſmall Weight is to be laid upon them, becauſe they are general *Dictums* in Popiſh Times of Bigottry, when we carried on little Trade, except the Trade of Religion. *Forteſcue*, *cap.* 26. had not the preſent Queſtion in Contemplation, and only meant Oaths between Chriſtians.—To the Aſſertion of *Coke* I will oppoſe the Practice of *England* before the Expulſion of the *Jews*, when it appears they were ſworn upon their own Books (*b*), and the conſtant Practice in this Kingdom ever ſince their Return; for I do not believe there is one Inſtance where they have been refuſed to be ſworn upon the *Pentateuch*. I will likewiſe oppoſe to it the great Authority of Lord *Hale*, in his 2 *Hiſt. Pl. Cr.* 279. tho' it has been mentioned already, becauſe I think it has ſo much of the true Spirit of Chriſtianity, that I may ſay of it *Decies repetita placebit*. I take it, that altho' the regular Oath, as it is allowed by the Laws of *England*, is *tactis Sacroſanctis Dei Evangeliis*, which ſuppoſes a Man to be a Chriſtian, yet, in Caſes of Neceſſity, the Teſtimony of a *Jew*, *tacto libro Legis Moſaicæ*, is not to be rejected, and is uſed, as I have been informed, among all Nations; yea the Oaths of idolatrous Infidels have been admitted in the Municipal Laws of many Kingdoms, eſpecially *ſi juraverint per verum Deum Creatorem*; and ſpecial Laws are inſtituted in *Spain* touching the Form of the Oath of Infidels. *Vide Cavarruviam*, *t.* 1. *p.* 1. *de Juramenti forma.* And it were a very hard Caſe, if a Murder committed here in *England*, in the Preſence only of a *Turk* or a *Jew*, that owns not the Chriſtian Religion, ſhould be diſpuniſhable becauſe ſuch an Oath ſhould not be taken, which the Witneſs holds binding, and cannot ſwear otherwiſe, and poſſibly might think himſelf under no Obligation if ſworn according to the uſual Stile of the Courts of *England*. As to the Quotation from *Covarruvias*, I will ſay once for all, that I do not lay any great Streſs upon the Citations out of the Civil Law Books, not only becauſe I think the Cauſe does not want them, but becauſe they are the particular Edicts in other Countries, and only ſhew the Opinion of the Legiſlators there, and what the Laws of other Nations are; and it is admitted in our Kingdom there is no Act of Parliament for this.—The laſt Anſwer I ſhall give to this Aſſertion of Lord *Coke*, in *Calvin*'s Caſe, is in his own Words, 4 *Inſt.* 155. concerning the *Fœdus Pacis* or *Fœdus Commercii*, which he allows may be ſtricken between a Chriſtian Prince and an Infidel, Pagan, and an Idolater; and I ſhall leave him here, and ſhall now proceed to explain the Nature

(*a*) I muſt take Leave to ſay, that this Notion of Chriſtians, not to have Commerce with Infidels, is a Conceit abſurd, Monkiſh, fantaſtical and fanatical; 'tis a-kin to *Dominium fundatur in Gratia.*

(*b*) In Proof of this, ſee (beſides the Paſſages cited by the Chief Baron) *Maynard's Ed.* 2. *Int. Memoranda in Scaccario, Mic.* 2 & 3 *Ed.* 1. *P.* 3. '*Corke* '*Hagin venit* '*ad Scaccarium* & '*Præſtitit* '*Sacramentum* '*in forma* '*Judaiſmi ſe* '*nunquam* '*dixiſſe*, *&c.*

ture of an Oath. If it were meerly a Chriſtian Inſtitution, as Baptiſm, the Sacrament, and the like, I ſhould admit none but Chriſtians could make Uſe of it; but Oaths were inſtituted long before Chriſtianity, and are almoſt as old as the Creation. *Juramentum*, according to Lord *Coke*, (3 *Inſt.* 165.) is nothing more than *Deum in teſtem vocare*, and therefore nothing but the Belief of a God, and that he will reward and puniſh Men for their Actions, is neceſſary for this. It would be endleſs to cite the Places in the Old Teſtament, where Mention is made of taking Oaths upon ſolemn Occaſions. I ſhall therefore only refer to *Gen.* xxvi. 31. xxxi. 53. *Numb.* xxx. 2. *Pſ.* xv. 4. From the Paſſages in the New Teſtament it is plain Oaths continued to be uſed in the ſame Manner; the Nature of an Oath was not at all altered, only the Obligation to keep it grew much ſtronger. St. *Paul* ſays, (*Heb.* vi. 16.) *An Oath for Confirmation is an End of all Strife*, and we have a remarkable Inſtance in *Mat.* xiv. 9. and the ſame is repeated *Mark* vi. 26. which ſhews what Regard even wicked Men paid to an Oath, that *Herod, tho' he was exceeding ſorry to deſtroy the Baptiſt, nevertheleſs, for his Oath's Sake, commanded his Head to be given*; and I cannot help taking Notice of what is ſaid by *Lactantius*, that ſome in his Time who were not afraid even of committing Murder, when they were to be purged upon their Oath, durſt not deny the Fact. In profane Authors we ſhall find pretty much the ſame Account of an Oath; it appears in *Homer* that not only his Heroes, but even his Gods, whom he reckons as Deities under the Supreme, frequently confirmed their Promiſes or Threatnings with an Oath, and they were then reckoned inviolable. *Heſiod*, in his Poem called *Dies*, ſays twice, horrible and dreadful Puniſhments attend Perſons who break their Oaths. *Hierocles*, in his Commentary on theſe, ſays, an Oath was looked on as one of the moſt ſolemn Acts of Religion. And *Tully* always ſpeaks of an Oath with the higheſt Reverence, and as the ſtrongeſt Obligation. Refers alſo to *Grotius de jure Belli & Pacis, lib.* 2. *ch.* 13. §. 1. And *Tillotſon*, *Vol.* 1. *P.* 241. The Apoſtle ſpeaks of it as the general Practice of Mankind to confirm Things by an Oath, in order to the ending of Differences; and indeed there is nothing that has more univerſally obtained in all Ages and Nations in the World. It is very plain, therefore, that the Subſtance of an Oath has nothing to do with Chriſtianity; the Form of an Oath hath been ſince varied, but ſtill the Subſtance is the ſame, which is no more than this, that God in all of them is called upon to be a Witneſs to the Truth of what is ſaid. *Grot. ubi ſup.* §. 10. The kiſſing the Book, or the Feet of the Prieſt, is not Part of the Oath, but only ceremonious; the ſwearing what is material in all of them, is the taking God for Witneſs. *Mat.* xxiii. 21, 22. *Whoſo ſhall ſwear by the Temple, ſweareth by it and by him that dwelleth therein; and he that ſhall ſwear by Heaven, ſweareth by the Throne of God and by him that ſitteth thereon.* Chriſtianity is indeed Part of the Law of *England*, but it does not therefore follow, that the admitting the Oath of an Heathen is contrary to the Law of *England*. There is as little Weight in the other Argument, that an Oath cannot be altered but by Act of Parliament, 2 *Inſt.* 479. 3 *Inſt.* 165. which plainly relate to *promiſſory Oaths* and *Oaths of Office*, not *at all to Oaths taken by Witneſſes*. As to the Caſes where a Judge aſked whether the Witneſs was a Chriſtian, and where two Witneſſes were refuſed for not being ſuch, nothing can be inferred from them, as it does not appear that thoſe Facts aroſe in a Foreign Country, and that it was inſiſted that there was any Neceſſity.—Having therefore ſhewn, that I think ſuch Infidels, who believe

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in God, and that he will puniſh them if they ſwear falſly, in ſome Caſes, and under ſome Circumſtances, ought to be admitted as Witneſſes in this tho' a Chriſtian Country, but that one, who has not ſuch Belief, cannot be admitted under any Circumſtances. I proceed to conſider this particular Caſe:—I indeed diſagree from the *Nota* 2 *Roll. Rep.* 346. that upon Trial of a Thing beyond Sea the Teſtimony of a Public Notary there is good Proof; and *Lee* Chief Juſtice ſaid that ſuch Proof as they beyond Sea will allow we will allow, for God knows then ſometimes we ſhould have ſtrange Evidence. Nor can I entirely agree with the Reſolution in *Cro. Ja.* 542. as I do not think in that Caſe the Certificate of the cohabiting together ought to have been received as Evidence, our Law never admitting a Certificate of a Matter of Fact, not even of the King himſelf, nor is it the beſt Evidence the Nature of the Thing will admit.—I do not think the ſame Credit is to be given to an Infidel Witneſs as to a Chriſtian one, who is under ſtronger Obligations to ſpeak Truth, and therefore this Objection goes to the Credit; but the Diſtinction between the Competency and Credit of a Witneſs is a known Diſtinction, and many are admitted as competent to whoſe Credit there are Objections. An examined Copy of a Record is good Evidence, but if the Record itſelf is produced and varies from it, that will be ſtronger Evidence.—What I have ſaid as to the general Queſtion, plainly ſhews my Opinion of the preſent Queſtion, which therefore I ſhall be very ſhort upon. It is admitted this is a Mercantile Affair, tranſacted in a Foreign Heathen Country; it muſt be agreed it is greatly to our Advantage to carry on Trade into Foreign Countries inhabited by Heathens, and particularly into theſe Countries. In this Caſe by the Defendant's own Act, his flying out of the *Eaſt-Indies*, the Plaintiff loſt the Advantage of his Suit there; he had but one Remedy, and that he took. No one will ſay he had not a Right to bring his Suit here, for tho' there was an old Notion that even an Alien Friend, eſpecially an Infidel, could not ſue in our Courts, this abſurd, wicked and unchriſtian Notion, God be thanked, has been long ago exploded. If he be at Liberty to bring his Suit here, it follows he muſt be at Liberty to produce his Evidence, and if he produces his Evidences, they muſt be upon Oath ſome way or other.—It does appear that the Witneſſes do believe a God, and that he will puniſh them if they ſwear falſly. I do not greatly rely upon the Books that give an Account of the *Gentou* Religion, (Authors that write of Things ſo far diſtant have ſeldom Veracity enough to be depended upon in Courts of Juſtice); but it is plain, from the Certificate itſelf, that they believe and worſhip a God, and have Prieſts for that Purpoſe.—The remaining Objection is, That theſe Witneſſes will not be liable to be indicted of Perjury, not being ſworn *ſuper Sacroſancta Dei Evangelia*, and therefore are not under the ſame Obligations to ſwear true as Chriſtian Witneſſes; but I think this has been fully anſwered by my Lord Chief Baron upon two very plain Reaſons: Firſt, That it appears theſe Words are not eſſential Parts of the Indictment. Secondly, That this Argument, if it proves any Thing, proves too much; as Multitudes of Perſons who muſt be examined, and have been ſo, are liable to the ſame Objection. From what I have ſaid, it is very plain that I think theſe Depoſitions ought to be read in Evidence.———*Lee*, C. J. There remains but very little for me to offer, as I do agree intirely with the Opinion already declared. Without entering particularly into the Nature of this Religion, I do apprehend that this Return proves that theſe are of a Religion. All Religion muſt have for its Foundation the Belief of a

God, and the Belief of future Rewards and Puniſhments; and tho' a Man may have a very confuſed Notion of ſuch a Being, (and it is very difficult to form an adequate Idea of God) yet it is ſufficient, for this Purpoſe, to have an Idea of his relative Nature. I mean with reſpect to the Relation Mankind feel in themſelves to him, as dependent Creatures upon ſome ſuperior Being, who is the Foundation of Religion; and conſidering ſuch a Being as having Dominion over them, to whom they are Servants, whom they worſhip and adore, as it is repreſented by as great an Author as ever lived in this Country, Sir *Iſaac Newton*. —I apprehend that the Rules of Evidence are to be conſidered as poſitive artificial Rules, framed by Men for their Convenience in reſpect to the Tranſaction of Buſineſs in Courts of Juſtice; artificial Rules they are founded in general upon very good Reaſoning, and for the moſt part good; but there is one Rule firm, eternal, immutable, which never can vary, the Rule of natural Juſtice; and I apprehend theſe Rules of Evidence are under proper Circumſtances, and upon proper Occaſions, to give way to that. This appears to me to be a Caſe that is to be conſidered in that Light, a Caſe where the general Rules ought to be receded from. And the Conſideration of the Rules of Evidence in this Way, is in all Caſes ſuited to the Laws of *England*, which admit the breaking in upon the moſt general Rules, even thoſe, that a Party intereſted cannot be received as a Witneſs. Hearſay Evidence admitted, or a Wife received againſt her Huſband, (in *Queries* touching Foreign Inquiries and Commercial Matters, the Rules relating to Evidence are not quite agreeable to the general Rules); indeed, in Caſes of Treaſon, I do not apprehend that a Feme Covert is a lawful Witneſs againſt her Huſband. Sir *T. Raymond* 1. 1 *Hal. Hiſt. Pl. Cr.* 301 (*a*). But however, in Civil Caſes, it has been allowed notwithſtanding, *Eq. Ca. Abr.* 226. See *Skin.* 647. All theſe Rules give way to Neceſſity, and that not abſolute, but moral and preſumed. So 2 *Roll. Abr.* 186. ſhews a Difference of Evidence touching the ſame Fact, when it concerns different Perſons.—I would refer to the Caſe cited before, 2 *Roll. Rep.* 346. which, with ſome Emendations and Obſervations, may, I think, be reckoned as Law. I would ſuppoſe this Caſe; it is well known that by the Laws of *France* Contracts are often made before a Notary Publick, and no other Perſons preſent; in which Caſe no other Evidence is required. Suppoſe a Queſtion ſhould ariſe here concerning ſuch Contracts, I ſhould think there can be no Doubt but that a Signature of the Notary Public would be Evidence, and would authenticate the Act, tho' by the Laws of our Country, no ſuch Certificate or Teſtimonial is to be received. Indeed the Expreſſion afterwards, 'ſuch Proof as they beyond the Sea will allow 'we will allow,' is too general, and muſt be conſidered under Reſtrictions. I have a little Doubt with me ſtill concerning the Caſe in *Cro. Ja.* 542. tho' that was the Opinion of the Judges at the Trial at Bar, where they did receive a Certificate from *Utrecht* of the Marriage and Cohabitation. There is a Caſe in *Cro. Ch.* 365. which does ſeem more reaſonable, and I ſhould think rather the Law, where it was held that a Certificate under the Seal of the Town where the Outlaw was reſident was not allowable, without Oath of the Truth thereof; the allowing it then is going further than we ſhould do in a Tranſaction ariſing here; and this ſeems a right Opinion, I think now, as to the Courts conforming themſelves to the local Rules of the Place wherein the Fact ariſes.—I think there are Caſes in Equity that ſhew plainly, that that is the Rule, *Prec. in Chan.* 207, 208. 1 *Will. Rep.* 431. When the Inquiry is in relation to a Foreign Tranſaction, the Courts

(*a*) See in 1 *St. Tr.* 371. a Wife, for Neceſſity, admitted againſt her Huſband; but that contradicted in Sir *T. Raymond* 1.

do conform as much as they can to the Laws of that Country; ſo likewiſe in Commercial Matters in an Action of Trover, *Skin.* 640. *Comb.* 366, 367. and in the common Inſtance where Porters, Brokers, *&c.* are admitted as Witneſſes, when, perhaps, there might have been other Witneſſes had; which are all Departures from the general Rules of Evidence.—It would be much more equitable to determine that a Pagan ſhould not be able to ſue in theſe Courts, than that when he has done ſo, he ſhall not be allowed to produce his Witneſſes. I think theſe ſeveral Witneſſes do appear to us under the Religious Tie of an Oath adminiſtered to them in the moſt ſolemn Manner, in the Way moſt uſual among them. This is a Tranſaction ariſing in that Country only, and the Defendant or his Repreſentatives have forced this Perſon to an Application to this Court for Juſtice; he would have had an undoubted Right to this Evidence in the Court from whence the Defendant withdrew himſelf, and he ought not to ſuffer by that; therefore it appears to me to be diſſonant to natural Juſtice to deny this Evidence. And as to what has been mentioned in reſpect to a temporal Remedy in Caſe of Perjury, that is not a ſufficient Reaſon; there can be no Puniſhment upon the Witneſſes on either Side, they being all out of this Kingdom; and in Stat. 10 & 14 *Car.* 2. *ch.* 11. §. 29. in the Caſe of Cuſtoms, there is an Introduction of Foreign Evidence, and the Examination of Witneſſes beyond Sea admitted as if it had been given *viva voce* in Court. Upon the whole, therefore, I am very fully clear of Opinion, that in this Caſe theſe Depoſitions of theſe Perſons, who do appear to be under this Religious Sanction, and where all the Witneſſes are upon the ſame Foundation, that theſe Perſons ought to be received.———*Hardwicke*, C. I am extreamly obliged to my Lords Chief Juſtices, and my Lord Chief Baron, for their learned Advice and Aſſiſtance; and as I concur intirely in Opinion with them, and they have ſupported that Opinion with ſuch ſtrong Arguments and Reaſonings, I might be excuſed from entering into the Argument of this Cauſe; but as it is of great Expectation and Conſequence, and may be a Precedent in other Caſes that may happen, it may be expected I ſhould give my Reaſons for my Opinion; and I muſt beg the Indulgence and Excuſe of my Lords here, if I take up their Time in repeating what they have ſaid ſo much better. I ſhall begin with taking Notice of what has not been ſo particularly entered into by them, and was not ſo neceſſary for my Lords to enter into as it is for me, the particular Objections as to the Inſufficiency of the Commiſſion, and the Certificate of the Commiſſioners; and theſe are two. Firſt, That it does not purſue the Directions of the Order made by this Court. Secondly, That this Certificate is not ſufficient in Subſtance. With regard to the firſt, there are two Particulars required by the Order; firſt, that the Commiſſioners ſhould certify in what Manner the Oath has been admitted that is admitted to be complied with; the next is, that they ſhould certify of what Religion the Witneſſes are. And they have only certified that they were Perſons who have profeſſed the *Gentou* Religion, without certifying what that Religion is. The Counſel for the Defendant go upon a wrong Conſtruction of the Order; a particular Certificate of the Religion of the Witneſſes was not required by the Court, and would by no Means be neceſſary or proper. The different Religions in the World are deſcribed and known by particular Denominations; the *Chriſtian*, the *Jewiſh*, the *Mahommedan*, the *Perſian*, the *Gentou* or *Banian*, which is the ſame; five of theſe Religions the beſt Hiſtories of the ſeveral Countries are Evidence in Law. See 1 *Salk.* 281. This holds *a fortiori*

fortiori in Matters relating to a Foreign Country. In general the Ground of my Direction was, that the Court might be informed whether the Witneſſes believed a God and a Providence; this fully appears by the beſt Hiſtories of this People and of their Religion. I would only mention Mr. *Lord*'s Account, who is an *Engliſh* Clergyman, and reſided in the *Eaſt-Indies*, in his Diſcovery of the Sect of the *Banians*, in the 6 *Vol.* of *Churchill's Collection*, *P.* 301. among the Eight Precepts of this Religion, which is the ſame as the *Gentou*, he mentions theſe, *P.* 313. The Third, *Thou ſhalt duly obſerve the Times of Devotion, thy Waſhings, Worſhipping and Prayers to the Lord thy God, with a pure and upright Heart.* The Fourth, *Thou ſhalt tell no falſe Tales, or utter Things that be untrue, by which thou mighteſt defraud thy Brother in Dealings, Bargains or Contracts, by this Coſenage to work thy own peculiar Advantage.* The firſt imports a Belief of the Being of God and of his Providence; the latter carrys almoſt the Senſe of the Ninth Commandment in the Decalogue. Beſides this, the Certificate ſpecifies that the Oath was interpreted to each Witneſs reſpectively, and that Oath concludes *So help me God*, which amounts to a Declaration of each Witneſs of his own Belief of a Deity.—— Theſe Objections being out of the Way, the Way is to open to the general Queſtion, which, I think, depends upon two Conſiderations: Firſt, Whether the Oath theſe Witneſſes have taken is a proper obligatory Oath according to the general Notion of it. Secondly, Whether, upon the ſpecial Circumſtances of this particular Caſe, their Depoſitions may be admitted to be read conſiſtently with the Rules of the Law of *England*. As to the firſt, whether the Oath theſe Perſons have taken, Reſpect being had to their Religion, be a proper obligatory Oath according to the general Notion of an Oath. I think it is plain that it is ſo. This Subject has been in a Manner exhauſted, and therefore I will not enter into it at large. I will only take Notice of what ſome learned Divines have ſaid upon it. Biſhop *Sanderſon*, in his Book *De Juramenti Obligatione*, which is a very judicious Book, 1 *Præl. P.* 3. when he is explaining *Quid ſit Juramentum*, after laying down *Tully*'s Definition of it, *breviſſima eſt illa Ciceronis; eſt inquit jusjurandum affirmatio Religioſa*, gives us his own *Pleniorem Juramenti definitionem. Siquis deſideret, hæc eſto; Juramentum eſt actus Religioſus in quo ad Confirmandam rem dubiam Deus teſtis invocatur.* An Oath follows from the Principles of Natural Religion, was in Being and Uſe in the World antecedent to the Chriſtian or even Moſaic Diſpenſation, and has received no Alteration from either, except as to the external Form of it, and the clearer Light from theſe Divine Revelations, as to the Conſequences of keeping or breaking ſuch Oaths. This is contradicted that I know of by no Writer, except Lord *Coke*, who has inſerted the Word *Chriſtian* in his very Definition of an Oath. 3 *Inſt.* 165. *An Oath is an Affirmation or Denial by any Chriſtian*, &c. and in this all Writers are againſt him, and the Law of *England* in the Admiſſion of *Jews*, intirely overthrows his Definition and takes away the Foundation of it. All other Writers in Divinity, Morality, the Law of Nature or Nations, or any other Science relative to this Subject, are againſt him. Citations on this Head were very numerous. *Puffendorf*, 4 *b. ch.* 2. §. 4. 336. is very full to this Purpoſe, and lays it down abſolutely, that an Oath is to be taken according to the Religion and Perſuaſion of the Witneſs taking ſuch Oath. Biſhop *Sanderſon*, 1 *Præl. P.* 4. *Quod autem ſit actus religioſus conſtat primò ex Authoritate Scripturæ. Deut.* vi. 13. *Ubi Moſes ita populum alloquitur: Dominum Deum tuum timebis, & ipſi ſervies, &*

per

per nomen ejus jurabis. Conſtat ſecundò ex conſenſu omnium Populorum, apud quos, etſi unius Naturæ lumine ducerentur, ſanctiſſima ſemper eſt habita juramenti religio, & quum plurima ipſis ſacra haberentur, juri-jurando tamen ſoli, non alia de cauſa quam quod inter tot ſacra ſacerrimum quodammodo eſſet, peculiari quodam jure ſacramenti nomen remanſit. I will only take Notice of another Paſſage or two from *Tillotſon*, in his Sermon upon the Lawfulneſs and Obligation of Oaths, tho' in popular Diſcourſes of this Kind ſtrict Inferences are not always to be drawn, but the Archbiſhop took particular Pains, and was more than ordinary exact in what he ſaid on this Subject, and has made it more Scientifical than Diſcourſes of that Kind generally are. His Text is *Heb.* vi. 16. *An Oath for Confirmation to them is an End of all Striſe*, (which does ſeem to relate to the *delatio juramenti*, where the Party's own Oath was taken); the Paſſage I refer to is the very firſt Sentence in the Sermon, (*S.* 1. *P.* 239.) the Obligation of an Oath, which is ſo neceſſary for the Maintenance of Peace and Juſtice among Men, depends wholly upon the Senſe and Belief of a Deity; and in *P.* 241 he ſays, *the Apoſtle ſpeaks of it as the general Practice of Mankind to confirm Things by an Oath, in order to the ending of Differences*; and indeed there is nothing that has more univerſally obtained in all Ages and Nations of the World. I will not ſpend any more Time in citing on this Head. As to the next Thing, what has been mentioned of the external Act or Ceremony attending the Oath taken by theſe Witneſſes, (the Laymen touching the Feet of a Prieſt, and the Prieſt's touching his Hand) I will not enter into the particular Objections, which, I think, are of no Weight with reſpect to the Grounds, my Lords and Judges and I ſhall go upon; all Writers laying it down that theſe outward Rites and Ceremonies are not of the Eſſence or Subſtance of the Oath, but variable *ad libitum*; ſo ſays *Sanderſon* in his *5th Prælection*, and *Tillotſon* in the Sermon I have cited, (*P.* 245.) All that is neceſſary appears in the preſent Caſe, an external Act, which is neceſſary to make it a corporal Oath.—I now come to the ſecond Conſideration, Whether upon the Circumſtances in this particular Caſe theſe Depoſitions may be permitted to be read conſiſtently with the Rules of the Law of *England*. The *Judges* and *Sages* of the Law have always laid it down that there is but one general Principle and Rule of Evidence, which is this, *that the beſt Evidence ſhall be given that the Nature of the Thing will admit of.* *Maxim.* I know of no other principal Rule of Evidence in Conſequence of this; generally ſpeaking, all Matters of Fact are to be proved by Witneſſes not intereſted in the Facts, conuſant and preſent at them, and upon a lawful Oath. Theſe are Rules following upon the general Principle, but by conſtant Practice and Allowance of the Judges all theſe Rules are broke in upon. The Grounds and Foundations on which theſe Rules are diſpenſed with may be reduced under two Heads. Firſt, *Strict abſolute Neceſſity*; I do not mean a *natural* Neceſſity to which Things of this Kind can never be reduced, but what is called ſo *in Moralibus vel Civilibus.* Secondly, A *Neceſſity inferred or preſumed from the Nature of Commerce*, and *the uſual and ordinary Tranſactions among Men.* For the firſt, ſtrict Neceſſity.—If Writings have ſubſcribing Witneſſes, they muſt be produced, but if they be dead, Proofs of the ſigning ſhall be admitted. In a Suit concerning ancient Cuſtoms, Hear-ſay Evidence of a general Cuſtom is *legal* Proof, tho' in general Hear-ſay is not Evidence. If an Inſtrument be not found, and there is Evidence that it did once exiſt, and is loſt, you may prove the Contents another Way; and in what other Way? If there be a

Copy, it muſt be produced, (of this there is a ſtrong Caſe in 1 *Mod.* 4.) if there is no Copy, then it may be proved by Witneſſes *viva voce*, that is, the *Law for Neceſſity admits that which of all Things it does moſt abhor*, I mean *parol Evidence of Deeds.* The other Ground of diſpenſing with the Rules of Evidence, is preſumed Neceſſity inferred from *Commercial* Affairs and Tranſactions of Merchants, which comes neareſt to the preſent Caſe. Under this Head are the Caſes of ancient Deeds, or thoſe *thirty* Years old, (or, as it formerly ſtood, *forty*); ſuch Deeds are read without Proof of the Execution or Hand-writing of the Witneſſes, becauſe it is preſumed in ſuch a Length of Time not only the Witneſſes, but the Perſons acquainted with their Hand-writing, may be dead, or not to be found. A Tradeſman's Books, kept by his Servants, are admitted as Evidence of the Delivery of the Goods, only upon a preſumed Neceſſity. So the Plaintiff, in an Action upon the Statute of *Hue* and *Cry*, is allowed, as a lawful Witneſs, to prove himſelf robbed. In theſe Caſes there is not an *abſolute* Neceſſity, but only a *Preſumption* of Neceſſity, and in the laſt the Judges upon Preſumption of Neceſſity only admit a Party and a Perſon intereſted in the Event of the Cauſe. Thus Hear-ſay Evidence has been admitted even upon particular Facts: Of this there is a very ſtrong Caſe, that of *Campoverde* and *Gideon*, *Nov.* 16 *Mich.* 2 *Anne* at *Guildhall*, before Lord *Holt*, in an Action upon a Policy of Inſurance. The Defendant had inſured one of the *Spaniſh* Galleons and her Cargo, from *Panama* to *Cadiz*; the Ship came to *Europe* with the *Flota*, and for Fear of the Enemy changed the Voyage inſured and came to *Vigo*, and was burnt there among others; and all this was proved by Hear-ſay Evidence, which was admitted by *Holt*, for the Neceſſity, to be good Evidence upon the Point of Deviation. In this Caſe Hear-ſay Evidence was admitted; yet there was not abſolute Neceſſity, for it might have been ſaid, *you may produce Witneſſes who were aboard the* Flota, *you may have a Commiſſion to* Spain *to examine them*; yet theſe Poſſibilities did not prevail. I will mention one Inſtance more; before the Statute 1 *Anne* no Perſon could be ſworn to give Evidence againſt the King in a Capital Caſe, (a Hardſhip, Lord *Coke* ſays, 3 *Inſt.* 79. unſupported, that he knows of, by any Act of Parliament, ancient Author, Book, Caſe, or Record, but ſo it was); in this Caſe, that the Party might not be deprived of his Evidences, the Judges heard them upon no Oath at all.—To apply what has been ſaid to the preſent Caſe. The Cauſe of Suit here is a Commercial Tranſaction ariſing in a Foreign Country, that of the *Great Mogul*; the Religion of the Country is Heathen; the Contract is admitted to be made among Heathens, and ſuch the Plaintiff is admitted to be. From theſe Circumſtances it is a common and natural Preſumption, that many of the Perſons concerned and privy to the Tranſaction ſhould be of the Religion of the Country; it is the like Kind of Neceſſity which *Hale* mentions (before the general Practice of admitting *Jews*) 'as in Foreign Con-'tracts between Merchant and Merchant,' which is this Caſe, which are many Times tranſacted by *Jewiſh*, I may ſay by Heathen Brokers, the Teſtimony of a *Jew*, I may ſay of a Heathen, is not to be rejected, and is uſed, as I have been informed, among all Nations. The Preſumption here is ſtronger than that for the Admiſſion of a Deed after *thirty* Years, without any Proof at all; ſtronger than that for the Admiſſion of Hear-ſay Evidence in the Caſe of *Campoverde* and *Gideon*; and much ſtronger than the Plaintiff being a Witneſs for himſelf on the Statute of Hue and Cry. Beſides, this Contract being made in a Foreign Country, the Parties muſt be preſumed to have

entered into it upon a Suppoſition that they might ſue upon it. Hence it follows, that if we ſhould reject this Evidence in a Mercantile Contract, one of the Parties, by removing from the Country where it was made, might deprive the other Party of his Evidence, contrary to what he might be preſumed to have relied upon when he made the Bargain.—This muſt be taken to be the Meaning of Lord Chief Juſtice *Ley* in that ſhort Note mentioned already in 2 *Roll. Rep.* 346. That goes too far, and the Obſervation made upon it by the Lord Chief Juſtice of the Common Plecs is very juſt; but I think it is eaſily capable of a ſound Senſe, and means only that ſuch Evidence as is reaſonably allowed in Foreign Countries ſhould be allowed here, becauſe otherwiſe, all Faith and Confidence between Perſons of different Nations and Religions, and by Conſequence the Commerce of Mankind, would be greatly obſtructed, if not quite deſtroyed. This laſt deſerves to be a little more particularly inforced and applied; as *England* has only a Factory in theſe Countries, the King's Subjects muſt have frequent Occaſion to ſue in the Courts there; and therefore, if we ſhould not admit this Evidence, they will probably by a *Reciprocity* of Conduct reject our Suits. This is agreeable to the Genius and Policy of the Law, not only in the Courts of Admiralty but of Common Law; and the Ground of what is determined in Sir *Tho. Raymond* 473. *Carth.* 32. where great Regard is had to Judgments in Foreign Courts. So *Marriages good in their own Countries, are good all over the World*; and *what is good Evidence of them there, is allowed here.* As to the Caſe in *Cro. Jac.* 541, 542. as that Caſe is ſtated in the Book, if the Certificate was allowed not only in reſpect of Marriage but Cohabitation, I do agree it is not Law; and that the Caſe ſeems to ſay that was the Evidence of it, but I am not clear whether the Book means that, for it is darkly expreſs'd. I will put another Caſe: Suppoſe a *Heathen*, not an Alien Enemy, as ſuppoſe this *Omichund*, ſhould have brought an Action at Common Law, and the Defendant ſhould have come here and obtained an Injunction for want of an Anſwer, will any one ſay the Anſwer of ſuch a Heathen ought not to be received upon ſuch Oath as has been taken here? If ſo, then either the Injunction muſt be perpetual, or the Party muſt change his Religion before he can put in his Anſwer. So ſuppoſe Mr. *Barker* had found *Omichund* the Heathen here, and had brought his Bill againſt him for general Relief, either he muſt change his Religion, or the Bill muſt be taken againſt him *pro Confeſſo*; this ſtrikes every Body that it would be a manifeſt Denial of Juſtice, and thus far the Defendant has given Judgment againſt himſelf; in the Proceedings at *Calcutta* he brought a Croſs-bill, and accepted the Anſwer upon this very Oath. —As to the Queſtion, whether Indictments will lie for Perjury upon ſuch an Oath, there is no Occaſion for me to give my Opinion, but the Law is clear, I think, that in an Indictment for Perjury it is not at all neceſſary to lay the Oath to be taken *ſuper ſacroſancta Evangelia*; I agree the ordinary Form of Indictments runs ſo, but certainly it is not neceſſary, and the old Precedents, which are of better Authority than many modern ones, are otherwiſe, and *debito modo jurat'*, is certainly the beſt way of laying them. However, admitting, for Argument Sake, that no Indictment for Perjury would lie, it is an Objection that holds equally againſt all Depoſitions taken in Parts beyond the Seas, which are every Day admitted, the Crime of Perjury being *local*. I am aware it may be ſaid, that in theſe Caſes the Inability of maintaining an Indictment does not ariſe from the Nature of the Oath itſelf, but from an accidental Circumſtance of the Place; but that will

make

make no material Difference, as the Place always appears upon the Return of the Commiſſion, and the Court is bound to take Notice of it. Another Objection was made, in Anſwer to the Obſervation that Oaths of this Kind were admitted in Foreign Countries, and particularly in *Spain*, that there were poſitive Laws for it in *Spain* of the Nature of our Acts of Parliament, (as there are not here). I would not be poſitive upon this Queſtion, but, as at preſent adviſed, I take that to be otherwiſe. *Selden*, in his Book *de Synedriis*, cites *Leys de la Partida*, which appears to be what is called *Alphonſini*, that is, the Collection of the Laws of the wiſe King *Alphonſo* King of *Caſtile* and *Arragon*; now I happen to have that Book; my Edition of it is that publiſhed by the Univerſity of *Alcala* in 1542, and I think it appears by that, that this was not a poſitive Law eſtabliſhed by King *Alphonſo*, but only what we ſhould call here Common Law, collected and authenticated by him; his Words are (*Partit.* 3. *tit.* 11. *c.* 19. *p.* 180. and again *c.* 21. *p.* 181.) 'the *Moors* have their particular Oath;' this Form of Expreſſion ſhews rather this was a Collection of what was practiſed before, than a new poſitive Law. This falls in directly with what is mentioned by *Puffendorf*, *Stair*, and other Writers, that it has been the Wiſdom of all Countries to accommodate the Oath to the particular Religion of the Parties, referring to the Conſcience of the Perſon who is to take the Oath.—Another Objection was made, that this would be for the Judges to alter the Law, but on the Grounds upon which I go, it is not Altering the Law, it is only Expounding what the Law is, which is the proper Office of Judges; it's no more an Alteration than the firſt Admiſſion of *Jews* was, not by far ſo much as the firſt Admiſſion of the Plaintiff to be a Witneſs for himſelf on the Statute of Hue and Cry, againſt the ſtrongeſt Rules of Law and Reaſon, that a Man ſhall not be Witneſs in his own Cauſe.—As to the Precedents that have been left with us, they are ſo little applicable to the preſent Caſe, and afford ſo little Light in it, that I ſhall only take Notice of the Caſe of the *Eaſt-India* Company and Admiral *Matthews* ſent by Mr. *Bunbury*; that was an Information filed by me when I was Attorney General, and I attended the Trial; and I do not remember what he ſtates of the other Judges being ſent to for their Opinion, nor do I know how it could be done.——*Parker*, C. B. He has ſtated it to be a Trial at Bar.——*Hardwicke*, C. I take it to be before Lord Chief Baron *Eyre* only, in which Caſe *there could be no going of the Judge to the other Courts, for it would be adjourning the Court.* I think it ſo uncommon a Thing, the ſending one Judge to the others for their Opinion, that I think I could not have forgot it. The Evidence there was rejected, becauſe the *Heathen* was offered to be ſworn upon the Bible, and therefore, there being no proper way of ſwearing him, he was rejected; I took that Caſe to go no further.—Therefore, upon the whole, I intirely concur with my *Lords Chief Juſtices* and my *Lord Chief Baron*, that upon the ſpecial Circumſtances of this particular Caſe (and I carry it no further) theſe Depoſitions may be permitted to be read, conſiſtently with the Rules of the Laws of *England*. And therefore that they may be read.——Cauſes after *Hil.* 18 *Geo.* 2. *Feb.* 23, 1744, *Omichund* and *Barker* (*a*), *MS. Rep.*

(*a*) If there ſhould appear to be any *Miſtakes* or *Omiſſions* in this *long* Caſe, (which may poſſibly happen by the tranſcribing of it), I hope the *Reader* will *excuſe* and *correct* them.

(B) What will be admitted as Evidence; — And here of preſumptive Evidence.

1. PLaintiff's own Proof of Defendant's Contempt allowed. *Mich.* 1669. *Nurſe* and *Guillem*, 2 *Freem. Rep.* 132. *Vide* (A) P. Ca.

2. Depoſitions taken in a Cauſe, wherein *Tenant in Tail* is Party, cannot be read againſt the *Iſſue in Tail* (*a*). *Per Lord Keeper*'s Opinion, *Mich.* 1702, in the Caſe of the *Earl of Peterborough* and *Dutcheſs of Norfolk*, *Prec. in Chan.* 212.

(*a*) But *Note*; This was *extrajudicial*, and not the Point in Queſtion; for the Caſe at the Bar was of *Tenant for Life*, with Remainder *to his Son in Tail*; and the Depoſitions were taken in a Cauſe, wherein only the Father, *Tenant for Life*, was Party. *Ibid.*——— *MS. Rep.* S. C. *accord'*, *Vide Ca.* 5. *this Page.*

3. Where *an Eſtate paſſes* by the Inrollment of a Deed, (as in a Bargain and Sale) there the inrolled Deed is Evidence without further Proof; but, where the Inrollment is *only for ſafe Cuſtody*, there it is not otherwiſe than againſt the Party who ſealed it, and all claiming under him, and ſo far it ſhall. *Trin.* 1702. *Anon. MS. Rep.* 2 *Freem. Rep.* 259. *Trin.* 1702. *Lady Holcroft* and *Smith*, S. C. ſays, on a Queſtion ariſing, Whether an inrolled Deed ſhould be Evidence without further Proof, this *Difference* was taken.——— 1 *Vol. Abr. Eq.* 224. *Ca.* 5. S. C. but not S. P.

4. A Settlement of *A.* under which the Plaintiffs claimed, being loſt, but being proved in Chancery by the Plaintiffs themſelves *thirty Years ſince*, who *were not then concerned in Point of Intereſt*, but *are ſince intitled by that Deed*, it was ordered that a Copy of the Deed ſhould be admitted to be read at Law, and alſo that the Plaintiffs Depoſitions ſhould be read to prove the Deed, altho' *they now claim under it*. *Trin.* 1702. *Anon. MS. Rep.* 2 *Freem. Rep.* 260. S. C. (under the Name of *Lady Holcroft et al'*, and *Smith.*) 1 *Vol. Abr. Eq.* 224. *Ca.* 5. S. C. and P. and more fully ſtated.

5. It was agreed that Depoſitions taken in a Cauſe, where Tenant for Life only was Party, could not be made uſe of as *Evidence* againſt the *Reverſioner* or *Remainder Man*; and *Lord Keeper* declared his Opinion, that Depoſitions taken in a Suit, where *Tenant in Tail was Party*, *could not be made uſe of againſt the Iſſue of Tenant in Tail*, becauſe he comes in by a Title Paramount, *per formam Doni*; and altho' *Tenant in Tail* hath a Power over the Eſtate, and may diſpoſe of it, yet if *he in a Bond binds himſelf* and *his Heirs*, the *Iſſue in Tail is not bound*; but if Tenant in Fee is Party to a Suit, the Depoſitions taken in ſuch a Cauſe may be read againſt his Heir. *Eaſt.* 1703. *MS. Rep.* 2 *Freem. Rep.* 264. *Lord Peterborough* and *Lady Dutcheſs of Norfolk*, S. C. *accord'*. ——*Vide Ca.* 2. *this Page.*

6. In ſome ſpecial Caſes the Anſwer of one Defendant may be read againſt the other. *Vide* Tit. *Anſwers*, &c. *P.* 67. *Ca.* 3.

7. *A.* purchaſes Houſes in *B.*'s Name, but no Truſt is declared. *A.* dies, and *B.* gives a Declaration of Truſt. This is good Evidence of the Truſt. *Per* Lord Chan. *Cowper*, *Trin.* 1716. *in Caſu Ambroſe* and *Ambroſe*, 1 *Will. Rep.* 321, 323.

8. Exemplification of a Sentence given in *Holland* ſhall be read as Evidence *here*, to *ſhew* that ſuch Sentence was given *there*, but *no farther*. *Mich.* 10 *Geo.* 1. *in Canc'*, *Anon.* 2 *Mod. Caſes in Law and Eq.* 66.

9. A Bond for Performance of Articles, tho' cancelled, was made an Exhibit, and allowed as Evidence, to prove the Execution of the Articles, the Limitation being inſerted, and recited in the Condition of the Bond. *Hil.* 12 *Geo.* 1. *Anon. Gilb. Eq. Rep.* 183.

10. The *Rule of Evidence is the ſame in* Equity *as at* Law; the proper Evidence of *Surrenders*, or *Title to a Copyhold*, is the *Court Roll* or a *Copy of it*, or it muſt appear they *exiſted* once, and are *loſt*, *&c.* and ſo make way to go into *parol* Evidence. *Per* Lord Chancellor *in Caſu Andrews* and *Waller*, *Hil. Vac.* 1733. *Vin. Abr.* Tit. *Copyhold*, (W. e.) *Ca.* 12.

An Infant's Anſwer by his Guardian is *not* Evidence againſt him, becauſe the Infant is not ſworn; and it is only for making proper Parties.

11. An *Infant's Anſwer cannot be given in Evidence againſt him*, becauſe it is not the *Infant's* Anſwer but the Guardian's, who only is ſworn to it, and not the Infant. *Hil.* 1733, in the Caſe of *Wrotteſley* and *Bendiſh*, ſaid *arg'* 3 *Will. Rep.* 237. *Ibid.* in a *Note* by the *Editor*. Cites *Carthew* 79.

But Lord *Talbot* would not give any Opinion whether

12. The Anſwer of a *Feme Covert*, no Evidence againſt her *Huſband*. *Ibid.* 238. the Anſwer might be read *againſt the Wife, when Diſcovert, or not.* *Ibid.* 238. in S. C.

13. A Deed was *executed*, and *altered by Conſent of Parties*, and *then re-executed*; and *per Cur'*, this Deed cannot be given in *Evidence* as a *new* Deed, unleſs it be ſtampt afreſh, becauſe the *Alteration vacates the whole Deed.* 8 *Geo.* 2. —— and *Lee*, *in Canc'*, *MS. Rep.*

14. *Thomas Calvert*, ſeiſed of Lands in Fee, had Iſſue two Sons, *James* and *William*, and one Daughter, *E.* In 1704 *he mortgaged the Premiſſes to Defendant*, and *died*; and *James went beyond Sea*, and *was never heard of.*——Afterwards *E.* with her Huſband conveyed the Equity of Redemption to the Plaintiff, who brought his Bill to redeem, and the *only Evidence of* James's *Death was his Abſence ſince* 1704, *and his not being heard of.* *Talbot*, C. held this *good Evidence to intend his Death*, eſpecially in the Caſe of a Mortgagee, for he has only a conditional Intereſt in the Land, and cannot be redeemed without paying Principal, Intereſt and Coſts. Upon ſuch Terms a Redemption was decreed to the Plaintiff. *Hil.* 8 *Geo.* 2, 1734. *Maſten* and *Cookſon*, *MS. Rep.*

15. A *Bond* or *Mortgage* is *primâ facie* a good Evidence of a Debt; but where-ever there are *manifeſt* Signs of Fraud, the *Obligee*, *&c.* in ſuch Caſe, he ought to prove actual Payment of the Money (*a*). *Trin.* 1734, *per* Lord Chan. *Talbot* in the Caſe of *Piddock* and *Brown et al'*, 3 *Will. Rep.* 288, 289.

(*a*) And tho' he may happen thereby to loſe ſome Part of the Money really due to him, for want of being able to make ſufficient Proof, this is but a juſt Puniſhment of him for the Fraud, which he *plainly* appears to have been guilty of, and will be a proper Diſcouragement to others from committing the like. *Per* Lord Chancellor. *Ibid.* 289.

16. Where a Bond is given, and no Intereſt appears to have been paid for *twenty Years* thereon, it is *preſumptive* Evidence that the Bond has been ſatisfied, unleſs ſomething appears to anſwer the Length of Time (*b*). *Per* Lord Chan. *Talbot*, who ſaid this was the Rule. *Mich* 1735. *Humphreys* and *Humphreys*, 3 *Will. Rep.* 395, 396.

(*b*) The producing a Receipt for Intereſt *within* twenty Years, indorſed on the Bond by the Obligee, (tho' the Time when ſuch Receipt was written and ſigned, did not appear, otherwiſe than by the Indorſement itſelf) has been held ſufficient to take off the *Preſumption* of Payment. *Ibid.* 397. in a *Note* by the *Editor*, who cites the Caſe of *The Lord Barrington* v. *Searle*, in Parliament, *Feb.* 1730, upon a Writ of Error from the Exchequer Chamber.

(C) In What Caſes parol or collateral Evidence ſhall be admitted.

1. COllateral Proof ſhall not be admitted againſt the expreſs Words of a Will, but the Intent of a Truſt may be ſupplied by Proof. *Per* Lord Chancellor, *Eaſt.* 1680. *Chamberlaine* and *Chamberlaine*, 2 *Freem. Rep.* 52, 53.

2. Where the Surplus is not diſpoſed of by the Will, parol Evidence may be admitted, to ſhew that the Teſtator intended to give the Surplus to his Executor, it being only to rebut an Equity, ariſing by Implication in favour of the next of Kin. *Hil.* 1709. *Lady Dowager Granvile* and *Dutcheſs Dowager of Beaufort*, 1 *Will. Rep.* 114, 115.

3. Parol Evidence, when concurring with the Conveyance, and only to rebut a pretended reſulting Truſt, ſhall be admitted to ſhew the Intention of the Party. *Per* Lord Chan. *Cowper*, *Mich.* 1709. *Lamplugh* and *Lamplugh*, 1 *Will. Rep.* 113.

4. Parol Evidence admitted to prove the Intention of the Deviſor, where doubtful. 13 *Feb.* 1710. *Dockſey* and *Dockſey*, *Vin. Abr.* Tit. *Deviſe*, (G. a. 2.) *Ca.* 24.

5. *A.* deviſed particular Lands to his Executors, to be ſold for Payment of all his proper Debts, and gave Direction to the Perſon who drew the Will, to give all his perſonal Eſtate to his Executors; but, by Miſtake, that was omitted, tho' proved by the Perſon who drew the Will. *Harcourt*, C. decreed the Executors to account for the perſonal Eſtate, ſaying, he muſt conſtrue the Intent of the Teſtator out of the Words of the Will, and not upon parol Evidence. *Mich.* 12 *Ann. MS. Rep.* *Vin. Abr.* Tit. *Deviſe*, (G. a. 2.) *Ca.* 25. *Gale* and *Croſts*, *Mich.* 12 *Ann.* S. C. and P. As to the parol Evidence of the Intent of the Teſtator *dehors*, the Will was cited *Littlebury* and *Buckley* (*a*) *in Dom. Proc*; and *per Lord Chancellor*, parol Evidence in that Caſe was admitted, becauſe the parol Evidence *there* was an Affirmance of the Right at Common Law, in Oppoſition to a Preſumption in Equity, that where the Executor had a ſpecifick Legacy, the Surplus was not intended to be given to him; but in this Caſe the parol Evidence is to controul the Common Law, and give the perſonal Eſtate to the Executor, which is Aſſets at Common Law to pay Debts. *Ibid.*

(*a*) 1 *Eq. Ca. Abr.* Tit. *Executors and Adminiſtrators*, (D) *Ca.* 9. *P.* 245.

6. A Deviſe was to a Son by Name, and his Chriſtian Name was miſtaken, but it being added, *ſuch a Son in the Service of the Duke of* Savoy, parol Evidence was admitted, and this Son, tho' his Name was miſtaken, had the Eſtate. Cited *per* Lord Chancellor, *Eaſt.* 9 *Geo.* *Vin. Abr.* Tit. *Deviſe*, (G. a. 2.) *Ca.* 33. So if two Perſons of the ſame Name, Father and Son, it ſhall be intended of Father, but Evidence may be admitted to prove which was meant. *Ibid.*

7. *A.* deviſed Lands to Truſtees and their Heirs, to pay ſome Annuities, *&c.* and willed, *That what remained ſhould go to his Heirs for ever, on the Part of his Mother.* *N. B.* This Eſtate deſcended from the Grandmother to his Mother, and from her to him. Lord Chancellor admitted parol Proof to be given, that he deſigned the Heir by the Grandmother, the Eſtate coming from her; and decreed that the Truſtees ſhould convey to Grandmother's Heir (*b*). *Eaſt.* 9 *Geo. Anon.* *Vin. Abr.* Tit. *Deviſe*, (G. a. 2.) *Ca.* 33. (*b*) Theſe Words, *(ſhall go and come to my Heirs a parte materna)* are no more than a Declaration that the Truſtees ſhould not take, and the Lands ſhall deſcend according to the old Uſes, as if theſe Words had not been in the Will. But this Will would have had another Conſtruction, if there had been any Alteration of the old Uſe by a Settlement. *Ibid.*

2 *Mod. Caſes in Law and Eq. Trin.* 1722. S. C. *P.* 9.

8. Where an expreſs Legacy is given to the Executor, without any further Words, nothing given for his Care and Pains, parol Evidence may, in ſuch Caſe, be admitted of the Teſtator's Intention, but not where Words following declare a Truſt. *Per Powis*, J. in the Abſence of Lord Chan. *Macclesfield. Trin.* 1723. *in Caſu Raſhfield* and *Careleſs*, 2 *Will. Rep.* 161.

9. Where the Will explains itſelf, no Evidence *dehors* ſhall be admitted. *Per Cur'*, in S. C. 2 *Mod. Caſes in Law and Eq.* 9.

10. *A.* makes a Will, and an Executor, and gives a Legacy of 500 *l.* to the Executor, but makes no Diſpoſition of the Surplus. Parol Evidence of the Intention and Declaration of the Teſtator, touching the Surplus, was admitted. *Per* Lord Chan. *Macclesfield, Hil.* 1723. *Duke of Rutland et al'* and *Dutcheſs of Rutland*, 2 *Will. Rep.* 210.

2 *Mod. Caſes in Law and Eq.* 10. S. C. cited.

11. Parol Evidence was to prove which Heir was intended, *viz.* whether the Heir of the Mother's Mother's Side, or the Heir of the Mother's Father's Side. *Eaſt.* 1723. *Harris* and *The Biſhop of Lincoln*, 2 *Will. Rep.* 135.

12. *A.* poſſeſſed of a conſiderable perſonal Eſtate, by Will deviſed ſeveral Legacies, but gave none to his Executor. Held clearly, that no parol Evidence could be admitted to prove that the Teſtator did not intend that the Executor ſhould have the Reſidue of his perſonal Eſtate, for that this would not be to admit Evidence to ouſt an Implication, but to contradict the Rule of Law, and what appeared on the Face of the Will. *Hil.* 6 *Geo.* 2. *Lady Oſborn* and *Villiers*, 2 *New. Abr.* 426.

13. A Preſbyterian, who had three Infant Daughters bred up that Way, and had three Brothers Preſbyterians, makes his Will, appointing his Brothers, and alſo a Clergyman of the Church of *England*, Guardians to his three Infant Daughters, and dies, having ſent his eldeſt Daughter to his next Brother. The Clergyman gets the two other Daughters into his Cuſtody, and places them at a Boarding School where they were bred according to the Church of *England*; and brought his Bill to have the eldeſt Daughter placed out with the other Daughters. The three Brothers, that were Preſbyterians, brought their Bill to have the two Daughters delivered to them, offering parol Evidence that the Teſtator directed and declared he would have his Children bred up Preſbyterians. *King*, C. declared, no Proof out of the Will ought to be admitted in the Caſe of a Deviſe of a Guardianſhip, any more than in the Caſe of a Deviſe of Land; and only directed a Maſter to inquire whether the School, at which the two younger Children were placed by the Clergyman, was a good and proper School for their Education, giving Liberty to all Parties to apply to the Court as there ſhould be Occaſion. *Trin.* 1730. *Storke* and *Storke*, 3 *Will. Rep.* 51.

14. On a Bill brought by the next of Kin to the deceaſed, againſt the Executors, for a Diſtribution, the Executors, in their Anſwer, ſet forth a Clauſe of the Will, whereby the Teſtator gave the Reſiduum of his Eſtate to the Poor of the Pariſh of *K. in Com' L.* It afterwards appeared that this Pariſh of *K.* was not *in Com' L.* but *in Com' N.* and that the Teſtator really thought that this Reſiduum would not amount to above 10 *l.* and that he declared ſo at the Time of making his Will, whereas it amounted to near 1000 *l.* His *Honour*'s Opinion was, That parol Evidence ought to be admitted to help out the Deſcription of the Pariſh, and that this was a ſettled Rule in Equity; and therefore that the Pariſh of *K. in Com' N.* were well intitled under the Will, but that ſuch Evidence ought not to be admitted in relation to the

Maxim.

the Quantity of the Thing deviſed; and therefore he thought the Pariſh intitled to the Will. Bill diſmiſſed. *Hil.* 5 *Geo.* 2. 1731. *Brown et al'* and *Longley et al'*, 2 *Barnard. Rep. in B. R.* 118.

15. Where parol Evidence, touching the Teſtator's Intention, is not to be admitted, and why. *Vide* the Caſe of *Fowler* and *Fowler*, *Eaſt.* 1735. 3 *Will. Rep.* 353.

(D) (*a*) Of examining Witneſſes in Chief, and De bene eſſe, and eſtabliſhing their Teſtimony in Perpetuam rei Memoriam; — Of publiſhing, reading, amending, and ſuppreſſing their Depoſitions (*b*).

(*a*) *Vide ante* the ſeveral Diviſions under this Head.

(*b*) Witneſſes examined in a Commiſſion *after the Demiſe of the Crown*, but *before Notice thereof*, liable to be indicted for Perjury if they ſwear falſly (*c*). 3 *Will. Rep.* 196.——See 1 *Ann. Stat.* 1. *cap.* 8. *ſ.* 5. whereby this Matter is now put out of Diſpute, it being by that Act provided *inter al'*, "That no Commiſſion *or* Proceedings, *iſſuing out of any* "*Court of* Equity, ſhall be diſcontinued by the Death of her Majeſty, *or any* King *or* Queen."

(*c*) *Vide Cro. Car.* 97. *Crew* v. *Vernon*, 1 *Will. Rep.* 568.

1. A Witneſs alledged he had miſtaken himſelf at a Commiſſion; the Commiſſion being returned, he came to *London* and made Oath that he was ſurprized; a ſpecial Commiſſion iſſued to re-examine him, which was done accordingly; but this ſpecial Commiſſion was ſuppreſſed by Motion. *Per* his *Honour*, with the Advice of the Six Clerks, as contrary to the Practice of the Court. 15 *Car.* 2. *Anon. MS. Rep.* 2 *Freem. Rep.* 178. 28 *Jan.* 15 *Cha.* 2. *Randall* and *Richford*, S. C. *accord'*.

2. Witneſſes may be examined *before* Replication, if the Plaintiff doth, not elſe. 24 *Car.* 2. *Ca.* 168. 2 *Freem. Rep.* 136.

3. The Plaintiff had an Order to prove a Deed *viva voce*; at the Hearing not allowed to prove the Witneſſes Hands, they being dead. But his *Honour* gave Liberty to examine in the Office to prove the Deed, tho' Publication was paſſed. *Mich.* 1696. *Bloxton* and *Drewit*, *Prec. in Chan.* 64.

4. A Witneſs dies after Examination, but before ſuch Examination is ſigned by him. His *Honour*, upon adviſing with the Maſter then in Court, denied the making Uſe of the Depoſitions, as being imperfect (*c*). *Eaſt.* 1718. *Copeland* and *Stanton*, 1 *Will. Rep.* 414.

(*c*) After a Witneſs is fully examined, the Examinations are read over to him, and the Witneſs is at Liberty to amend or alter any Thing; after which he ſigns them, and then, (but not before), the Examinations are compleat, and good Evidence. *Ibid.* 415. inſerted by the *Reporter*.

5. *Plaintiff* examined Witneſſes *De bene eſſe*, and afterwards examined them *in Chief*, and the Cauſe was heard; but the Court taking Time to conſider of it, and the *Defendant* obſerving that ſome of the Witneſſes examined by the Plaintiff to prove the Will in Queſtion, (which was by the Plaintiff alledged to be made by *Defendant*'s Father ſubſequent to that Will, under which the *Defendant* claimed) had confeſſed that they would not ſwear the Defendant's Father did ever ſign the ſaid Will, and that yet the ſame Witneſſes, when examined *in Chief*, had ſworn poſitively the Defendant's Father did ſign the Will; and the Defendant having Reaſon to believe that the Witneſſes when

His *Lordſhip* obſerved that it was admitted on both Sides, that what was aſked for, (*viz.* the Publication of the Depoſitions taken *De bene eſſe*) was never yet done, and it being *without any Precedent*,

there ought to be very good Reaſons to prevail with the Court to do it. That the Reaſon why the Court allows the taking of Depoſitions *De bene eſſe*, is, either for a Contempt of the Party in not anſwering, and thereby preventing the joining of Iſſue, or elſe, where the Party is in Danger of loſing his Witneſſes in Caſe of Death, by reaſon of Sickneſs or Age, ſo that there may be Ground to apprehend their not living to be examined *in Chief*; but if theſe Witneſſes do live and are examined *in Chief*, their Depoſitions *De bene eſſe* ſhall fall to the

Ground, and, as it were, be buried, having anſwered the whole Purpoſe for which they were taken.——If the Depoſitions in the preſent Caſe were to be publiſhed, or any ways made uſe of againſt the Witneſs ſo examined *De bene eſſe*, ſuch Witneſs ought to have a Copy of the Depoſitions before he is examined *in Chief*, to the Intent that he may have due cautionary Means allowed him to prevent his contradicting himſelf, which is always done in the like Caſes; alſo many Queſtions might ariſe, if it ſhould happen that the Depoſitions *De bene eſſe* were quite contradictory to the Depoſitions *in Chief*; for his *Lordſhip* ſaid, he did not think it would be *Perjury* at Law (*a*), there being *no Iſſue joined*, as there muſt be before the Depoſitions are taken *in Chief*.——And as to ſeeing theſe Depoſitions *himſelf*, his *Lordſhip* ſaid, it was true Lord *Somers* and Lord *Cowper* did order Copies to be brought to them to inſpect, but that was for the better enabling them to judge whether the Plaintiff in thoſe Cauſes, after ſo long a Time elapſed ſince the Commencement of them, and ſo many Tranſactions in them, ſhould be allowed after the Plea to proceed to a Hearing; but his *Lordſhip* ſaid, as this Cauſe has ſince proceeded to a Hearing, for him to read theſe Depoſitions *De bene eſſe* in his Study, if he ſhould there form any Judgment upon them, it would be ſtrange that *That* ſhould guide *him*, which nobody elſe was to know any Thing of. *Ibid.* 568, 569. (*a*) *Vide Cro. Car.* 352. 2 *Inſt.* 167. And yet it ſeems as if ſuch Depoſitions, taken *De bene eſſe*, upon a Bill to perpetuate the Teſtimony of Witneſſes where there is no Iſſue joined, on the Death of the Witneſs may be read in Evidence. *Carth.* 265.——*Vide P.* Ca. [illegible] of *this* Work.

when examined *De bene eſſe*, did not ſwear ſo fully as they had been prevailed upon to do when examined *in Chief*, petitioned Lord C. *Parker* that theſe Depoſitions *De bene eſſe* might be publiſhed, or at leaſt that his *Lordſhip* would be pleaſed to have them brought before *him* for his Inſpection; which in this Caſe Lord *Somers* and Lord *Cowper* had done, in order to ſatisfy themſelves whether the Cauſe which had ſlept ſo long as Years, ſhould proceed or no; but his *Lordſhip* diſmiſſed the Petition, refuſing to publiſh the Depoſitions taken *de bene eſſe*. *Trin.* 1719. *Cann* and *Cann*, 1 *Will. Rep.* 567.

6. The Defendant, after an Order for Publication, examined a Witneſs, and then conceiving himſelf irregular, (it being after Publication) got an Order (upon Petition and Affidavit from *himſelf*, his *Clerk in Court* and *Solicitor*, that they had not nor would ſee any of the Depoſitions) to re-examine this Witneſs, but before there could be a Re-examination, the Witneſs died, and upon Affidavit of this, Lord Chan. *Parker* ordered, that the Defendant might make uſe of the Depoſition, the Re-examination of him having been prevented by the Act of God. *Mich.* 1723. *Debrox* and ——, 11 *Will. Rep.* 415.

2 *Mod. Caſes in Law and Eq.* 133. S. C. ſays, that the Bill was for to redeem a Mortgage made *in Anno* 1636. And upon a Motion for Publication of the Depoſitions, the Queſtion was, Whether a Depoſition taken *De bene eſſe* on a Commiſſion formerly iſſued to examine Witneſſes, and taken *before the Defendant had anſwered*, or *Iſſue joined* in that Cauſe, ſhould be now read at the Hearing of this Cauſe; and according to the Reſolution in *Brown*'s Caſe, *Hardres Rep.* 315. it ought not. Says, it was ſaid *pro Quer'*, and admitted to be true, that where the Delay is made by a *Defendant* ſo that a Witneſs cannot be examined *in Chief*, he either *loſing his Memory*, or *dying before he can be examined in Chief*, in ſuch Caſe his Depoſitions taken *De bene eſſe* may be read; but if the Delay is on both Sides, they ſhall never be read againſt the Defendant, becauſe he loſes the Benefit of croſs-examining the Witneſſes. That in the *principal* Caſe, there was a greater Delay made by the *Plaintiff* than by the *Defendant*, for the Bill was filed againſt him when he was in *Italy*, and as ſoon as he returned, in *December*, &c. he put in his Anſwer, which was filed 10 *Feb.* following. That as ſoon as the Replication came in (which was 28 *April* following) Defendant rejoined, and on the 2d of *June* gave Commiſſioners Names; but Plaintiff did not join in Commiſſion 'till the 28th of ſaid *June*, ſo that the greateſt Delay was on his Side.—Says it was moved, that Publication of the Depoſitions *in perpetuam rei Memoriam* might paſs, and might be read at the Hearing of the Cauſe, the *Witneſſes being ſince dead*; but the Court would give no Opinion as to this, but ordered that Publication ſhould paſs, ſaying, if the Plaintiff thought fit, he might make this Objection in proper Time. *Ibid.* 133, 134.

7. Upon a Bill to preſerve the Teſtimony of Witneſſes, *A.* being a Witneſs and ſick, was, by Order of Court, examined *De bene eſſe* for Defendant. Afterwards, on 28 *Nov.* Defendant anſwered, and *A.* died on the 18 *Dec.* following. And all the Judges were of Opinion, and held, that his Depoſition could not be read in Evidence at a Trial at Law in Ejectment, becauſe it was taken *before Iſſue joined*, and *A.* lived long enough after the Anſwer came in to be examined *in Chief*. *Hil.* 11 *Geo.* 1. *in Scac'*, *Southcott* and *Lord Limrick*, *MS. Rep.*

8. So where a Witneſs was examined *De bene eſſe*, and lived eight Months after, in which Time ſhe might have been examined *in Chief*, but ſhe died without being examined, it was held that theſe Depoſitions *De bene eſſe* ſhould not be read in Evidence. *Ibid.* 134.

9. A Witneſs examined on a Commiſſion ſwears reflecting Words, yet he ought not to pay Coſts, it being the Commiſſioners Fault to take down ſuch Depoſitions. *Per King*, C. *Hil.* 1726. *Anon.* 2 *Will. Rep.* 406. The *Reporter* ſays, *Quære*, If the Interrogatory had led to it? For it ſeems in the *principal* Caſe it did not, it being the laſt general Interrogatory. *Ibid.*

10. A Witneſs was ordered to be examined *De bene eſſe*, where the Thing examined into lay only in the Knowledge of the Witneſs, and was a Matter of great Importance, tho' the Witneſs was not proved to be *old* or *infirm*. *King*, C. *Mich.* 1730. *Shirley et al'* and *Com' Ferres*, 3 *Will. Rep.* 77.

11. On a Petition to amend the Depoſition of a Witneſs, the Witneſs and the Examiner were ordered to attend, and the Examiner, being examined by *Lord Chancellor*, ſwore, he took the Depoſition truly from the Mouth of the Witneſs, to whom he diſtinctly read it, and then the Witneſs ſubſcribed his Name. The Witneſs being examined, did not ſwear poſitively that the Examiner had taken his Depoſition falſe, but that he was induced to believe he did not expreſs himſelf in the ſame Manner the Depoſition was taken, and was *poſitive* he did not intend or mean to ſwear as the Examiner had taken it down, but really as the Amendment deſired; and that the ſame was what he had before declared in Converſation, and alſo what another Witneſs in the Cauſe had poſitively ſwore. Lord Chan. *King* ſaid, that where it appeared that either the *Examiner* is miſtaken in the taking, or the *Witneſs* in making the Depoſition, he thought it was for the Advancement of Truth and Juſtice to amend it, and the ſooner this is done the better, in regard the Witneſs may be dead, or in remote Parts before the Hearing. It would be unjuſt to pin a Witneſs down to what is a Miſtake, by denying to rectify it; and as to the amending of it after Publication, the Miſtake could not be known before. Wherefore his *Lordſhip* ordered it to be amended, and the Witneſs to ſwear it over again. *Mich.* 1731. *Griells* and *Ganſell*, 2 *Will. Rep.* 646.

12. A Commiſſion was granted to examine Witneſſes at *Algiers*, and Plaintiff died, by which the Suit abated, but the Witneſſes were examined before Notice of the Plaintiff's Death; the Examination (*a*) held regular, tho' *A.* (*b*) one of the Witneſſes, was living. *Per* Lord Chan. *King*. *Trin.* 1733. *Thompſon's Caſe*, 3 *Will. Rep.* 195. (*a*) *Vide Cro. Car.* 97. *Crew* and *Vernon*. See alſo 2 *Vern.* 400. *Burch* and *Maypowder*.

(*b*) It was inſiſted that the Depoſition of *A.* who was living, and might be examined over again, might be ſuppreſſed, but this was denied. *Per Lord Chancellor*. *Ibid.* 196.

13. After the *Defendant* has been examined on Interrogatories, (touching a Deed ſuſpected to be in his Cuſtody, which he deny'd) and Publication paſſed, the *Plaintiff* ought not to have a Commiſſion to examine Witneſſes, in order to falſify the Defendant's Examination, tho' the Maſter, before whom the Defendant was examined, certified that he thought it reaſonable the Plaintiff ſhould have a Commiſſion. *Hil.* 1735. *Smith* and *Turner*, 3 *Will. Rep.* 413. And his *Lordſhip* ſaid, that at this Rate three or four Cauſes might ſpring out of one; and that tho' there could be no Michief in examining the Party himſelf, yet the examining Witneſſes after Publication paſſed, eſpecially where it may relate to the Matter in Iſſue, is againſt the Rule of the Court, and may be greatly inconvenient, and make Cauſes endleſs. *Ibid.*

Vide Tit. Wills, (L) *P.* 180. Hearing and Rehearing, *P.*

CAP.

CAP. XXXIX.

Executors and Administrators.

(A) An Executor is considered as a Trustee.

(a) *Vide* Tit. *Wills, P.* (B) Concerning the Probate of Wills (*a*).

(C) In what Cases and to whom Administration shall be granted;——Of Administration de bonis Non;——And of joint Administration, &c.

(D) Of Administration durante Minore Ætate.

(b) *Vide* Tit. *Heir, P.* (E) What the Executor shall have and not the Heir (*b*), et econt', (as well touching the Reality, as Chattels personal.)

(F) Concerning Distribution, and who are intitled thereto, and in what Proportion;——And when the Surplus of the personal Estate belongs to the Executor, or he is to be a Trustee for the next of Kin.

(c) 22 & 23 *Car. 2. ca.* 10. (G) What shall be esteemed an Advancement within the Statute (*c*) to be brought into Hotchpot.

(H) Concerning the Power of an Executor.

(I) In what Cases an Executor may retain.

(K) Executors, how far favoured in Equity.

(L) Executor and Administrator chargeable, in what Cases.

(M) Executors; in what Cases the Survivor shall take the Whole.

(N) Where one Executor renounces.

(O) In what Cases an Executor shall take as such, or as a Legatee or a Devisee.

(d) *Vide* Tit. *Creditor and Debtor, P.* (P) In what Order Executors ought to pay Debts (*d*) and Legacies.

(Q) What shall be Assets.

(R) Devastavit; What.

(A) An Executor is considered as a Trustee.

1. AN Executor is a Person intrusted by the Law with the Testator's personal Estate, and therefore, if there does not appear to be some *Insolvency* in the Executor, or some gross Design to waste the Testator's Effects, or to go into another Kingdom, Equity will not take the Securities out of his Hands. *Per* Lord Chancellor *in Casu Clare* and *Almuty, Trin. 7 Ann. MS. Rep.*

But the *Executrix* in this Case having married, and so put herself under the Power of her Husband, his *Lordship* said, he would hear any Affidavit against him; and accordingly an Affidavit was produced to this Effect: *That the*

the Huſband was the younger Son of a Man of a ſmall Eſtate in Ireland, *and no viſible Subſtance, and that they feared he might waſte the Teſtator's Effects, and go over into* Ireland. But his *Lordſhip* held, that this was not ſufficient. *Note*; The Maſter of the Rolls having ordered, upon an interlocutory Decree, that the Teſtator's Securities ſhould be lodged in a Maſter's Hands, now upon an Appeal his *Lordſhip* reverſed that Part of the Decree.——*Another MS. Rep.* S. C.

2. An Executor from his Name is but a *Truſtee*, he being to execute his Teſtator's Will, and therefore called an Executor; and this is the Reaſon why the Spiritual Court cannot compel a Diſtribution; *becauſe they cannot inforce the Execution of a Truſt. Per Parker*, C. *Trin.* 1719, in the Caſe of *Farrington* and *Knightly*, 1 *Will. Rep.* 549.

3. An Executor is a *Truſtee* for the *Legatee*, with reſpect to the Legacy; and this is the *only* Reaſon why the Legatee may bring his Bill in Equity againſt the Executor for his Legacy, ſuppoſing it to be a Truſt. *Per Parker*, C. *in Caſu Wind* and *Jekyl* and *Albone. Mich.* 1719. *Ibid.* 575.

4. It is a fundamental Rule in Equity, that an Executor is but a Truſtee. *Per Powis*, J. ſitting for Lord Chancellor. *Trin.* 1723. 2 *Will. Rep.* 161.

(B) Concerning the Probate of Wills (*a*).

(*a*) *Vide* Tit. *Wills, P.*

1. A BILL was brought by *B.*'s Executor to be relieved againſt a Legacy of 100 *l.* claimed by Defendant, as given her by *B.*'s Will. This 100 *l.* Legacy was interlined in the Will by a different Hand, and ſuppoſed to have been done by Defendant herſelf when ſhe was left in the Room alone with the Corpſe, in which Room the Will was. But foraſmuch as the Will was proved by the Plaintiff the Executor in a proper Court, that had a proper Juriſdiction (it relating only to a perſonal Eſtate) and more eſpecially for that the Executor might have proved the Will in the Spiritual Court, with a proper Reſervation as to *this* Legacy, Lord Chan. *Cowper* ſaid, his Remedy muſt be there, and the Bill with Coſts. *Mich.* 1717. *Plume* and *Beale*, 1 *Will. Rep.* 388.

2. A Perſon who proved a Will in the Spiritual Court, by which he *ſwears the Teſtator was of ſound Memory*, after *controverts the ſame at Law as to the real Eſtate*; upon which an Iſſue was directed *Compos* or *non Compos*, and found *non Compos. Ap.* 1, 1717. *Montague* and *Maxwell*, *Vin. Abr.* Tit. *Executors*, (B. 6.) *Ca.* 9.

3. Will concerning *perſonal* Eſtate proved in the Spiritual Court; Reſpondent having a *former* Will in his Favour, brings *a Bill to diſcover by what Means the latter was obtained*, and to have an Account of the perſonal Eſtate, and whether the Teſtator was *incapable* or *impoſed* upon. Defendant demurred, Becauſe it belonged to the Spiritual Court only to prove the Validity of Wills, and the *former* Will was not proved in the Spiritual Court as the Will in his Favour was. The Demurrer was over-ruled. *Note*; It was mentioned in the Reſpondent's Caſe, that the Appellant, who was the Executor of the approved Will, was only in the Nature of a Truſtee for the Reſpondent. *Feb.* 6, 1723. *Andrews* and *Powis*, *Vin. Abr.* Tit. *Executors*, (B. 6.) *Ca.* 11.

4. Executor of a Will which was obtained by Fraud, but proved in the Spiritual Court. Decreed, as to ſo much of the Will as ſubjected the Lands for Payment of Debts, it ſhould ſtand; but as to the reſt, the Executor to be *a Truſtee for the Deviſee of the former Will.*

By Lord Chancellor, but *reverſed* 11 *Mar.* 1727. *Kerrick* and *Branſby*, *Vin. Abr.* Tit. *Deviſe*, (Z. 2.) *Ca.* 14.

5. Where a Bill is to *prove* a Will of Lands, the *Sanity* of the Teſtator muſt be proved; *ſecus* in the Caſe of a Deed of Truſt, to ſell for Payment of Debts. *Per* Sir *Joſ. Jekyll*, Maſter of the Rolls, *Hil.* 1730, in the Caſe of *Harris* and *Ingledew*, 3 *Will. Rep.* 93.

6. A Deed may be proved *viva voce* at the Hearing, but no Order can be made for proving a Will. *Per* his *Honour* in the above Caſe. *Ibid.*

7. *A.* by Will deviſed an Eſtate to be by them diſpoſed of by Sale, and to diſtribute the Money among her Children and Grandchildren, as therein directed; and, amongſt the reſt, the Sum of 100 *l.* to *B.* her only Son, who was a Lunatick; and made *C.* her Daughter Executrix, who, ſoon after *A.*'s Death, proved her Will in the Eccleſiaſtical Court. On the Death of *A.* the Lunatick had an Eſtate of 100 *l. per Annum* deſcended to him, and is now under a Committee appointed by the Court of Chancery, and his Children have been educated and maintained by the ſaid Committee, and have not any other Proviſion but what is deviſed by *A.*'s Will, and therefore the Truſtees named in the Will exhibited their Bill againſt the *Lanatick*, to prove the ſaid Will *per Teſtes*, and to have the ſaid Truſts thereof performed and executed; which Cauſe being at Iſſue, and ſeveral Witneſſes examined, At the Hearing *Lord Chancellor* declared, that the Will was well proved. 9 *Ap.* 1730. *Luther* and *Kerby*, *Vin. Abr.* Tit. *Executors*, (B. 4.) *Ca.* 15.

8. Tho' it be proper to prove a Will of Lands in Equity, eſpecially in Caſe of a *modern* Will, yet the ſame is not abſolutely neceſſary to make out the Title, any more than it would be to prove a Deed in Equity, by which the Eſtate is ſettled from the Heir at Law after the Anceſtor's Death. *Per* Lord Chan. *King*, *Trin.* 1733, in the Caſe of *Colton* and *Wilſon et al'*, 3 *Will. Rep.* 192.

(C) In what Caſes and to whom Adminiſtration (*a*) ſhall be granted;—Of Adminiſtration de bonis Non;—And of joint Adminiſtration, &c.

(*a*) Adminiſtration is granted, and one Bond is taken upon the granting it; another Adminiſtration Bond in a farther Penalty cannot afterwards be taken. *Eaſt.* 1740, *in Caſe Havers* and *Havers*, *Barnard. Rep. in Chan.* 24.

1. THE *Reſidue of my Goods* I *give to my loving Executor*, (with a Blank). Adminiſtration muſt be granted. *Eaſt.* 1681. *Winne* and *Littleton*, *Vin. Abr.* Tit. *Executors*, (C) *Ca.* 26.

2. *A.* had taken Securities in his own Name, *In Truſt* for *B.* for divers Sums of Money, and makes *C.* his Executor, and dies. *B.* aſſigns the Money and all Bonds taken in *A.*'s Name, *In Truſt* for him to *D.* and then dies *inteſtate*. *E.* Adminiſtrator to *B.* aſſigns his Letters of Adminiſtration to *D.* and then *E.* dies inteſtate. *F.* Daughter of *E.* and Wife of *C.* the Defendant, takes Letters of Adminiſtration of the Goods of *B. unadminiſtered by E.* her Father. *D.* prefers a Bill againſt *C.* as Executor to *A.* the Truſtee. *C.* claims in Right of his Wife. Holden, upon a Plea and Demurrer in Chancery, by *North*, Lord Keeper, that the Intereſt of *E.* well paſſed by the Aſſignment of his Letters of Adminiſtration to *D.* And ſo likewiſe

holden at a *Hearing* before the *Maſter of the Rolls*. And ſo decreed. *Eaſt.* 1 *Jac.* 2. *B. R.* *Maſon* and *Good* at the Rolls, *Skin. Rep.* 232.

3. If a Wife be intitled to a diſtributive Share of the Eſtate of a Perſon dying inteſtate, and dies within a Year, 'tis an Intereſt veſted and goes to her Huſband, or other Repreſentative. *Carth.* 51.——So in general of any other Perſon intitled. *Ibid.*

4. Rent of 60 *l.* being due to *A.* he *died inteſtate*, leaving *B.* his Adminiſtrator. *B.* and the *Tenant* account, and the *Tenant* pays *B.* 29 *l.* and gives him a Note for 31 *l.* and then *died inteſtate*; and the Queſtion was, Whether the Adminiſtrator of *B.* or the Adminiſtrator *de bonis Non* of *A.* ſhould have this Rent? Ruled that *B.*'s Adminiſtrator ſhould have it, for by taking a Note for it he had altered the Property, ſo as to make it due to him in his own Right, unleſs there had been any Debts of the *firſt* Inteſtate unpaid, and then this Court would have made it liable to ſatisfy thoſe Debts. *Mich.* 1687. *Anon. in Canc'*, 2 *Freem. Rep.* 100. *Vern.* 473. *Ca.* 463. *Barker* and *Talcot* and *Shaw*, S. C. held *accord'*.

5. *A.* died inteſtate, leaving Iſſue *B.* and *C.* his *perſonal* Eſtate being valued at about 3500 *l.* *C.* agreed to take 1500 *l.* for her Share, and that *B.* ſhould take Adminiſtration, and ſhe releaſes her Right to the *perſonal* Eſtate. *B.* paid the 1500 *l.* and dies, and makes *D.* his Executor, and deviſes to him all his *perſonal* Eſtate, there being 1000 *l.* out upon Bond of *A.*'s Eſtate. The Queſtion was, Whether *D.* *B.*'s Executor, or *C.* the Daughter, who was ſince married to *E.* ſhould have Adminiſtration? And the Judge of the Prerogative Court gave it to *D.* which Sentence was affirmed by the *Delegates*, becauſe, they ſaid, that *D.* as Executor of *B.* was in Equity intitled to *all* Benefit of the *perſonal* Eſtate of *A.* by reaſon of the Agreement. *Mich.* 1689. *Young* and *Peirce*, 1 *Freem. Rep.* 496.

6. *A.* had four Daughters, *B.* *C.* *D.* and *E.* and, after having given ſome Legacies, deviſed his *real* and *perſonal* Eſtate among his ſaid Daughters equally, and died. *E.* married *F.* and afterwards *B.* died *inteſtate*. *F.* aſſigned over all his Wife's Share of *B.*'s Eſtate (conſiſting of *Choſes en Action*) to *G.* and then *E.* his Wife, died. *F.* married again, and died *inteſtate*; his ſecond Wife took out Adminiſtration to him, and alſo to *E.* *de bonis Non* adminiſtered by *F.* The Queſtion was, Who was intitled to *E.*'s Share of *B.*'s Eſtate, the Aſſignment being without a valuable Conſideration, and only in Truſt, and *F.* the Huſband, not having taken out Adminiſtration? And *Cowper*, C. thought the Property bound by the Aſſignment, tho' voluntary, becauſe of the Delays that might be uſed before he could recover in Equity, which ought not to prejudice him; and that the Exception in the Stat. 29 *Car.* 2. *c.* 3. *ſect.* 25. does not confine it to the Life of the Huſband, or to the Circumſtance of his having reduced any Part of the Wife's perſonal Eſtate into Poſſeſſion, but provides that no Part of her Eſtate ſhall be diſtributed among her Relations after her; and decreed *E.*'s Share of *B.*'s perſonal Eſtate to the Adminiſtrator of *F.* *Mich.* 1717. *Squib* and *Wyn*, 1 *Will. Rep.* 378.

7. A Wife died poſſeſſed of *Choſes en Action*, and the *Huſband ſurvived*, and *died without taking out Letters of Adminiſtration to his Wife*; after which, *the next of Kin of the Wife adminiſtered to her*. And Lord Cha. *Parker* held, that the *Wife's Adminiſtrator was but a Truſtee for the Executor of the Huſband*, the *Right to the Wife's* Choſes en Action *being by the Statute of* Diſtribution *veſted in the Huſband as next of Kin to the Wife*; and whereas there is a Proviſo in 29 *Car.* 2. ſaying, that the Statute of Diſtribution ſhall not extend to the Eſtate of *Feme Coverts* that die inteſtate, but that their Huſbands may have Adminiſtration of their

their *perſonal* Eſtate as before the making the Act, his *Lordſhip* ſaid, this Clauſe was made *in Favour of the Huſband*, and *not to his Prejudice*; ſo that it was intended by the Parliament that the Huſband ſhould be within the Statute of Diſtribution ſo as to take the Wife's *Choſes en Action* as to his Benefit, but ſhould not be within the ſame as to his Prejudice; and that this was not a new Point, but had been ſettled, and upon very good Reaſon; for were the Conſtruction to be otherwiſe, the Huſband of the Wife inteſtate would be in a worſe Caſe than the next of Kin, tho' ever ſo remote, which was not the Intent of the Statute. 1 *Mich.* (*a*) 1718. Cites it as the Caſe of *Cart* and *Reeves*, 1 *Will. Rep.* 381.

(*n*) *Jovis* 27 *Nov.*--The *Reporter* adds, that Mr. *Vernon* cited the Caſe of Lady *Aiſcough*, wherein he ſaid, Lord *Cowper*'s Opinion was the ſame with Lord *Parker*'s, (*viz.*) that the Wife's *Choſes en Action* did veſt in the Huſband by the Statute of Diſtribution; ſo that ſince this Reſolution the Right of Adminiſtration follows (includes) the Right of the Eſtate, and ought, in Caſe of the *Huſband*'s Death *after* the Wife, to be granted to the *next of Kin to the Huſband*, in the ſame Manner as it is granted to a *reſiduary* Legatee. *Ibid.* 382.——If an Huſband ſurvive his Wife, all Intereſts veſted in her belong to him, and altho' *he dies without getting them in*, or *taking out Adminiſtration to her*, yet they belong to his Repreſentatives, and not to her's (*b*). *MS. Rep. Anon.* (*b*) *Quære* Term and Year.

8. If I make *A.* my Executor, and ſay no more, and *A.* dies *inteſtate* without diſpoſing, in his Life-time, of his *perſonal* Eſtate (*b*), *my* next of Kin, and *not* the next of Kin of *my Executor*, ſhall have Adminiſtration *de bonis Non*, together with all my perſonal Eſtate. *Per Parker*, C. *in Caſu Farrington* and *Knightly*, *Trin.* 1719. 1 *Will. Rep.* 553.

(*b*) *Vide* the Caſe of *The Duke of Rutland* and *The Dutcheſs of Rutland.*

9. If *A.* and *B.* ſeverally make their Wills, and make *C.* Executor, and *A.* gives him the Surplus of his perſonal Eſtate; but *B.* does not; and then *C.* dies inteſtate; in this Caſe the *perſonal* Eſtate of *A.* and *B.* ſhall go ſeveral Ways, for the Adminiſtrator of *C.* is admitted to the Adminiſtration of the *perſonal* Eſtate of *A.* but the next of Kin to *B.* are to have Adminiſtration to him, and will be intitled to his *perſonal* Eſtate, which proves *C.* as to that was but *a Truſtee*. *Per* Lord Chan. *Parker*, *in Caſu Farrington* and *Knightley*, *Trin.* 1721. *Prec. in Chan.* 567.

10. By the *Civil* Law the Father *or* Mother make *one Degree*, the Grandfather *or* Grandmother *two Degrees*, and the Uncle *or* Aunt *three Degrees*; but if you go one Degree further, and reckon to the Great Grandfather *or* Great Grandmother, they are in equal Degree with the Uncle *or* Aunt, as they are in the third Degree, in direct Lines with the Uncle *or* Aunt, who are in the third Degree in the Collateral Line; for you muſt reckon thro' the Grandfather *or* Grandmother to come at the Uncle *or* Aunt, and then they are juſt in the ſame Degree of Remove from the Nephew *or* Niece in the *Collateral* Line, as the Great Grandfather *or* Great Grandmother are in the direct *aſcending* Line. But the Computation by the *Canon* Law is different. *Per* his *Honour*, *Trin.* 1722, in the Caſe of *Mentney* and *Petty* (*c*), *Prec. in Chan.* 593.

(*c*) *Vide* this Caſe, *P. Ca.*

11. If an Executor dies *inteſtate*, ſo much of the Teſtator's perſonal Eſtate as remains unadminiſtred muſt go the Teſtator's next of Kin, *viz.* to the Adminiſtrator *de bonis Non*, *&c.* and not to the Adminiſtrator of the Executor. *Per Powis*, J. who ſat for *Lord Chancellor*. *Trin.* 1723, in the Caſe of *Rachfield* and *Careleſs*, 2 *Will. Rep.* 161.

12. If a Man marries an Executrix and ſhe dies inteſtate, the Teſtator's perſonal Eſtate muſt go to the Adminiſtrator *de bonis Non*, and not to the Huſband. *Per Powis*, J. in S. C. who ſaid it was ſo determined in the Caſe of Lady *Aſtry*, Executrix of Sir *Samuel Aſtry*, who had married Mr. *Harcourt*. *Ibid.*

13. If

13. If an *Executor dies inteſtate*, all the perſonal Eſtate, the *Property whereof is not altered*, ſhall go to the Adminiſtrator *de bonis Non, &c.* and *not to the next of Kin of the Executor*, becauſe, from the Time the Executor dies inteſtate, the firſt Teſtator dies inteſtate alſo, and it was the Executor's own Fault that he did not, as he might, alter the Property. *Per King*, C. in the Caſe of *Attorney General* and *Hooker*, and *Somner* and *Hooker*. *Hil.* 1725. 2 *Will. Rep.* 340.

14. Notwithſtanding the Statute of *H.* 8. Adminiſtrations have been granted to the principal Creditor from the next of Kin, by the Opinion of both *Civil* and *Common* Lawyers, where it is viſible that the next of Kin cannot have any Advantage or Benefit of the Eſtate; and this has been always taken to be out of the Statute. *Per* Lord Chan. *King*. *Mich. Vac.* 1725. *Vin. Abr.* Tit. *Executors*, (K) *Ca.* 24.

15. His *Honour* held, that if a *Son dies inteſtate*, or *a Wife*, the *Huſband of ſuch Wife* and the *Father of ſuch Son* are intitled to the whole of the perſonal Eſtate, and to Adminiſtration; and if *ſuch Huſband* or *Father dies before Adminiſtration granted to them*, yet the perſonal Eſtate of their Inteſtate was *an Intereſt veſted in them*, and ſhall be Part of their perſonal Eſtate, and *Adminiſtration ſhall be granted to the Repreſentative of ſuch Huſband* or *Father*; for the *Spiritual* Court *regards the Property* in granting Adminiſtration; and his *Honour* ſaid, this Point had been *ſolemnly* determined, as above. *Eaſt. Vac.* 1729. *Bacon* and *Bryant*, *Vin. Abr.* Tit. *Executors*, (K) *Ca.* 25.

16. A *Baſtard* dies *inteſtate*, without Wife or Iſſue. The King is intitled, and the Ordinary of Courſe grants Adminiſtration to the *Patentee of the Crown*. *Hil. Vac.* 1729. *Jones* and *Goodchild*, 3 *Will. Rep.* 33.

17. *A.* makes his Will, and *B.* and *C.* Executors, and left his Wife principal Legatee. *B.* and *C.* died inteſtate. The Wife, as principal Legatee, may take Adminiſtration; but if ſhe will not, her *After-Huſband* may; and tho' the Wife and the After-Huſband were divorced *a Menſa & Thoro*, yet upon a *Reconciliation*, tho' but for a few Days, he ſhall be reſtored to the Right, notwithſtanding any Decree, during the Divorce, to the contrary. *Hil.* 4 *Geo.* 2. *B. R. Vanthienen* and *Vanthienen*, *Fitz-Gibb. Rep.* 203.

18. If an Executor dies *inteſtate* before *Probate*, the Repreſentative of the Teſtator is intitled to Adminiſtration; but if I am appointed an Executor, and likewiſe Legatee of the perſonal Eſtate, there being an expreſs Gift to me, I take as Legatee, and conſequently, upon my Death, my Repreſentative will be intitled to Adminiſtration, an Intereſt being veſted in me in my own Right in the one Caſe, but nothing at all in the other until I have converted it. *Vide Caſes in Eq. Temp. Talbot* 209.

19. Adminiſtration granted to two, and one dies, the Adminiſtration ſurvives to the other. *Per* Lord Chan. *Talbot*, on hearing Civilians, 30 *July* 1735. *Ibid.* *Vide* P. Ca.

20. Adminiſtration granted in a *Foreign* Court (as at *Paris*) is not taken Notice of in our Courts. Said *arg'*, *Trin.* 1735. *Tourton* and *Flower et al'*, 3 *Will. Rep.* 371.

21. A Woman, intitled to a *Choſe en Action*, marries and dies; the *Huſband takes out Adminiſtration to her*, and *dies before the Money is received.* Adminiſtration *is taken out to the Huſband*, and the *Money is paid to his Adminiſtrator.* Plaintiff takes out Adminiſtration to the Wife, and brings a Bill againſt the *Huſband's Adminiſtrator* to repay the Money; and held that *it was a Right veſted in the Huſband, immediately*

mediately on the Death of the Wife, and that *her Adminiſtrator is only a Truſtee for the Huſband*; and her Adminiſtrator bringing ſuch Bill againſt the Perſon for whom he is a Truſtee, is a Breach of Truſt; and diſmiſſed the Bill, with Coſts. *May* 18, 1737. *Humphry* and *Bullen* (a), *Vin. Abr.* Tit. *Executors*, (K) *Ca.* 26.——Says, that the ſame Point was ſo determined by Lord *Macclesfield*, *Mich.* 1718, in the Caſe of *Cart* and *Rees*. *Ibid.*

(a) *Vide ante P. C.* S. C. at large.

22. *A.* and *B.* two Bond Creditors, taking joint Letters of Adminiſtration. *A.* gets into his Hands beſt Part of the Aſſets, and retains for his own Debt againſt *B.* On a Bill by *B.* *A.* was decreed to account for the Reaſons in the Margin. *Per* his *Honour* 28 *Feb.* 1738. *Chapman* and *Turner*, *Vin. Abr.* Tit. *Executors*, (D. 2.) *Ca.* 2.

In this Caſe the Queſtion was, Whether *A.* by this had got ſuch a legal Advantage as to be intitled to keep the Aſſets, and ſo *B.* loſe his Debt? And *per* the *Maſter of the Rolls*: The Rule of this Court in Caſes of *Retainer* is, unleſs the *Party can ſhew a legal Right to retain, we never give it him*; if *he can ſhew a legal Right, we never take it away from him.* The Queſtion then is, Whether at *Law* this be a good *Retainer?* At *Law*, no doubt, an *Executor* or *Adminiſtrator* has a Right, in Caſe of Debts in equal Degree, to prefer one to another, and to *retain for his own in the firſt Place* againſt any other Creditor. The *Reaſon is*, not (as ſome of the Old Books ſay) becauſe the Law leaves it to the Conſcience of the Executor which Debts to prefer, for that, his *Honour* ſaid, *he* took to be a fictitious Reaſon, being contrary to the general Principle of Law, for a Man to become judge in his own Cauſe, and be left to determine which Debt ought firſt to be paid, his own or another's. But the true Reaſon is, becauſe if a *Retainer* were not allowed, an *Executor*, in Caſe of a Deficiency of Aſſets, would have no poſſible Way of obtaining Satisfaction for his Debt; for, *at Law, there is no ſuch Thing as ſplitting of Debts*, or making a rateable Proportion; and therefore he cannot come in upon an Average with the reſt of the Creditors, nor has the Advantage of another Creditor, who, bringing his Action in due Time, may recover his Debts, tho' there be not enough Aſſets at laſt to anſwer all Demands upon the Teſtator; for he cannot ſue himſelf, ſo that this Privilege of retaining is founded on the Policy of the Common Law, that Executors may not be deprived of one Advantage without having another in Lieu of it; and that they may not be in a worſe Condition than all Mankind beſides. But this is not a Caſe between an *Executor* or *Adminiſtrator* and a *Creditor*, but between two joint Adminiſtrators, who are both in the ſame Condition in all Reſpects. Now here has been no Authority cited to ſupport a Retainer by one *Adminiſtrator* againſt the *other*, nor did his *Honour* ſee how there ever could be one, becauſe an *Adminiſtrator can bring no Sort of Action againſt his Companion*, wherein this Point might have been ſettled at Law; neither does the Reaſon of the Law juſtify ſuch a Retainer, for *Adminiſtrators* are conſidered but as one Perſon in Law; the Poſſeſſion of the one is the Poſſeſſion of the other; the Receipt of one is the Receipt of the other; and therefore, the Retainer of one muſt be conſidered as the Retainer of the other, and muſt enure for the mutual Benefit in the Diſcharge of the Debts of both in Proportion. Then the Conſequence would be very bad were a Retainer allowable in this Caſe, for Adminiſtrators muſt fight for the Aſſets, if getting the ſole Poſſeſſion would intitle either to a ſeparate Right in them; ſo that as no legal Right of Retainer has been ſhewn, the Rule muſt take Place, That *he who cannot retain in Law, cannot in Equity.* That the Plaintiff was intitled to an equal Diſtribution of Aſſets, being an equal Creditor according to Conſcience and Equity, and Defendant muſt be decreed to account. *Per* his *Honour*. *Ibid.*

(D) Of Adminiſtration durante Minori Ætate.

1. *A.* Who was Adminiſtrator *durante Minori Ætate* of two Infants, and intitled to a Share of the Inteſtate's Eſtate in his own Right, brought a Bill for a Diſcovery and Account, and proceeded to Examination of Witneſſes, and then got his own Share, and let the Suit drop. After the Infant's coming of Age, 'twas moved to have the Benefit of theſe Proceedings, and to carry on the Cauſe; and *Lord Keeper* thought it reaſonable, if it could be done, that they might not begin *de novo*, but thought the Suit quite dead, and at an End, by the Infant's coming of Age, whereby the Adminiſtration *durante Minori Ætate* determined, and aſked the Bar, If any ſuch Thing had been done? And it was anſwered, That the like had been once done by Lord Chan. *Somers* in the Caſe of *Davis* and *Davis*, where an Adminiſtrator *durante Minori Ætate* proceeded to a Decree and Account before the Maſter, and then the Infant coming of Age, and praying, it was allowed to go on, tho' much oppoſed, but here it would not be granted; for *Davis*'s Caſe had proceeded to a Decree, and tho' the Plaintiff there was an Adminiſtrator *durante Minori Ætate*, yet it was *cum Teſtamento annexo*, which by him made ſome Difference; and the Infant

fant there had brought a Bill to have the Benefit of the ſaid Proceedings, and offered to be bound by them. *Mich.* 1701. *Jones* and *Baſſet*, *Prec. in Chan.* 174.

2. Adminiſtration of an Inteſtate is granted to *A.* during the *Minority* of four Infants, (*donec aliquis eorum* ſhould attain to twenty-one), one of whom being a Daughter, marries an *Huſband, who is of Age.* The Adminiſtration is *not* determined, for that the *Huſband* hath *no* Right to adminiſter, becauſe *not next of Kin to the Inteſtate.* *Per* Lord Chan. *King* and Lord Chief Juſtice *Raymond.* *Mich.* 1730. *Jones* and *Com' Stafford et al'*, 3 *Will. Rep.* 81.

So if Adminiſtration be granted during the Minority of four Infants, and one of them ſhould die before he comes to Age, this

will *not* determine the Adminiſtration; for the living Infants would not be of Age, and the other dying, during his Infancy, and not being in *Eſſe*, would be as out of the Cafe. *Per* Lord Chan. *King* and Lord Chief Juſtice *Raymond*, *ibid.* 89. contrary to the Opinion in 5 *Co. Bundenel's Caſe.*——— -If Adminiſtration be granted during the *Minority* of *two* Infants, and *one* dies, yet the Adminiſtration continues. *Eaſt.* 10 *Jac.* *Anon. Brownl. Rep.* 47.

3. Where an Infant Executrix is under ſeventeen, and an Adminiſtration (*durante Minori Ætate*) is granted, if ſuch Infant Executrix marries an Huſband of full Age, this does *not* determine the Adminiſtration, by the Opinion of Lord Chan. *King* and *Raymond*, C. J. contrary to the Opinion in 5 *Co. Prince's Caſe* (*a*); and their *Lordſhips* ſtrongly inclined againſt the Caſe in 5 *Co.* the ſame not being taken Notice of in other *Cotemporary* Reports, as in 2 *And.* 132. *Cro. Eliz.* 718, 719. and 3 *Leo.* 278. in all which Books *Prince*'s Caſe is *reported*, and ſaid, it was remarkable that the *Author* of the Book, intitled, *The Office of Executors*, *P.* 213. mentioning this Opinion, (in 5 *Co.*) a little *marvels* thereat, conſidering, (as he obſerves) " That " theſe Things are managed in the *Spiritual* Court, and by that Law " (the Canon) which intermeddles not with the Huſband in the Wife's " Caſe, and ſince by *that* Law, and by our *Common* Law, comes " in *this Limitation of ſeventeen Years.* He adds, that he has ſeen " that Caſe otherwiſe reported in this Point." *Mich.* 1730. 3 *Will. Rep.* 88.

(*a*) Which ſays, that if an Infant Executrix takes Baron before ſeventeen, Adminiſtration *durante Minori Ætate* ſhall ceaſe, if the Baron be of full Age.

4. An Adminiſtration *durante Minori Ætate* ought not to be committed to one that is very poor, *tho' ſhe is Guardian* and *next of Kin to the Infant.* *Per* Lord Chan. *Hardwicke.* *Eaſt.* 1740, in the Caſe of *Havers* and *Havers*, *Barnard. Rep. in Chan.* 23.

The Ordinary may grant Adminiſtration *durante Minori Ætate* to whom he

pleaſes. *Mich.* 4 *Geo.* 2. *B. R. The King* and *Bettesworth*, *Fitz-Gilb. Rep.* 163.——But *Vide* the Caſe of *Havers* and *Havers*, *P. Ca.* this Sort of Adminiſtration being not within the Statute. *Vide* 3 *Will. Rep.* 89. Where the Court of Chancery ſees Reaſon to think, that there will be a *Miſapplication* of the Effects of the Inteſtate, and an Abuſe and Waſting, to the Prejudice of an Infant, by a limited Adminiſtrator, who is only a Truſtee for the Infant, it is incumbent on the Court to take Care that the Infant be not prejudiced; and the Court will, in ſuch Caſe, appoint a Receiver of the perſonal Eſtate, notwithſtanding Adminiſtration is granted of it. *Per Lord Chancellor. Vide Barnard's Rep. in Chan.* 24.

(E) What the Executor ſhall have and not the Heir (*b*), et econt', (as well touching the Realty, as Chattels perſonal.)

(*b*) *Vide* Tit. *Heir*, *P.*

1. THE Heir of the Mortgagee exhibited a Bill to have the Mortgagor redeem, or elſe to be fore-cloſed. The Defendant demurred, Becauſe the *Executor*, *who might have Title to the Money*, was not Party; and the Demurrer was allowed. 12 *May* 16 *Car.* 2. *Freake* and *Horſeley*, 2 *Freem. Rep.* 180.

2. The

Chan. Caſes 284. S. C. *accord'.*—— *Vide* 1 *Vol. Abr. Eq.* 326. *Ca.* 2.

2. The Queſtion was, Whether the *Heir* or *Executor* ſhould have the Mortgage Money? And after Conſideration it was reſolved, That the Executor ſhould have it; *per Finch*, Lord Keeper, the Mortgage being forfeited; tho' it was mentioned, that if the Mortgagor did pay, *&c.* to the Mortgagee, his *Heirs*, *Executors*, or *Adminiſtrators*, *&c.* becauſe the Reaſon of the Common Law in theſe Caſes ought, as near as may be, to be followed in Equity. Now by the Common Law, if the Condition or Defeazance of a Mortgage of Inheritance be ſo penned, that no Mention is made, either of *Heirs* or *Executors*, to whom the Money ſhall be paid, in that Caſe the Money ought to go to the Executors, in regard the Money came firſt out of the perſonal Eſtate, and therefore naturally returns thither again; but if the Defeazance appoints the Money to be paid either to the *Heirs* or *Executors*, there, by the Common Law, if the Mortgagor pays the Money preciſely at the Day, he may *elect* to pay either to the *Heir* or *Executor*; but where the preciſe Day is paſt, and the Mortgage forfeited, all Election is gone, for, *in Law*, *there is no Redemption*; then when the Caſe is reduced to an Equity of Redemption, that Redemption is not to be upon Payment to the Heir or Executor of the Mortgagee at the Election of the Mortgagor; for it were againſt Equity to revive the Election, for then the Mortgagor might defer the Payment as long as he pleaſed, and at laſt force a Compoſition by Payment of the Money to that Hand which will uſe him beſt; much leſs can the Court elect or direct a Payment where they pleaſe, for a Power ſo arbitrary might be attended with many Inconveniencies; there ought, therefore, to be a certain Rule in theſe Caſes, and a better cannot be choſen than to be as near the Rule and Reaſon of the Common Law as may be. Now the Law always gives the Money to the Executor, where no Perſon is named. And where the Election to pay either Heir or Executor is gone and forfeited in Law, it is all one in Equity as if neither Heir nor Exeeutor were named; and then Equity ought to follow the Law, and give it to the Executor; for, in natural Juſtice and Equity, the principal Right to the Mortgagee is the Money, and his Right to the Land is only a Security for the Money; wherefore, when the Security deſcends to the Heir of the Mortgagee, attended with an Equity of Redemption, as ſoon as the Mortgagor pays the Money the Land belongs to him, and only the Money to the Mortgagee, which is merely perſonal, and ſo accrues to the Executor or Adminiſtrator of the Mortgagee; and for this Reaſon a Mortgage of Inheritance to a Citizen of *London* hath been held to be Part of his perſonal Eſtate, and divided according to the Cuſtom; and tho' it may ſeem hard, that the Heir ſhould be decreed to make a *Reconveyance* without having the Money which comes in Lieu of the Land, it will not ſeem ſo to them who conſider that Land was no more than a Security, and that after Payment of the Money, the Law keeps a Truſt for the Mortgagor, which the Heir of the Mortgagee is bound to execute. And his *Lordſhip* declared, that the Right to a Sum of Money, which is a perſonal Duty, ought always to be certain, and not to be variable upon Circumſtances; wherefore his *Lordſhip* did not think it material that the Adminiſtrator in this Caſe had Aſſets without this Money; for Aſſets or not Aſſets is not the Meaſure of Juſtice to Executors or Adminiſtrators, but ſerves only a Pretence to favour the Heir, who either ought to have the Money, if there had been no Aſſets, or not to have it, if there be Aſſets; and for the ſame Reaſon his *Lordſhip* did

not think it material that there wanted the Circumſtance of a perſonal Covenant for the Mortgagor to pay the Money; for, tho' the Caſe of the Adminiſtratrix of the Mortgagee had been ſtronger with it, yet it is ſtrong enough without it; and his *Lordſhip* declared that he had conſidered the various Precedents in this Caſe which had been urged, wherefore one did not come to the very Point, there being a very great Difference between a Mortgage and an abſolute Conveyance, with a Collateral Agreement to reconvey upon Repayment of the Purchaſe Money. The other late Precedents which made for the Heir, being contrary to the more ancient Precedents of this Court, and ſo ſome modern Proceedings alſo ſeemed to his *Lordſhip* of no Weight, his *Lordſhip* being of Opinion, that all Mortgages ought to be looked upon as Part of the perſonal Eſtate, unleſs the Mortgagee, in his Life-time, or by his Will, do otherwiſe declare or diſpoſe of the ſame; and thereupon his *Lordſhip* decreed accordingly. 10 *July* 27 *Car.* 2. *Thornborough* and *Baker*, *MS. Rep.*——2 *Freem. Rep.* 143. S. C. *accord'*.

3. In a Caſe between the *Heir* and *Executor of a Mortgagee*, who ſhould have the Money due upon a Mortgage forfeited, which was *made to the Mortgagee* and *his Heirs*, Lord Chan. *Finch* declared, Firſt, that when upon a Mortgage Money is made *payable to the Heir* or *Executor*, there, *before the Day*, or *at the Day of Payment*, the *Mortgagor has Election to pay it to which he pleaſes*; but *after the Day of Payment is over*, and the Mortgage forfeited by *Law*, tho' *Equity* doth give the Mortgagor Relief, ſo as upon the Payment of the Money he ſhall have his Land, yet *Equity* will not revive the Election of the Mortgagor to pay it to the *Heir* or *Executor*, but then he ſhall be forced to pay it to the *Executor*, *becauſe it came out of the perſonal Eſtate of the Teſtator*, and *thither it ſhall return*; but if in the Mortgage *neither Heir* nor *Executor* be mentioned, then, *after the Death of the Mortgagee*, the Law determines it *to be paid to the Executor*; and accordingly, in the principal Caſe, the Money was decreed to the Executor. *Mich.* 1676. *Anon.* 2 *Freem. Rep.* 12. *Ca.* 11.

A. mortgages in Fee to *B.* The Money not being paid at the Day, *B.* enters, and lending the *Mortgagor* more Money, *reinſtoffs* the *Mortgagor*; Proviſo, *That if he did not pay* 500 l. *at the Day, that then he ſhould re-enter*. *B.* dies, and *his Heir releaſes the Condition to* A. The *Executor of* B. prefers his Bill againſt *A.* the *Mortgagor* and the *Heir of* B. the *Mortgagee*, to pay the Money. On Demurrer, *Finch* Lord C. took theſe Rules: Firſt, Where a Man mortgages Land, with a Condition to be void upon Payment of Money at a Day, and neither Heir nor Executor is named, *if the Party die before the Day*, the Law conſtrues this Payment to be paid to the Executor, for *Litt.* Reaſon, 1 *Inſt.* 209. *b. becauſe this Money went out of the Mortgagee's perſonal Eſtate, and thither it ſhall return.* Secondly, If Money be limited to be paid to the *Mortgagee, his Heirs* or *Executors, at ſuch a Day*, there, if the Mortgagee dies before the Day, the Party has his Election if he pays it at the Day; but if he does not pay it at the Day, then it is expreſly limited to nobody; and this Court gives it conſtantly to the Executor upon that Reaſon. *Trin.* 1677. *Rightſon* and *Overton*, 2 *Freem. Rep.* 20.——And tho' it was urged by the *Attorney General*, that here the *Mortgagor*, by the Acceptance of the Re infeoffment, had extinguiſhed his Equity, yet *per Lord Chancellor*, this being originally a Mortgage, and being continued ſtill for a Security of Money, there remains ſtill an Equity for the *Mortgagor*; and his *Lordſhip* ſaid, that if the Mortgagor had Election, *any Time after the Payment*, to pay the Money either to the *Heir* or *Executor*, it would be very inconvenient; for then he would make his Markets, and he that would give moſt ſhould have the Money, and it would be a Power not fit to be left in the Breaſt of the *Chancellor* to give it to one or the other, and therefore it always goes to the Executor. *MS. Rep.* in the above Caſe of *Rightſon* and *Overton*.——2 *Freem. Rep.* 21. *accord'* in S. C.

4. *A.* had a Mortgage in Fee which was forfeited, and deviſed *all his Mortgages* to *B.* and makes him Executor, and dies. *B.* proves the Will, and after dies inteſtate. *C.* takes out Adminiſtration *de bonis Non* to *A.* and alſo Adminiſtration to *B.* and brings his Bill againſt the Mortgagor. *D.* the Heir at Law of *A.* and *B.* had bought in the Equity of Redemption. This Cauſe was heard on Bill and Anſwer, and tho' it was agreed that both *A.* and *B.* left ſufficient Aſſets without this Mortgage, yet it was decreed that the Mortgage ſhould go to the Executor. But Lord Commiſſioner *Trevor* ſaid, that if the *Mort-*

gagee had been in Poſſeſſion and died ſo, he would not have taken the Mortgage from the Heir, *there being no Defect of Aſſets. Trin.* 1690. *Fiſk* and *Fiſk*, *Prec. in Chan.* 11.

5. Where Lands are deviſed to the Executors to be ſold for ſeveral Purpoſes, and the Surplus is expreſly deviſed to them, there can be no reſulting Truſt for the Benefit of the Heir. *Per Cur'*, (cites the Caſe of *Crompton* and *North*) *Eaſt.* 1699. *Dormer* and *Bertine*, *Prec. in Chan.* 94.

In this Caſe the Defendants inſiſted on the Statute of Frauds and Perjuries, and that theſe Lands could not be ſubject to the Plaintiff's Demands, there being no Declaration of Truſt in Writing; and the Caſe of *Kerk* v. *Webb* was cited and relied on, but his *Honour* ſaid, that Caſe did not govern this, but ſtood on its own Bottom, and that *here* was an Intereſt veſted in the Daughters by the Statute of Diſtributions, and that it would be very miſchievous to Infants, if their Money might be inveſted in Lands, and that Land not liable to make them Satisfaction; for which Reaſon his *Honour* decreed as above. But Lord Keep. *Wright* reverſed his Honour's Decree, as contrary to the Caſe of *Kerk* and *Webb*. *Ibid*, 172.——2 *Vern.* 440. S. C. by the Name of *Kendar* and *Milward*, ſays, Lord Keeper reverſed his *Honour*'s Decree, *Mich.* 1702, as being within the Reaſon of *Kerk* and *Webb*, lately affirmed in Parliament, that *Money had no Ear-Mark*, and *could not be followed when inveſted in a Purchaſe. Ibid.*

6. *J. S.* dies inteſtate, leaving a Wife and two Daughters Infants. After his Death 500*l. is found in the Houſe*, and the Widow (who had taken out Adminiſtration) lays out this Money in the Purchaſe of Lands, and afterwards conveys the Lands to Truſtees and their Heirs, to the Uſe of herſelf for Life, and after, as to one Moiety to the Uſe of one Daughter and the Heirs of her Body; and as to the other Moiety to the other Daughter and the Heirs of her Body, with Croſs-Remainders, with Remainder of the whole to her own right Heirs. The Daughters afterwards marry and die, and the Mother dies. The Huſband of the ſurviving Daughter took out Adminiſtration to his Wife and her Siſter, and brought his Bill againſt the Heir of the Mother to have this Land made perſonal Eſtate, and to have two Thirds of it, as being purchaſed with the Money which belonged to the Daughters. His *Honour* decreed, that the Lands ſhould ſtand charged with two Thirds of the Purchaſe Money for the Plaintiff, and, that if it were not paid, the Land to be ſold. *Mich.* 1701. *Kinder* and *Miller*, *Prec. in Chan.* 171.

7. Held that a *Furnace*, tho' fixed to the Freehold, and purchaſed with the Houſe, and alſo Hangings nailed to the Walls, ſhall go to the *Executor*, and not to the Heir, and ſo determined, contrary to *Herlakenden*'s Caſe, 4 *Co. Trin.* 1701. *Squier* and *Mayer*, 2 *Freem. Rep.* 249.

8. Deviſe of Lands *to an Executor in Truſt*, and to the Intent *that the ſame*, or *ſo much thereof as ſhould be needful, ſhould be ſold for Payment of Debts* and *Legacies*. This is a beneficial Legacy to the Executor, and not a *reſulting* Truſt to the Heir; and *parol* Evidence admitted. *Feb.* 15, 1710. *Dockſey* and *Dockſey*, *Vin. Abr.* Tit. *Executors*, (U) *Ca.* 71.

9. *J. S.* being ſeiſed in Fee, deviſed, that if his perſonal Eſtate ſhould not be ſufficient to pay his Debts and Legacies, then his Executors ſhould receive the Profits of his whole *real* Eſtate for the Payment of the ſame, and after Payment of his Debts and Legacies he deviſed his real Eaſtte to *A.* The Executors have only a (*a*) Chattel Intereſt for Payment of Debts. So held *in Dom. Proc'* 22 *May* 1717, upon the Advice of *all* the Judges, on the Appeal of Sir *Robert Coppen* and *Samuel Barnardiſton*, 1 *Will. Rep.* 505, 508, 509.

(*a*) *Vide* 2 *Vern.* 404.

10. A Leſſee of Lands to him and his Heirs for three Lives, aſſigns the whole Eſtate, *reſerving a Rent to him and his Executors, Adminiſtrators and Aſſigns*; Proviſo, *that on Nonpayment he and his Heirs may re-enter*; and the Aſſignee covenants to *pay the Rent to* A. *his Executors and Adminiſtrators. Per Cur'*, this is a plain Caſe; here is no Reverſion to the Aſſignee, and the Rent is by expreſs Words

reſerved to the Executor; the Proviſo for the Heir to re-enter is not material, as long as the Reſervation of the Rent is to the Executor, for in ſuch Caſe the Heir is a Truſtee for the Executor; Bill diſmiſſed *with Coſts*. *Per* his *Honour*, *Trin.* 1719.——Afterwards this Matter came on again before Lord *King*, who ſaid, that if the Reſervation were void, yet the Covenant muſt be plainly good; but the Court inclined that *here being no Reverſion*, the Rent, during the three Lives, might be well reſerved to the Executors; and at length decreed it to the Executor. *Trin.* 1727. *Jeniſon* and *Lord Lexington*, 1 *Will. Rep.* 555, 557.

11. *J. S.* poſſeſſed of a Term for Years, deviſed it to *A.* for Life, Remainder to the Heirs of *A.* It ſeems this ſhall, on *A.*'s Death, go to his Executor, and not to his Heir. *Vide* 3 *Will. Rep.* 29. the Caſe of *Davis* and *Gibbs in Dom. Proc'*, *Hil. Vac.* 1729.

12. *A.* having *Lands of Inheritance in* B. *and* C. and *a Mortgage in* D. and *Lands extended in* E. on a Statute, deviſed *all his Credits* and *Mortgages to his Executors*; and *all his Meſſuages*, *Lands*, &c. and *all his real Eſtate whatſoever in* B. C. D. *and* E. *to* R. W. *and* J. S. *for their Lives*, and *after their Deceaſe*, *to their Heirs*. Lord Chan. *King* decreed the *mortgaged* and *extended* Lands in *D.* and *E.* to the Executors. *Hil.* 3 *Geo.* 2. *Davis* and *Gibbs*, *Fitz-Gibb. Rep.* 116.

13. Whatever Intereſt in, or Profits out of a real Eſtate are undiſpoſed of by a Teſtator, deſcend to the Heir, and he takes them; not by the Will, or the Intent of the Teſtator, but they are thrown upon him by the Law for want of ſome other Perſon to take. *Æquitas ſequitur Legem.* *Mich.* 1734, in the Caſe of *Hopkins* and *Hopkins*, *Caſes in Eq. Temp. Talbot* 44. Maxim.

14. *J. S.* deviſed as follows: Imprimis, "I deviſe, give and bequeath all and ſingular my Meſſuages, Lands and Hereditaments whatſoever and whereſoever in the Counties of *N. S.* and *C.* unto my Siſter *A.* and to her Heirs and Aſſigns for ever, *Upon Truſt* that the ſame ſhall be ſold by her or them, for the beſt Price that can be gotten for the ſame, as ſoon as conveniently can be after my Deceaſe; and that out of the Monies ariſing therefrom all my juſt Debts, of what Kind ſoever, be paid; and after Payment of my Debts, I deviſe out of the Remainder of the Money the Sum of 500 *l.* to my Siſter *B.*" And gave ſeveral other pecuniary Legacies, and among which was a Legacy of 500 *l.* to his Nephew *D.* (his Heir at Law) and then ſays, "Item, After my Debts and Legacies paid as aforeſaid, and ſubject to the ſame, I give and bequeath all the reſt and Reſidue of my perſonal Eſtate unto my Siſter *A.* who he appointed ſole Executrix of his Will." It was inſiſted for the Plaintiff the Executrix, that here could be no reſulting Truſt for the *Heir*. Firſt, Becauſe the Teſtator had given a Legacy of 500 *l.* to the Heir. Secondly, Becauſe the Teſtator had directed his real Eſtate to be ſold for Payment of his Debts and Legacies, and had therefore conſidered it as a perſonal Eſtate; and after Payment of his Debts and Legacies, and ſubject to the ſame, had given all the reſt and Reſidue of his perſonal Eſtate to his Executrix. But if it ſhould be conſtrued to be a reſulting Truſt for the Heir, the Teſtator's Intention would be utterly defeated; for then the perſonal Eſtate muſt be applied in Eaſe of the real, and ſo the Executrix would have but a troubleſome Affair, without any Benefit or Conſideration, which could never be the Teſtator's Intention; and in order to ſhew clearly that was the Teſtator's Intent, it was inſiſted upon giving *parol* Evidence. But Lord Chan. *Talbot* decreed, That upon the Will itſelf, indepen-

dently

dently of the *parol* Evidence, here was no reſulting Truſt for the Heir; and that the Executrix ſhould have the whole Reſidue after the Sale of the Eſtate, both of the Money ariſing by ſuch Sale, and of the perſonal Eſtate. *Eaſt.* 1735. *Mallabar* and *Mallabar*, *Caſes in Eq. Temp. Talbot* 79, 80.

15. It is now a ſettled Point in Courts of Equity, that if Lands be ſettled, or a Term of Years created, on Truſt to raiſe Portions for Daughters to be paid at the Age of twenty-one or Marriage, and a Daughter dies before the Time of Payment, the Portion ſhall not go to the Executor or Adminiſtrator of the Daughter, but ſink in the Eſtate for the Benefit of the Heir. *Per* his *Honour*, *Eaſt.* 13 *Geo.* 2. *in Caſu Harvey* and *Aſton*, *Comyns's Rep.* 742.

(F) Concerning Diſtribution, and Who are intitled thereto, and in What Proportion;—— And When the Surplus of the perſonal Eſtate belongs to the Executor (*a*), or he is to be a Truſtee for the next of Kin.

(*a*) *A.* deviſed the Reſidue of her Eſtate to her Siſter and her Huſband, for the Siſter's Life, and gave all her next of Kin, except one, Legacies, and after the Death of her Siſter gave one Moiety to *B.* but ſaid nothing of the other, and named the Siſter and the Huſband Executors. And it was held that tho' the Deviſe was only during the Siſter's Life, and one of the next of Kin had no Legacy, yet it was ſuch a beneficial Legacy as would not ouſt the Huſband of the Moiety not given away; and it was ſaid, that a Legacy to exclude the Executor from the Surplus muſt raiſe a Preſumption that he was not to have it, or it does nothing. *Willes* and *Brady*, *MS. Rep.* (*b*).
(*b*) *Quære* Term and Year.

1. BY Stat. 22 & 23 *Car.* 2. *c.* 10. *ſ.* 4. the Surpluſage ſhall be diſtributed as follows: One Third to the Wife of the Inteſtate, the Reſidue among his Children, and ſuch as legally repreſent them, if any of them be dead, other than ſuch Children (*not Heirs at Law*) who ſhall have any Eſtate by Settlement of the Inteſtate in his Life-time equal to the other Shares.——Children, other than Heirs at Law, advanced by Settlements or Portions, not equal to other Shares, ſhall have ſo much of the Surplus as ſhall make the Eſtate of all to be equal.——But the Heir at Law ſhall have an equal Part in Diſtribution with the other Children, without any Conſideration of the Value of the Land which he hath by Deſcent, or otherwiſe, from the Inteſtate.

2. *Sect.* 5. If there be no Children, nor legal Repreſentatives of them, one Moiety ſhall be allotted to the Wife, the Reſidue equally to the next of Kin to the Inteſtate, in equal Degree, and thoſe who repreſent them.

3. *Sect.* 6. No Repreſentation ſhall be admitted among Collaterals after Brothers and Siſters Children.——And if there be *no* Wife, all ſhall be diſtributed among the Children; and if no Children, to the next of Kin to the Inteſtate, in equal Degree, and their Repreſentatives.

4. By the Stat. 29 *Car.* 2. *c.* 3. *ſect.* 25. it is enacted, That the Act of 22 & 23 *Car.* 2. *c.* 10. of Diſtributions, ſhall not extend to the Eſtates of *Feme Coverts* that die inteſtate, but that their Huſbands may have Adminiſtration of their perſonal Eſtates.——*Made perpetual* 1 *Jac.* 2. *c.* 17.

5. Where a Man makes an Executor, to whom he deviſes *all the reſt and Reſidue*, &c. and this Executor dies before the Teſtator, he that takes Adminiſtration *cum Teſtamento annexo* ſhall be liable to make

make Diſtribution of this Surplus within the Act of Diſtribution of Inteſtate's Eſtates. *Hil.* 1682. *Anon. Ca.* 94. cites it as ſo reſolved by Lord Keep. *North*, 2 *Freem. Rep.* 85.

6. By Stat. 1 *Jac.* 2. *c.* 17. *ſect.* 7. If, after the Death of a Father, any of his Children ſhall die inteſtate, without Wife or Children in the Life-time of the Mother, every Brother and Siſter, and their Repreſentatives, ſhall have equal Share with her.

7. By Stat. 1 *Jac.* 2. *c.* 17. *ſect.* 8. *Such Part of any Inteſtate's Eſtate within the City of* London *or* Province *of* York, *as any Adminiſtrator has, by Virtue only of being Adminiſtrator, ſhall be ſubject to Diſtribution as in other Caſes, and the Cuſtom ſhall not extend to it.* ——But the 4 & 5 *W. & M. takes away the Cuſtom of the* Province *of* York, *and gives Power to diſpoſe of their perſonal Eſtates by Will, but excepts the* Cities *of* York *and* Cheſter.——The Stat. 2 *Ann. c.* 5. *ſect.* 1. *repeals the Proviſo as to the* City *of* York.

8. *A.* poſſeſſed of a perſonal Eſtate and of Leaſes for Years, makes his Will, and thereby gives Legacies to every one of his Grandchildren, and likewiſe 10*l.* unto *Mount*, and made him his Executor, and died. There being no Diſpoſition of the perſonal Eſtate, the next of Kin exhibited their Bill to have a Diſtribution. Inſiſted, that the Executor cannot be a Truſtee for the next of Kin for the Reſidue of the Eſtate which is not diſpoſed of, ſince the Statute of Frauds, unleſs there had been a Declaration of the Truſt; and giving a Legacy to the Executor cannot alter the Caſe, becauſe there are Legacies alſo given to the next of Kin, which makes them equal. *Per Lord Chancellor*, the ſaid Statute doth not affect this Caſe; and altho' the next of Kin have Legacies given, yet a Legacy given to the Executor excludes him from having the Reſidue; therefore decreed a Diſtribution. *Note*; This Decree, upon a Re-hearing before the Lords Commiſſioners, was reverſed; and their Decree was ſet aſide in the Houſe of Lords, and this Decree affirmed. *Anon. MS. Rep.* (*a*).

This ſeems to me to be the Caſe of *Foſter* and *Munt*, 1 *Vern.* 473. and 1 *Vol. Abr. Eq.* 243. *Ca.* 1. tho' not ſo clearly reported.

(*a*) *Quære* Term and Year.

9. A Man made his Will, and deviſed all the *Reſiduum* of his perſonal Eſtate to *J. S.* and to his Wife, nevertheleſs *In Truſt* for his Wife, and made the ſaid *J. S.* and his Wife his Executors. After the making of this Will, and ſix Months before the Death of the Teſtator, the Wife died, and then the Teſtator died, and the next of Kin preferred a Bill againſt the Executor to have an Account of the perſonal Eſtate, and inſiſted upon it that *J. S.* was only a Truſtee, and had no Benefit intended him by the Teſtator. But *per tot' Cur'*, the Bill was diſmiſſed, for the Law had caſt it upon *J. S.* by being Executor, and there appeared no Intent of the Teſtator that it ſhould be otherwiſe. *Trin.* 1689. *Anon.* 2 *Freem. Rep.* 105.

10. *A.* deviſed in theſe Words, *I give to my Daughter* H. 1000*l. to be ordered and diſpoſed of by her, and for the Benefit of her Children, as ſhe pleaſeth, without giving an Account to any Body. H. died* and made *no* Diſpoſal. Defendant (her Huſband) took Adminiſtration, and the Children brought their Bill for this 1000*l.* And the ſole Queſtion was, Whether there was any Intereſt veſted in the Children by this Deviſe? For, if there was not, then it belonged to Defendant. The Cauſe was referred, and ſo the Court gave no Opinion, but ſeemed *doubtful* in the Caſe. *Mich.* 1689. *Hillier* and *Hillier*, 2 *Freem. Rep.* 110.

11. It was held, that where a Man makes a Will and an Executor, and the Executor dies, an Adminiſtrator *de bonis Non* ſhall not make Diſtribution, becauſe the Party did *not* die inteſtate, and ſo *not* within the Statute. *Hil.* 1696. *Anon. Ca.* 285. (*b*) 2 *Freem. Rep.* 212.

12. Where a Man dies, having made his Will and an Executor, and gives him any particular Sum, as 5 *l.* or 10 *l.* and makes *no Diſpoſition of the Reſidue*, there the *Reſiduum* ſhall be diſtributed to the next of Kin, becauſe, altho' he makes a Will, yet he is held to die inteſtate as to the *Reſiduum*. *Hil.* 1696. *Anon. Ca.* 285. (*b*) 2 *Freem. Rep.* 212.

13. *J. S.* having a Daughter and two Brothers, made his Will, and thereby gave 5 *l.* apiece to his Brothers, appointing, but made no Diſpoſition of the Surplus. On a Bill by the Daughter againſt the Executors for an Account of the Surplus, and tho' there were Proofs that the Teſtator intended his Executors ſhould have the Surplus, in regard that the Daughter had incurred her Father's Diſpleaſure by marrying againſt his Conſent, yet theſe being ſomewhat doubtful, it was decreed by Sir *J. Trevor*, and affirmed by Lord *Somers* upon an Appeal, that the Executors ſhould be but Truſtees as to the Surplus after their Legacies paid; and that ſuch Surplus ſhould go according to the Statute of Diſtribution (*a*). 20 *May* 1696. *Petit* and *Smith*, 1 *Will. Rep.* 79.

(*a*) And his *Lordſhip* ſaid, that *Equity did delight in Equality*, and that the Diſtribution according to the Statute was moſt agreeable to *natural* Juſtice. *Ibid.* 9.——On the Death of the Teſtator, the Daughter, as next of Kin, libelled in the *Spiritual* Court againſt the Executors to have the Reſidue of the perſonal Eſtate, it appearing (as was ſuggeſted) by the expreſs Legacies given to the Executors, that they were to have nothing farther; and in the Spiritual Court ſhe recovered a Sentence for the Reſidue of the perſonal Eſtate; from which the Executors appealed to the *Delegates*, and *now* moved in *B. R.* for a Prohibition to the ſame *Delegates*. And *per Holt*, C. J. the Daughter, not being *reſiduary* Legatee, can have no Pretence of ſuing for this *Surplus* in the Spiritual Court; on the contrary, the Teſtator's having appointed his Brothers Executors, is a Gift to them of the *Reſidue* after Debts and Legacies paid.—At Common Law, before the Statute ordered Adminiſtration to be granted, the Ordinary appointed Committees of the perſonal Eſtate, and in thoſe Times it was a Practice to compel ſuch Committees to diſtribute; but afterwards, when the Ordinary, by Virtue of the Act of 31 *Ed.* 3. *cap.* 11. granted Adminiſtration, this Adminiſtrator had *all* the Power of an Executor, and being in Nature of an Executor, it was adjudged that he was (*b*) not compellable to make Diſtribution, which being thought hard as to thoſe of Kin to the *Inteſtate* in equal Degree, the Statute of Diſtribution was made. So that what is ſaid in 2 *Inſt.* 33. "*that* "*an Executor or Adminiſtrator having paid all the Debts and Legacies, and Funeral Expences, is compellable to di-* "*vide amongſt the next of Kin*," ſeems not to have been thoroughly conſidered. But that the Point might be more ſolemnly ſettled, the Executors were ordered to declare upon a Prohibition, and afterwards, on Debate, a Prohibition was granted (*c*). *Ibid.* 7, 8, 9.——5 *Mod.* 247, 248. *W.* 3. *B. R.* S. C. ſays, a Prohibition was granted *Niſi*.—1 *Lord Raymond* 86. S. C. *accord*.—*Comb.* 378. S. C. *accord*.—*Comyns's Rep.* 3. S. C. ſays, the Court inclined that a Prohibition ſhould go. (*b*) *Vide* 1 *Lev.* 233.—*Cro. Car.* 62, 202.—*Hob.* 83.—1 *Will. Rep.* 41. *Blackborough* and *Davis*;—but more particularly, ſee the Caſe of *Edwards* and *Freeman*, 2 *Will. Rep.* 441. (*c*) The Prohibition was granted rightly, foraſmuch as the *Spiritual* Court, by compelling a Diſtribution, would effectually *compel the Execution of a Truſt*, which they cannot do. See this Reaſon given *per* Lord Chan. *Macclesfield*, in the Caſe of *Farrington* and *Knightly*, 1 *Will. Rep.* 544.

1 *Vol. Abr.* 245. *Ca. Eq.* 11. *Ball* and *Smith*, is *not* S. P.

14. An Infant *in Ventre ſamere*, at the Time of the Death of the Father, was held clearly, *per Lord Chancellor*, to be intitled unto a Share by the Statute of Diſtribution, for he is, in the *Eye of the Law*, a Child, and ought to be provided for as well as the reſt; and altho' it was *admitted* that a diſtributory Share is an *Intereſt veſted upon the Death of the Inteſtate*, even *before Diſtribution*, and *ſhall go to the Executor* or *Adminiſtrator of the Party*, altho' *he die before the Diſtribution*, yet that was not ſuch an Intereſt veſted in the Children born ſo as to deprive the *after-born* Child. *Mich.* 1698. *Ball* and *Smith*, 2 *Freem. Rep.* 230.

15. *A.* by Will gives the Plaintiff (who was his Couſin and Heir at Law of the *whole* Blood) 50 *l.* to buy him Mourning; gives ſeveral Eſtates to his Brothers of the *half* Blood in Fee, and ſeveral other Legacies, and alſo 5 *l.* apiece to Defendants to buy them Mourning; and then ſays, *all the reſt*, &c. *of my Manors*, &c. *Goods*, *Chattels*, &c. *and all other my real and perſonal Eſtate whatſoever*, *I give to* B. C. *and* D. (*the Defendants*) *whom I nominate and appoint Executors of this my Will*, *equally to be divided between them*, *to hold to them*, *their Heirs and Aſſigns for ever*. The Bill was to have the Surplus a

reſulting Truſt for Plaintiff the Heir, becauſe Defendants had Legacies given them; but decreed for the Executors, and affirmed *in Dom. Proc'*, *Eaſt.* 1699. *Donner* and *Bertie* (*a*), *MS. Rep.*

(*a*) *Prec. in Chan.* 94. S. C. *accord'* ſays, the Court held that if one can give away the Surplus of his Eſtate it is done *here*, and no Truſt for the Heir; and cited the Caſe of *Crompton* and *North* as a much *ſtronger* Caſe, and yet *held* no Truſt; and tho' a Legacy given an Executor may be an Argument againſt him *quoad* the Surplus, when *not* expreſsly given him, yet it can be no Argument at all when it is expreſsly given him. Alſo, the Plaintiff has a *Legacy given him*, and *not the Surplus*, which turns the Argument ſtrong againſt him. Says, the Decree was affirmed in the Houſe of Lords, that it was no Truſt for the Heir.

16. *J. S.* died *inteſtate*, having neither Wife nor Children; his next of Kin was *A.* a deceaſed Brother's Child, and to whom Adminiſtration was granted. The Perſons claiming Diſtribution were the Children of *J. S.*'s Brother's Son. And the Queſtion was, Whether the Inteſtate's Brother's Son's Children, being the Grand Nephew and Grand Niece of the Inteſtate, ſhould come in for a diſtributive Share with *A.* the Inteſtate's Niece, the Statute ſaying, *that the perſonal Eſtate, in Caſe there ſhall be no* Wife *or* Child, *ſhall go to the next of Kin of the Inteſtate, and their legal Repreſentatives*; after which comes a *Proviſo*, enacting, *that there ſhall be no Repreſentatives among Collaterals after Brothers and Siſters Children?* And a *Mandamus* to the Judge of the Spiritual Court, to make Diſtribution of the Stat. of 22 & 23 *Car.* 2. *c.* 10. was denied, the whole Court declaring, that among *Collaterals*, ſaving only in the Caſe of Brothers and Siſters Children, *Proximity* of Blood ſhould give Title to the perſonal Eſtate of the Inteſtate (*b*). *Trin.* 1700. *in B. R. Pett's Caſe*, 1 *Will. Rep.* 25.

(*b*) Sir *Walter Walker*, a famous *Civilian*, drew this Act for Diſtribution, and the only Queſtion now is, Whether the Words *Brothers and Siſters Children*, in the Proviſo, ſhall not be intended *Brothers and Siſters Children of the Inteſtate?* Now ſurely they ought to be ſo taken, for the *Inteſtate* is the Subject Matter of this Act; it is *his Eſtate*, his *Wife*, his *next of Kin*, his *Children*, and conſequently his *Brother's Children* that the Statute ſpeaks of; ſo that the *relative* Terms made uſe of throughout have the Inteſtate for their *Correlative*. The Intent of the Proviſo was to confine the Degrees of Repreſentation, that they ſhould not go beyond *Brothers and Siſters Children*. And if this Conſtruction has not already prevailed in the *Spiritual* Court, the Parties are at Liberty to *appeal*. *Per Holt*, C. J. *Ibid.* 27, 28. —*Et per Gould*, J. it has been always ſaid, the Statute ſhall *not* be taken in favour of Diſtributions. *Ibid.* 28. —*Comyns's Rep.* 87. *Pett* and *Pett*, *Trin.* 12 *W.* 3. S. C. *accord'* ſays, the *Mandamus* was denied for the Reaſons given in the laſt Caſe of *Raymond's Rep.*—1 *Lord Raymond's Rep.* 571. *Rex* and *Raines* or *Pett* and *Pett*, *Trin.* 12 *W.* 3. S. C. ſays, by the Opinion of the whole Court a *Mandamus* to the Spiritual Court to command them to compel the Adminiſtrator to make Diſtribution, was denied.—1 *Salk.* 250. S. C.—3 *Salk.* 138. S. C. —*Caſes in B. R. Temp. W.* 3. 409. *Pet* and *Pet*, S. C. ſays, the Words *(Brother and Siſter)* and *(Collateral)* in the Statute of Diſtribution, ought in all Reaſon to refer to the *Inteſtate*, for Inteſtates are the Subject Matter; and in this Court they would never hear Argument for Diſtribution before the Statute, but once in Conſideration to Sir *Francis Walcot* (*c*), who, finding it would not do, procured this Statute to be paſſed; and the *Proviſo* is, *that there ſhall be no Diſtribution in Collaterals beyond Brothers and Siſters Children*; and that muſt be *Brothers and Siſters Children of the Inteſtate*. *Per Cur'*, upon Debate upon a Motion for a *Mandamus*. *Ibid.* 410.— By the Stat. of 22 & 23 *Car.* 2. there ſhall be no Diſtribution amongſt *Collaterals* after *Brothers and Siſters Children of the Inteſtate*; for that Statute is a *Reſtraint* on the *Common Law*, and therefore ſhall not be carried farther than the Letter, and after ſuch Collaterals it ſhall go to the next of Kin to the *Inteſtate*. *Per Cur'* in S. C. 3 *Salk.* 138. (*c*) *Quære* If it ſhould not be Sir *Walter Walker?* Sir *Walter* had Liberty to argue in *C. B.* for the Power of the Spiritual Court in granting Diſtributions; and after he had argued for three Hours, *Bridgman* C. J. inclined in Opinion to Sir *Walter*, but the other Judges oppoſed it, and it never obtained in *Weſtminſter-Hall*, but Prohibitions were granted upon the firſt Motion, and then he procured the Act. *Per Holt*, C. J. in S. C. 1 *Lord Raym. Rep.* 574.—And *per Gould*, J. the Words in this Clauſe upon which the Plaintiffs rely, are, *their Repreſentatives as aforeſaid*, which muſt mean what they are allowed to mean in the *Proviſo*, and then it will ſtand upon the Words of the Proviſo. And *per Holt*, C. J. in *Tracy*'s Caſe, a Prohibition was granted, and after a Conſultation was awarded upon great Debate. *Ibid.* 574.—*Vide* 2 *Vern.* 168. *Becton* and *Darking et econt'*, and 1 *Vol. Ab. Eq.* 245. *Ca.* 4. but more particularly the Caſe of *Bowers* and *Littlewood*, *P. Ca.* of this Work.

17. *J. S.* deviſed to *A.* and *B.* his Wife's Children (as he called them, not owning them to be his) 10 *s.* apiece and no more, and gave the Children which he owned conſiderable Legacies; then he deviſed Legacies to his Executors, but did not mention them to be for their Care and Pains, or any thing to that Purpoſe. Decreed that the Executors ſhould not have the Surplus, but that it muſt be diſtributed, and that the Children which the Teſtator did not own ſhould come

come in for a Share, for the Words of Excluſion are not plainly expreſſed, and ſhall be taken ſtrictly in this Caſe. *Trin.* 1701. *Vachell* and *Jefferies*, *Prec. in Chan.* 169.

1 *Salk.* 251. S. C.—*Caſes in B. R. Temp. W.* 3. S. C. —1 *Lord Raym. Rep.* 684,686. S.C. ſays, the Court held that the *Grandmother* was as near as the *Aunt*, for in this Caſe in Deſcent of Lands it would be a *mediate* Deſcent, and the ſame *Medium* to both, *viz.* the Father.

18. *A.* dies *inteſtate*, leaving *a Grandmother* and *an Aunt* his next of Kin. Adminiſtration was granted to the *Grandmother*. The *Grandmother* is nearer of Kin to the Inteſtate than the *Aunt*, for the Aunt is not of Kin to the Inteſtate but as ſhe derives her Kindred from the *Grandmother* her Mother, and therefore not in equal Degree; beſides, where one is *Lineal*, and the Cauſe of the Kin, and the other *Collateral*, the Perſon who is *Lineal* ſhall be preferred; here the *Grandmother is* the Root of the Kindred, and ſo muſt be nearer than they that derive their Relation from her. *Per Holt*, C. J. And *per tot' Cur'*, a Motion for a *Mandamus* to the Spiritual Court, commanding them to grant Adminiſtration to the *Aunt* as more near of Kin than the *Grandmother*, was denied. *Eaſt.* and *Hil.* 1701. *Blackborough* and *Davis*, 1 *Will. Rep.* 41.

And the *Grandmother* ſeems to have the Advantage, becauſe ſhe is of the *right* Line, the *Aunt* of the *Collateral* Line; and Sir *B. Shower* cited a Caſe between *Burton* and *Sharpe* the laſt *Trinity* Term, where an Adminiſtration was ſued to be granted to the *Great Grandmother*. And the *Aunt* moved for a Prohibition in the Common Pleas to ſtay the Suit in the Spiritual Court, and it was denied. *Ibid.* 686.

19. If a *Child had died inteſtate, without Wife, Child* or *Father*, living only the *Mother*, the *Mother* had the whole 'till 1 *Jac.* 2. excluſive of the *Brothers* and *Siſters*, and there muſt be the ſame Law now, as to the Grandmother with relation to the Aunts; the *Father ſurviving* has the Child's whole Eſtate at this Day. *Per Holt*, C. J. *Ibid.* 48.

20. The Stat. of 1 *Jac.* 2. allowed the Proceedings of the *Spiritual* Court to be right as the Law *then* ſtood, but thought it *unreaſonable* that the Mother (who might marry again) ſhould carry away all, and therefore the Parliament let in the *Inteſtate's Brothers* and *Siſters* equally with the Mother, but ſtill the *Father has all.* If the *Spiritual* Court ſince the Stat. of *Car.* 2. ſhall attempt a Diſtribution contrary to the Rules of the Common Law, we will *prohibit* them, for by that Statute they are reſtrained to the Rules allowed among us. *Per Holt.* C. J. *Ibid.* 49.

21. It appears from *Ridley's View of the Civil Law*, (*P.* 63.) that the *Grandmother*, *&c.* of the *aſcending* Line to the *utmoſt* Degree was anciently preferred before the *neareſt* Collaterals, but that may be now altered by the Stat. of *Car.* 2. which prefers the next of Kin *tho' Collateral*, before one *tho' Lineal*, that is more remote. *Per Holt*, C. J. *Ibid.* 51.

2 *Freem. Rep.* S. C. and P. decreed *accord'* by *Lord Keeper.*

22. *J. S.* having made his Will, and his Wife Executrix, gave 1000 *l.* apiece to his Daughters, and ſome Jewels and other Things to his Wife; and one Queſtion was, Whether the Wife ſhould have the whole *Surplus* as Executrix; for, altho' it was agreed that as the Law is now ſettled ſince the Caſe of *Foſter* and *Munt*, that where a particular Legacy is given, and no Diſpoſition of the *Surplus*, there ſhall be a Diſtribution; yet, in the *principal* Caſe, it was inſiſted upon that ſo near a Relation as the Wife being Executrix, it could not but be ſuppoſed the Teſtator intended her ſome Benefit by making her Executrix. But decreed, that ſhe having a particular Legacy given her, ſhe ſhould diſtribute the Surplus; and ſo, it was ſaid, it had been already ſettled, even in the Caſe of a Wife Executrix, in the Caſe of *Randall* and *Bookey* (*a*), *Mich.* 1702. *Pawlett et Ux'* and *Lady Morley et al'*, *MS. Rep.*

(*a*) *Vide* 2 *Vern.* 425. *Eaſt.* 1701. —*Prec. in Chan.* 162.—And 1 *Vol. Abr. Eq.* 272. *Ca.* 4.

23. *J. S.*

23. *J. S.* deviſed the *Uſe of his Houſhold Goods to his Wife during her* Widowhood, and made *her Executrix during her Widowhood*, and if *ſhe ſhould die* or *marry*, he appointed his *Son* and *Heir to be Executor*, and deviſed ſome Curioſities and Rarities to remain as *Heir-Looms* in his Family. And Lord Keep. *Wright* was of Opinion, that the Wife ſhould have the Surplus, *ſhe having but a limited Executorſhip*; and tho' this Court has diſtributed the Surplus where the Executor has a Legacy, on a ſuppoſed Intention of the Teſtator that he intended him no more, yet *here* it cannot be intended ſo, as to *exclude the Heir when his Executorſhip ſhall take Place*; for, as to the *Heir-Looms*, that appears to be given to another Intent, and not to exclude him from the Surplus; neither ſhall the Wife, in this Caſe, be excluded. *Mich.* 1706. *Hoſkins* and *Hoſkins*, *Prec. in Chan.* 263.

24. I give *to my Daughter* A. *all my Goods and Plate*, 1500 l. *to my Son* B. *and* 10 l. *and no more, to my Son* W. *and* 10 l. *and no more, to my Wife's Daughter* P. and made *C.* and *D.* Executors, and gave them 100 *l.* each, but makes no Diſpoſition of the Reſidue. Decreed that it ſhall go in a Courſe of Adminiſtration; but Decree reverſed, for it is plain that *W.* and *P. were to have* 10 l. *and no more. Mar.* 8, 1706. *Vachel* and *Breton*, *Vin. Abr.* Tit. *Executors*, (Z. 11.) *Ca.* 16.

25. *A.* deviſes 500 *l.* apiece to *B.* and *C.* payable at twenty-one. *B.* dies an Infant and inteſtate, and then *D. B.*'s Father, dies without taking Adminiſtration to *B.* his Son. Decreed *per Cur'*, that 500 *l.* Legacy deviſed to *B.* be diſtributed amongſt his Mother, Brothers and Siſters, equally (*a*). *Trin.* 1706. *Grice* and *Goodwin*, *Prec. in Chan.* 260.

(*a*) But upon a Bill of Review to reverſe this Decree, it was aſſigned for Error, that on the Death of *B.* in the Life-time of *D.* his Father, this Legacy veſted in *D.* by the Statute of Diſtribution; tho' he took not out Adminiſtration to him, and therefore ought not to have been diſtributed as *B.*'s *perſonal* Eſtate, but as the *perſonal* Eſtate of *D.* the Father, and then the Mother would be intitled to a Third of it. And this was held *per Cur'* to be an Error appearing in the Body of the Decree; ſo the Decree was opened. *Ibid.* 260, 261.

26. If a Man be declared Executor, this of itſelf gives him an Intereſt in the perſonal Eſtate, and he ſhall have the whole; but *if Part* of that Eſtate *be deviſed to him*, it will exclude him as to the reſt, and he ſhall have no more than ſo deviſed. *Per* Lord Chan. *Cowper*, *Eaſt.* 6 *Ann. Vin. Abr.* Tit. *Executors*, (O. b.) *Ca.* 21.

27. Where a Perſon, intitled to a diſtributory Share of an Inteſtate's Eſtate, died within a Year after the Inteſtate, in ſuch Caſe, tho' by the Statute no Diſtribution is to be made *within* a Year, yet the Share of the deceaſed Perſon will be an Intereſt veſted, *tranſmiſſable to his Executors* or *Adminiſtrators*; for *in this Senſe* the Statute makes a Will for the Inteſtate, and it is as if a *Legacy was bequeathed payable a Year hence*, which would *plainly be an Intereſt veſted preſently*; nay, where one died without Wife or Iſſue, and Inteſtate leaving a Father, who alſo died before taking out Adminiſtration, or altering the Property of the Eſtate, tho' in that Caſe there was only one who could claim as next of Kin, and ſo, *literally* and *ſtrictly* ſpeaking, there could be no *Diſtribution*, yet by the Statute the Right to the Inteſtate's perſonal Eſtate veſted in the Father, and conſequently belonged to *his* Executors or Adminiſtrators, and not to the next of Kin to the firſt Inteſtate, who in ſuch Caſe happened to be a different Perſon (*b*). *Per* Lord Chan. *Cowper*, *Hil.* 1708. *Grice* and *Grice*, 3 *Will. Rep.* 49, 50. in a Note.

(*b*) *Note*; Mr. *Vernon*, upon this Occaſion, told the *Reporter* it had been twenty Times determined in Equity, that where there is only *one* Perſon intitled to take the perſonal Eſtate of the Inteſtate as next of Kin, the Statute veſts the Right in that Perſon, making him as a Legatee of the Party deceaſed. *Ibid.* 50.

28. *A.* made *B.* and *C.* his Executors, and deviſed Legacies to *B.* and not to *C.* but made no Diſpoſition of the Surplus of his perſonal Eſtate. Lord Keep. *Harcourt* decreed that the Executors ſhould come in equally for their Share of the Surplus, notwithſtanding theſe ſpecifick Legacies to one Executor. *Hil.* 1711. *Coleſworth* and *Brangwin et al'*, *Prec. in Chan.* 323.

29. A Legacy of 500 *l.* being left to an Executor, without any expreſs Diſpoſition of the Surplus, but there was ſtrong Proof that the Teſtator intended him the Surplus, on a Bill brought by the next of Kin againſt him for a Diſtribution, the Executor anſwers, and waves the Benefit of the Surplus by Miſtake of the Law in that Point, and admitted himſelf accountable for the Surplus; but being a Creditor upon an open Account, he inſiſted that he ought to have his Legacy over and above his Debt. But, upon better Information, he prayed to amend his Anſwer as to the waving the Surplus, which was denied by Sir *J. Trevor* Maſter of the Rolls, but his *Honour* decreed the Legacy over and above the Debt. And on Appeal, *Cowper* C. ſaid, that he would not, againſt his own Confeſſion, decree the Surplus for him. *Mich.* 1715.——But in *Eaſter* Term 1718, the Cauſe coming before Lord Chan. *Parker*, his *Lordſhip* ſaid, he could not but incline to help the Defendant, who, by *Miſtake* or *Miſ-advice*, was in a way of loſing his Right; therefore, if Plaintiffs would bind the Defendant by his Anſwer, they ought to take it in the Terms in the Anſwer, (*viz.*) the Executor waves the Surplus, but inſiſts upon the Debt and Legacy; and decreed him both, even tho' by the Maſter's Report it appeared that the Legacy was much greater than the Debt. *Eaſt.* 1718. *Rawlins* and *Powell*, 1 *Will. Rep.* 297.

30. Lord *Cowper* was of Opinion, upon the Stat. 22 & 23 *Car.* 2. *c.* 10. *ſect.* 4. that the Word (*Portion*), *with reſpect to younger Children*, did *include an Eſtate in Land as well as in Money*, and that this Land, in the Computation of the Eſtate to be diſtributed, was to be added to, and computed with other Parts of it; but with reſpect to the eldeſt Son, whatever Land came to him from his Father by Deſcent, or otherwiſe, he is to have his Share, without any Conſideration of the Value of ſuch Land, *&c.* *Hil. Vac.* 1715. *Lloyd* and *Twitſham*, *Vin. Abr.* Tit. *Executors*, (Z. 10.) *Ca.* 3.

Prec. in Chan. 401. *Roach* and *Hammond*, S. C. *in totidem verbis.*

31. *A.* deviſed his *perſonal* Eſtate to *B. for the Uſe of his Relations*, without ſpecifying any in particular, or uſing any other Words, and makes *B.* his Executor in 1706, and died. The Mother and three Siſters of the Teſtator brought this Bill as neareſt Relations, for a Diſcovery and Account of the *perſonal* Eſtate, and to come in according to the Courſe of Diſtributions, ſettled by 1 *Jac.* and 2 *Car.* It was agreed to be the Rule in Conſtruction of ſuch Deviſes to Relations, that thoſe who would by the Statute of Diſtributions be intitled to the *perſonal* Eſtate in Caſe the *Teſtator* had died *inteſtate*, ſhould, upon ſuch general Deviſes, be let into the ſame Proportion only; and Lord Chan. *Cowper* ſaid, he thought it the beſt Meaſure for ſetting Bounds to ſuch *general* Words, and that it had been often ruled accordingly in this Court. *Eaſt.* 1715. *Anon. MS. Rep.*

32. *A.* on Shipboard, intitled to Part of a conſiderable Leaſehold Eſtate, which he knew not that he had any Right to, made his Will at Sea, and deviſed to his Mother (if living) his Rings, and makes *A.* his Executor, and deviſes to *A.* his red Box, and all Things elſe, not before bequeathed. *Trevor*, Maſter of the Rolls, decreed the Executor a Truſtee for the Surplus for Teſtator's Brothers and Siſters, but held that the Rings, *&c.* given to the Mother, were lapſed Legacies,

ſhe dying in Teſtator's Life-time, and muſt fall to the Executor. *Hil.* 1715. *Cook* and *Oakley*, *Will. Rep.* 302.

33. *Children* and *Grandchildren* muſt take *per Capita* and not *per Stirpes*, they all taking in their own Right, and not by way of Repreſentation. *Per* Sir *John Trevor* Maſter of the Rolls, *Hil.* 1716, in the Caſe of *Northey* and *Strange* (*a*), 1 *Will. Rep.* 340, 343. (*a*) *Vide P. Ca.*

34. *A. dies inteſtate without Brother or Siſter, his Mother living*; ſhe makes her Will, and makes *B. her Executor and reſiduary Legatee, and dies within a Week after her Son*, and *before ſhe had taken out Adminiſtration to him.* The *Brother of the Mother takes out Adminiſtration to the Son*, as his Uncle and next Friend. The *Mother's Executor* brings a Bill againſt the Uncle and the Son's Adminiſtrator *to have an Account of the perſonal Eſtate of the Son in Right of his Teſtatrix, who was intitled to it by the Statute of Diſtribution. Cowper* C. ſaid, that the Adminiſtrator of the Son is only Truſtee for the next of Kin to the Inteſtate, who are intitled to a Diſtribution by the Statute; and that in this Caſe was the Mother, the Son dying without Father, Brother or Siſter, and this *is an Intereſt veſted in the Mother, tho' ſhe died before Adminiſtration taken out to the Son*, and ſhall go to the *Executor* and *reſiduary Legatee.* And decreed accordingly for the Plaintiff. *Trin.* 2 *Geo. Jackſon* and *Proudehome*, *Vin. Abr.* Tit. *Executors*, (Z. 12.) *Ca.* 1.

35. A. *deviſeth to* J. *his Daughter a Legacy, and declares it to be in full of every Thing ſhe could claim out of his Eſtate*, and *then makes a Deviſe of the* Reſiduum, *who, dying in his Life-time, he, by a Codicil, makes a Deviſe of his* Reſiduum *to his Wife* F. *to be diſpoſed of by her with the Approbation of the Truſtees*; *A.* dies, *the Wife gives the* Reſiduum *by her Will* without *the Truſtees*, &c. *Cowper* C. ſaid, the Wife not obſerving the Terms preſcribed to her, this is to be taken as if the Teſtator had made no Diſpoſition thereof; and he dying inteſtate, it ſhall go in a Courſe of Diſtribution. Secondly, That *J.* here ſhall have her Share notwithſtanding the excluſive Words, for this is a new Right accruing by the Codicil *thro'* an Antecedent after the Will, of which the Teſtator had not then any View or Proſpect; but he argued a Caſe up and determined in the Houſe of Lords, where *a Man deviſed* 1 s. *and no more, to one of his Children, and died inteſtate as to the* Reſiduum, that theſe Words (*and no more*) excluded that Child from having any Share, contrary to an Opinion declared by the *Maſter of the Rolls. Mich.* 3 *Geo.* 1. *Sympſon* and *Hutton*, *Vin. Abr.* Tit. *Executors*, (Z. 7.) *Ca.* 16.

36. Lord Chan. *Parker* ſaid, he was not ſatisfied with that Notion, that a Legacy to an Executor excludes him from the *Surplus*, and therefore, had not the Executor ſubmitted to account for the Surplus, his *Lordſhip* ſaid, he knew not whether he ſhould have decreed him to account for it. *Eaſt.* 4 *Geo.* 1. ——— and *Mortimer Powell* (*b*), (*b*) *Vide P. Ca.* *Lucas's Rep.* 400.

37. *J. S.* died *inteſtate*, leaving no *Wife* or *Child*, *Brother* or *Siſter*, but his next of Kin were an *Uncle by his Mother's Side*, and a *deceaſed Aunt's Child.* The *latter* brought a Bill againſt the *Uncle* for a Share of Inteſtate's Eſtate, to which Defendant demurred, and Demurrer allowed (*c*). *Per* Lord Chan. *Parker*, *Mich.* 1719. *Bowers* and *Littlewood*, 1 *Will. Rep.* 594. (*c*) His *Lordſhip* ſaid, *Pett's* Caſe, (*P. Ca.*) was in Point, and he apprehended this Matter to have been ſettled, and that the Practice in the *Spiritual* Court had been conformable thereto. That what had been urged in regard to the Hardſhip of the Caſe, was nothing; for ſo it may ſeem hard, that if an Inteſtate leaves a deceaſed Brother's only Son, and ten Children of a deceaſed Half-Siſter, the ten Children ſhall take ten Parts in eleven with the Son of the deceaſed Brother, and yet the Law (*d*) is ſo, becauſe they all take *per Capita*, and *not* by way of Repreſentation. *Ibid.* 594. (*d*) *Vide* the Caſe of *Walſh* and *Walſh*, *P. Ca.* determined by Lord *Somers* on great Deliberation.

38. *J. S.*

38. *J. S.* (*inter al'*) bequeathed the *Surplus* of his perſonal Eſtate to four Perſons, *A. B. C.* and *D.* equally to be divided Share and Share alike, and made *E.* his Executor in Truſt. *D.* died in the Life-time of *J. S.* and then the Teſtator *J. S.* died. Lord *Macclesfield*, after Time taken to conſider of it, held that this Legacy of a fourth Part to *D.* became void, and was as ſo much of the Teſtator's Eſtate (*a*) *undiſpoſed* of by the Will, and could not go to the Survivors, becauſe each of them had a fourth Part deviſed to them *in Common*, and *D.*'s Death could not avail them as it would have done had they been all *joint Legatees*; and this Share could not go to *E.* (*b*) he being but a bare Executor in Truſt, and conſequently that it muſt go to *J. S.* his next of Kin, according to the Statute of Diſtribution, as ſo much of the perſonal Eſtate remaining undiſpoſed of by the Will, and that as to this *E.* was a Truſtee for ſuch next of Kin. *Trin.* 1721. *Bagwell* and *Dry* (*c*), 1 *Will. Rep.* 700.

(*a*) *Vide* the Caſe of *Lord Bindon* and *Earl of Suffolk*, 1 *Will. Rep.* 96.

(*b*) *Vide* the Caſe of *Page* and *Page*, *P. Ca.* ſame Determination.

(*c*) See this Caſe cited in *Farrington* and *Knightly*, *Prec. in Chan.* 567. but the Report *there* is not warranted by the Regiſter's Book. *Vide* 1 *Will. Rep.* 701.

39. *J. S.* by Will gave 50 *l.* to his Brother *B.* and 50 *l.* to his Nephew *C.* and made them Executors, and gave 20 *s.* apiece to others of his Relations, ſeveral of whom were his *Brothers*, *Nephews* and *Nieces*, *and as ſuch his next of Kin in equal Degree within the Statute of Diſtribution*; after which the Teſtator abruptly broke off without ſaying *in Witneſs whereof*, &c. or making any Diſpoſition of the Surplus, which amounted to about 1200 *l.* All the Will was wrote with the Teſtator's own Hand, tho' not ſigned by him, and was proved in the *Spiritual* Court as his Will. And *Parker* C. each Party having attended his *Lordſhip* with Precedents, and having taken Time to conſider of them, held that here being an expreſs Legacy of 50 *l.* to each of the Executors, and no Diſpoſition of the Surplus of the perſonal Eſtate, the Executors were but Truſtees with reſpect to the Surplus, which muſt go to the next of Kin according to the Statute of Diſtribution. *June* 10, 1721. *Farrington* and *Knightly*, 1 *Will. Rep.* 544, 555.

Prec. in Chan. Trin. 1721. S. C. ſays, it was ſo decreed *per Lord Chancellor*, on View and Conſideration of all the Precedents; and adds, that his *Lordſhip* was clear of Opinion that the Executors in *theſe* Caſes were but *Truſtees*; that if the Teſtator intended them the Surplus, could he not have eaſily have ſaid ſo; that to give them the ſame Thing twice over would be abſurd, for the Legacies muſt come out of the Surplus; that ſince the Statute of Diſtribution, the Succeſſion to the perſonal Eſtate was as much eſtabliſhed as the Succeſſion to the real Eſtate was before; that becauſe they are made Executors, they therefore muſt have the Surplus to their own Uſe, would be to conſtrue the Will but a Rule, which probably the Teſtator did not underſtand, for he might be ignorant of the Import of the Word Executor, or never intend, by making them ſuch, to give them his perſonal Eſtate; that here it would be the more unreaſonable, becauſe they had Legacies given them.——*Lucas's Rep.* 442. *Trin.* 5 *Geo.* 1. S. C. ſays, his *Lordſhip* took further Time to conſider of his Decree. *Ibid.* 443. *Sed Quære*, For the other two Reporters take no Notice of this.

40. *J. S.* made two Executors, and gave them ſpecifick Legacies, and by his Will deſired them to be kind to *A. his old Servant*, *and to give her ſome ſmall Pieces of Furniture then in his Houſe*, *if ſhe deſired it.* Decreed that the Executors ſhould have the Reſidue (after Debts paid) free from *Diſtribution*, it being the apparent Intent of the Teſtator it ſhould be ſo; for otherwiſe they could not be kind to his old Servant, or give her any Part of his Furniture if it were not theirs to give, and if he left them no Aſſets for that Purpoſe, ſo that thoſe Words are explanatory of what the Teſtator intended. Bill diſmiſſed. *Trin.* 1722. *Heron* and *Newton* at the Rolls, 2 *Mod. Caſes in Law and Eq.* 11.

41. *A.* having 10,000 *l.* in Money, by Will gave pecuniary Legacies to every Brother and Siſter and Half Brothers and Siſters, and to *B.* her eldeſt Brother 500 *l.* *and made him Executor*, but *made no Diſpoſition*

Diſpoſition of the Surplus. Lord Chan. *Macclesfield* admitted *parol* Evidence of the Intent and Declaration of the Teſtator touching the *Surplus*. *Hil.* 1723. *Duke of Rutland* and *Dutcheſs of Rutland*, 2 *Will. Rep.* 210.

42. Where an Executor *hath no ſpecifick Legacy deviſed to him, he ſhall have the* Reſiduum *of the perſonal Eſtate, after Debts and Legacies paid. Trin.* 9 *Geo.* 1. *Hutchinſon et al'* and *Vincent*, 2 *Mod. Caſes in Law and Eq.* 27.

An Executor hath *certainly* the whole and entire Right to the Teſtator's perſonal Eſtate, both in Law and Equity, unleſs, upon the Face of the Will, it appears by ſome Indications that the Teſtator intended to the contrary, as by giving him a ſpecifick Legacy; for, by ſuch a Deviſe, it appears that he intended him no more; and this was laid down as a Rule when Lord *Jefferies* was Chancellor, and with good Reaſon, and hath been a ſtanding *Rule* in the Court ever ſince (with ſome little Variations and Exceptions from the Circumſtances of Caſes) to exclude the Executors. *Per Cur'*. *Ibid.* 28.

43. *A.* by Will gives his Executor 5 *l. for his Care in performing the Will*, and makes no Diſpoſition of the Surplus; but *parol* Proof made of the Intention and Direction of the Teſtator to the *Scrivener*, that the Executor ſhould have the Surplus; yet the Surplus decreed to the next of Kin. *Trin.* 1723. *Vide* the Caſe of *Rachfield* and *Careleſs*, 2 *Will. Rep.* 158.

2 *Mod. Caſes in Law and Eq.* 9. S. C. under the Name of *Raſhfield* and *Careleſs*, ſays, the 5 *l.* was given to the Executor for *the Care and Pains he might take in fulfilling the Truſt* in the Will.

44. One died *inteſtate*, leaving a *Grandfather by the Father's Side* and a *Grandmother by the Mother's Side*, his next of Kin; theſe *Grandfather* and *Grandmother* ſhall take in equal Moieties by the Stat. *Car.* 2. as being *in equal Degree*, for tho' the Grandfather by the Father's Side may, in ſome Reſpects, be more worthy of Blood, yet *here* Dignity of Blood is not material, in regard the *Brother of the* (*a*) *Half Blood ſhall take equally with the Brother of the whole Blood*; and Sir *Joſ. Jekyll* was ſo clear as to this Point, that he would not ſuffer it to be debated. 1 *Will. Rep.* 53. cites it as the Caſe of *Moor* and *Barkam*, 13 *May* 1723, at the Rolls.

(*a*) *Caſes in Parliament* 108. *Carth.* 51.

45. *J. S.* having a Siſter his next of Kin, deviſed 100 *l. per Annum* to her for Life out of his *Bank Stock*, and the Reſidue of his Bank Stock to his Executor (who did not appear to be any Relation to him) and alſo deviſed the Furniture of his Houſe to him, giving an expreſs Legacy of a Sum of Money to his ſaid Siſter. *King* C. held, that if the expreſs Legacy to the Executor be allowed to exclude him from taking the Surplus, by the ſame Reaſon the expreſs Legacy to the next of Kin will bar her likewiſe; and then, here being *Excluſion againſt Excluſion*, the Law muſt take Place, and the Executor have the Surplus *as Executor*; and decreed accordingly, tho' Mr. *Lutwyche* ſaid, this would ſhake many Precedents. *Hil.* 1725. *Attorney General* and *Hooker*, and *Somner* and *Hooker*, 2 *Will. Rep.* 338.

His *Lordſhip* ſaid, he could wiſh that an Act of Parliament was made to reduce this Point to a Certainty, for if it were once ſettled either Way, it would be well enough. *Ibid.* 340.

46. A Will was begun, and ſeveral Legacies were given to the next of Kin, and alſo to the Executors, and then at the Beginning of the next Sentence the Will ſtopt, and was left unfiniſhed. And *per Lord Chancellor*, the Teſtator having given the Executors a Legacy, it is moſt likely he would have given away the Reſidue from them, and therefore decreed the *undiſpoſed Reſidue* to be diſtributed according to the Statute of Diſtributions. *Hil.* 12 *Geo.* 1. *Knewell* and *Gardiner*, *Gilb. Eq. Rep.* 184.

47. The Intent of the Statute of 1 *Jac.* 2. *cap.* 17. *ſect.* 7. was plainly to put the Mother in the ſame State and Condition with the Collaterals, who before ſtood on the ſame Footing with the Father, ſo that whenever ſhe is intitled they ſhall have an equal Share with her. *Per Cur'*, *Eaſt.* 12 *Geo.* 1. *Keilway* and *Keilway*, *Gilb. Eq. Rep.* 190.

48. If one dies without a Wife, leaving Children, they have the whole; if without Children or Wife, leaving a Father, then ſuch Father has the whole; if no Father but a Mother, then to the Mother and next of Kin; if without Child, but a Wife and a Father, it goes in Moieties between the Wife and the Father; if no Father but a Mother, then that Moiety, *viz.* the Moiety remaining after the Wife's Moiety, between the Mother of the Inteſtate and his next of Kin, as Brothers and Siſters, Nephews and Nieces, the Repreſentatives of the deceaſed Brother. *Per Cur'*, *Eaſt.* 12 *Geo.* 1. in the Caſe of *Keilway* and *Keilway* (*a*), *Gilb. Eq. Rep.* 190.

(*a*) *MS. Rep.* S. C. ſtates it thus: *J. S.* died inteſtate, *leaving a Wife and no Child*, and *leaving a Mother, three Brothers and a Siſter, and two Nieces, the Children of a deceaſed Brother*, and poſſeſſed of a perſonal Eſtate. And the Queſtion being touching the Diſtribution thereof, it was admited *per omnes*, that the *Inteſtate's Wife* was to have *one Moiety* of his perſonal Eſtate by the Stat. 22 & 23 *Car.* 2. *cap.* 10. ſo that the only Difficulty was as to the remaining Moiety, whether the *Inteſtate's Mother*, as the next of Kin, ſhould have it, or whether the Teſtator's *Brothers* and *Siſter*, &c. ſhould come in for their Shares *equally with the Mother?* Objected for the Mother, That by the Statute of Diſtribution the Mother, as next of Kin, was intitled to this remaining Moiety juſt as the Father would have been, and that the Brothers and Siſter, &c. could not be thought to be of equal Degree of Kindred to the Inteſtate with the Mother; to which the Court agreed. Then it was inſiſted that this Caſe was *not* within the Stat. of 1 *Jac.* 2. *cap.* 17. *ſect.* 7. but reſted upon that of Diſtribution, *Car.* 2. by which the Mother, as next of Kin, took one Moiety, and the Wife would be intitled to the other; but Lord Chan. *King* decreed contrary; holding the Intention of the Stat. of *Jac.* 2. to be that in every Caſe where after the Death of the Father the Child dies without Iſſue, if there be no Wife the Child's Brothers and Siſters ſhall come in equally with the Mother as to the whole, and that where the Mother before that Statute came in for Half, there the deceaſed Child's Brothers and Siſters ſhall now come in for a Share of that Moiety, and that as the Intention of the Stat. of *Jac.* 2. was in *Prejudice* of the Mother, ſo, in the *principal* Caſe, the Words were plainly againſt her, they being, "*That if after the Death of the Father any of the Children ſhall die without Wife or Children, then* "*the Brothers and Siſters*, &c. *ſhall have their Share with the Mother.*" Now here one of theſe Contingencies has happened, and therefore the *Brothers* and *Siſters* ſhould come in with the Mother.——2 *Will. Rep.* 343. *Eaſt.* 1726. *Keylway* and *Keylway*, S. C. *in totidem verbis*, with *MS. Rep.* and adds, that *Lord Chancellor* admitted that if the *Inteſtate ſhould have a Child* and *no Wife*, and *a Brother and Mother*, in ſuch Caſe neither the Brother nor Mother would have any Part, but the *Child ſhould take all*, becauſe originally the *Lineal Deſcendants* the Children, ſhould be preferred before the *Lineal Aſcendants* the Father or Mother, and the *Lineal Aſcendants* the Father and Mother ſhould be preferred to *Collateral Deſcendants* the Brother and Siſter; but this being altered by the 22 & 23 *Car.* 2. (*b*) his *Lordſhip* decreed that the *Mother* of the *Inteſtate* J. S. ſhould come in for no more than her Share of the Moiety of the perſonal Eſtate with the *Inteſtate's Brothers* and *Siſter*, and the *two Nieces* the *Repreſentatives of the deceaſed Brother*. *Ibid.* 346. The Reporter ſays, by way of *Note*, that this Caſe was affirmed to be Law by Lord Chan. *Hardwicke* in the Caſe of *Stanley* v. *Stanley*, 15 *May* 1739. *Ibid.* 347.—— S. C. cited *arg'* 1 *Abr. Eq.* 253.

(*b*) Before this Statute they diſtributed firſt among the *Lineal Deſcending Line* as Children, then they took the *Lineal Aſcending Line* as Father and Mother, and *then the Collateral Line* as Brothers and Siſters.—*Per Cur'*, in S. C. *Gilb. Eq. Rep.* 189.

49. An Eſtate *pur auter vie*, when limited to Executors, is a *perſonal* Eſtate, and as ſuch diſtributable (*c*) within the Statute of Diſtribution. Cited *per Talbot* Solicitor General, *Mich.* 1726, in the Caſe of the *Duke of Devon* and *Atkins* (*d*), to have been ſo decreed by Lord *Cowper*, 2 *Will. Rep.* 382.

(*c*) *Vide* 2 *Salk.* 464. and *Carth.* 376. *Oldham* and *Pickering* in *B. R.* ſays, *ſuch* an Eſtate is *not* diſtributable by the Stat. 22 & 23 *Car.* 2. *cap.* 10.—However, tho' in the *Spiritual* Court an Eſtate *pur auter vie* be *not* diſtributable on account of its being a *Freehold*, yet it ſeems as if in a Court of Equity it ſhould be diſtributable, and that the Adminiſtrator ſhould be taken to be a Truſtee for general Legacies, if any; and if no Will, then for the next of Kin: And as the Adminiſtration may be granted to one only as principal Creditor, he ought not to go away with the Reſidue of the Eſtate *pur auter vie* as Adminiſtrator.—2 *Will. Rep.* 382. by way of Note.—An Eſtate *pur auter vie* is diſtributable in *Equity*, tho' not in the *Spiritual* Court, *it being a Freehold*; decreed by Lord Chan. *King*, *Hil. Vac.* 1730, *in Caſu Witter* and *Witter*, 3 *Will. Rep.* 99, 102.—*Vide* the *Stat.* 14 *Geo.* 2. whereby an Eſtate *pur auter vie* being *undeviſed*, or *in Part applied to the Payment of Debts according to the Statute of Frauds*, ſhall be *diſtributed in the ſame Manner as perſonal Eſtate.*—3 *Salk.* 137. S. C.—1 *Lord Raym.* 96. S. C.—*Comb. Rep.* 388. S. C.—And *Caſes in B. R. Temp. W.* 3. 103. S. C.

(*d*) In this Caſe *King* C. ſaid, that an Eſtate *pur auter vie* was *perſonal* Eſtate. *Ibid.* 381, 382.

50. The Occaſion of making the Stat. 22 & 23 *Car.* 2. *cap.* 10. was to put an End to the Controverſy between the Temporal and the Spiritual Courts. The Ordinary before took Bonds from the Adminiſtrator

And *per* his *Honour* (*Ibid.* 441.) the Occaſion of making this Statute was to put an End to the long Conteſt which had been betwixt the *Temporal* and *Spiritual* Courts, for when the *Spiritual* Courts ordered any Diſtribution, or Bond to be given by the Adminiſtrator for that Purpoſe, the *Temporal* Courts ſent a Prohibition, being of Opinion that the Adminiſtrator had a Right to all, and that the Spiritual

ſtrator to make Diſtribution, and thoſe Bonds were at Law adjudged void, and the Adminiſtrator intitled to all the perſonal Eſtate. But this Statute takes away the Adminiſtrator's Pretenſions (which he before had made with Succeſs) of retaining the whole. *Per* Lord Chan. *King*, *Hil.* 1727. *in Caſu Edwards* and *Freeman*, 2 *Will. Rep.* 447, 448.

Court could not break into that Right; and ſo this Statute was made in favour of this Practice of the Spiritual Court, which proceeded to order Diſtribution as often as the Common Law Courts did *not* prohibit them; and the Act *intended to make the Childrens Proviſion equal; which was agreeable to the Civil Law*, where *Goods moveable* and *immoveable* (i. e. *Lands*) *are conſidered as the ſame*, tho' our Law would never let the Civil Law meddle with Lands. *Ibid.* 141, 142.——The End and Intent of the Statute of Diſtribution was to make the Proviſion for all the Children of the Inteſtate equal as near as could be eſtimated, and to do what a good and juſt Parent ought to do for all his Children. *Per* his *Honour*, *ibid.* 439, 440.

51. The Statute of Diſtribution does not break into any Settlement which has been made by the Father, but only meddles with what is left *undiſpoſed of by him*; it takes away nothing that has been given, however *unequal* or *how much ſoever that may exceed the Remainder of the perſonal Eſtate left by the Inteſtate*. *Per Raymond* C. J. *Hil.* 1727, in the Caſe of *Edwards* and *Freeman*, 2 *Will. Rep.* 443.

52. The Right to the diſtributive Share on the Stat. *Car.* 2. veſts immediately on the Inteſtate's Death. *Per* his *Honour*, *Hil.* 1727, in the Caſe of *Edwards* and *Freeman*, 2 *Will. Rep.* 442.

The diſtributive Share according to the Reſolutions does *not* in all Events veſt in the Iſſue on the Teſtator's Death, becauſe if there be a *Poſthumous* Child, ſuch Child ſhall be let in for its Share, tho' not *in Eſſe* at the Inteſtate's Death. *Per Raymond* C. J. in S. C. *Ibid.* 446.

53. *A.* by Will declares his Intention to *diſpoſe of his Houſhold Goods by his Codicil*, and deviſes the Reſidue of his perſonal Eſtate *not diſpoſed of*, nor *reſerved to be diſpoſed of by his Codicil*, to his Wife. Afterwards the Teſtator makes a Codicil *without diſpoſing of his Houſhold Goods thereby*; the Houſhold Goods ſhall not go to the reſiduary Legatee, but according to the Statute of Diſtribution. *Per* Lord Chan. *King*, *Trin.* 1730, in the Caſe of *Sir Jermin Davers et al'* and *Sir Jermin Dewes et al'*, 3 *Will. Rep.* 40.

54. If one dies inteſtate without Iſſue, Brother or Siſter, but ſeveral Brothers and Siſters Chidren, *viz.* one Nephew by a Brother, and three Nephews and two Nieces by a Siſter, theſe ſhall take *per Capita* and not *per Stirpes*, *becauſe all equally of Kin*. *Trin.* 1730. *Davers* and *Dewes*, 3 *Will. Rep.* 50.

55. A Papiſt *may* take within the Statute of Diſtribution. In the Caſe of dying *inteſtate*, it is the *Act of the Law* (*a*); is is the *Legiſlature* that gives theſe diſtributary Shares to the Widow and next of Kin; it is a Succeſſion *ab inteſtato* to a perſonal Eſtate, ſimilar to a Deſcent of Land, where an Heir, tho' a Papiſt, if above the Age of eighteen Years and ſix Months, may inherit; beſides, the Intent of the Statute of Diſtribution was, that the Adminiſtrator ſhould ſell all the perſonal Eſtate of the *Inteſtate*, turn it into Money, and diſtribute it. Now it would be inconſiſtent that the *Papiſt* ſhould have a Share of the Money *left* by the *Inteſtate*, but not of the Money raiſed by the Adminiſtrator out of the *Inteſtate*'s Eſtate. *Per* Lord Chan. *King*, *Trin.* 1730. *Davers et al'* and *Dewes et al'*, 3 *Will. Rep.* 48, 49.

(*a*) By the ſame Reaſon it ſhould ſeem that a *Papiſt* is capable of taking as Tenant by the *Curteſy* or in *Dower*. *Ibid.* 49, in a Note by the *Editor*.

56. Where the Wife was made Executrix, and a conſiderable Legacy deviſed to her, yet the Proof being ſtrong that the Teſtator intended the *Surplus* to her own Uſe, the ſame was decreed accordingly, both at the *Rolls* and in *Chancery*. *Hil.* 6 *Geo.* 2. *Hatton* and *Hatton*, 2 *New Abr.* 426.

57. Sir *Joſeph Jekyll*, (*Feb.* 20, 1736.) ſpeaking of the Caſe of *Foſter* and *Munt*, 1 *Vern.* 473. and *Abr. Eq.* 1 *Vol.* 243. (D) *Ca.* 1. ſaid,

ſaid, It had been often urged, that that Caſe turned upon Fraud; but that he had looked into all the Proceedings, and there was no ſuch Thing pretended, but the whole turned upon this: That as the Executors Legacy was given for their Care, unleſs ſuch Care was to turn to the Benefit of others, and not of themſelves, the Will would be abſurd; and therefore it neceſſarily followed, that the Teſtator deſigned them only to be Truſtees for the next of Kin; and tho' no ſuch Declaration was made, yet the Legacy being given generally, the Law made the ſame Conſtruction, and it was for their Care, it being impoſſible to imagine that the Teſtator would give a general Legacy, if he intended the Executors ſhould take the whole. *MS. Notes, Feb.* 20, 1736.

58. *A.* made his Will, and, leaving a Wife, Daughter, and three Grandchildren by another Daughter, he deviſed to his Wife the Income and Profits of all his real and perſonal Eſtate for her Life, and after her Deceaſe, he deviſed an Annuity of 20 *l.* a Year to his Daughter for her Life, and deviſed ſome other Legacies to the Children of his deceaſed Daughter, ſome payable at a certain Age, others on their Marriage generally, and one to his Daughter upon her Marriage with the Conſent of her Mother; and makes his Wife Executrix, but if ſhe died in the Life of her Daughter, then he made the Daughter Executrix. And as the Reſidue, after the Mother's Death, was not diſpoſed of, the Queſtion was, Who ſhould have it; whether the Mother as Executrix, or it ſhould be divided as a reſulting Truſt amongſt the next of Kin? And by the Court, after Arguments on both Sides, it ſeems the Reſidue muſt be diſtributed as veſted in the Executrix only as a Truſtee for the next of Kin. 'Tis certain there is no Difference whether a Mother or Stranger is made Executrix, for, if the Executrix has a Legacy given ſimply and abſolutely, the Law of this Court is, that 'tis given for her Trouble in managing the Adminiſtration, and if it ſhould not go in Reſtraint of any further Claim, but the Executrix ſhould take the whole, ſuch a Bequeſt would be abſurd; and therefore, without ſome contrary Evidence, it is looked upon as an Indication of the Teſtator's Mind to give only ſuch particular Legacy to the Executrix for her own Uſe, and ſo ſhe becomes a Truſtee for the Reſidue.—Indeed there have been ſome Diſtinctions on this Point made; as where a Man deviſes a ſpecifick Thing to his Executor for Life, and after his Deceaſe to another for Life, and ſays nothing of the Reſidue, there the Deviſe to the Executor goes only by way of *Exception* (*a*) to the Intereſt deviſed over, and as it was abſolutely neceſſary to make the firſt Deviſe to the Executor to ſupport the ſubſequent Remainder; there the Deviſe to the Executor has *not* been looked on as a Satisfaction for his Trouble, but only to introduce the ſucceeding Gift, and ſo does not ouſt the Executor of the Reſidue of the perſonal Eſtate; and ſo was the Caſe of the Duke and Dutcheſs of *Beaufort*, and *Mackworth* and *Lewellin*, *Mich.* 1734, before Lord *Talbot*, where *A.* deviſed a Term of twenty-one Years for three Years to his Executor *Herbert Mackworth*, paying 30 *l.* to *B.* which was the full Value of the Term for three Years, Remainder to *C.* if he ſhould live to the End of the Term; and it was held that the Reſidue of the Term, on the Death of *C.* belonged to the Executor.—But, in the preſent Caſe, there is no ſuch Intention to be collected; the Teſtator has deviſed the Profits of his real and perſonal Eſtate to his Wife for her Life, and has given ſeveral ſpecifick Legacies, which may poſſibly veſt in her Time, ſome muſt, as thoſe of Marriage with Conſent; the Annuity of 20 *l.* is to take Place after her Deceaſe, not as a Remainder

mainder of the Eſtate given to her, but as a Charge to ariſe out of the whole; the former Legacies go in Diminution of her Intereſt under the Will on the Contingencies they depend upon, but muſt be paid whether ſhe lives or dies; and the latter is an abſolute Annuity independent of her Intereſt whenever ſhe dies; ſo that the Deviſe to the Wife is a ſimple Legacy to her and a beneficial Intereſt, and if the Limitation for Life does not confine it to that Time, 'tis of no Eff ct at all; and therefore decreed the Reſidue, after the Wife's Deceaſe, to be diſtributed, *i. e.* one Third to her, another to the Daughter, and the remaining Third to the Children of the deceaſed Daughter.——There was another Queſtion in this Caſe, which was this, The Teſtator and his Wife being at their Marriage willing to keep their own Eſtates, covenanted, that if the Huſband died inteſtate, the Wife ſhould not take out Adminiſtration to him, nor have any Part of his perſonal Eſtate; and it was urged, this ought to exclude her from a diſtributive Share. *Sed per Cur'*, The Covenant intends a general Inteſtacy, when an Adminiſtrator would be neceſſary, where the Huſband makes no Diſpoſition of his Perſonalty, but here it's diſpoſed of; the Executrix has every Thing not ſpecifically deviſed in Truſt for the next of Kin, and ſo much of it reſults back to her as ſhe is intitled as Wife, and there is no Pretence for calling this Truſt Eſtate reſulting to the Kindred an Inteſtacy, any more than a reſulting Truſt of Lands after Debts paid under a Deviſe. *Gobſall* and *Sounden*, 20 *Feb.* 1736, at the Rolls, *MS. Rep.*

59. *Mary Scarlet* had a Legacy left her by *Oſborn* her former Huſband, and after intermarried with *William Scarlet*, and died; then *William Scarlet*, her ſecond Huſband, took out Adminiſtration to her, but died before he received the ſaid Legacy; and the Defendants *Bullen* and his Wife, took out Adminiſtration to him, and received the Legacy, which was now demanded by the Plaintiff's Bill as Adminiſtrator *de bonis Non* of *Mary Scarlet*. And the only Queſtion was, Whether the Legacy belonged to the Plaintiff in that Right, or to the Defendant as Repreſentative of the Huſband *William Scarlet*. Attorney General for the Plaintiff. But the Lord Chan. *Hardwicke* thought it ſo clear, that he would not permit any one to argue it for the Defendants; and *per* his *Lordſhip*, This is a plain Caſe, taking it as it ſtood on the old Statute of Adminiſtrations, for thereby the Huſband was intitled to Adminiſtration if he ſurvived his Wife; and as it ſtood on theſe Statutes, nobody could call him to an Account for the Effects, for the Party was to adminiſter for the Good of the Soul, but not to make a Diſtribution; but by the Stat. 22 & 23 *Car.* 2. *cap.* 10. Adminiſtrators are liable to make Diſtribution, one Third to the Wife of the Inteſtate, *&c.* yet upon the Penning of that Statute, tho' no Notice was taken of the Huſband being Adminiſtrator of his Wife, yet it was held *not* to be within the Act, for no Perſon could be in equal Degree to the Wife with the Huſband, and ſo he was not ſubject to the Statute of Diſtributions; which Matter is explained by the 29 *Car.* 2. *cap.* 3. *ſect.* 25. which ſays, the Huſband may demand Adminiſtration of his deceaſed Wife's perſonal Eſtate, and recover and enjoy the ſame, as he might have done before that Act, which was before that Act as his own Property; and if before the Statute of Diſtributions, the Huſband had died before he had called in the Effects of his Wife, and any other Perſon had taken out Adminiſtration to the Wife, he would have been a Truſtee for the Huſband. So in the Caſe of *Cart* and *Reve* in Lord *Macclesfield*'s Time, it was held that an Adminiſtrator *de bonis Non* of the Wife was a Truſtee for the Re-

preſentative of the Huſband; therefore, tho' in Point of Law the Plaintiff may be Repreſentative of the Wife, yet he is only a Truſtee for the next of Kin to the Huſband, and then the Plaintiff, by bringing this Bill againſt his *Ceſtui que Truſt*, has been guilty of a Breach of Truſt, ſo his Bill muſt be diſmiſſed with Coſts (*a*). *Humpreys* Adminiſtrator of *Mary Scarlet*, and *Bullen et Ux'* Adminiſtrators of *William Scarlet* (*b*), *MS. Rep.*

(*a*) *Vide* 2 *Vern.* 302. *Cary* and *Taylor*, which ſeems to be a Caſe in Point where the Huſband never took out Adminiſtration to his Wife at all.——— S. C. 1 *Abr. Eq.* 69. *Ca.* 10.

(*b*) *Quære* Term and Year.

Vide P. 60. A *Poſthumous* Child ſhall be intitled within the Statute 1 *Jac.* 2. *cap.* 17. *ſect.* 7. to a Share in a *Brother's* or *Siſter's* perſonal Eſtate as if ſuch Child had been born in the Life-time of the *Brother* or *Siſter*. *Hil.* 1740. *Wallis* and *Hodſon*, *Barnard. Rep. in Chan.* 272.

(G) What ſhall be eſteemed an Advancement within the Statute (*c*) to be brought into Hotchpot.

(*c*) 22 & 23 *Car.* 2. *ca.* 10.

1. *J. S.* had four Daughters, *A. B. C.* and *D.* and by Will deviſed to *A.* 1000 *l.* and by the ſame Will deviſed to them 1500 *l.* apiece for their Portions, which ſeveral Sums of 1500 *l.* were to be raiſed out of a real Eſtate deviſed by his Will for that Purpoſe. Afterwards *A.* married in *J. S.*'s Life-time, and *J. S.* gave her 4000 *l.* as a Portion. *J. S.* made his Wife Executrix, and gave her ſome Legacies, but made *no Diſpoſition of the Surplus of his Eſtate*. *Lord Keeper* decreed that the Widow muſt diſtribute the Surplus; alſo decreed the Portion to be brought into *Hotchpot*, and *B. C.* and *D.* to have the Benefit of it, but *not the Wife*, and 1500 *l.* of the 4000 *l.* coming out of the Land, there is 2500 *l.* only to be brought into Hotchpot. *Hil.* 1701. *Ward* and *Lant*, *Prec. in Chan.* 182, 184.

2. *M.* who married *H.* and ſurvived him, had three Children, two Sons and a Daughter, and having, *out of her own Eſtate*, given 1000 *l.* to her Daughter in Marriage, died inteſtate, leaving thoſe three Children. And the Queſtion was, Whether the Daughter, who had received this 1000 *l.* ought to bring it into *Hotchpot* before ſhe ſhould receive any further Share of her Mother's perſonal Eſtate? And Lord Chan. *King* ſaid, It weighed with him that the Act of Diſtribution was grounded upon the Cuſtom of *London* (*d*), which *never affected a Widow's perſonal Eſtate*, and that the Act ſeems to include thoſe within the Clauſe of *Hotchpot* who are capable of having a Wife as well as Children, which muſt be *Huſbands only*, and ſo in this Caſe (tho' without much Debate) his *Lordſhip* ruled that the Daughter ſhould not bring the 1000 *l.* which ſhe had received in her Mother's Life-time, into Hotchpot. *Trin.* 1726. *Holt* and *Frederick*, 2 *Will. Rep.* 356.

(*d*) *Vide Edwards* and *Freeman.*

3. *J. S.* on his (*e*) Marriage, covenants to ſettle (within ſix Months after Requeſt, &c.) all his Lands in *B.* &c. (*inter al'*) for raiſing Daughters Portions, *viz.* if but one Daughter 5000 *l.* if more 6000 *l.* payable at eighteen or Marriage, and to raiſe Maintenances for ſuch Daughters

(*e*) *Vide* 1 *Abr. Eq.* 249. *Ca.* 10. ſame Caſe at large. This 5000 *l.* is an Advancement *pro tanto* within the Cuſtom of *London*, upon which Cuſtom (*f*) the Statute of Diſtribution was in a good Meaſure founded; and it can be no *Injuſtice* to the Child, becauſe it is left to the Election of the Child thus advanced, whether ſhe will *collate* or not; if the Child be content with what ſhe has received, ſhe may keep it. *Per Lord Chancellor. Ibid.* 449.

(*f*) *Vide* the Caſe of *Holt* and *Frederick*, *P.* *Ca.*

Daughters 'till their Portions ſhould become payable, 80 *l. per Annum* if but one Daughter, and ——— *per Annum* if more than one. The Wife died leaving only one Child, a Daughter. No Settlement having been made purſuant to the Marriage Articles, *J. S.* afterwards marries a ſecond Wife, and ſettled great Part of the Lands compriſed in the Articles, *without giving any Notice of the Articles*, and had Iſſue of *this* Marriage a Son and a Daughter. *J. S.* died inteſtate, and his Widow (the Defendant) took out Adminiſtration to him. The Daughter by the *firſt* Wife being then eleven Years old, who having ſince intermarried with *W. E.* they brought their Bill for their diſtributory Part of *J. S.*'s perſonal Eſtate, but *did not pray the* 5000 l. This Cauſe having been often argued, it was at length decreed by Lord Chan. *King*, aſſiſted by *Raymond* C. J. the *Maſter of the Rolls*, and *Price* J. That the 5000 *l.* ſecured to the Daughter by the *firſt* Wife, (tho' on the Contingencies (*a*) of living to eighteen or being married, and which hath ſince happened) muſt be brought into *Hotchpot* to intitle her to a Diſtribution. *Hil.* 1727. *Edwards* and *Freeman*, 2 *Will. Rep.* 435 to 449.——As to the Maintenance Money 80 *l.* a Year, ſecured by the Father to Plaintiff the Daughter, *they* were of Opinion, That this ought not to be brought into *Hotchpot*, no more than what is allowed or ſecured by the Parent for the Education of the Child. *Ibid.* 449.

(*a*) A contingent Proviſion, when it happens, is an Advancement *pro tanto*; as a Covenant to leave a Child 100 *l.* if living a Week after my Deceaſe; ſo if it were upon the Contingency that the Child ſhould be living one, two or three Years after the *Inteſtate*'s Death. Suppoſe (in the *principal* Caſe) it were a Bond inſtead of a Covenant, or a Mortgage inſtead of a Bond, it would make no Difference, *per* Lord Chief Juſtice *Raymond*, who granted that it would be no Proviſion 'till the Contingency happens; and his *Lordſhip* agreed, that the Contingency ſhould be limited to ariſe in a reaſonable Time, which being at eighteen or Marriage, he held a reaſonable Time. *Ibid.* 444, 445.

4. The Words of the Statute of Diſtribution makes *no* Difference between a *voluntary* and a *Marriage* Settlement, but are of Settlements in general. *Per* Lord Chief Juſtice *Raymond*, in the Caſe of *Edwards* and *Freeman*, *ibid.* 444.

5. A Proviſion for a Child *by* (*b*) *Will* is not an Advancement to be brought into *Hotchpot*; for a Caſe may happen, that as to Part of the perſonal Eſtate the Teſtator may die inteſtate; neither ſhall *Land given by Will to a younger Child*; for a *Proviſion to be brought into Hotchpot muſt be ſuch as is made by an Act in the Teſtator's Life-time*, and *not by Will*. *Per* his *Honour*. *Ibid.* 440. in S. C. (*b*) *Vide Swinb.* 165.

6. If the Father ſettles a Rent out of Lands upon a *younger* Child, this is an Advancement. *Per* his *Honour*. *Ibid.* 441.

7. If the Father by Deed ſettles an Annuity upon a Child, to commence after his Death, this is an Advancement *pro tanto* (*c*); and his *Honour* ſaid, that by the ſame Reaſon a *Reverſion* ſettled on a Child, as it may be valued, is an Advancement alſo. *Ibid.* 442. (*c*) His *Honour* cited this out of *Swinb.* 165.

8. A Proviſion within the Statute of Diſtribution, for a Child need not take Place in the Father's Life-time; a *future* Proviſion is a Bar *pro tanto*; and a Portion aſſured or ſecured to a Child, tho' *in futuro*, is a Proviſion according to its Value. *Per* his *Honour*. *Ibid.* *Ibid.* 445. S. P. by *Raymond* C. J.

9. If the Father covenants with Truſtees to pay a Child 100 *l.* a Week after his Death, as ſuch Covenant would have been plainly good, ſo would it have been a Proviſion within the Act. A Caſe put *per Raymond* C. J. *Ibid.* 445.

10. A *future Proviſion* is within the Act, but an *Annuity for Maintenance* and *Education* is *not* to be brought into *Hotchpot*. *Vide* 1 *Abr. Eq.* 254. *Mich.* 1725, in ſaid Caſe of *Edwards* and *Freeman*.

11. *J. S.*

11. *J. S.* had ſeveral Children, and in his Life-time *advanced in Part one of them.* This Child *died in* J. S.*'s Life-time, leaving Iſſue*; afterwards *J. S. died inteſtate*, poſſeſſed of a conſiderable *perſonal* Eſtate. The Iſſue of the deceaſed Child muſt bring into *Hotchpot* what *their Father received in Part of Advancement*, as he, if living, muſt have done, in regard the Iſſue ſtands in the Place and Stead of the Father, and a Claim under him, and cannot be in a better Condition than their Father, if living, would have been, and had claimed his diſtributive Share. Admitted by Mr. Solicitor *Talbot* as Counſel for the Children of the deceaſed Child, *Mich.* 1729. *Pround* and *Turner*, 2 *Will. Rep.* 560.

12. Caſe upon a Bill brought by Conſent for the Opinion of the Court, was, that the late *T. Lutwich*, Eſq; having purchaſed an Houſe, *&c.* at *Turnham Green*, (which was *Copyhold* and *of the Cuſtom of Borough Engliſh*) afterwards died inteſtate, leaving two Sons and ſeveral Daughters, and the younger Son brought his Bill for a diſtributive Share of his Father's perſonal Eſtate, *&c.* Inſiſted for the Defendants the other Children, that he ought to bring this *Copyhold* into *Hotchpot*, upon the Authority of the Caſe of *Pratt* and *Pratt.* Decreed in Point by the *Maſter of the Rolls* 11 *May* 1732. And two Queſtions were made upon the Stat. 22 & 23 *Car.* 2. *cap.* 10. Firſt, Whether by the *former* Part of *ſect.* 5. in the Statute, a *younger Son, having Lands by Deſcent*, is to bring into *Hotchpot?* And Secondly, Whether the *latter* Part of the Clauſe, which provides that the Heir at Law ſhall have Diſtribution, notwithſtanding Lands deſcended, *&c.* regards the *Heir at the Common Law only?* And *Lord Chancellor* as to the firſt Point held, that the *younger Son, having Lands by Deſcent*, as in this Caſe, *was not obliged to bring them into Hotchpot*; and that the Heir at Law in the *latter*, meant the *Heir at the Comnon Law*, tho' that Point, he ſaid, was not neceſſary to determine, inaſmuch as he thought, upon the firſt Part of the Clauſe, the *younger* Son, by having Lands by Deſcent, by the Cuſtom was *not barred of an equal Share of the perſonal Eſtate with the other Children.*——As to the Caſe of *Pratt* and *Pratt*, his *Lordſhip* declared he had a great Regard and Deference to the Opinion, and the Judgment thereupon given, but that however *he muſt be guided by his own Judgment and Conſcience.* 26 *Mar.* 1735. *Lutwich* and *Lutwich*, *Vin. Abr.* Tit. *Executors*, (Z. 9.) *Ca.* 11.

(H) Concerning the Power of an Executor.

1. A Teſtator may make his Creditor Executor, and then the Law gives him a Preference (*a*); and not only ſo, but the Law allows this Executor to give any *other* Creditor, in *equal* Degree, a Preference (*b*). It is true ſometimes *Chancery* will interpoſe, becauſe theſe Powers may be an Inlet to Fraud, but it will never take from the Executor himſelf this Preference the Law gives him. *Per* Lord Chan. *Parker*, *Eaſt.* 8 *Geo.* 1. *in Caſu Cock* and *Goodfellow*, *Lucas's Rep.* 496.

(*a*) But the Debt of the Executor muſt be in *equal* Degree with the Debts of others, and then he may prefer himſelf according to the Rule of *In Æquali Jure Melior eſt Conditio Poſſidentis. Wentworth's Office of Executors* 142.

(*b*) S. P. in *Wentworth's Office of Executors* 142. But if the Debt of the *one* be payable at a *future* Day, and of the *other preſently*, the Executor cannot prefer ſuch *future* Debt and pay it *before* the Day of Payment comes, and leave the other unpaid; but *after* the Day happens, he may prefer *either*, unleſs in Caſe of a Suit commenced before the Day; and *Wentworth* even thinks that a *bare* Demand of the Executor before the *other* Debt becomes due prevents the Preference, tho' *contrary* to *Doctor and Student*, but ſays he lays it not down *peremptorily.*

2. *J. S.* poſſeſſed of a Term for Years, deviſed it to *A.* and then died indebted, having made *B.* his Executor. *B.* ſold the Term to *C.* upon which the *Deviſee of the Term brought a Bill againſt* C. inſiſting, that the Term being deviſed to him, *B.* was but a Truſtee for him, and that *C.* muſt have Notice of this Truſt, the Term having been bought of *B.* and conſequently muſt be taken ſubject to the Truſt. His *Honour* ſaid, That Notice of the Will and of the Deviſe of the Term to a third Perſon was nothing, for every Perſon buying of an Executor named, muſt, of Neceſſity, have Notice, ſo that if Notice were to be an Hindrance, then no Executor could ſell; and to put every Purchaſer of a Leaſe from an Executor to take an Account of the Teſtator's Debts, is not reaſonable, nor has he any Means to diſcover them; on the contrary, as the Teſtator's perſonal Eſtate is liable to the Debts, this Leaſe muſt (*inter al'*) of Neceſſity be liable, and therefore may be ſold by the Executor. If Equity were otherwiſe, it would be a great Hindrance to the Payment of *Debts* and *Legacies*, and would lay an *Embargo* upon all *perſonal* Eſtates in the Hands of *Executors* and *Adminiſtrators*, which would be attended with great Inconveniencies. If an Executor ſhould ſell a Term for an Under-Value, or to one who has Notice that there are no Debts, or that all the Debts are paid, this, his *Honour* admitted, might be another Conſideration, but there being no ſuch Ingredient in the preſent Caſe, he diſmiſſed the Bill. *Trin.* 1723. *Ewer* and *Corbet*, 2 *Will. Rep.* 148.

His *Honour* ſaid, He remembered it to have been once ruled, that an Executor could not make a good Title of a Term to a Purchaſer, and that was in the Caſe of *Major Bill* v. *Humble* (*a*), *Mich.* 1703. But ſince that, he ſaid, he took it to have been *reſolved*, and *with great Reaſon*, that an Executor, where there are Debts, may ſell a Term, and the *Deviſee of the Term* has no other Remedy but againſt the Executor to recover the Value thereof, *if* there be ſufficient Aſſets for the Payment of Debts. *Ibid.* 148.

(*a*) 2 *Vern.* 444. Where it appears that a Mortgage made of a Term by an Executor was by this Court held to be good, and that a *reſiduary* or *ſpecifick* Legatee had only his Remedy againſt the Executor. But that Decree was, on Appeal, reverſed by the Houſe of Lords.

3. A Freeman of *London*, poſſeſſed of ſeveral Leaſehold Houſes among other perſonal Eſtate in 1699, deviſed *one Third of all his perſonal Eſtate to his Wife*, another *Third to his Child*, and *his own Teſtamentary Third to* M. *his Wife for Life*, Remainder *to ſuch of his Children as ſhould be living at* M.'s *Death*; and having made *M.* Executrix, appointed *B. Overſeer of the Will*, giving him 10 *l. for his Care in ſeeing the Will performed*, and died. *M.* ſold all the Leaſehold Houſes to ſaid *B.* and then ſhe died; whereupon *C.* who was the only Child living at the Death of *M.* brought her Bill to have the Benefit of the Term, inſiſting that this *differed* from the Caſe of *Ewer* and *Corbet* (*b*); but it appearing by the *Inventory*, that the Debts could not be paid without the Leaſe of Part of the Leaſehold Houſes, his *Honour* diſmiſſed the Bill (*c*). *Trin.* 1723. *Burting* and *Stouard*, 2 *Will. Rep.* 150.

(*b*) *Ca.* 2. *this Page.*

(*c*) And his *Honour* ſaid, That this Caſe was not ſo ſtrong as the Caſe of *Ewer* and *Corbet*, becauſe *here* nothing *ſpecifick*, nor any *particular* Leaſe, was deviſed to the Children, as in *Ewer* and *Corbet*, but only a third Part of his perſonal Eſtate in general. *Ibid.* 151.

4. A Bond was put in Suit againſt an Executor, who pleaded *Plene Adminiſtravit*, that *he was a Bond Creditor himſelf, and had paid himſelf.* On the Trial it appeared there was an *Interlineation of* 50 l. after *the Bond was executed*, ſo at Law the Bond was void. Now Application was made, that tho' the Bond be void at Law, yet it may be conſidered as good in Equity, for what it was really given. And Lord C. *King* ſaid, That this, at moſt, can be but a Charge by ſimple Contract; for you yourſelves have deſtroyed its being a Bond; ſo it is as if it never had been; and ſo can be no Bar to the Payment of a Debt of a *ſuperior* Nature. *Trin.* 11 *Geo.* 1. *Anon. Select Caſes in Chan.* 24.

5. An Executor, *tho' a bare Truſtee*, and tho' there be a *reſiduary Legatee*, is intitled to ſue for the perſonal Eſtate *in Equity* as well as *at Law*, unleſs the *Ceſtuy que Truſt* will oppoſe it. *Hil. Vac.* 1729, by way of Note to the Caſe of *Jones* and *Goodchild*, 3 *Will. Rep.* 34.

6. Executors are the proper Perſons that by Law have a Power to diſpoſe of the Teſtator's *perſonal* Eſtate.——Perſonal Eſtate may be *cloathed* with ſuch a particular Truſt that it is poſſible the Court, in ſome Caſes, may require a Purchaſer of it to ſee the Money rightly applied. But unleſs there is ſome ſuch particular Truſt, or a Fraud in the Caſe, it is impoſſible to ſay but the Sale of the perſonal Eſtate, when made by an Executor, muſt ſtand; and that after the Sale is made, the Creditors cannot break in upon it. *Per* his *Honour*, *Eaſt.* 1740, in the Caſe of *Elliot* and *Merryman*, *Barnard. Rep.* 78, 81.

(I) In what Caſes an Executor (*a*) may retain.

(*a*) And an Adminiſtrator.

If there are two Executors Creditors to the Teſtator, and one gets all the Aſſets into his Hands, Equity will not ſuffer him to *retain* againſt his Companion. *Chapman* and *Turner* (*b*), *MS. Rep.*

(*b*) *Quære* Term and Year.

1. A Decree was had againſt the Defendant's Inteſtate by the Plaintiff for 400*l.* and the Inteſtate, before the Decree, was indebted to the Defendant by Bond. The Inteſtate dying, the Defendant got Adminiſtration. And the Queſtion was, Whether the Defendant could *retain* to ſatisfy his own Bond againſt this Decree, there being no Aſſets to ſatisfy both? And held by *Atkins*, *Turton* and *Lechmere*, Barons, that he might, and thereupon it was decreed, that the Defendant ſhould pay the Plaintiff, *in Caſe he had Aſſets*, in the firſt Place. *Powell dubitavit*, for that in Caſe the Party was ſued at Law upon a Bond, he could not plead nor give this Decree in Evidence to bar the Plaintiff; and ſo it would be one Way *at Law*, and another Way *here*. But for that he was anſwered, that the Party might be relieved by his Bill in Equity, and have an Injunction. *Eaſt.* 1693. *Staſby* and *Powell in Scac'*, 1 *Freem. Rep.* 333.

Prec. in Chan. 179. S. C. *in totidem verbis.*

2. If *J. S.* be indebted by Bond in 2000*l.* to *A.* to which *Plaintiff* is intitled as his Repreſentative, and in 1300*l.* to *B.* the Defendant's Teſtator, for which *J. S.* and *C.* were bound. *J. S.* makes his Will, and thereof *B.* and *D.* Executors, and deviſes *his Lands to them and their Heirs, Share and Share alike, to be ſold for Payment of his Debts.* The Executors employed the greateſt Part of his (*J. S.*'s) *perſonal* Eſtate in Payment of a Mortgage of 2000*l.* charged on the *real* Eſtate *deviſed for Payment of Debts*, but *kept it on foot* and *took an Aſſignment thereof to themſelves*. And *J. S.* had alſo a Bond taken in *B.*'s Name for Money due to *J. S.* Plaintiff brought his Bill againſt the *Executors* of *J. S.* for a Diſcovery of Aſſets, and to have a Satisfaction of his Debt. *B.* in his Anſwer inſiſts to *retain* out of the *real* Eſtate when ſold, and alſo out of the *perſonal* Eſtate, to pay his own Debt. The Cauſe went on to a Hearing, and a Decree was obtained for an Account; and then *B.* died, having made his Will, and Defendant *M.* his Wife Executrix, (who was before Executrix of *C.* the Co-Obligor with *J. S.*); and the Caſe was revived againſt her. *Per* Lord Keep. *Wright:* An *Executor of an Executor may retain*, but not in this Caſe; the Land being deviſed to the Executors, Share and Share alike, makes, as his *Lordſhip* thought, a *Tenancy in Common*; but here the *Executor of the Executor is not the Executor to the* firſt *Teſtator*, and therefore

cannot retain; and the *perſonal Aſſets are gone.* And the *Queſtion* is now, As to the *real* Eſtate. And in Equity *all Debts are equal* (*a*); and you cannot prefer yourſelf, and Equity *will never aſſiſt a Retainer* (*b*); and theſe being only *equitable* Aſſets, you ought not to retain *to pay all*, but *only a proportionable Part*; and as to the *Bond* you are a *Truſtee*, and therefore that muſt follow the ſame Rule. *Mich.* 1701. *Hopton* and *Dryden*, *MS. Rep.*

(*a*) *Maxim.*

(*b*) *Maxim.*

3. It was agreed, that both in *Law* and *Equity* an Executor may retain for his *whole* Debt, *when in equal Degree.* *Mich.* 1715, in the Caſe of *Waring* and *Danvers*, 1 *Will. Rep.* 296.

4. *A.* lent Money on Bond to *B.* who dying inteſtate, *C.* took out Adminiſtration to him; after which *C.* dying, *A.* took out Adminiſtration *de bonis Non*, *&c.* to *B.* and it was determined (*int' al'*) that *A.* might out of the Aſſets of *B.* retain for ſuch Bond Debt contracted before he took out Adminiſtration; and tho' *A.* happened to die before he had made any Election in what particular Effects he would have the Property altered, yet the Court ſaid, it muſt be preſumed he would elect to have his own Debt firſt paid; and this being preſumed, there would remain no Difficulty as to altering the Property; for as the Executors of *A.* were to account for the Aſſets of *B.* they muſt on the Account deduct to the Amount of the Money lent by *A.* to *B.* *Mich.* 1720. *Weekes* and *Gore* at the *Rolls*, 3 *Will. Rep.* 184, in a *Note.*

5. Plaintiff was a Bond Creditor for 120 *l.* of Defendant's Teſtator, and brought his Bill to be paid out of the *perſonal* Aſſets of the Teſtator. And an Account was decreed, and the Maſter to ſtate any Thing ſpecially that he thought fit; and he reported that the Teſtator gave a Bond to *J. S.* a Truſtee, for Defendant his Wife and Executrix, to leave her 100 *l.* at his Death, if ſhe ſurvived him; and that ſhe, ſurviving her Huſband, claimed to retain this 100 *l.* out of the Aſſets, which created a Deficiency to pay the Plaintiff his 120 *l.* Objected, That the Executrix cannot retain this 100 *l.* the Bond being made to a Truſtee, tho' ſhe might give Judgment to her Truſtee on this Bond. But that the *Executor's Right of Retainer is where he cannot ſue*, and *therefore*, *for Neceſſity*, *ſhall retain*; ſo that *here* the Debts are to be paid in *Average*, as has been often decreed by the *Maſter of the Rolls.* But Lord Chan. *King* held, That tho' in Strictneſs of Law, in *this* Caſe, the Executrix cannot retain the *Bond*, *not being made to herſelf*, yet ſince ſhe may pay *what Bond ſhe pleaſes firſt*, and as it would be a vain Thing for her to pay the 100 *l.* to her Truſtee with the one Hand and take it back with the other, therefore this Bond ſhall be the ſame in Equity as if made to herſelf; and accordingly it was ruled that the Executrix was intitled to the 100 *l.* by which Means but 5 *l.* remained to the Plaintiff (*c*). *Trin.* 1725. *Cockroft* and *Black*, 2 *Will. Rep.* 298.

(*c*) The Reporter adds a *Quære* (by way of Note); For in *Hill* and *Underwood*, *Trin.* 1739, *Lord Chancellor* ſeemed not ſatisfied with this Reſolution. *Ibid.* 299.

6. *A.* dies indebted by Bond to *B.* and by another Bond to *C.* and leaves *B.* and *J. S.* Executors. *B.* intermeddles with the Goods, and *dies before Probate*, and *before any Election made to retain.* *Quære*, Whether as *B.* might have retained the Goods in his Hands, *his* Executors have not the ſame Power? But this Point being *waved*, the Court gave no Opinion touching the ſame. *Eaſt.* 1733. *Croft* and *Pyke*, 3 *Will. Rep.* 183.

(K) Executors, how far favoured in Equity (a).

(a) By 29 *Car.* 2. *c.* 3. *ſect.* 4. No Action lies to charge an Executor on a ſpecial Promiſe to anſwer Damages out of his own Eſtate, unleſs there be a Note in Writing ſigned by him or his Order.

1. IN the Caſe of *Lindſey* and *Covill* it was admitted that an *Executor* or *Adminiſtrator*, in ſome Caſes, tho' he committed a Deva ſtavit in Law, might be relieved in Equity.—As an Adminiſtrator in *London*, before the Fire having Leaſes of Houſes, *&c.* and a great Surplus of Aſſets, and beyond what would pay Debts and Legacies, paid all as they were demanded; and after the Fire coming, deſtroyed the Houſes, which was the greateſt Part of his Aſſets; and then a Debt upon a Bond ſtarted up, and the Adminiſtrator was relieved againſt this. *Eaſt.* 1676. *Executors of Lady Croft* and *Lyndſey* and *Covill*, 2 *Freem. Rep.* 1.

2. *A.* the Teſtator, having 1000 *l.* due upon a Mortgage, deviſed the *Profits of it to* B. (*the Defendant*) *for her Livelihood and Maintenance*, and after her Death, without Iſſue, to the Plaintiff, and made *B.* Executrix, and died. Plaintiff preferred his Bill *to compel* B. *to give him Security that the Money ſhould be preſerved to him in Caſe ſhe ſhould die without Iſſue*; and it was made a Queſtion, Whether this Deviſe of the Money was good or no? The *major* Opinion of the *Bar* ſeemed to be, that the Limitation over to the Plaintiff was void; but *Lord Chancellor* gave no Opinion; but ſaid, That altho' this Court doth ſometimes *compel Executors to give Security for Legacies*, yet *that muſt be when they are clear* and *beyond Diſputes*, *and not when the Right is diſputable*, as in this Caſe, or *at leaſt depends upon a Contingency*. Bill diſmiſſed. *Mich.* 1678. *Dingly* and *Dingly*, 2 *Freem. Rep.* 40.

3. *A.* intruſts *J. S.* with Monies of his to diſpoſe of at Intereſt; then *A.* dies, Part of the Monies remaining in *J. S.*'s Hands undiſpoſed of; *A.'s Executrix deſires* J. S. *to put it out at Intereſt*, *which he does*, and *the Security proves defective*. The Executrix ſhall not make it good to the Plaintiffs, *who were to have a Share of the Eſtate by the Cuſtom of the Province of* York, but againſt a *Creditor* ſhe ſhould. So it is of Goods ſold *bonâ fide* to a Perſon who became inſolvent before all the Money paid. *Mich.* 1692. *Gibbs* and *Herring*, *Prec. in Chan.* 49.

Note; The Executrix herſelf was intitled to a Share of the Eſtate as well as the Plaintiffs. *Ibid.* in a *Note.*

4. Where an Executor puts out Money *without the Indemnity of a Decree*, if it be on a *real* Security, and one that there was no Ground at that Time to ſuſpect, Lord Keep. *Harcourt* delivered it as his Opinion (tho' he ſaid it had not been ſettled) that the Executor, under ſuch Circumſtances, was *not* liable for the Loſs, and ſo ſhould account for the Intereſt. *Eaſt.* 1711. *in Caſu Brown* and *Litton* (*b*), 1 *Will. Rep.* 140, 141.

(*b*) *Vide P. Ca.*

5. An Executor receives Money due on a Mortgage, and pays it away to his Teſtator's Creditors; after which it appears that the Mortgage had been ſatisfied in the Teſtator's Life-time. The Executor, on a Bill brought by the Creditors of the Mortgagor, was decreed to *refund*, tho' he had before paid the Money away in Debts, (which he had not otherwiſe Aſſets to pay); but the Executor may ſue ſuch Creditors of the Teſtator as thro' Miſtake he paid, to make them refund. Decreed *per* his *Honour*, *Trin.* 1717, and affirmed by Lord Chan. *Cowper*, in the Caſe of *Pooley et al'* and *Ray*, 1 *Will. Rep.* 355.

His Lordſhip declaring, That tho' this was an hard Caſe, yet if the Plaintiffs had a Right to be repaid the Money which had been overpaid on the Mortgage, that this Right could not be overthrown by the Executor's applying the Money in any Manner

Manner he ſhould think fit, any more than if an Executor at Law ſhould recover a Debt, and pay the Teſtator's Debts with it, and afterwards this Judgment is reverſed in Error, the Executor muſt reſtore the Money to the Plaintiff in Error; and his having paid it away in Debts of his Teſtator will not excuſe him from paying it back; ſo if there were a Decree for the Executor to be paid a Sum of Money by the Defendant, and the Executor, having received the Money, pays it away in Debts; and then the Defendant, againſt whom the Executor had recovered the Decree, brings his Appeal and reverſes the Decree; the Plaintiff, in the Appeal, ſhall be reſtored to the Money. *Secus* if the Defendant had delayed the Appeal, and willingly ſtood by whilſt the Executor paid away this Money to the Teſtator's Creditors, for this would be drawing the Executor into a Snare; *per Lord Chancellor*, who ſaid that nothing of this Kind appeared in the *preſent* Caſe.

6. An Executor brings a very frivolous Bill, which was *diſmiſſed with Coſts* out of Aſſets; the Executor was ordered to be examined on Interrogatories *if he denies Aſſets*, and ſo it was done in *another* Cauſe the next Day. *Mich.* 12 *Geo.* 1. *Cole* and *Rumney*, *Select Caſes in Chan.* 62.

7. Equity will not compel an Executor *to give Security* without an *Affidavit* of *Miſbehaviour* or *Inſolvency*. *Feb.* 20, 1727. *Dillon* and *Shaven*, *Vin. Abr.* Tit. *Executors*, (B. c.) *Ca.* 25.

But in this Caſe a *Receiver* was appointed, the Executrix having married a Perſon in needy Circumſtances. *Ibid.* in S. C.

8. An *Executor in Truſt* who had *no* Legacy, and where the Execution of the Truſt was likely to be attended with Trouble, at firſt refuſed, but afterwards agreed with the reſiduary Legatees, in Conſideration of one hundred Guineas, to act in the *Executorſhip*; and he dying before the Execution of the Truſt was compleated, *his Executors* brought a Bill *to be allowed theſe one hundred Guineas* out of the Truſt Money in their Hands, inſiſting that the *reſiduary* Legatees might as well make a Contract with the Executor, touching the Surplus, (which was their own Property) as the Teſtator himſelf, and that no Harm could happen thereby to the Truſt Eſtate; but he ſaid, all Bargains of this Kind ought to be diſcouraged, as tending to eat up the Truſt, and here the Executor had died before he had finiſhed the Affairs of the Truſt, wherefore the Plaintiff's Demand was diſallowed. *Mich.* 1732. *Gould* and *Fleetwood*, at the Rolls.——And it ſeems to be owing to this *Jealouſy* which a Court of Equity entertains of an *Executor* or Truſtee, that if *they* compound Debts or Mortgages, and buy them in for leſs than is due thereon, they ſhall *not* take the Benefit of it themſelves, 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 intitled to the Surplus; whereas if one, who acts for himſelf, and is not in the Circumſtances of an Executor or Truſtee, buys in a Mortgage for leſs than is due, or for leſs than it is worth, *he* ſhall be allowed all that is due thereon. See *Salk.* 155. *Mich.* 6 *Ann. Anon.*——Thus in the Caſe of *Baldwin* and *Baniſter*, heard at the Rolls *Eaſt.* 1718, the Caſe was, a Mortgagor in Fee died, and the Mortgagee bought in the Mortgagor's Wife's Right of Dower. Decreed that the Heir of the Mortgagor, on his bringing a Bill to redeem, ſhould have the Benefit thereof on this Principal, that the Mortgagee is but a Truſtee for the Mortgagor after his Money paid. ——So in the Caſe of *Powell* and *Glover*, *Mich.* 1721, at the Rolls, where a Guardian compounded Debts. Decreed it ſhould be for the Benefit of the Infant. 3 *Will. Rep.* 251, by way of *Note*.

9. A Father by Will gave a great *perſonal* Eſtate equally between *M.* his Wife and his two Infant Children, and made *M.* one of his Executors, and died. A Bill was brought in the Name of the Infant Children by a Relation as *Prochein amy*, againſt *M.* to have an Account and Diſcovery of the Teſtator's *perſonal* Eſtate; whereupon ſeveral Relations of the Infants by the Father's and Mother's Side (nearer than the *Prochein amy*) made an Affidavit that due Care was taken of the Infants and of their Eſtate, with which they were well ſatisfied;

and that they believed this Suit was exhibited rather out of *Pique* than any real Concern for the Infants Benefit, there being a Suit inſtituted in the *Spiritual* Court by the *Prochein amy*'s Son againſt *M.* upon a Marriage Contract alledged to have been made by her with him. His *Honour*, upon Petition, referred it to a Maſter, who reporting it to be ſo, the Defendant filed a new Bill in the Infants Name by another *Prochein amy*, *for an Account of the Infants Eſtate*, *in order that it might be improved*; and now Lord Chan. *King* decreed that the former Bill ſhould be diſmiſſed, and the *Prochein amy* named therein pay the Coſts (*a*). *Eaſt.* 1732. *Da Coſta* and *Da Coſta*, 3 *Will. Rep.* 140.

(*a*) As to this Matter ſee the Caſe of *Turner* and *Turner*, 2 *Will. Rep.* 297.

10. It is a *ſettled* Rule, that a *Truſtee* or an *Executor in Truſt* ſhall not have any Allowance for his Care and Trouble, (unleſs there are ſome particular Words in the Will for that Purpoſe) eſpecially where there is an expreſs Legacy for his Pains, *&c.* *Per* Sir *Joſ. Jekyll* Maſter of the Rolls, *Eaſt.* 1734, *in Caſu Robinſon* and *Pett*, 3 *Will. Rep.* 249.

And *per* Lord Chan. *Talbot*, on an Appeal, It is an *eſtabliſhed* Rule that a *Truſtee*, *Executor* or *Adminiſtrator*, ſhall have no Allowance for his Care and Trouble; that the Reaſon ſeems to be, for that on theſe Pretences, if allowed, the Truſt Eſtate might be loaded and rendered of little Value, beſides the great Difficulty there might be in *ſettling* and *adjuſting* the *Quantum* of ſuch Allowance, eſpecially as one Man's Time may be more valuable than that of another; and there can be no Hardſhip in this Reſpect upon any *Truſtee*, who may chuſe whether he will accept the Truſt or not; neither will it alter the Caſe that the Executor *renounces* the *Executorſhip*; that if this were to make any Difference, it would be an Art practiſed by Executors to get themſelves out of this Rule, which, his *Lordſhip* ſaid, he took to be a *reaſonable* one, and *to have long prevailed*; and added, that in the *preſent* Caſe the Teſtator has by his Will directed what ſhall be the Defendant's (the Executor's) Recompence for his Trouble in Caſe of his *refuſing* the *Executorſhip*, *(viz.)* that he ſtill ſhould have the 100 *l.* given by the Will, to which his *Lordſhip* ſaid he could make no Addition; however, it being an hard Caſe, his *Lordſhip* ordered the Defendant the Depoſit. *Ibid.* 251.

11. Where there are two Executors, and one renounces, he is ſtill at Liberty, whenever he pleaſes, to accept of the Executorſhip; otherwiſe if both renounce, and the *Ordinary* commits Adminiſtration to another. *Per* Lord Chan. *Talbot*, in the Caſe of *Robinſon* and *Pett*, *Eaſt.* 1734, 3 *Will. Rep.* 251.——Tho' in this Matter the *Common Lawyers* differ from the *Civilians*, the *latter* holding that a Renunciation once made, tho' only by one of them, is peremptory. *Vide Salk.* 321. *Hows* and *Downs* v. *Lord Petre.*

12. Generally ſpeaking, where the Teſtator thinks fit to repoſe a Truſt, in ſuch Caſe, until ſome Breach of that Truſt be ſhewn, or at leaſt a Tendency thereto, the Court of Chancery will continue to intruſt the ſame Hand, without calling for any other Security than what the Teſtator has required; but where one by Will charged the Reſidue of his *perſonal* Eſtate with 40 *l. per Annum* to his Wife to be paid Quarterly, the Executor was ordered to bring before the Maſter ſufficient in Bonds and Securities (of which the perſonal Eſtate appeared to conſiſt) to be ſet apart to ſecure this Annuity. *Per* Lord Chan. *Talbot*. *Mich.* 1734. *Slanning et al'* and *Style*, *et econt'*, 3 *Will. Rep.* 334.

13. Tho' generally ſpeaking an *Executor* or *Truſtee* compounding or releaſing a Debt, muſt anſwer for the ſame; yet if this appears to have been for the Benefit of the Truſt Eſtate, it is an Excuſe. *Mich.* 1735, *in Caſu Blue* and *Marſhall et Ux'*. *Vide* 3 *Will. Rep.* 381.

14. *A.* owes Money by ſeveral *Judgments*, and *Bonds*, and dies inteſtate; his Adminiſtrator pays the Judgments and ſome of the Bonds, and pays more than the perſonal Eſtate comes to; what the Adminiſtrator paid on the Judgments muſt be allowed him; but as to

what he paid on the Bonds, he muſt come in *pro ratâ* with the other Bond Creditors out of the real Aſſets. *Mich.* 1735. *Robinſon et al'* and *Tonge*, and *Dunn et al'*, 3 *Will. Rep.* 398, 400.

15. One may bring a Bill in Chancery as Adminiſtrator *before Adminiſtration actually taken out*, tho' this would be an Exception in an Action at Law. *Per* Lord Chan. *Hardwicke*, *Mich.* 1740, *in Caſu Fell* and *Lutwidge*, *Barnard. Rep. in Chan.* 320.

(L) Executor and Adminiſtrator chargeable, in what Caſes.

1. IF an Executor have a Leaſe for Years, determinable upon the Life of *J. S.* which is by a reaſonable Eſtimate worth 200 *l.* if the Executor will not ſell this, but keep it, and *J. S.* dies in a ſhort Time, yet he ſhall anſwer the Value of it at the Time of the Death of the Teſtator, for it was his own Fault that he would not ſell it; and ſo on the other hand, if he ſhould keep it, and *J. S.* ſhould live fifty Years, he ſhall anſwer for no more, *becauſe here is a contingent Gain*; but it might have been a Loſs; and as if it had been *dammum* he ſhould have born it, ſo being *Gain* he ſhall receive it. *Averred*, and agreed to *per Lord Chancellor*, *Mich.* 1676, *in Caſu Phillips* and *Phillips*, 2 *Freem. Rep.* 11, 12.

2. The Tenant for Life and Remainder Man join in a Mortgage of Lands, and they both covenanted and gave Bond to pay the Money; the *Tenant for Life dies*. And *per* Lord Chan. *Cowper*, If the *Remainder Man* pays the Money and takes up the Bond, *or* gets the Covenant aſſigned, he may prefer his Bill againſt the Executors of the Tenant for Life, but *not* elſe. *Eaſt.* 7 *Ann. in Caſu Hungerford* and *Hungerford*, *Gilb. Rep. in Eq.* 69.

3. *A.* poſſeſſed of a perſonal Eſtate, makes his Will, and after having bequeathed ſome Legacies, makes Defendant his Wife *Executrix* and reſiduary Legatee, deſiring her to bury him decently. Defendant in Teſtator's Life-time, in order to defray the Charges of the Funeral, borrowed 100 *l.* of *B.* and after her Huſband's Death gives a Bond for it. *B.* exhibits his Bill againſt her and the Legatees, to have Satisfaction of the 100 *l.* out of the Teſtator's Eſtate. *Lord Chancellor* thought it but reaſonable that the 100 *l.* ſhould be charged upon the Teſtator's perſonal Eſtate, ſo far as it was diſburſed upon that Occaſion. But it was inſiſted upon at the Bar, that the Eſtate of the Teſtator was not chargeable, becauſe Defendant, by giving this Bond, had made it her own Debt. His *Lordſhip* obſerving that this Point was likely to be ſpun out, decreed an Account to be taken of the Reſidue of the Eſtate of the Teſtator; for he ſaid, if there ſhould prove a ſufficient Fund, then that Diſpute would be at an End, for the Reſidue of the Teſtator's Eſtate belongs to the Defendant; altho' his *Lordſhip* thought it reaſonable that the 100 *l.* ſhould be charged on the perſonal Eſtate, yet he ſaid it cannot affect the Legatees, and oblige them to refund their Legacies; and therefore it is not fit that they ſhould be brought in to an Account. *Trin.* 7 *Ann. Langley* and *Oates*, *MS. Rep.*

4. In an Anonymous Caſe, *Trin.* 7 *Ann.* Sir *Thomas Powis arguendo* (in Chancery) ſaid, that *Lord Chancellor* did lately determine that where there is an Executor, and a Debt is to be paid by him, which doth carry Intereſt as a Bond, there his *Lordſhip* directed an Enquiry whether the Executor had a ſufficient perſonal Eſtate in his Hands to diſcharge it; and if it is found before a Maſter, that he hath; then to

turn the Intereſt upon the Executor himſelf, for he might have paid it, and ſaved the Intereſt; and it may be, he made Intereſt of the Money in his Hands in the mean Time. This was not denied by any; and *Lord Chancellor* admitted it. *MS. Notes.*

5. If Executors ſever in their Receipts and Diſburſements, in ſuch Caſe they ſhall be only reſpectively anſwerable *pro tanto*; but if they act jointly, each of them ſhall anſwer the whole, if one becomes inſolvent. Admitted by *Lord Chancellor* and the Bar, *in Caſu Darwell* and *Darwell*, *Mich.* 8 *Ann. MS. Rep.*

6. *A.* is indebted to *B.* upon Bond, and makes *C.* his Executor, and dies, *leaving Aſſets ſufficient to keep down the Intereſt due upon the Bond.* If the Executor does act, and poſſeſs himſelf of the Aſſets, and keep them in his Hands, and let the Intereſt go on, this Prejudice turns upon himſelf. *Eaſt.* 8 *Ann. Anon. MS. Rep.*

7. An *Adminiſtrator writes a Letter to his Inteſtate's Creditors*, viz. "*I promiſe to pay you what Money was to you before I went out of* "*Town, but it will be a Kindneſs to me if you will ſtay 'till next Win-* "*ter, but if not, I will endeavour to pay you.*" *Per Cur'*, Promiſe to pay or Forbearance before the Statute of Frauds was accounted a good Conſideration to charge the Executor or Adminiſtrator *de bonis propriis*; and ſince, a Writing is ſufficient after a *parol* Promiſe; and by this Letter *it appears that the Adminiſtrator had made a Promiſe, and confirmed it by this Letter*; ſo decreed that the Adminiſtrator ſhould be bound by the Promiſe, and ſhould anſwer Debts and Coſts out of his own Eſtate, but have Satisfaction out of Aſſets, if any. *Hil.* 1715. *Frederick* and *Wynne*, *Vin. Abr.* Tit. *Executors*, (A. a.) *Ca.* 19.

8. An Attorney having delivered up Deeds to an Executor, which he was not obliged to do 'till his Bill was paid, which Deeds would be of great Uſe to the Executor in ſeveral Suits that were then carrying on, the Executor having changed his Attorney; this is a ſufficient Conſideration to make the Executor liable for the full Demand, whether Aſſets or not. *Jan.* 27, 1719. *Dutcheſs of Hamilton* and *Incledon*, *Vin. Abr.* Tit. *Executors*, (P. a.) *Ca.* 53.

9. *A.* by Will gives an Annuity out of his *perſonal* Eſtate. If the Executor has miſbehaved himſelf, the Court will order Part of the *perſonal* Eſtate to be ſet aſide to ſecure this Annuity. *Trin.* 1723. *Batton* and *Earnley*, 2 *Will. Rep.* 163.

(M) Executors; in what Caſes the Survivor ſhall take the Whole.

1. *J. S.* by Will *deviſes the* Reſiduum *to Defendant* A. *and to* E. Ux' B. *and to* C. Ux' T. *and makes them three Executors.* The Defendant *A. only adminiſters*, and *before all the Eſtate of the Teſtator was got in and his Debts paid*, E. Ux' B. *dies*, and then *B.* her Huſband dies. *Quære*, If the Adminiſtrator of the Huſband is intitled to the third Part of the *Reſiduum* of the Teſtator, or the Adminiſtrator of *E.* the Wife? And *per* Lord Chan. *Cowper*, The *Reſiduum* of the Teſtator's Eſtate is *uncertain until his Eſtate is got in* and *his Debts paid*, and thereby *reduced to a Certainty*, and before that *it cannot be ſaid to be actually veſted, but remains as a* Choſe en Action, and therefore ſhall not go to the Adminiſtratrix of the Huſband, but to the Adminiſtrator of the Wife. 3 *Geo* 1. *Amhurſt et al'* and *Selby*, *Vin. Abr.* Tit. *Executors*, (A. b. 8.) *Ca.* 8.

2. *A.*

2. *A.* makes two Executors, *B.* and *C.* appointing them *residuary Legatees.* *B.* dies; the Whole shall survive to *C.* *Trin.* 1729. *Vide* the Case of *Cray* and *Willis* at the Rolls, 2 *Will. Rep.* 259. *Vide* 1 *Vol. Abr. Eq.* 243. *Ca.* 3. S. C.

(N) Where one Executor renounces.

1. *J. S.* as an Encouragement to his Executors (who were four) to accept of the Trust and Executorship, did give to each of them 100*l.* and 12*l.* apiece for Mourning, and to each of them a Ring, and 10*l.* a Year for their Trouble. And *per* Lord Chan. *Cowper*, notwithstanding the Condition of the Acceptance might seem to run to all the Legacies, yet the Executors, tho' they did not act, should have their *Rings* and *Mourning*, these being intended them immediately, and not to wait their Time of Acceptance; but that they should not have the 100*l.* or the 10*l.* Annuity, unless they accepted of the Trust; and that the Share or Annuity of the renouncing Executor should not go over to the acting Executors, as a further Encouragement, but ought to sink into the Estate. *Hil.* 1716. *Humberston* and *Humberston*, 1 *Will. Rep.* 332. 1 *Vol. Abr. Eq.* 207. *Ca.* 8. S. C. but *not* S. P.—*Prec. in Chan.* 455. S. C. but *not* S. P.—*Gilb. Rep. in Eq.* 128. S. C. but *not* S. P.—2 *Vern.* 737. S. C. but *not* S. P.

2. *J. S.* devises that his Executors should sell his Land, and leaves two Executors, one whereof dies, and the other renounces, and Administration, with the Will annexed, is granted to *A.* who brings a Bill against the Heir to compel a Sale. Objected, That the renouncing Executor, in whom the Power of Sale *collateral* to the Executorship was vested, ought to have been made a Party; but there being *only a Power*, and *no Estate devised to the Executors*, this Objection was over-ruled (*a*). *Per* Lord Chan. *King*, *Mich.* 1725. *Yates* and *Compton*, 2 *Will. Rep.* 308, 309.

(*a*) But the *Reporter* adds a *Quære.*—*Select Cases in Chan.* 54. S. C. says, it was held that the Estate descends to the Heir at Law, and that he is only a Trustee to the Use of the Will since the Executors renounce, so no Occasion to be Parties.

3. Where there are two Executors, and one renounces, *vide* (K) *Ca.* 11.

(O) In what Cases an Executor shall take as such, or as a Legatee or a Devisee.

1. *J. S.* having lent *A.* (the Defendant) 2000*l.* by Will devises that after his Debts paid the *Residue of all his Goods, Chattels, Debts, Shipping*, &c. *should be divided between* B. (*the Plaintiff*) *and said* A. *his Nephews*, and makes *A.* his Executor, and dies. And *Lord Chancellor* held clearly, that this Debt of 2000*l.* should not be extinct, but should be cast in with the *Residue* of the Estate, especially in this Case, where Debts are particularly mentioned; and this was a Debt at the Time of making of the Will; and that if the Word *Debts* had *not* been in, his *Lordship* said, he believed it would have been all one, but that made it more strong. *Mich.* 1676. *Phillips* and *Phillips*, 2 *Freem. Rep.* 11. *Finch Rep.* 410. *Hil.* 31 *Car.* 2. S. C.—1 *Chan. Cases* 292. *Mich.* 28 *Car.* 2. S. C.—1 *Vol. Abr. Eq.* 292. *Ca.* 6. *Phillips* and *Phillips*, is *not* S. P.

2. Bill by Heir at Law against Executor to have an Account of the *personal* Estate of his Ancestor, *&c.* in Exoneration of the *real Estate devised to Trustees to be sold for Payment of Debts.* *W.* by Will devises to Trustees (*ut supra*) and *gives his Wife several specifick Legacies*, and further devises to her *all the Residue of his personal Estate*,

and *alſo gives her the Sum of* 600 l. *out of the Money to be raiſed by Sale of the Truſt Eſtate*, and *makes her Executrix*. *Harcourt* C. ſaid, This is a much ſtronger Caſe than that of *Chriſt's Hoſpital* and *Garraway*, for *there* was no Deviſe out of the *perſonal* Eſtate, but *here* is that and alſo a Deviſe of the perſonal Eſtate; it ſhews that he did not think this ſufficient for her, but gives her a further Sum of 600 *l.* which is the ſtrongeſt Preſumption imaginable of the Intent that the Wife ſhould have the Reſidue of the *perſonal* Eſtate; and as to the Account thereof, the Bill was diſmiſſed. 12 *Ann. Waſe* and *Whitfield*, *Vin. Abr.* Tit. *Executors*, (K. b.) *Ca.* 19.

3. *J. S.* by Will ſettles his Lands for Payment of his Debts, and makes *M.* his Wife Executrix, and deviſes all his *perſonal* Eſtate to his Executrix, and by ſubſequent Clauſes deviſes ſeveral *ſpecifick* and *pecuniary* Legacies to her, and dies. Adjudged that *M.* takes the *perſonal* Eſtate not as a *Legatee* but as an *Executrix*, and ſo the ſame, after the Legacies paid, ſhall be applied to diſcharge the real Eſtate in favour of the Heir. *Hil.* 2 *Geo.* 2. *in Scac'*, *Lucy* and *Bromley*, *Fitz-Gibb. Rep.* 41.

But *per Pengelly* C. B. if theſe Words *(to her own Uſe)* had been added, or ſuch like Words, it might give ſome Cauſe of Doubt. *Ibid.*

4. If I deviſe a Term for Years to my Executor, who enters generally, he may, *primâ facie*, take as Legatee, this being more for his Advantage; tho' it is otherwiſe where I deviſe a Term to my Executor for Life only, with Remainder to *J. S.* becauſe if the Term were veſted in the Remainder Man, it could not be deveſted out of him again, and ſo might make a *Devaſtavit*. *Per* his *Honour* (cites 1 *Roll Abr. Eq.* 619.—*Cro. Eliz.* 347. *Pannel* and *Fenn*) in the Caſe of *Cray* and *Willis*, *Trin.* 1729, 2 *Will. Rep.* 531.

(P) In what Order Executors ought to pay Debts (*a*) and Legacies.

(*a*) *Vide* Tit. *Creditor and Debtor*, P. *Ca.* (Q.) P. See alſo Tit. *Bonds*, &c. P. *Rule.*

1. *Debtor* in Bonds and *ſimple* Contracts aſſigns Lands to ſell *in Truſt* for Payment of his Debts. *Reſolved* and *declared* to be the *conſtant* Rule *that the Creditors ſhould have in Proportion*, and *not the Bonds to be firſt ſatisfied.*——So *Legatees* ſhall have equal Proportion *pro rata* according to the *Greatneſs* or *Smallneſs*, for the Land is made Debtor, &c. *Sed ſecus of Judgments which affect Land by their own Strength* and *Nature*. 6 *Nov.* 15 *Car.* 2. *Woolſton Croft* and *Long*, *et econt'*, 2 *Freem. Rep.* 175.

And *per Lord Chancellor*, if it had been *Quadratenta* it had been good *in Law* for 400 *l.*

2. A Bond was *in Quadraginta libris*, conditioned for the Payment of 180 *l.* The Court decreed this to be good *pro Quadringentis*, by reaſon of the Greatneſs of the Sum expreſſed in the Condition; *tho' no Money was proved to be lent upon it*, and it being decreed good for 400 *l.* the Court ſaid it ſhould have all the Effects of a Bond, and the Obligor being dead, they decreed it ſhould charge the Heir as far as his Aſſets as well as the Executor, and that it ſhould be ſatisfied by the Executor before any Bond that Judgment was not obtained upon *before* the Day of pronouncing the Decree. But admitted that Judgments upon Bonds obtained *after* the *Subpœna* and *before* the Decree, ſhould be preferred before it, tho' the contrary was preſſed. *Hil.* 1676. *Anon. in Canc'*, *MS. Rep.*

2 *Freem. Rep.* 16. *Ca.* 14. S. C. *in totidem verbis*, ſays, *Keck* cited the Caſe of *Savage* and *Brown*, where a Seal being broke off a Bond, *this Court* decreed it good, and that after it ought to have all the Effects of a Bond to charge an Heir, if mentioned. *Ibid.*

3. *A.*

3. *A.* made his Will, and died indebted to ſeveral Perſons by Bond more than his perſonal Eſtate would pay. A Bond Creditor brought a Bill againſt the Executor to have a Diſcovery and Account of the *perſonal* Eſtate, and a Satisfaction of his Debt; at the Hearing the Executor made Default, ſo there was a Decree againſt him for an Account and Satisfaction out of the Aſſets *Niſi, &c.* Before the Decree was made abſolute another Bond Creditor of the Teſtator brought an Action at Law againſt the Executor upon a Bond; he appeared, and becauſe he could not plead this Decree at Law, ſuffered Judgment to go againſt him by Default; and the Account being carried on before the *Maſter*, the Queſtion before *him* was, Whether *he* ſhould allow this Judgment on the Account? And *he* being in Doubt, reported the Matter ſpecially to the Court, and his *Honour* was of Opinion that the Decree muſt be preferred; and it coming to be reheard before *Lord Chancellor*, he was of the ſame Opinion. *Mich.* 1697. *Joſeph* and *Mott, MS. Rep.* *Prec. in Chan.* 79. S. C. *in totidem verbis.*

4. *A.*'s Executors brought a Bill againſt all the Teſtator's Creditors, ſome were Creditors by *Judgment*, ſome by *Bond*, and ſome by *ſimple Contract*. *A.* had deviſed Lands to his Executors for the Payment of his Debts, and in the firſt Part of his Will had deviſed an Annuity of 50*l. per Annum* to his Wife. *Lord Chancellor* directed, Firſt, That the Lands being deviſed to his Executors, it ſhould be conſtrued that *A.* the Teſtator intended that they ſhould be paid in the ſame Order as the Law directs, *i. e.* that the Debts ſhould be *firſt* paid before this Annuity, which was but a Legacy, let the wording of the Will be how it will; altho' it deviſed the Lands charged with this Annuity for the Payment of Debts, yet the Debts ſhould have the Preference; but his *Lordſhip* held that the Debts of all Kinds, whether by *Judgment*, *Bond* or *ſimple Contract*, ſhould be ſatisfied *pari paſſu*, and if the Value of the Land fell ſhort, then that they ſhould be ſatisfied in Proportion, only *Judgments that did affect the Land, without any ſuch Deviſe, were to have the Preference*; but a *Debt by a Decree in Chancery ſhould be put in equal Degree with Debts by* Bond *or* Contract, becauſe *that doth not bind the Land until Sequeſtration*; but ſo far as the *perſonal* Eſtate did extend, his *Lordſhip* ordered that the Debts ſhould be paid in that Order as the Law did direct, and *there a Debt by a Decree in Chancery ſhould have the Preference of a Bond. Hil.* 1679. *Foly's Caſe, MS. Rep.* 2 *Freem. Rep.* 49, 50. S. C. *accord'*, ſays the Caſe of *Hickſon* and *Witham* was cited. *Ibid.* 50.

5. *J. S.* deviſed Lands to *A.* and *B.* In Truſt to be ſold for the Payment of his Debts, and makes them Executors. And the Queſtion was, Whether Bond Debts ſhould have a Preference, or all Debts be paid *pari paſſu?* This *Difference* was taken, When the ſame Perſons that are Truſtees to ſell the Lands are Executors likewiſe, and when not; for in the *former* Caſe, after the Land is ſold, it is Aſſets, even at Law; and therefore to decree them to pay otherwiſe than according to the *legal* Courſe, would be to decree a Devaſtavit. *Lord Keeper* took Time to conſider of it, and afterwards delivered his Opinion *That Bond Debts muſt be preferred* (*a*). *Mich.* 1700. *Cutterback* and *Smith, Prec. in Chan.* 127. 2 *Vern.* 295. S. C.

(*a*) And 23 *Dec.* 1700, at *Powis Houſe*, in the Caſe of *Bickman* and *Freeman*, was a like Decree and Difference. *Ibid.*

6. An Executor pays *Bond* Debts before Money, on a Decree againſt his Teſtator. *Per Cur'* clearly, he ſhall not be allowed thoſe Payments in his Account, becauſe the Decree *here* is equal to a Judgment at Law. *Mich.* 1700. *Biſhop* and *Godfrey et al'* Executors of *Swift, in Chan. Prec. in Chan.* 179.

7. *A.* deviſed *Lands to be ſold for Payment of his Debts*, and makes the *Deviſees* Executors. The Queſtion was, Whether the Debts ſhould be paid in Proportion, or according to the Courſe of Adminiſtration? And *Lord Keeper* having taken Time to conſider of it, he delivered his Judgment that they muſt be paid in a *Courſe of Adminiſtration*, becauſe *where the ſame Perſon is Executor and Truſtee*, the *Land*, *when ſold*, *is* legal *Aſſets*; ſecus *when the Truſtee is Executor*, there *they ſhall be paid in Proportion*. *Mich.* 1700. *Bickham* and *Freeman*, *Prec. in Chan.* 136.

8. *After* a Bill filed againſt an Executor for a Diſcovery of Aſſets, *&c.* and Anſwer put in, the Executor *voluntarily paid a Bond Debt to* J. S. *without Suit*. The Cauſe proceeded to a Hearing, and an Account was decreed; and the Queſtion was, Whether this *voluntary* Payment pending a Suit *here* ſhould be allowed them on the Account? And Lord Keep. *Wright* thought the Payment ought to be allowed; but this being a Point of Conſequence, his *Lordſhip* ordered Precedents to be ſearched. *Hil.* 1701. *Darſton* and *Earl of Orford*, *Prec. in Chan.* 188.——Afterwards 3 *June* 1702, on Precedents produced on both Sides, his *Lordſhip* ſeemed to be of the ſame Opinion, and ſaid the Caſe of *Joſeph* and *Mott* (*a*) was a Precedent againſt him, but ſaid he thought that a direct Change of the Law. The next Day (upon Conſideration of the Precedents) his *Lordſhip* ſaid he was bound up by them, and therefore decreed the Payment (being voluntary) to be diſallowed, but ſeemed to diſapprove of the Caſe of *Joſeph* and *Mott*, where the Judgment at Law was fairly obtained.——21 *Nov.* 1702, this Decree was reverſed *in Dom. Proc'*, and the Payment allowed (*b*). *Ibid.* 189.

(*a*) *Vide P. Ca.*

(*b*) 3 *Will. Rep.* 401, 402. S. C. cited and ſays, the Decree was reverſed *in Dom. Proc'*.

9. The Grantor's Covenant in a Marriage Settlement *for him and his* Heirs, *that the Premiſſes were free from Incumbrances*, ſhall come in with Creditors *equally* on Bond. *Per* Lord Chan. *Cowper*, *Eaſt.* 1715. *Parker* and *Harvey*, *Vin. Abr.* Tit. *Executors*, (Q. a.) *Ca.* 39.

10. *A.* a *ſimple* Contract Creditor of the Teſtator, filed his Original againſt the Executor in order to recover his Debt; the other *ſimple* Contract Creditors offered *A.* to come in for his Proportion of his Debt with them, but having firſt filed his Original, he inſiſted on his whole Debt in Preference to the reſt; upon which the Executor and the other *ſimple* Contract Creditors entered into Articles, agreeing that, firſt, the Executor ſhould be paid his Debts, and then that all the ſimple Contract Creditors ſhould equally ſhare the Aſſets betwixt them, excluſive of *A.* and in order to bar the Plaintiff at Law the Executor gave Judgment in the ſeveral *Quantum Meruits* brought by the other ſimple Contract Creditors for the ſeveral Sums which were laid as Damages in the Declarations, without aſcertaining the Damages by Writ of Inquiry, but that thoſe Damages were ſo laid as not to exceed the real Debt. Upon this *A.* brought his Bill; but his *Honour* diſmiſſed the Bill *without* Coſts, it being a hard Caſe; but afterwards, on Conſideration, his *Honour* gave (*c*) Coſts. Decree affirmed by *Lord Chancellor*. *Mich.* 1715. *Waring* and *Danvers*, 1 *Will. Rep.* 295.

(*c*) His *Honour* ſaid, If *A.* deſired it he would ſend it to the Maſter to ſee whether the Judgments confeſſed to the *other* Creditors be more than their real Debts, but *A.* not thinking it worth his while, the Court decreed *ut ſupra*. *Ibid.* 297.

11. The late Earl of *Winchelſea* died ſeiſed of ſome Lands in Fee, and conſiderably indebted *by Judgment* and *ſimple Contract*; and after his Death, and *before the* Eſſoin *Day of the next following Term*, many of the *Judgment Creditors delivered* Fieri Facias's *to the Sheriff*, and *took the Goods in Execution*; whereupon the *ſimple* Contract Creditors

petitioned

petitioned (for it did not come before the Court upon a Bill) *that the Judgment Creditors might be paid out of the Land*, or *at leaſt* that *as to ſo much as the Judgment Creditors had, by taking it from the perſonal Eſtate, exhauſted the ſame, they* (the *ſimple* Contract Creditors) *might ſtand in their Place, and be paid out of the Land. Sed per Cur'*, This Rule of Equity is very juſt, but not applicable to the preſent Caſe. Here the *Judgment* Creditors have lodged their Writs of Execution with the Sheriff in the ſame Vacation that the Party died; it relates to the *Teſte* of the Writ, as to *all* but *Purchaſers*; and conſequently by relation, the perſonal Eſtate of which the *ſimple* Contract Creditors would avail themſelves, as being in the Poſſeſſion of the Earl at his Death was not ſo, being evicted from him in his Life-time by the Execution; and therefore the *ſimple* Contract Creditors ſeem to be without Remedy, as to ſuch of the Aſſets as have been ſeiſed by theſe Executions. *Per* Lord *Parker*, *Hil. Vac.* 1719. *Finch* and *The Earl of Winchelſea*, 3 *Will. Rep.* 399, in a Note by the *Reporter*, who ſays *Sed Quære.*

12. *J. S.* mortgaged Land to *A.* and about ſix Years after died *inteſtate*, and *D.* (the Plaintiff) *without* taking out Adminiſtration, poſſeſſed herſelf of his *perſonal* Eſtate, and paid it *all* away in ſatisfying Debts on *ſimple* Contract. *A.* died having made his Will, and thereof Defendant Executor, who proved the ſame, and was in Poſſeſſion of the mortgaged Lands. About ſeven Years after *J. S.*'s Death Plaintiff found a Will of *B.*'s, the Grandfather of *J. S.* the Mortgagor, whereby theſe Lands were given to his Son in Tail, and *no* Fine or Recovery appearing to have been levied or ſuffered of thoſe Lands, *C.* the Plaintiff's eldeſt Son by her firſt Huſband, who was Heir in Tail, brought an Ejectment, and recovered Poſſeſſion of the mortgaged Lands; whereupon the Executor of *A.* (the Defendant) having a Bond for Performance of the Covenants in the Mortgage Deed, put it in Suit againſt *D.* and *D.* brought a Bill for an Injunction, ſhe having paid away all the Teſtator's Aſſets before any Notice of this Bond, and therefore ought not to be chargeable with a Devaſtavit. Defendant demurred (*a*), and the Demurrer was clearly allowed, the Bill being an Attempt to alter the Courſe of Law; but if any extraordinary Fraud had been charged on Defendant by which ſhe had been deceived or induced to pay away the Aſſets, that might have varied the Caſe. *Trin.* 1720. *Greenwood* and *Brudniſh*, *Prec. in Chan.* 534.

(*a*) For that of the Plaintiff's own ſhewing it appeared that Aſſets came to her Hands more than ſufficient to pay and ſatisfy this Bond, and that it alſo appeared by her own ſhewing that ſhe paid away theſe in ſatisfying Debts on *ſimple* Contract and of an inferior Nature; and that was to introduce a Courſe of Adminiſtration contrary to Common Law. *Ibid.* 535.

13. Deviſe of a *real* Eſtate to *Truſtees and their Heirs, to be ſold for the Payment of Debts and Legacies, and gives ſeveral Legacies and* 200 l. *to* B. The Will is executed according to the Statute. Then by a *Codicil* he gives 1000 *l.* more to *B.* but the Codicil is neither *executed* or *ſigned by him.* The *Maſter of the Rolls* ſaid, *this Deviſe is a total Diſheriſon of the Heir*, and the whole is out of him, and the *Reſiduum* is Money, (which was given away.) The Codicil is a good Appointment, and the Money raiſed by Sale of the *real* Eſtate being a Fund for Payment of Debts; and the *Reſiduum* of the *perſonal* Eſtate being given alſo away, the perſonal Eſtate given as ſuch is freed from the Debts without negative Words. *Trin.* 6 *Geo.* 1. *Bowerſby* and *Bowyer*, *Vin. Ab.* Tit. *Executors*, (Y. b.) *Ca.* 8.

14. *J. S.* a Fellow of *Greſham* College, and a Fellow likewiſe of a College in *Cambridge*, by a Note directed to the Defendant his Ex-

ecutor, *taking Notice that he was indebted to Plaintiff in* 80 l. *deſires the Debt ſhould be paid of what ſhould be due to him from the College as* Fellow *at the Time of his Death*, and *out of what might be raiſed by the Sale of his Furniture of his Chambers at the Time of his Death. Quære*, If this Note of Directions to his Executor doth create a *ſpecifick* Lien of theſe Things in favour of the Plaintiff to give her the Preference to other Creditors? *King* C. ſaid, *This is no ſpecifick Lien* upon theſe particular Things, but the *Note is fraudulent as to other Creditors*, and the Plaintiff ought to prove her Debt and come in as other Creditors in *equal* Degree; if ſuch Notes ſhould give a Preference to Debts by *ſimple* Contract, juſt Creditors by *Specialty* or *Record* might be ſtript of their Debts, and the Plaintiff, in this Caſe, *ought to come in only as a Creditor by ſimple Contract*, without any Preference upon Account of this Note; but Plaintiff agreeing to accept the Sum offered by Defendant's Anſwer, it was decreed by Conſent. *Trin.* 12 *Geo.* 1. *Hudſon* and *Martin*, *Vin. Abr.* Tit. *Executors*, (Q. a.) *Ca.* 43.

15. If I charge all my Lands with Payment of my Debts, and deviſe Part to *A.* and another Part to *B. &c.* the Creditors cannot be paid out of the Lands 'till the Maſter has certified what the Proportion is which each Deviſee is to contribute; but if the Maſter certifies that the Debts will exhauſt the whole *real* Eſtate, then the Creditors may proceed againſt any one Deviſee for the whole. *Hil.* 1730. *Harris* and *Ingledew*, 3 *Will. Rep.* 98.

16. All Executors ſhall be preſumed to take Notice of all Judgments, even (*a*) in the *inferior* Courts of Law, and therefore are not to pay Bonds before ſuch Judgments but at their Peril. *Trin.* 1731. *Per* Sir *Joſeph Jekyll* Maſter of the Rolls, in the Caſe of Mr. *Herbert*, 3 *Will. Rep.* 117.

(*a*) See the Office of an Executor, *Cap.* 12.

17. Any *voluntary* Bond is good againſt an Executor *or* Adminiſtrator, unleſs ſome Creditor be thereby deprived of his Debt; indeed if the Bond be merely voluntary, a real Debt, tho' by ſimple Contract only, ſhall have the Preference; but if there be no Debt at all, then a Bond, however voluntary, muſt be paid by an Executor, *Per* Sir *Joſeph Jekyll*, *Mich.* 1733, *in Caſu Lechmere* and *Earl of Carliſle*, 3 *Will. Rep.* 222.

18. *A.* and *B.* are Partners in Trade. *A.* gives a Bond to leave his Wife 1000 *l.* *A.* dies. *B.* (who was one of *A.*'s Executors) adminiſters; if the Wife would be paid this 1000 *l.* out of the *ſeparate* Eſtate of *A.* on there being Effects, ſhe ſhall have a Preference before other Creditors; but if there is *no ſeparate Eſtate*, and ſhe would have a Satisfaction out of the *Partnerſhip* Effects, then all the *Partnerſhip* Debts muſt be *firſt* paid; and if there ſhall remain any Surplus in *A.*'s Share of the Stock, then that to be liable to anſwer this Bond. Decreed *per* Lord Chan. *King*, *Eaſt.* 1733. *Croft* and *Pyke*, 3 *Will. Rep.* 180, 182.

But the Court declared that where a Bond is due to *A.* but taken in the Name of *B. In Truſt* for *A.* and *A* dies, this muſt be paid in a Courſe of Adminiſtration; for in ſuch Caſe there can hardly be any Diſpute touching the *Quantum* of the Debt, ſeeing the Principal, Intereſt and Coſts muſt be paid to the *Obligee*.——So, for the ſame Reaſon, if a Term for Years be taken in the Name of *B. In Truſt* for *A.* this, on the Death of *A.* the *Ceſtuy que Truſt*, will be *legal* Aſſets; for here the Right to the Thing is plain, and if the Truſtee conteſts it, he muſt *primâ facie* do it on the Peril of paying Coſts. *Per Cur'*. *Ibid.* 342, 343.

19. *J. S.* poſſeſſed of a *Term for Years*, *mortgages it*, and dies, leaving Debts, ſome *by Bond*, and ſome *by ſimple Contract*. The Equity of Redemption is *equitable* Aſſets, and ſhall be *liable to all the Debts equally*. Decreed *per* Sir *Joſeph Jekyll*, *Mich.* 1734, in the Caſe of *The Creditors of Sir Charles Cox*, 3 *Will. Rep.* 341.

20. *J. S.* poſſeſſed of a Term for one thouſand Years, articles to purchaſe the Inheritance, and the *Vendor* covenanted to procure a Conveyance to be made thereof to *J. S.* and his Heirs; *J. S.* dies before the Conveyance made, having by Will given to the Defendant his Daughter a Legacy of 3000*l.* and left *S.* his Son and Heir, his Executor. *S.* aſſigns the ſaid Term, In Truſt to attend the Inheritance intended to be purchaſed, and afterwards takes a Conveyance of the Inheritance to himſelf; then *S.* confeſſes a Judgment to *A.* (a Defendant) and mortgages the Inheritance to *B.* (another Defendant) without taking any Notice, or making any Aſſignment of the old Term of one thouſand Years, and dies inſolvent. The Queſtion was, Whether the Daughter, and who was the Adminiſtratrix of *S.* was intitled to a Satisfaction for her 3000*l.* Legacy out of the one thouſand Years Term, in Preference to the other Incumbrancers, and to have it conſidered as *equitable* Aſſets of *J. S.* the Father, notwithſtanding the Aſſignment made by the Son in Truſt to attend the Inheritance? Or, Whether the *Judgment* Creditor and Mortgagee ſhould have the Benefit of this Term, as connected with the Inheritance by the Aſſignment that had been made thereof to attend the ſame? And Lord Chan. *Talbot* decreed that the Judgment Creditor ſhould be firſt ſatisfied, according to the Priority of Liens affecting the *real* Eſtate; in the next Place the *Mortgagee*; and as the Eſtate is to be ſold for the Satisfaction of Creditors, tho' the Siſter and Adminiſtratrix of *S.* claims a Debt but by ſimple Contract, on account of the *Devaſtavit*; yet having a *Right, as* Adminiſtratrix, *to retain againſt all Creditors in equal Degree*, ſhe ſhall retain her Debt *prior* to all the *ſimple* Contract Creditors of her Brother. *Mich.* 1734. *Charlton et al'* and *Low et al'*, 3 *Will. Rep.* 328.

21. The Court apprehended, that if a *ſimple* Contract Creditor, on Behalf of himſelf and the reſt of his Creditors, were to bring a Bill, and obtain a Decree, that he and the reſt of the Creditors ſhould come in before the Maſter, and be paid all their Debts; and that an Advertiſement be put in the *Gazette* for that Purpoſe. Here any *Bond* Creditor coming in on the Foot of the Decree, ſhall be paid only *pro ratâ* with the *ſimple Contract Creditors*; for his coming in implies a Submiſſion to the Decree. And this was thought to be clear. *Mich.* 1734, *in Caſu* of *The Creditors of Cox*, 3 *Will. Rep.* 343.

22. But the Court inclined to hold further, that if ſuch Bond Creditor would lie by, having Notice of the Decree and Advertiſement in the *Gazette*, (notwithſtanding every one is in many Caſes obliged to take Notice of a *Lis pendens*) and after ſuch lying by, ſhould bring his Action againſt the *Executor* or *Adminiſtrator* of the Obligor; tho' at Law the *latter* might not be able to defend himſelf, yet his *Honour* thought that in this Caſe, an Equity would ariſe in favour of ſuch *Executor* or *Adminiſtrator*, and of the *ſimple Contract Creditors*, to compel the *Bond* Creditor to come in and accept of a Proportion of his Debt rateably with the *ſimple Contract Creditors*. But however ſtrongly his *Honour* inclined to be of this Opinion, he ſaid, it was no Part of his Judgment; nevertheleſs *he* declared, *he* ſhould always do *his* utmoſt to extend the Rule of *diſtributing equitable Aſſets amongſt all Creditors* (*a*). *Ibid.* 343, 344. in S. C.——The *Reporter* ſays, that this Reſolution was communicated to him by his *Honour* himſelf. *Ibid.* 344.

(*a*) See 2 *Vern.* 435. *Shephard* and *Kent*.

23. If a Man deviſes his Lands to Truſtees to pay all his Debts, and dies indebted by *Specialty* and *ſimple Contract*, and the *Bond Creditors* recover Part of their Debts out of the *perſonal* Eſtate, and afterwards

terwards they apply to be paid the reſt of their Bond Debts out of the *real* Eſtate deviſed for that Purpoſe; in this Caſe, as the Teſtator intended all his Creditors ſhould be equally paid their Debts, the *Bond Creditors* ſhall *not* come in upon the Land, until the *ſimple Contract Creditors* have received ſo much thereout as to make them *equal*, and upon the *Level* with the *Bond Creditors*, in reſpect of what they received out of the perſonal Eſtate. And this Lord Chan. *Talbot* ſaid, was what the *Maſter of the Rolls* had very rightly decreed on great Conſideration (*a*). *Trin.* 1734, in the Caſe of *Haſlewood* and *Pope*, 3 *Will. Rep.* 323.

(*a*) This ſeems to have been the Caſe of *Deg* and *Deg*, 2 *Will. Rep.* 416.

24. *A.* bequeaths *all* his *perſonal* Eſtate to his Daughter, an Infant about ſeventeen, and deviſes all his *real* Eſtate to Truſtees, *In Truſt* to pay his Debts and Legacies, Remainder to his Daughter in Tail, Remainder over; the *perſonal* Eſtate ſhall, in the *firſt* Place, be *all* applied to pay the Debts. *Per* Lord Chan. *Talbot*, *Trin.* 1734, *Haſlewood* and *Pope*, *ibid.* 324.

25. Expreſs Words, or Words *tantamount*, are requiſite to exempt the *perſonal* Eſtate from Payment of Debts. *Per* Lord Chan. *Talbot*, *ibid.* 325. in S. C.

26. *A.* dies indebted by Bond, and ſeiſed in Fee of divers Lands, Part of which he deviſes to *J. S.* and other Part he permits to deſcend to his Heir; the Lands permitted to deſcend ſhall, in the *firſt* Place (*b*), be liable to pay the Bonds. *Trin.* 1735. *Chaplin* and *Chaplin*, 3 *Will. Rep.* 367.

(*b*) The Reporter *here* adds the following *Note*.

The Reaſon why, where a Man dies indebted by Bond, and deviſes ſome Lands to *J. S.* and leaves other Lands to deſcend to the Heir at Law, not mentioning them in his Will, the Lands deſcending to the Heir ſhall be firſt applied to pay the Bond Debts, is, becauſe the applying the Lands deviſed to *J. S.* to pay the Bond Debts, would diſappoint the Will, which Equity will not permit, if it can be avoided; whereas it no way diſappoints the Will to ſay, that the Lands not mentioned ſhould be in the *firſt* Place liable to pay the Debts: But it ſeems it would be otherwiſe, if the Teſtator had deviſed the Lands to his Heir at Law; for tho' ſuch Deviſe were void, (as to the Purpoſe of making the Heir take otherwiſe than by Deſcent) yet it ſhews the Teſtator's Intent, that the Heir ſhould have the Land, and therefore (I take it) the deviſed Lands to *J. S.* and the other Lands deviſed to the Heir at Law ſhall, in this laſt Caſe, contribute in Proportion to pay the Bond Debts. Alſo, for the above mentioned Reaſon (I ſhould think) the Lands permitted to deſcend to the Heir at Law, and not mentioned in the Will, ſhall be applied to pay the Bond Debts before a *ſpecifick* Legacy, leſt otherwiſe the Teſtator's Intention ſhould be diſappointed. *Ibid.*

(Q.) What ſhall be Aſſets (*c*).

(*c*) Where there are two Executors,

and one is beyond Sea and the other in *England*, and a Bill is brought againſt him that is in *England*, he having Aſſets in his Hands to anſwer the Demand; *per Cur'*, The other Executor need not be made a Party in ſuch a Caſe of Neceſſity. *Eaſt.* 7 *Ann. Jeoffrey* and *Napper*.———Where *A.* deviſed to his Executors and their Heirs his Eſtate in Truſt to ſell Part, and take the Rents for the other Part to pay Debts and Legacies, with Power to raiſe Money by Leaſe, Mortgage, &c. neither the Rents or the Money are legal Aſſets in their Hands. *Prowſe* and *Abingdon* (*d*).———In general an Executor has a legal Power to diſpoſe of his Teſtator's Aſſets, and the Debt of Creditors being no ſpecifick Lien upon the Effects, but only a perſonal Demand on the Executor in Right of his Teſtator, unleſs there is Fraud or perhaps want of Conſideration in a Diſpoſition made by an Executor, the Court will not follow the Aſſets themſelves, and there is no Difference whether the Aſſets are legal or equitable, nor whether it be for Money paid down as a Satisfaction for a former Debt due from the Executor himſelf without Fraud (*e*). *MS. Notes*.———If *A.* makes *B.* one of his Executors, and *B.* owed *A.* Money upon Bond, tho' the Debt was extinguiſhed in Point of Law, yet if the Reſidue of the Eſtate be deviſed between the Executors, the Co-Executors may ſue in Equity for their Share of ſuch Debt, and it ſhall be Aſſets. *Selwin* and *Brown*, *Angier* and *Brockwell* (*f*), *MS. Rep.*———There is no Colour for one Executor to force the Aſſets out of the Hands of another, unleſs there be ſome ſpecial Reaſon for it, and then the Court, upon a proper Bill, will take Care of them. *Lewis* and *Scale* (*g*), *MS. Notes*.———But if both the Executors were Creditors to the Teſtator, and one gets all the Aſſets into his Hands, Equity will not ſuffer him to retain againſt his Companion. *Chapman* and *Turner* (*h*), *MS. Notes*.

(*d*) *Quære* Term and Year. (*e*) *Quære* Term and Year. (*f*) *Quære* Term and Year. (*g*) *Quære* Term and Year. (*h*) *Quære* Term and Year.

(Q.) *MS. Rep.* S. C. *accord'*. —3 *Chan. Rep.* 2. S. C. —*Nelſ. Chan. Rep.* 74. S. C.—2 *Vern.* 57. S. C. cited in the Caſe of *Baden* and *Earl of Pemberton*.

1. *A.* Bequeathed 500 *l.* to *B.* and made *D.* her Executor, and died. *D.* ſold Lands of his to *E.* and left 500 *l.* of the Purchaſe Money in *E.*'s Hands, who gave Bond for it to *D.* *D.* made his

his Will, and the Plaintiffs his Executors, and died. Plaintiffs inventoried the 500 *l.* as Part of *D.*'s perſonal Eſtate; afterwards *B.* obtains a Decree againſt the Plaintiffs for the 500 *l.* on this Equity, (*viz.*) *That the* 500 l. *was left in* E.*'s Hands with Intent and upon Truſt that he ſhould pay it to* B. *the Legatee*; the Court *then declaring that it was not Aſſets of* D.*'s Eſtate*, tho' inventoried as ſuch. After the now Defendant brought Debt againſt the Plaintiffs on a Bond of *D.* their Teſtator, and they not having other Aſſets, this 500 *l.* being ſo decreed *ut ſupra*; and *that Decree* and *Payment thereupon not to be given in Evidence* or *pleaded at Law in that Action*, thereupon the Plaintiffs exhibit their Bill againſt the Defendant, ſetting forth their Caſe to be in Effect *ut ſupra*; and the Queſtion was, Whether the Plaintiffs ſhould have an Allowance for the Payment of the ſaid 500 *l.* againſt the Defendant? And it was decreed that they ſhould; and that the Matter ſhould go to an Account. And Sir *John Maynard* ſaid, That if a Man ſell his Land, and leave 500 *l.* of the Purchaſe Money in the Purchaſer's Hands, and then give or appoint this Money to be paid to a Stranger, and after making his Will this Stranger ſhall have the Money, it ſhall not be Aſſets (*a*). *Eaſt.* 1661. *Jones* and *Bradſhaw*, 2 *Freem. Rep.* 153.

(*a*) *Vide Hob.* 265.

2. The Anceſtor's Incumbrances on the Lands were ſo great the Revenue would not pay the Intereſt; for which Reaſon reſolved to be no Aſſets in Equity. 10 *Feb.* 1664. *Bennett* and *Box et al'*, 2 *Freem. Rep.* 184.

Vide Ibid. 139. *Pratt* and *Colt.*

3. *Ceſtuy que Truſt* of an Inheritance binds himſelf and his Heirs in a Bond; this Truſt is *not* Aſſets to the Heir, tho' queſtioned in Lord Chan. *Hyde*'s Time; but *clearly* the Truſt of a Leaſe for Years *is* Aſſets to charge an *Executor* in Equity. *Eaſt.* 21 *Car.* 2. *Attorney General* and *Sands*, *in Scac'*, 2 *Freem. Rep.* 129, 131.

Nelſ. Chan. Rep. 134. S. C. and P. —3 *Chan. Rep.* 37.

4. A Promiſe by an Executor to his Teſtator to pay all the Legacies given by the Will in Caſe he will not alter the Will, ſhall bind, tho' he does not receive Aſſets ſufficient to pay the Legacies. Decreed by *Lord Chancellor*; who ſaid it was the conſtant Courſe of this Court to make ſuch Decrees upon ſuch Promiſes. *Eaſt.* 1678. *Chamberlaine* and *Chamberlaine*, 2 *Freem. Rep.* 34.

5. By the Stat. 29 *Car.* 2. The Truſt of an Inheritance is Aſſets by the expreſs Words of the Statute, and liable to a Debt by Bond. *Vide* 2 *Freem. Rep.* 115.

6. Tenant in Tail ſuffers a Recovery to let in a Mortgage of five hundred Years, and then limits the Land to the old Uſes, and makes his Will, and deviſes all his Lands for the Payment of his Debts. The Court thought that the Equity of Redemption of this Mortgage ſhould be Aſſets to ſatisfy Creditors, or a ſubſequent Grantee of an Annuity. *Note*; The Redemption was limited to him, his *Heirs or Aſſigns*. *Hil.* 1691. *Foſſet* and *Auſtin*, *Prec. in Chan.* 39.

7. *J. S.* ſettled an Houſe on his Daughter for Life, with ſeveral Remainders over, and then by Will deviſes the Goods, Furniture and Ornaments of the Houſe, to ſuch Perſons as the ſaid Houſe was to go to after his Death by Virtue of the ſaid Settlement. The Daughter marries *B.* who dies, not leaving perſonal Eſtate ſufficient to pay his Debts; and the Queſtion was, Whether by this Deviſe the Daughter had the abſolute Property of the ſaid Goods, for if ſhe had, then by the Intermarriage they became her Huſband's, and would be liable to his Debts? But the Court were of Opinion, That ſhe could have but ſuch an Intereſt in the Goods as ſhe had in the Houſe, *viz.* the Uſe of them for her Life, and that nobody ſhould have an abſolute

1 *Vol. Abr. Eq.* 66. *Ca.* 1. S. C. but not S. P.

Property in them but he that had an abſolute Property in the Houſe by the apparent Intent of the Deviſor. *Trin.* 1691. *Offley* and *Offley*, *Prec. in Chan.* 26.

8. *A.* ſeiſed of the Manor of *B.* of about 200 *l. per Annum* (which was charged with a Rent-charge of 120 *l. per Annum* for Life) ſettled the ſaid Manor on himſelf for Life, and after on the Plaintiff (who was his near Kinſman) and his Heirs, and Plaintiff as the Conſideration of the ſaid Settlement gave a Bond of 1000 *l.* to Defendant by *A.*'s Direction and In Truſt for him, conditioned *to pay any Sum* or *Sums of Money not exceeding* 500 l. *to ſuch Perſons* and *in ſuch Manner as* A. *ſhould by his laſt Will deviſe and appoint.* *A.* was, at the Time of making this Settlement and giving this Bond, indebted to Plaintiff in 300 *l.* by Bond, and did afterwards become indebted to him in 70 *l.* and upwards. Afterwards *A.* makes his Will, and reciting the ſaid Bond to Defendant in Truſt for him, deviſes the 500 *l.* ſecured thereby to Defendant the Obligee, and makes him Executor and dies. Defendant ſues Plaintiff upon the Bond, who brought his Bill to ſubject this Money to be Aſſets in his Hands to pay the 300 *l.* and 70 *l.* due to him from the Teſtator. *Lord Keeper* directed an Iſſue to try whether it were agreed that the Bond of 300 *l.* ſhould be delivered up or ſunk; and it was found that it was not agreed, *&c.* On coming to be heard on the Equity reſerved, *Lord Keeper* decreed the 500 *l.* to be Aſſets to pay Plaintiff's Debt, and that it ſhould go to a Maſter to compute what was due to him, and he to retain ſo much as to ſatisfy himſelf, and to pay the Overplus to Defendant. Affirmed on Appeal by the Lords. *Eaſt.* 1695. *Thompſon* and *Towne*, *Prec. in Chan.* 52.

9. *A.* treats for a Purchaſe with *B.* and the Lands to be purchaſed were incumbered with Mortgages and Judgments; the Purchaſe Money being agreed, was returned to *London* and placed in an indifferent Hand to be paid in Diſcharge of thoſe Incumbrances when the *Quantum* of them ſhould be adjudged and Aſſignments made; but before that was done the Purchaſer died, and did not leave ſufficient Aſſets to pay his Debts upon Bond. The Queſtion was, Whether the Money depoſited as aforeſaid ſhould be Aſſets of the Purchaſer, and be applied to pay his Debts, or muſt be applied to pay off the *real* Incumbrances on the purchaſed Eſtate; for if it were to be applied to pay off theſe Incumbrances, then the Creditors of the Purchaſer muſt loſe their Debts; but if otherwiſe, then the Mortgagees, *&c.* would be paid out of the Land by Virtue of their Securities, and the Creditors would have their Satisfaction out of the Money, and ſo all might be paid. Lord Keep. *Wright* was of Opinion that the Money was bound by the Agreement, and muſt be applied to pay off the Incumbrances. *Mich.* 1701. *Farr* and *Middleton*, *Prec. in Chan.* 174.

10. The Lord *Cornwallis*, upon his Marriage with Sir *S. Fox*'s Daughter, veſted a Term in Truſtees, Upon Truſt to raiſe 3000 *l.* for younger Children, and 3000 *l.* more for ſuch Uſes and Purpoſes as he ſhould appoint. He appoints 3000 *l.* to be raiſed for his Daughter, and the other 3000 *l.* he appointed to be raiſed, and by his Will gave the laſt 3000 *l.* to his Daughter alſo, and died. The Creditors preferred a Bill to have the laſt 3000 *l.* applied as Aſſets towards Payment of their Debts, which was the only Queſtion in this Caſe. It was decreed that the *laſt* 3000 *l.* ſhould be Aſſets, for he having appointed it to be raiſed, it was in the Nature of his perſonal Eſtate, and the Debts ſhould take Place before the Legacy given to his Daughter; but in this Caſe, that if a Man who hath Power to raiſe Money dies in

Debt, having made no Appointment for raiſing it, the Creditors cannot make this Aſſets, and raiſe the Money purſuant to the Power; but in the Caſe in Queſtion the Money was appointed to be raiſed, which made the Difference. *Hil.* 1704. *The Lord Cornwallis's Caſe*, 2 *Freem. Rep.* 279.

11. *A.* on his Marriage created a Term for five hundred Years, In Truſt to raiſe 6000 *l.* of which 3000 *l.* was for younger Children, and the other 3000 *l.* for ſuch Purpoſes as he ſhould think fit; afterwards he appoints the laſt 3000 *l.* to be a collateral Security to *B.* for his quiet Poſſeſſion of an Eſtate he had ſold him of which there was ſome Doubt of the Title, and after by Will appoints this 3000 *l.* ſubject to the ſaid collateral Security, and alſo the other 3000 *l.* to his Daughter. Plaintiff, a Bond Creditor, brings his Bill to have his Debt out of the 3000 *l.* ſubject to *B.*'s Indemnity; that being a voluntary Gift as to the Daughter, and not to prevail againſt him; and that the Will was a Deviſe, not a farther Appointment, for there was a compleat Appointment before, tho' not a Diſpoſition of the whole 3000 *l.* And Lord Keep. *Wright* decreed the 3000 *l.* ſubject to *B.*'s Indemnity to be liable to the Creditors, becauſe he had a reſulting Equity in it which he might deviſe, but not to take Place of Creditors, and he had before made an Appointment, which ſatisfied his Power. *Mich.* 1704. *Laſſells* and *Lord Cornwallis, Prec. in Chan.* 232.

12. A Feme hath a Fortune of 400 *l.* to be raiſed by 40 *l. per Annum* out of a Term of twenty-one Years, to commence *in futuro*. *B.* married her and died before the Term commenced. The Queſtion was, If this *Choſe en Action* when the Term commences, ſhall be the Huſband's Aſſets, and ſo liable to his Debts? *Lord Chancellor:* If the Huſband made a Settlement upon his Wife, it is but reaſonable this *Choſe en Action* ſhall be liable to his Debts; but if he hath not, the Wife ſurviving will have it. The Maſter to inquire if any and what Proviſion the Huſband made. *Eaſt.* 8 *Ann. Morgell's Caſe, MS. Rep.*

13. Defendant had Lands to the Value of 700 *l.* and alſo 500 *l.* due to her upon Bond, which remained in *D.*'s Hands. Her Huſband, before Marriage, makes a Marriage Settlement, and in Conſideration of a conſiderable Fortune and Portion with his intended Wife, he *does grant*, &c. but the Particulars wherein her Portion did conſiſt did not appear by the Deed; and the Queſtion was, If this Bond to the Defendant for 500 *l.* Part of her Portion (being a *Choſe en Action* and *not called in by the Huſband*) *ſhould be Aſſets in Equity to ſatisfy a Debt of the Huſband*, the Wife having enjoyed the Benefit of the Settlement made to her out of her Huſband's Eſtate, which would have been liable to the Debt? *Parker* C. decreed an Account to be taken of the Huſband's Aſſets, but not of this 500 *l.* Bond. *Mich.* 6 *Geo.* 1. *Heaton* and *Haſſell, Vin. Abr.* Tit. *Baron and Feme*, (D) in a Note to *Ca.* 11.

His *Lordſhip* ſaid, the Caſe was ſo very clear that Defendant's Counſel need not to argue it; Creditors in this Caſe cannot be in a better Condition than the Executor of the Debtor; and can it be imagined, that if another Perſon had been made Executor to the Huſband, and ſuch Executor had brought a Bill againſt the Wife to compel her to aſſign this Bond, that the Court would have decreed for the Executor?——What the Law gives the Huſband by the Intermarriage, is a good Conſideration for making a Settlement; but the Huſband's making a Settlement does not veſt in the Huſband the *Choſe en Action* of the Wife, unleſs it be expreſsly ſo agreed between the Parties, and that appears to be Part of the Conſideration of the Settlement, for then the Huſband is a Purchaſer, and well intitled to them in a Court of Equity. *Ibid.*

14. On a Queſtion in Chancery, Whether the Widow was to account to Executors for the *Receipt of* Tipping's *Water*? Lord *Parker* declared, That *if the Secret was imparted to her by her Huſband*, then it became a Matter of her own Knowledge, Part of her Underſtanding,

ing, which could not be taken from her; but *if ſhe learned the Art by finding the Receipt after her Huſband's Death*, or *had the Knowledge communicated to her by any Servant*, &c. then the Executors were to have the Benefit of this Receipt. *Mich.* 8 *Geo. Tipping* and *Tipping*, *Vin. Abr.* Tit. *Executors*, (G. a. 5.) *Ca.* 15.

15. *J. S.* ſeiſed of a Leaſehold Eſtate for three Lives, and having upon his Daughter's Marriage ſettled the ſame upon Truſtees, In Truſt to the Daughter for her Life, Remainder to her Huſband, Remainder In Truſt to her Children, and for want of ſuch Children, then In Truſt to the ſaid *J. S.* his Executors and Adminiſtrators; and the Daughter being dead without leaving any Child, *J. S.* makes a Will and deviſes the Reverſion, which was thus reſerved to himſelf and his Executors, to his Wife for Life, and afterwards to his Siſter, and then to his Siſter's Son, and dies. On a Bill brought by *D.* who was a conſiderable Creditor of *J. S.* to charge this Eſtate with his Debts, it had beed decreed (*a*) by Lord *Cowper* that the Reverſion of this Eſtate for Lives, reſerved to *J. S.* his Executors and Adminiſtrators, was, by the *Statute of Frauds and Perjuries*, made perſonal Eſtate, and as ſuch could not be deviſed away by the Teſtator in Prejudice of his Creditors, but ought to be liable to his Debts, and ſold for that Purpoſe.—But the Deviſee in Remainder after the Death of *J. S.* the Teſtator not being made a Party to that Suit, and the Teſtator's Wife the Deviſee for Life being dead, he now brought this Matter over again, and a Caſe was put, That if one ſeiſed in Fee ſhould convey to the Uſe of himſelf for Life, Remainder to his Executors, would that be perſonal Aſſets? And if the Executors are ſpecial Occupants, or take by Occupancy, then it cannot be Aſſets. But Lord Chan. *King* ſaid, That the Caſe put of Lands in Fee being limited to Executors, is different; that here the Executors and Adminiſtrators are made ſpecial Occupants, and alſo take as Executors, whereby the Premiſſes are *perſonal* Eſtate as naturally as if limited originally to Executors; and decreed this to be perſonal Eſtate; and that it could not be deviſed away by the Teſtator from his Creditors, but that this being a ſpecifick Deviſe, all the reſt of the Teſtator's perſonal Eſtate, *not* ſpecifically deviſed, muſt be firſt applied to pay the Debts; and if there be any other ſpecifick Deviſe, that the ſame ought to come in Average with *this*, and pay its Proportion; but if that will not ſerve, all muſt be ſold to pay Teſtator's Debts. *Trin.* 1726. *Duke of Devon* and *Atkins*, 2 *Will. Rep.* 381.

(*a*) *Vide* 2 *Vern.* 719. S. C.

16. The Huſband after Marriage purchaſed a Term for Years to himſelf and his Wife, and the Survivor, and the Executors, Adminiſtrators and Aſſigns of ſuch Survivor for the Reſidue of the Term. The Huſband mortgaged the Term with the Wife's joining (as he might do) Proviſo *to be void on Payment of the Money by him* or *his Wife*, or *either of their Executors* or *Adminiſtrators*; Proviſo *that the Huſband, his Executors* or *Adminiſtrators*, ſhall, 'till Default of Payment, quietly enjoy. The Huſband ſeven Years after contracted Debts, and died, leaving his Wife Executrix, the Mortgage Money unpaid. Decreed that this Settlement of the Term being after Marriage in the Power of the Huſband, and the Equity of Redemption being reſerved to himſelf as well as to his Wife, and being alſo in the Caſe of Creditors, was Aſſets to pay Debts. *Trin.* 1726. *Watts* and *Thomas* at the Rolls, 2 *Will. Rep.* 364.

17. His *Honour*, on decreeing an Account to be taken of a *perſonal* Eſtate, doubted, whether a *Leaſehold* Eſtate in *Scotland* could be looked upon as a perſonal Eſtate in *England*; tho' a *Leaſehold* Eſtate

in

in *Ireland* is perſonal Eſtate in *England*, and may be ſold here. But the Maſter was left at Liberty to report any Thing ſpecially. *Trin.* 1731, in the Caſe of *Bligh et al'* and *Earl of Darnley*, at the Rolls, 2 *Will. Rep.* 619, 622.

18. A Leaſe granted to one and his Heirs, for three Lives, is a real Eſtate, and tho' by the Statute of Frauds it is made liable to pay Debts, yet it is only ſuch Debts as bind the Heir; and where the Spiritual Court ſetting aſide a Will (*int' al'*) of ſuch Eſtate as revoked, this Sentence did not affect the Deviſe of ſuch real Eſtate. *Hil.* 1732. *Marwood* and *Turner*, 3 *Will. Rep.* 166.

19. Money articled on Marriage to be laid out in Land, and ſettled, is not Aſſets even at Law. 3 *Will. Rep.* 217.

20. Where the Huſband agreed that the Wife ſhould have two Guineas of every Tenant that renewed a Leaſe with the Huſband beyond the Fine, which the Huſband received, this was allowed to be the Wife's ſeparate Money. *Mich.* 1734. cited *per Cur'*, as the Caſe of *Calmady* and *Calmady*, 3 *Will. Rep.* 339.

21. One *poſſeſſed of a Term for Years, mortgages it*, and dies, leaving Debts, ſome by *Bond*, and ſome by *ſimple* Contract. The Equity of Redemption is *equitable* Aſſets, and ſhall be liable to all the Debts equally. *Per* Sir *Joſeph Jekyll* Maſter of the Rolls, *Mich.* 1734. *Cox's Caſe* (*a*), 3 *Will. Rep.* 341.

(*a*) *Vide P. Ca.*

22. But where a Bond is given to *B.* In Truſt for *A.* who dies, the Money due on the Bond ſhall be paid in a Courſe of Adminiſtration.—So if there be a Term for Years to *B.* In Truſt for *A.* *Ibid.* 342. in S. C. (*b*).

(*b*) *Vide P. Ca.*

23. An Advowſon deſcending to an Heir is real Aſſets, and (as it ſeems) extendable in an *Elegit*. *Mich.* 1735. *Robinſon* and *Tonge*, 3 *Will. Rep.* 401.

24. An Advowſon in Fee, which deſcended to the Heir, had been adjudged *in Dom. Proc'* to be Aſſets to pay Debts, where the Heir was bound. *Mich.* 1735. *in Caſu Robinſon* and *Tonge*, 3 *Will. Rep.* 399.

(R) Devaſtavit; What.

1. STAT. 30 *Car.* 2. *c.* 7. *ſect.* 2. *The Executors and Adminiſtrators* of Perſons, *who, as Executors in their own Wrong, or Adminiſtrators, ſhall waſte any Eſtate or Aſſets of any Perſon deceaſed*, ſhall be chargeable in the ſame Manner *as their Teſtator or Inteſtate would have been, if living*. Made perpetual 4 & 5 *W. & M. c.* 24.

2. Stat. 4 & 5 *W. & M. c.* 24. *ſect.* 12. ſays, *That foraſmuch as it had been a Doubt whether the ſaid Act of the* 30 Car. 2. *extended to Executors or Adminiſtrators of any Executor or Adminiſtrator of* Right, *who, for want of Privity, were not before anſwerable, nor could be ſued for Debts due by the firſt Teſtator or Inteſtate, notwithſtanding ſuch Executors or Adminiſtrators had waſted the Eſtate of the firſt Teſtator*, it is thereby enacted, *That the Executors or Adminiſtrators of any Executor or Adminiſtrator of* Right, *who ſhall waſte or convert to his Uſe Goods or Eſtate of his Teſtator or Inteſtate, ſhall be chargeable in the ſame Manner as their Teſtator or Inteſtate might have been.*

3. If a Debt be due to the Inteſtate, and the Adminiſtrator takes a Security in his own Name, altho' the firſt Security be not delivered up, yet in Caſe the Debt be not paid, this will be reckoned as Aſſets come to his own Hands, and will make a *Devaſtavit*. *Cur'* ſeemed

to be of this Opinion, *Mich.* 1687. in an *Anon. Caſe*, 2 *Freem. Rep.* 100. *Ca.* 110.

4. An Executor bringing *Trover* for Goods of the Teſtator, upon an Agreement the Executor took a Bond for the Value of the Goods; afterwards the *Obligor became inſolvent*; and this was adjudged a *Devaſtavit*. Cited *per Finch*, as ſo adjudged *in Dom. Proc'*, *Mich.* 1687. in an *Anon. Caſe*, 2 *Freem. Rep.* 100. *Ca.* 110.

5. Judgment againſt an Executor upon a *Devaſtavit*; and upon a Demand of the Money due upon this Judgment, the Executor refuſed to pay; a Bill was exhibited againſt him to compel Payment with Intereſt; which was decreed; for, by *Lord Chancellor*, when a Debt becomes due upon a Bill, and a Demand is made, and a Refuſal, Equity will give Intereſt, altho' it is not a penal Bill (*a*). The Recoverer is under a Neceſſity of coming into Equity for nothing, but the Sum aſcertained by the Judgment is by Law recoverable. *Eaſt.* 8 *Ann. Anon. MS. Rep.*

(*a*) Juries at Law will not only give the Debt due upon ſuch Bills, but alſo Intereſt in Damages. *Ibid.*

6. A Term aſſigned by an Executor In Truſt to attend the Inheritance, will, in Equity, follow all the Eſtates created thereout, and all Incumbrances ſubſiſting upon ſuch Inheritance; but the Term being by this Means become not Aſſets at Law, the Executor who aſſigned the ſame is liable to the Creditors as for a *Devaſtavit*. *Per* Lord Chan. *Talbot*, *Mich.* 1734. in the Caſe of *Charlton* and *Low*, 3 *Will. Rep.* 330.

CAP. XL.

Extinguiſhment.

1. WHERE a Charge upon Land comes to the ſame Perſon that is intitled to the Land, if he has not the ſame Intereſt in both, there ſhall be *no* Extinguiſhment upon this Account. *Eaſt.* 1740. in the Caſe of *Price* and *Seys*, *Barnard. Rep. in Chan.* 117.

CAP. XLI.

Fee-Farm Rents.

Vide the Acts of 22 *Car.* 2. *c.* 6. *ſect.* 6, 7, 9, 12, 14.—22 & 23 *Car.* 2. *c.* 24. *ſect.* 2, 4, 8, 9.—9 & 10 *W.* 3. 8.—10 *Ann. c.* 18. *ſect.* 4, 5.—7 *Geo.* 2. *ſect.* 5, 26.—*Vide* alſo Mr. *Cay's Abridgment of the Statutes*, Tit. *Fee-Farm Rents*.

2 *Vern.* 730. 1. A Was intitled in Fee-ſimple to a *Fee-Farm Rent* of 50 *l. per Annum*, reſerved to the Crown upon the Grant of *Ed.* 1. of divers Franchiſes to the Corporation of *C.* which Rent being (*int' al'*) ſold by the Crown by Virtue of the Stat. 22 *Car.* 2. *c.* 6.

c. 6. became veſted in the ſaid *A.* and by the Words of the ſaid Statute as full a Remedy is given to the *King's Patentees*, their Heirs and Aſſigns, as the King himſelf had, excepting an Extent; ſo that *A.* (among other Privileges) might undoubtedly have diſtrained for this *Fee-Farm Rent* upon *any other* of the Lands belonging to the Corporation of *C.* but the Lands of that Corporation being under Sequeſtration for the Nonpayment of a Sum of Money decreed to belong to Sir *Thomas White*'s Charity, this made the Difficulty. And Lord Chan. *Cowper* having called in to his Aſſiſtance the Chief Juſtices *Parker* and *King*, held, Firſt, That the King might reſerve a Rent out of a Franchiſe or Matter incorporeal, as well as out of Land, and might diſtrain on any other Lands of the Tenant out of it. Secondly, That tho' by Virtue of the ſaid Stat. *Car.* 2. the Grantee of a Fee-Farm Rent had the like Remedy, by way of Diſtreſs, as the King himſelf had, yet that ſuch other Lands muſt be in the actual Poſſeſſion of the Tenant; for if the Tenant ſhould have made any Leaſe for Years, or at Will only, the Goods or Chattels of ſuch an Under-Leſſee were not diſtrainable even by the King himſelf, and conſequently not by his Grantee. Thirdly, That as any Leaſe made by the King's Tenant of the Lands not held of the King, would prevent even the King's Diſtreſs; ſo if there were an Extent upon an *Elegit* of ſuch other Lands, the Goods or Chattels upon the Premiſſes ſo extended would not be liable, for this was a greater Eſtate than an Eſtate at Will.—And *Lord Chancellor* held, That he could not (as was prayed) order the Sequeſtrators to pay the Arrears of the Fee-Farm Rent out of their Money or Rent ſequeſtred, in regard ſaid *A.* the Claimant thereof, had *no Decree* or *Bill for the ſame*; nor was there any Contempt on which the Court could ground a Sequeſtration as to the ſaid *A.* in reſpect of his Fee-Farm Rent, ſo as to let him have the Benefit of this Sequeſtration; and ſhould the Sequeſtrators be ordered to pay him the Arrears of his Rent, this would be to put *A.* in a better Condition than he would have been had there been no Sequeſtration. Wherefore the Court ordered that *A.* ſhould be at Liberty to diſtrain for his Rent at Law, without incurring any Contempt in Equity; and that no Leaſe or Eſtate derived under the Sequeſtrators, ſhould be made Uſe of in Evidence againſt *A.* to prevent the Diſtreſs. *Hil.* 1715. *Attorney General* and *Mayor of Coventry* (*a*), 1 *Will. Rep.* 306.

(*a*) The *Reporter* ſays, That afterwards Chief Juſtice *Parker* informed him, that he thought it might have been proper to have determined that the Sequeſtration was as the Hand of the Court upon the Eſtate; and where a Right to a Fee-Farm Rent appeared to be *prior* and *indiſputable*, the Court might reaſonable enough have ordered to Payment, elſe *A.* for ought appeared would be in a worſe Condition than if there had been no Sequeſtration; for 'till the Sequeſtration the Corporation paid the Fee-Farm Rent *voluntarily*, and now they are diſabled purely by the Sequeſtration; and putting *A.* to diſtrain was putting the Charge of the Suit upon the Eſtate; whereas nothing appeared to the contrary, but that the Corporation was ſenſible of *A.*'s Right to the Rent, and deſired it might be paid. *Ibid* 308, 309.

CAP.

CAP. XLII.

Feoffment.

(A) Livery ſuppoſed and ſupplied in Equity.

1. A Deed of Lands in two different Counties by way of Feoffment, and Livery and Seiſin of the Lands in one County indorſed; the Deed was made in 1657. Decreed that tho' no Livery appeared of the other Lands, yet by reaſon of the Poſſeſſion, and great Length of the Time, Equity will ſuppoſe and ſupply it; it had been much ſtronger, had the Livery been indorſed of Lands in one County in the Name of both; it would have been an Implication that none was of the other, ſince one was deſigned for both. 4 *Nov.* 1730. *Jackſon* and *Jackſon*, *Select Caſes in Chan.* 81.

Fitz-Gibb. Rep. 1. *Mich.* 4 *Geo.* 2. S. C. and ſays, that it was inſiſted that, as to the Poſſeſſion and Length of Time, the Intendment endeavoured to be made out from thence can have no Weight, becauſe the ſame Perſons that enjoyed the Lands under the Deed, were alſo at Law, and as ſuch muſt have enjoyed them otherwiſe, tho' there had been no ſuch Deed; yet *Lord Chancellor* declared, that, was he to try this Matter at Law, he ſhould preſume and ſo direct, that Livery was executed as to all the Lands, according to the Deed, after this Length of Time; but however, that this Court would aid a Defect of this Kind.

CAP. XLIII.

Fine.

(A) What Eſtate or Intereſt, &c. may be barred or extinguiſhed by a Fine.

(B) Of ſetting aſide a Fine in Equity;——Of Fine and Non-Claim;——And here of a void Fine.

(C) Where the Parties ſhall have Election in what Part of the Eſtate a Fine (and Recovery) ſhall operate.

(A) What Eſtate or Intereſt, &c. may be barred or extinguiſhed by a Fine.

1. *A.* Deviſes his Lands to *B.* for Payment of his Debts, and then to *B. for Life*, with Power to make Leaſes determinable on three Lives, Remainder *to the Heirs Male of the Body of* B. Remainder *over*. Tho' this be but the Deviſe of a *Truſt*, and *Executory*, and expreſſed to be to *B.* for Life, yet it is an Eſtate-tail in *B.*

B. barrable by a *Fine* and *Recovery*; *ſecus* in Caſe of Marriage Articles to ſettle an Eſtate *on* A. *for Life*, Remainder *to the Heirs Male of his Body*; this being an Agreement to do a *future* Act, and in which the Iſſue are particularly conſidered and looked upon as Purchaſers. *Eaſt.* 1711. *Bale* and *Coleman* (*a*), 1 *Will. Rep.* 142.

(*a*) *Vide Ca.* 14. *P.* 309. S. C. more fully abridg'd.

2. *J. S.* on his Marriage with *A.* gave a Bond for 600 *l.* to a Truſtee, and a Warrant of Attorney to confeſs a Judgment thereon; and this Judgment was defeazanced on Payment of 300 *l.* to the *Wife*, if ſhe ſurvived the *Huſband*; afterwards ſhe joined with her Huſband in a Conveyance by Leaſe and Releaſe, and Fine of his real Eſtate. Agreed by *Counſel* and *Lord Keeper* that her joining in the Leaſe and Releaſe did not extinguiſh her Intereſt in the Judgment, but that the Fine carried away all her Right and Intereſt in the Land. *Eaſt.* 1722. *Goodrick* and *Shotbolt et al'*, *Prec. in Chan.* 333.

Gilb. Eq. Rep. 18. *Trin.* 9 *Ann. Shotbolt* and *Biſcow*, S. C.

3. Baron ſeiſed in Right of his Wife *in Fee* of a Share of the *New River* Water; the Wife cannot be barred *ſans* Fine. *Per* his *Honour*, *Eaſt.* 1723. *Drybutter* and *Bartholomew*, 2 *Will. Rep.* 127.

A Fine may be (and uſually is) levied of *New River* Shares by the Deſcription of ſo much Land *aquâ coopert'*. *Per* his *Honour*, *ibid.* 128.——And wherever a Fine and Recovery are neceſſary for the cutting off the Intail and Remainder of ſuch Shares in regard the *New River* runs thro' *three* Counties, *viz. Hertford*, *Middleſex* and *London*, there muſt be three ſeveral *Fines* and Recoveries paſſed as to any of theſe Shares, *viz.* a *Fine* and *Recovery* in each County. *Ibid.* in a *Note* by the *Editor*.

4. *A.* deviſed his Lands to Truſtees for ninety-nine Years, for Payment of his Debts; and if they did not act, then he deviſed them to *T. S.* and his Heirs, *In Truſt* to pay his Debts; and afterwards to *B.* in Tail, Remainder in Tail to *C.* *B.* who was the *Ceſtui que Truſt* in Tail, levied a Fine and died without Iſſue, and five Years paſſed with *Non-Claim*. Decreed that this *Fine* and *Non-Claim* barred the Remainder Man in Tail, tho' it was inſiſted that the Title of *C.* was not yet commenced, becauſe the Debts were not paid, and the Term for ninety-nine Years was ſubſiſting; and that the entire Eſtate at Law being in the Truſtees, they ſhould have entered; and that it was againſt Equity for him to ſuffer the *Ceſtui que Truſt* to be barred by a Fine and Non-Claim thro' his Default; yet he was decreed to be barred. Cited *per Cur'*, *Eaſt.* 11 *Geo.* 1. in the Caſe of *Webber* and *Earl of Montrath*, as the Caſe of *Baſket* and *Pierce* (*b*), 2 *Mod. Caſes in Law and Eq.* 144.

(*b*) 1 *Vern. Rep.* 227. S. C. reported.

5. One having a Sum of Money charged upon Land ſecured by a Term in a third Perſon, levies a Fine and ſuffers a Recovery of the Land; this extinguiſhes his Right to the Charge. *Vide* the Caſe of *The Duke of Chandos* and *Talbot*, *Trin.* 1731. 2 *Will. Rep.* 601, 605.

6. *A.* deviſed Lands to *B.* and *C.* and *the Survivor of them*, and *the Heirs of ſuch Survivor*, In Truſt *to ſell*. The Eſtate was decreed to be ſold, but the *Maſter* reported the Parties could not make a good Title, there *being no Fee-ſimple in the Truſtees*, for that the *Remainder in Fee could only be veſted in the Survivor*, and it was uncertain which would be the Survivor. On Exceptions to this Report, Lord Chan. *Talbot* held, That the *Truſtees joining in a Fine would paſs a good Title by* Eſtoppel (*c*); that here the Fee was *in Abeyance*; and as, where the eldeſt Son of Tenant in Tail levies a Fine and ſurvives his Father, tho' he afterwards dies without Iſſue, yet this will paſs a good Title as long as the Tenant in Tail has Iſſue, and thereby conclude the youngeſt Son, who muſt derive his Deſcent from the eldeſt, notwithſtanding the latter, at the Time of the Fine levied, had nothing. So in *this* Caſe one of the Truſtees muſt be the Survivor,

(*c*) *Quære* if any Thing could operate by way of *Eſtoppel* in this Caſe becauſe an Intereſt paſſed?

and intitled to this *future* Intereſt; conſequently his Heirs claiming under him would be eſtopped, by reaſon of the Fine levied by their Anceſtor, to ſay *Partes finis Nihil habuerunt*, altho' he that levied the Fine had *at that Time no Right* or *Title to the contingent Fee. Trin.* 1735. *Vick* and *Edwards, MS. Rep.*

3 *Will. Rep.* 372. S. C. *accord'*, (from which the above MS. Caſe ſeems to be a Tranſcript) ſays, the Deviſor's Heir joining in the Conveyance to the Purchaſer would ſupply the want of proving the Will, but in every other Reſpect it would be void. *Per* his *Lordſhip*, *ibid.* 373.——His *Lordſhip* cited the Caſe of *Weale* and *Lower*, in *Pollexf. Rep.* 54. where a Fine was adjudged to paſs an Eſtate *not veſted* by way of Eſtoppel, and to convey the Intereſt of ſuch Eſtate which accrued by the Contingency happening afterwards. *Ibid. MS. Rep. accord'.*

(B) Of ſetting aſide a Fine in Equity;—Of Fine and Non-Claim;—And here of a void Fine.

Prec. in Chan. 150. S. C. *accord'.*

1. *J. S.* prevailed with his Wife (on her Death-bed) to levy a Fine of her Land to him, pretending that he was thereby only to have it for his Life; a *Dedimus* iſſued, and the Caption was taken the Day ſhe died; and becauſe the Fine could not have ſtood, the Party dying before the *King's Silver* was paid, the Writ of Covenant was razed in the *Teſte*, and made to bear Date ten Days backward; and all other Parts of the Fine were razed, and made to correſpond with it; and the *King's Silver* was paid, and ſo all appeared upon the Record to have been done before the Wife's Death. The Heir at Law brought a Bill to ſet aſide this Fine as obtained by Fraud, or to have a Reconveyance of the Land. And *per Lord Keeper*, There is a great deal of Difference between the *Irregularity* of paſſing a Fine and the *fraudulent* Manner of obtaining of it, and he cited *Greenwood*'s Caſe and *Hungate*'s Caſe, 5 *Co.* and 2 *Vent.* 30. and ſaid, if a *fraudulent* obtaining of a Fine could have been relieved here, it would have been attempted in ſome of thoſe Caſes; and if it ſhould be examinable *here*, it would be a great weakning of Fines, and can only be examined *here* to puniſh the Party that did it *Criminaliter*; in *Gellibrand*'s Caſe, where one was *perſonated*, yet the Fine was not ſet aſide, but a Reconveyance ordered; afterwards the Bill was diſmiſſed. *Hil.* 1700. *Clark* and *Ward, MS. Rep.*

Prec. in Chan. 216. S. C. *accord'.*

2. *J. S.* married a young Heireſs, and by *indirect* Means procured her to levy a Fine of her Inheritance when ſhe was under Age; and the Huſband's Father was one of the Commiſſioners who took the Fine; and the Uſes were declared to the Feme and her Huſband, and the Heirs of their two Bodies, Remainder to the Heirs of the Survivor. The Feme died in her Minority without Iſſue. The Huſband, after her Death, mortgaged the Premiſſes to *B.* and died without Iſſue. Of whom *C.* the *Heir* at Law of the *Wife*, gets an Aſſignment, and then levies a Fine, and five Years paſs, and the Deed, declaring the Uſes of the *firſt* Fine, was loſt. *D.* who was intitled under the *firſt* Fine, brought a Bill to redeem, and for a Diſcovery of the ſaid Deed of Uſes. *C.* the Heir of the Wife, pleads the *ill Practices* in obtaining the Fine, and alſo *his own Fine and Non-Claim*, and that there was no ſuch Deed, or, if there was, it was obtained by Fraud. And *per Cur'*, *G.* the *Huſband's Father*, in taking the Fine from his Daughter-in-Law, could not have been aſſiſted here, and the *Plaintiff claims under him.* All Titles at Law, that are not directly againſt Conſcience, ſhall be aſſiſted here to a Redemption; and if there were only a Blemiſh of the Title, ſo ſhould the Plaintiff; but cannot get over the Fine and Non-Claim. The Plea is good; Bill diſmiſſed. *Mich.* 1703. *Sir John Packington* and *Barrow, MS. Rep.*

3. Fine levied by *Leſſee for Years*, or *at Will*, void; *ſecus* where by one having a defeaſible Right, and ſuch Leſſee joins with him. *Vide* the Caſe of *Carter* and *Barnardiſton*, *Mich.* 1718. 1 *Will. Rep.* 505, 520.

4. The Intention of Marriage Articles for a Settlement to be made afterwards, will be conſidered in Equity, that if a Fine be levied to different Uſes the Court will ſet a Fine aſide. *Trin.* 5 *Geo.* 1. *in Chan. Trevor* and *Trevor*, *Lucas's Rep.* 436. *Vide Ibid.* (O. b.) *Ca.* 11. S. C.

5. A Fine and Non-Claim ought not to ſcreen a *fraudulent* Purchaſe, but the Conuzee ſhall be deemed a Truſtee for the equitable Title. So decreed; but the Caſe was compounded in the Houſe of Lords. 6 *Mar.* 1724. *Martin* and *Martin*, *Vin. Abr.* Tit. *Fraud*, (A. a.) *Ca.* 12. Cites it as a MS. Rep. ſaid to be *Lord Harcourt's*, Tit. *Fraud.*

(C) Where the Parties ſhall have Election in what Part of the Eſtate a Fine (and Recovery) ſhall operate.

1. WHERE a Fine and Recovery is of ſo many Acres in *S.* the Parties have their *Election* in what Part of the Eſtate it ſhall operate. *Mar.* 27, 1723. *Lord Blaney* and *Mohon*, *Vin. Abr.* Tit. *Recovery* (*Common*), (R) *Ca.* 5. Cites it as a MS. Caſe, ſaid to be *Lord Harcourt's.*

Vide Tit. Recovery, *P.*

CAP XLIV.

Foreign Laws, Cuſtoms, Plantations.

(A) Caſes relating to Foreign Laws (*a*), —— Cuſtoms.
(B) Foreign Plantations, by what Laws governed.

(*a*) *Vide* the Caſe of *Drummond* and *Decker*, *P. Ca.*

(A) Caſes relating to Foreign Laws, —— Cuſtoms.

1. ON a Marriage of two *French* People in *France* the Contract was, That the Huſband ſurviving the Wife ſhould have two Thirds of her Fortune for Life, (whereas by the Cuſtom of *Paris*, where they married, he would have had but a Moiety) and 300 *Prec. in Chan.* 207. S. C. *accord*', ſays, it was anſwered to the *Objection*, that Marriage Contracts are to be ſupported in all Countries without regard to the Place where made; and that this Contract did extend to the whole Fortune of the Wife, and not only to the Particulars mentioned; and the ſaying the reſt ſhould go according to the *Cuſtom* of *Paris*, is as much as if the Cuſtom had been recited at large, and that the Fortune ſhould go ſo. *Ibid.* 208.

300 *Livres*, in the firſt Place, by way of Preſent, and that the reſt ſhould go according to the Cuſtom of *Paris*; after they fled *hither* from the Perſecution, and ſeveral Years after the Wife died; her Relations brought a Bill for an Account of the Eſtate, and to have the Benefit of the ſaid Contract. *Objected*, They could not bring over the *French* Law hither, but muſt now be governed by the Laws of *England*, where, the Huſband ſurviving, is intitled to all the Wife's Perſonalty; at leaſt, there was no Colour to carry it further than the Sum *ſtipulated* in the Contract, and not to that which was left to go according to the *Cuſtom* of *Paris*, which is only a *local* Law, and therefore they could have no Benefit of it *here*. *Lord Keeper* decreed Relief only as to the Sum *ſtipulated*; but on an Appeal to the *Lords*, they had Relief for the Whole. *Mich.* 1702. *Feaubert* and *Turſt* (*a*), *MS. Rep.*

(*a*) 1 *Will. Rep.* 431.

S. C. cited in the Caſe of *Freemoult* and *Dedire, et econt', Eaſt.* 1718. which was a Caſe of *Marriage Articles* made in *Holland*, and it was contended that by the Law of *Holland ſuch Articles* take Place of any *other* Debts, wherefore they ſhould be *here* conſtrued according to the Law of *Holland* where they appeared to have been made, which was ſaid to have been held in the ſaid Caſe of *Feaubert* and *Turſt*. To which it was anſwered, and ſo ruled, That it ought to have been proved in this Caſe what is the Law of *Holland*, as in *Feaubert* and *Turſt* it was proved what was the Law of *France*, without which Proofs our Courts cannot take Notice of *Foreign* Laws.

2. Sentence of a *Foreign* Court who have Juriſdiction, and the Perſons are within it, is concluſive. *Nov.* 22, 1726. *Burrows* and *Jemineau*, *Select Caſes in Chan.* 69.

Vin. Abr. Tit. *Contract and Agreement*, (E) *Ca.* 22. S. C.

3. Contracts are to be adjudged *according to the Law of the Place where they were made*. *York Buildings Company* and *Meers*, before the Houſe of Lords, 23 *Nov.* 1728. *Grounds and Rud. of Law and Eq.* 18. *Ca.* 5.

(B) Foreign Plantations, by what Laws governed.

1. IF there be a *new* and *uninhabited* Country found out by *Engliſh* Subjects, as the Law is the Birth-Right of every Subject, ſo wherever they go they carry their Laws with them, and therefore ſuch *new* found Country is to be governed by the Laws of *England*. Said *per* the *Maſter of the Rolls* 9 *Aug.* 1722, to have been ſo determined by the Lords of the Privy Council upon an Appeal from the Foreign Plantations. 2 *Will. Rep.* 75.

2. *Tho'* after ſuch Country is inhabited by the *Engliſh*, Acts of Parliament made in *England*, without naming the *Foreign* Plantations, will not bind them. *Ibid.*

3. *For* which Reaſon it has been determined that the Statute of *Frauds*, which requires three Witneſſes to a Will, and that theſe ſhould ſubſcribe in the Teſtator's Preſence in Caſe of a Deviſe of Lands, does not bind *Barbadoes*. *Ibid.*

CAP. XLV.

Forfeiture.

1. EQUITY will not aſſiſt any one to take Advantage of a Forfeiture. *Trin.* 1717. *Vane* and *Fletcher*, 1 *Will. Rep.* 353.

2. Equity will *not* relieve againſt a *Forfeiture* incurred by Act of Parliament. 1723. *Sweet* and *Anderſon*, *Vin. Abr.* Tit. *Forfeiture*, (A. a.) *Ca.* 6. cites it as a MS. Caſe, ſaid to be *Lord Harcourt's Rep.*

3. *J. S.* a Foreign Marchioneſs, either herſelf, or *D.* by her Order, employed Defendant to purchaſe Bank Annuities, and depoſited 50,000 *l.* in his Hands for that Purpoſe; accordingly Defendant purchaſed ſeveral Annuities in *D.*'s Name, but In Truſt for the Lady, and aſſigned 10,000 *l.* Part thereof to her Uſe. On a Bill brought by the *Lady* and *D.* to have the reſt of the Securities aſſigned to the Lady, and the Money not laid out in Stocks paid to her, the Defendant admitted the Demand, but ſaid, hearing that the Lady was married to *B. attainted* of Treaſon, he was adviſed not to pay it without being indemnified by a Decree of this Court. The Attorney General was a Party, and inſiſted for the King, that if any Right ſhould appear to be in the Crown, that the ſame might be ſaved and ſubmitted to the Demands, if the Plaintiff ſhall give ſufficient Proof that ſhe is *not* married to *B. &c.* Whereupon her *Affidavit* (annexed to the Bill) was read, by which it appeared that ſhe was not married; but if ſhe was, it was inſiſted *arg'* that the Law of *England* ſhould not be the Meaſure of the Decree of this Court in ſuch Caſe, but the Law of *another Country*, this being a *bare Truſt for a Foreigner*, and that the Court has always a *Regard to the Laws of other Nations*, as of the Laws of *Holland* and of the *Plantations*. And cites 1 *Chan. Ca.* 145, 232.—2 *Vent.* 358.—There being no Proof made to contradict the Lady's Affidavit, the Securities were decreed to be aſſigned, and the reſt of the Money not laid out in Stocks to be paid to her, and Defendant to have his Coſts, he having done nothing but what he ought, for in this Caſe it was not prudent in him to pay the Money 'till ſecured. *Mich.* 11 *Geo.* 1. *Drummond* and *Sir Matthew Decker*, *MS. Rep.* 2 *Mod. Caſes in Law and Eq.* 100.

Mich. 11 *Geo.* 1. S. C. ſays, there being no Proof of the *Lady*'s Marriage to *B.* the Point, whether the Money was forfeited or not, was not determined, but it was decreed as above.——But if ſhe was married to *B.* it would then be a Queſtion of great Importance whether *this Money was forfeited* or *not* by *B.'s Attainder*; for, ſince *all Foreigners are encouraged by Act of Parliament to place their Money in the Publick Funds*, it would be very hard that this Money ſhould be *forfeited*; for then the Conſequence would be, that a *Lady in* France, who hath a ſeparate Property from her Huſband in her own perſonal Eſtate, would, by placing it in the Funds purſuant to the Statute, be deveſted of that Property, and have it tranſmitted to her Huſband by his coming over into *England*, ſo that he may diſpoſe thereof at his Pleaſure; or, by her being married to a Subject of *England*, ſhould veſt in him in *France*; or in the King here, upon his *Attainder* before or after Marriage. *Ibid.* 101.

CAP. XLVI.

Fraud, — Circumvention, — Covin.

2 *Freem. Rep.* 101. *Gay* and *Wendow*, *Mich.* 1687. S. C. ſays, it was urged for the Defendant, that it was good Reaſon for the Huſband, or any of his Iſſue, to be relieved in Caſe they had been concerned, but that was no Reaſon that the Woman herſelf, who gave the Bond, ſhould be relieved; but decreed as above. *Ibid.*

1. A Feme who had 150 *l.* given her by her Brother the Defendant, upon her Marriage gives a Bond privately to her Brother to repay that Sum; the Huſband being dead without Iſſue, the Defendant ſued the Plaintiff upon the Bond at Law, whereupon ſhe exhibited her Bill to be relieved againſt it, being a Fraud by reaſon it was done without the Privity of her Huſband. *Lord Chancellor* ordered that the Bond ſhould be delivered up, for being *once a Fraud, no Accident of Death* or *Courſe of Time* ſhould alter the Caſe; and the Plaintiff was relieved, notwithſtanding it was her own Agreement, being *done in Fraud of her Huſband. Mich.* 1687. *Anon.* S. C.

Where Fraud is *apparent*, Chancery will decree againſt it, without ordeing a Trial.

2. Chancery may decree a *Conveyance* to be fraudulent meerly for being *voluntary*, and that without any Trial at Law. *Per* all the *Lords Commiſſioners.* And ſo they did *Trin.* 1691. in *White* and *Huſſey et al', in Chan. Prec. in Chan.* 13, 15.

Vide 2 *Chan. Ca.* 46. *Colſton* and *Gardner.*

3. *A.* ſteals a young Woman who had a conſiderable Portion, which was in Truſtees Hands; after the Marriage her Friends would not part with the Portion, unleſs the Huſband would give Security that it ſhould be ſettled for the Benefit of his Wife; and it was agreed that it ſhould be laid out in Land, to be ſettled to the Huſband and Wife, and the Heirs of their Bodies; and a Judgment was given by the Huſband for this Purpoſe. This Agreement, tho' after Marriage, ſhall *not* be conſidered as *voluntary*, ſo as to be ſet aſide in favour of a Creditor of the Huſband; and a Bill brought by a Creditor of the Huſband was diſmiſſed, but without Coſts; for, *per Cur'*, if the Huſband himſelf had exhibited a Bill againſt the Truſtees for the Portion, the Court would not have decreed it to him without making ſome ſuch Settlement. *Eaſt.* 1691. *Moor* and *Rycault, Prec. in Chan.* 22.

4. *A.* being to procure 1000 *l.* for *B.* borrows it, and pays *B.* only 300 *l.* and the remaining 700 *l.* in Goods, which prove worth little or nothing; and for ſecuring the whole 1000 *l.* both gave a Recognizance; yet that being ſued againſt *B.* he brought his Bill and had a perpetual Injunction againſt the Recognizance on Payment of of 300 *l.* only, and Intereſt, by reaſon of ſome Circumſtances of Fraud in *A. Hil.* 1697. *Smith* and *Loader, Prec. in Chan.* 80.

5. A *Will* as well as a *Deed* may be ſet aſide in Chancery for *Fraud* or *Circumvention. Cur'* clearly of this Opinion. *Mich.* 1700. in the Caſe of *Welby* and *Thornagh' et Ux', et econt', Prec. in Chan.* 123.

6. *A.*

6. *A.* being in an undue Manner drawn in to execute a Conveyance of his Eſtate, a few Months before his Death makes his Will, and thereby deviſes *all his Lands for Payment of his Debts.* His Creditors may ſet aſide the Conveyance, having a Right in Nature of an Equity of Redemption (which may be aſſigned) as the Teſtator himſelf had. *Per* Lord Keep. *Wright* and the *Maſter of the Rolls*, tho' urged that it was but in Nature of a *Choſe en Action*, and not aſſignable. *Hil.* 1700. *Blake* and *Johnſon*, *Prec. in Chan.* 142.

7. If there be two Dealers, and one of them is very much indebted to the other, and in order to get an Abatement from him he makes him believe he is inſolvent, by abſconding, ſkulking, or ſhutting up Shop, whereby the other has juſt Cauſe to fear the Loſs of his Debt, and thereby procures a Releaſe or an Abatement, when in Truth the Man was really ſolvent, the Court will relieve againſt ſuch Releaſe, *&c.* and this was agreed to have been often done, and the Caſe of *Bonny* and *Bonny* quoted for an Inſtance; *ſecus* if the Party had not juſt Cauſe to fear the Loſs of his Debt. *Mich.* 13 *W.* 3. *Monger* and *Kett*, *in Canc'*, *Caſes in B. R. Temp. W.* 3. 558.

8. *A.* ſurrenders the Reverſion in Fee of Copyhold Lands to his eldeſt Son in Tail, Remainder to his own right Heirs, in order to leſſen the Fine the Son muſt have paid in Caſe the Reverſion had come to him by Deſcent from his Father, he having it by this Surrender as a Purchaſe. Afterwards on the Son's Treaty of Marriage with *B.* the Father tells her Friends that this Copyhold was ſettled on his Son as above, and therefore propoſed a Settlement of Leaſehold Lands, which was made, and the Marriage was had, and 2000 *l.* Portion paid. Afterwards the Father ſettles the Copyhold on a ſecond Wife. *Cowper* C. decreed the Surrender to the Son good; and ſaid, that tho' it were at firſt voluntary, yet upon his Treaty of Marriage it being regarded as the principal Inducement thereto, it was now become valuable, and ought to be conſidered as if it had been but *then* ſurrendered to the Son (*a*). *Hil.* 1708. *Kirk* and *Clarke*, *MS. Rep.* *Prec. in Chan.* 275. *Hil.* 1708. S. C. ſtates it *accord'*.—Says, the Bill brought by the Father's ſecond Wife and her Truſtees to compel a ſpecifick Performance of her Marriage Articles, was diſmiſſed *with Coſts*. *Ibid.* 276, 278.——(*a*) It was not neceſſary to inſert in the *Son*'s Marriage Articles the Copyhold, it being an Eſtate of another Nature and to paſs in another Manner, and being already ſettled, it was ſufficient in theſe Articles to provide for the Settlement of what they further intended to ſecure on *that* Marriage, without taking Notice of what was already ſettled to their Satisfaction, and ſo the *Copyhold* paſſed by the *Surrender* as a proper Conveyance for that kind of Inheritance, and the *Leaſehold* by the *Settlement* as a proper Means for carrying over that, and both together made the Settlement inſiſted on agreed to be made, and were in *Conſideration of Marriage*, and a *Marriage Portion*, which is a *valuable* Conſideration, and ought not to be ſet aſide in Equity.—*Per Lord Chancellor* in S. C. *Prec. in Chan.* 278.—*MS. Rep.* in S. C. *accord'*.

9. *J. S.* Supercargo of a Ship which was to go to the *Eaſt-Indies*, having ſhipped on board ſeveral Goods, borrowed of *B.* 600 *l.* and gave a Bottomree Bond to pay 40 *l. per Cent.* in Caſe the Ship ſhould reign three Years; and at the ſame Time made a Bill of Sale to *B.* of the ſaid Goods (which were invoyced particularly) and of the Produce and Advantage that ſhould be made thereof; and this was in the Nature of a Security for the Repayment of the ſaid 600 *l.* and the 40 *l. per Cent. Premium* upon the Ship's reigning three Years. The Ship went her Voyage, and theſe Goods were ſold, and with the Money others bought, and thoſe likewiſe were inveſted in other Goods, and ſo there had been ſeveral Barters and Exchange of ſeveral Sorts of Goods. The Ship after three Years returned home richly laden with ſeveral Sorts of Goods, but *J. S.* died in his Return home, and Defendant, who was a Creditor of his, by Judgment for 1500 *l.* obtained before *Prec. in Chan.* 285. *Hil.* 1709. *Bucknal et al'* and *Roiſton*, S. C. accordingly.

before the Sale of theſe Goods, takes out Adminiſtration, and poſſeſſed himſelf of the ſeveral Goods returned home which belonged to *J. S.* *B.* brought his Bill to have an Account and Diſcovery of thoſe Goods, and to have Satisfaction for the Produce and Advantage that was made thereof. Lord Chan. *Cowper* was of Opinion, That the *Truſt* of theſe Goods *appeared upon the very Face of the Bill of Sale*; that tho' they were ſold to *B.* yet he truſted *J. S.* to negotiate and ſell them for his Advantage, and *J. S.*'s keeping Poſſeſſion of them, was not to give a *falſe Credit to him*, but for a particular Purpoſe agreed upon at the Time of the Sale; and 'tis true in Caſe of a Bankrupt, ſuch keeping Poſſeſſion *after* a Sale will make the Sale void againſt his Creditors by the Statutes; and ſo for other Sales by the Statute of fraudulent Conveyances; but here *B.* is preſently intitled to the Truſt of theſe Goods upon the Sale, and to all the Advantages conſequential upon ſuch Truſt, and *may follow the Goods for that Purpoſe*; and therefore decreed an Account to be taken of the Produce of thoſe ſpecifick Goods; and if that could be made to appear, it was to be liable to make Satisfaction to *B.* for which Purpoſe it was ſaid at the Bar, that the Goods belonging to *J. S.* were marked with *J. S. &c.* and other Marks to diſtinguiſh them from other Goods; but if not, what fell into the Bulk of *J. S.*'s perſonal Eſtate in general would be liable to go in a Courſe of Adminiſtration, and Defendant to be preferred in Payment of his Judgment before *B.* *Hil.* 1709. *Anon.* *MS. Rep.*

10. *Suppreſſio veri*, or *Suggeſtio falſi*, is either of them good Reaſon to ſet aſide any *Releaſe* or *Conveyance*. *Per* Lord *Harcourt*, *Mich.* 1713. in the Caſe of *Broderick* and *Broderick* (*a*), 1 *Will. Rep.* 239, 241.

(*a*) *Vide* this Caſe, *P. Ca.*

11. *F. B.* ſeiſed of an Eſtate in Fee, deviſed it to Defendant. *F. B.* executed the Will, but it was *not atteſted in his Preſence by three Witneſſes*. *F. B.* died, and Defendant, finding that the Will was void, for one hundred Guineas paid to Plaintiff, who was *F. B.*'s Heir at Law, procured from him a Releaſe, which recited that *F. B.* by his laſt Will *duly executed* had deviſed his Eſtate to Defendant; and Defendant thinking himſelf not ſafe with the Releaſe only, for fifty Guineas more prevailed with the Plaintiff to convey the Land by Leaſe and Releaſe to one *Day* who was Truſtee for Defendant, to whom *Day* afterwards conveyed. Afterwards Defendant, upon a *valuable* Conſideration, conveyed Part to one *Parker*, who had not any other Notice of the Invalidity of the Will, ſave that he heard it mentioned in common Diſcourſe. Plaintiff brought his Bill againſt ſaid Defendant, *Day* and *Parker*, to have the Releaſe, Leaſe and Releaſe delivered up as *fraudulenty* obtained; and it not appearing that the Plaintiff at the Time of his making the Releaſe, *&c.* knew that the Will was bad, *Harcourt* C. decreed, That they ſhould be delivered up; and it not appearing that *Parker* was privy to the Fraud, tho' he had heard of the Invalidity of the Will *as above*, it was decreed that he, upon receiving his Purchaſe Money with Intereſt, ſhould convey to the Plaintiff, and ſhould account for the Rents and Profits which he had received, and be allowed what he had laid out in Repairs, or otherwiſe. *Mich.* 12 *Ann.* *Broderick* and *Broderick et al'*, *Vin. Abr.* Tit. *Circumvention*, *Ca.* 3.

Mr. *Viner* ſays, That in this Caſe it was decreed that the Defendant do account for the Rents and Profits of the Freehold Leaſes to the Plaintiff, and the Defendant to have all juſt Allowances for Debts and Legacies paid by him, and the Plaintiff to account for one hundred and fifty Guineas to Defendant, with Intereſt, *&c.* —As to the Purchaſe *bona fide* of Part of the Freehold Lands, he ſhall convey to the Plaintiff upon Payment of the Purchaſe Money, with Intereſt at 5 *l. per Cent.* becauſe he had Notice of the *Invalidity* of the Deviſe by common Report, tho' not actually Notice from the Plaintiff or Defendant; and tho' he was *not a fraudulent Purchaſer*, yet *he was a raſh one*, and ought to have inquired into the Validity of the Will, or got the Heir at Law to join in the Conveyance to him. *Per Harcourt* C. *Ibid.*

12. *A.* being Parſon of the Pariſh of *C.* in *Eſſex*, and *B.* having Lands in that Pariſh, told *A.* that there was a *Modus* of 40 *s. per Annum paid Time out of Mind* for his Lands in the Pariſh; and to convince *A.* of it he ſhewed a Copy of a Record in *B. R. Temp. Eliz.* where a Prohibition was granted againſt the Parſon in a Suit for Tithes in Court Chriſtian upon a Suggeſtion of this *Modus*; whereupon *A.* agreed with *B.* to take 40 *s. per Annum* for the Tithes of *B.*'s Lands in that Pariſh; but it appearing in the Cauſe that *B.* did *ſuppreſs Part of the Record wherein afterwards a Conſultation was granted*, and thereby deceived *A.* and drew him into this Agreement; for that Reaſon the Lords did make void the Agreement, being obtained by ſuppreſſing the Truth. *Mich.* 12 *Ann.* cited in the Caſe of *Broderick* and *Broderick*, *in Canc'*, as the Caſe of *Dr. Dent* and *Buck in Dom. Proc'*, *Vin. Abr.* Tit. *Circumvention*, *Ca.* 4.

13. *A.* agrees with the *Eaſt-India* Company to go as Preſident to *Bengal*, and enters into a Bond (with two Sureties) of 2000 *l.* Penalty for Performance of the *Articles*, and a few Days after he ſettles all his Eſtate on Truſtees, and (*inter al'*) he declared the Truſt of a Term for five hundred Years, to be for the raiſing of 5000 *l.* for his Daughter's Portion, payable three Months after Marriage. The Daughter afterwards married *J. S.* a Gentleman of 700 *l. per Annum*, who, before his Marriage, was adviſed by Counſel that the Portion was ſufficiently ſecured, and who, afterwards on her Death, had on her Requeſt expended 400 *l.* on her Funeral, but never made any Settlement on her. *A.* embezelled 2600 *l.* of the Company's Effects; the Company cannot break thro' this Proviſion in the Settlement, there being *no* Colour of Fraud in it; and the *Articles* do not bind the *real* Eſtate but the *Bond* only, ſo far as the Penalty goes; therefore decreed the 5000 *l.* to *J. S.* after Payment of 2000 *l.* to the Company. *Eaſt.* 1714. *Eaſt-India Company* and *Clavel*, *Prec. in Chan.* 377.

14. There being *Accounts current*, *between* A. *and* B. a Goldſmith, B. *gives out his Caſh Note to* C. *for* 5000 l. and *A. mortgages his Eſtate as a collateral Security* for the Money. B. *gives* C. 100 l. *for his Favour in the Matter*, *who keeps the Caſh Note by him.* Some Time *after the Mortgage forfeited* B. *becomes a Bankrupt.* *A.* prays Relief, becauſe *C.* neglected to turn his Caſh Note into Money, when he might have done it. It was directed, that an Account be taken, how Matters ſtood between *A.* and *B.* 10 *Feb.* 1717. *Maſon* and *Lake*, *Vin. Abr.* Tit. *Fraud*, (G) *Ca.* 4. cites it as a MS. Rep. ſaid to be *Lord Harcourt*'s, Tit. *Fraud.*

15. *A.* makes an *abſolute Conveyance to* B. *for* 1500 l. *B.* executes a *Defeazance upon Payment of* 1500 l. *within ſix Years*, and after, *on Marriage*, *ſettles it as an abſolute Eſtate on his Wife and Iſſue.* There being Proof that *A.* made the *Conveyance to enable* B. *to get a Fortune*, tho' that was another Lady and not the Wife *B.* really married, it was decreed that *A.* was *bound as Particeps Criminis*; and this Decree was affirmed by eight Lords againſt ſeven. *Cowper* and *Harcourt* againſt the Decree; *Parker* for it. 21 *Jan.* 1718. *Webber* and *Farmer*, *Vin. Abr.* Tit. *Fraud*, (H) *Ca.* 3. cites it as a MS. Rep. ſaid to be *Lord Harcourt*'s, Tit. *Fraud*, and ſays, there is added a Note in the MS. that the Wife's Father had Notice of the Defeazance before the Settlement made. *Ibid.*

16. *A.* agreed for the Purchaſe of Timber, and *A.* and *B.* both enter into a Bond, that *A.* his *Executors and Adminiſtrators*, ſhould not cut down under ſuch a Size. It comes out that *A.*'s Name was only made uſe of for *B.* in the Agreement. *B.* cuts down Timber

under Size. There can be no Remedy at Law againſt *B.* upon this Bond; but it is a Fraud on the Seller, and relievable in Equity. 12 *Mar.* 1720. *Butler* and *Pendergraſs*, *Vin. Abr.* Tit. *Fraud*, (C. a.) *Ca.* 13.

Maxim. *Equity has ſo great an Abhorrence of Fraud, that it will ſet aſide its own* Decrees, if founded thereupon. *Vin. Abr.* Tit. *Fraud*, (A. a.) *Ca.* 9.

17. In *Caſes of Fraud, Equity will relieve even againſt the Words of a Statute*; as if one Agreement in Writing ſhould be propoſed, and another fraudulently or ſecretly brought in and executed in Lieu of the former; in this, or ſuch like Caſes of Fraud, Equity will relieve; but where there is no Fraud, only relying upon the *Honour*, *Word* or *Promiſe* of the Defendant, the Statute of Frauds making thoſe Promiſes void, Equity will not interfere. *Per Parker* C. *Eaſt.* 1720. *in Caſu Viſcounteſs Montacute* and her Huſband *Sir George Maxwell*, 1 *Will. Rep.* 620.

18. A Releaſe of an Equity of Redemption, obtained by *Miſrepreſentation*, was ſet aſide for that Reaſon. 23 *May* 1721. *Kirwan* and *Blake*, *Vin. Abr.* Tit. *Fraud*, (H. a.) *Ca.* 9. cites it as a MS. Rep. ſaid to be *Lord Harcourt*'s, Tit. *Fraud.*

19. A *Statute* was made in *Ireland*, that *all Leaſes which ſhould not be regiſtered by ſuch a Day ſhould be void.* The *Reſpondent*, who *lived in the remoteſt Part of* Ireland, not having Notice of this Act, *did not regiſter within the Time*; whereupon *another Leaſe was made*, and regiſtered, *to one who had Notice of the firſt Leaſe*, and *an Ejectment was brought upon it*; but the Reſpondent was relieved, becauſe the *Statute which was made to prevent Fraud ſhall never be uſed as a Means to cover it. Note*; This Act was appointed to be read at every *Quarter Seſſions* and *Aſſize.* 23 *Feb.* 1722. *Lord Forbes* and *Deniſton*, *Vin. Abr.* Tit. *Fraud*, (F. a.) *Ca.* 9. cites as a MS. Rep. ſaid to be *Lord Harcourt*'s, Tit. *Fraud.*

20. In Caſe of *great Fraud*, Equity will *not* direct an Iſſue. 5 *Feb.* 1722. *White* and *Lightburn*, *Vin. Abr.* Tit. *Fraud*, (L. a.) *Ca.* 7. cites it as a MS. Rep. ſaid to be *Lord Harcourt*'s, Tit. *Fraud.*

21. It is no Objection, that the Parties to a Fraud have their Remedy at Law, and may bring Actions for Money had and received for their Uſe; for in Caſes of Fraud *Equity has a concurrent Juriſdiction with the Common Law, Matter of Fraud being the great Subject of Relief in Equity. Per* his *Honour*, *Trin.* 1723. in the Caſe of *Colt* and *Woollaſton* and *Arnold* (*a*), 2 *Will. Rep.* 154, 156.

(*a*) *Vide* this Caſe, *P. Ca.*

22. One of ſeventy-two Years of Age conveyed Lands of 40 *l.* a Year for an Annuity for his Life of 20 *l.* a Year, and who lived but two Years after, but it was ſet aſide upon a Bill brought by the Heir at Law, it appearing that the old Man was weak, and eaſily to be impoſed upon. *Mich.* 1723. *Clarkſon* and *Hanway et al'*, 2 *Will. Rep.* 203.——This Decree was affirmed by Lord *Macclesfield. Ibid.* 206.

In this Caſe there being no Evidence of any Inſtruction given by the *Grantor* to the *Drawer* of the Deed, tho' the *Drawer* had been examined, but the Inſtructions were given by the *Grantee* only; and it not appearing that the Deed was read to the *Grantor* at the Time of executing the ſame, and the *Annuity being ſecured by Covenant only* inſtead *of a Mortgage of the Eſtate*, and the Annuitant not having the Deed itſelf in his Hands, his *Honour* ſaid that all this is Fraud apparent, and that judging upon the Face of a Deed is judging upon Evidence, which cannot err, whereas the Teſtimony of Witneſſes may be falſe. *Ibid.* 203 to 206.

23. Obligor on Payment of 20 *l.* to the Obligee, who was ſuperannuated, and very weak and forgetful, and incapable of tranſacting any Buſineſs, procured a Bond and Notes for about 250 *l.* to be delivered up to him on Pretence of *Poverty*, and Kindred to the Obligee; but neither being proved, he was ordered to account for the Bonds and Notes. *Mich.* 11 *Geo.* 1. *Lucas* and *Adams* (*b*), 2 *Mod. Caſes in Law and Eq.* 118.

(*b*) *Vide* this Caſe, *P. Ca.*

24. *A.* intending to marry *B.* gave a Bond to *B.*'s Father for 500 *l.* payable at a certain Day, but defeazanced not to be put in Suit, but for Security of the Daughter, in Caſe any Misfortune ſhould happen to *A.* to be paid before other Creditors. This is a fraudulent Bond on the Face of it, to diſappoint Creditors; ſo held *per King* C. *Trin.* 1725. *Wiſe's Caſe, Select Caſes in Chan.* 46.

25. Lord Commiſſioner *Jekyll* took a Difference betwixt a *Deed* and a *Will* gained from a *weak* Man, and upon *Miſrepreſentation* or *Fraud*; for if a *Will* be gained from a *weak* Man, and by *falſe Repreſentation*, this is (*a*) *not* a ſufficient Reaſon to ſet it aſide in Equity, as was determined in the Caſe of the late Duke of *Newcaſtle*'s Will between Lord *Thanet* and Lord *Clare*, and in the Caſe of *Bodvil* and *Roberts* (*b*); but where a *Deed* (which is not revocable as a Will) is gained from a weak Man upon a *Miſrepreſentation*, and *without any valuable Conſideration*, the ſame ought to be ſet aſide in Equity. *Eaſt.* 1725. in the Caſe of *Janes* and *Greaves*, 2 *Will. Rep.* 270.

(*a*) *Vide Goſſe and Tracy*, 2 *Vern.* 700. *contr'.* See alſo 1 *Abr. Eq.* 406.

(*b*) *Roberts and Wynne*, 2 *Chan. Rep.* 236. S. C.

26. Equity *will never countenance Demands of an unfair Nature*; in this Caſe the Bill was *to have an Allowance for attending at Auctions to enhance the Price of Goods*; nor will Equity *ſuffer them to be ſet againſt fair* and *juſt Demands in an Account*; and a Croſs-bill for that Purpoſe was diſmiſſed with *Coſts.* 6 *Mar.* 1726. *Walker* and *Gaſcoigne*, *Vin. Abr.* Tit. *Fraud*, (A. a.) *Ca.* 13. cites it as a MS. Rep. ſaid to be *Lord Harcourt*'s.

Grounds and Rud. of Law and Eq. P. S. C.

27. *A.* being much indebted, gave 600 *l.* for the Benefit of his younger Children; this is *not fraudulent as againſt Creditors*, tho' it would have been *ſo of a real Eſtate* or *Chattel real*; yet the Court would not have taken it to be ſo *pro confeſſo*, but would have directed an Iſſue to try it. *July* 14, 1729. *Duffin* and *Furneſs*, *Select Caſes in Chan.* 77.——And ſo it was done in Lord *Somers*'s Time, and, on Iſſue directed, determined *fraudulent* before Lord Chief Juſtice *Holt*. *Ibid.* 78.

CAP. XLVII.

Funeral Expences.

1. *J. S.* dies, not leaving ſufficient *perſonal* Eſtate to pay his Debts; there had been 600 *l.* laid out in his *Funeral*, which the Court decreed ſhould be a Debt to affect a Truſt Eſtate ſettled for Payment of his Debts, he being a Man of a great Eſtate and Reputation in his County, and being buried there; but if he had been buried elſewhere, it ſeemed his Funeral might have been more private, and the Court would not have allowed ſo much. *Trin.* 1691. *Offley* and *Offley*, *Prec. in Chan.* 26, 27.

1 *Vol. Eq. Abr. P.* 66. *Ca.* 1. S. C. but S. P. does not appear.

2. The Wife has a ſeparate Maintenance, with Power to diſpoſe of it by Will; ſhe accordingly makes a Will, and an Executor, and thereby deviſed ſeveral Legacies to the Amount of more than ſhe had to diſpoſe of. The Huſband's Eſtate in the Hands of another (which amounted to 270 *l.*) was made liable to the Funeral Expences of the Wife. *Trin.* 9 *Geo.* 1. *Bertie* and *Lord Cheſterfield*, at the Rolls, 2 *Mod. Caſes in Law and Eq.* 31, 32.

CAP. XLVIII.

Guardian (a).

(a) *Vide* Tit. *Wards, P. Ca.*

(A) Of appointing,—aſſigning, (or admitting),—and removing a Guardian;—the Power, &c. of a Guardian;—and here touching Survivorſhip of a Guardianſhip.

(B) What Act of a Guardian, with Conſent of the Infant, will bind the Infant.

(C) Guardian, in what Caſe chargeable;—and how compellable to account.

(A) Of appointing,—aſſigning, (or admitting),—and removing a Guardian;—the Power, &c. of a Guardian;—and here touching Survivorſhip of a Guardianſhip.

1. GUARDIANS appointed by Will according to the Stat. 12 *Car.* 2. *c.* 24. are only Truſtees, and have no more Power than Guardians *in Socage*; and that as the Court could interpoſe where there was a Guardian *in Socage*, ſo might it alſo in Caſe of a Guardian by the Statute. *Per* Lord Chan. *Macclesfield.*——And in Anſwer to an Objection, that the Court ſhould not interpoſe before the Guardians had *miſbehaved*, his *Lordſhip* obſerved, that *preventing Juſtice* was to be preferred to *puniſhing Juſtice*; and that if any wrong Steps had been taken as might induce the leaſt Suſpicion of Prejudice to the Infant, tho' not to deſerve Puniſhment, yet the Court would interpoſe, and order the contrary; and that this was grounded upon the general Power and Juriſdiction which this Court has over all Truſts; and that a Guardianſhip was moſt plainly a Truſt. *Trin.* 1721. *The Duke of Beauford* and *Berty*, 1 *Will. Rep.* 704, 705.

2. As to a Guardian's being *in loco Parentis*, the Solicitor General took a Difference between a *natural Parent* and a Guardian; for that if the *latter* was for marrying a Ward under his Quality, it was moſt uſual for this Court to interpoſe; but not ſo in Caſe of a Father's endeavouring to marry his Infant Child to one beneath him. But *per Macclesfield* C. This Court would, and had interpoſed, even in the Caſe of a Father; as where the Child had an Eſtate, and the Father, who was inſolvent, and of an ill Character, would take the Profits, there the Court has appointed a Receiver (*b*). *Trin.* 1721. in the Caſe of *Duke of Beauford* and *Berty*, 1 *Will. Rep.* 705.

(*b*) As was done in the Caſe of *Kitten* and *Kitten*, cited *per Lord Chancellor. Ibid.*

3. Teſtamentary Guardians are recommended by the Will to act with the Advice of *J. S.* and *J. S.* is attainted, this Superintendency devolves upon the Great Seal as the general Guardian of all Infants. *Per* Lord Chan. *Macclesfield:* Wherefore it was ordered that the Guardians ſhould apply to, and adviſe with *A.* and *B.* the Infant's near Relations

Relations. *Trin.* 1721. *Duke of Beauford* and *Berty*, 1 *Will. Rep.* 706.

4. At Common Law the Father could *not* appoint a Guardian, whether Tenant in *Chivalry* or in *Socage*. *Eaſt.* 8 *Geo.* 1. *Earl of Shaftſbury* and *Shaftſbury*, *Gilb. Eq. Rep.* 176.

5. If two Perſons are appointed Guardians by Virtue of the Stat. of 4 & 5 *Ph. & M.* and one of them dies, it will *not* ſurvive, it being a *naked* Authority to a ſpecial Purpoſe, *viz.* to make the *Raviſher* criminal. But a *Teſtamentary* Guardian, under the Stat. of 12 *Car.* 2. *c.* 24. *ſect.* 8. has *not a naked Authority*, but, being made after the Manner of a Guardian in *Socage*, has an Intereſt, which, tho' it be neither *aſſignable* nor *transferable*, is yet ſuch an Intereſt as ſhall ſurvive. *Ibid.* 176, 177.

6. And were it an Authority only, it muſt be conſtrued joint and ſeveral, elſe the more Guardians are appointed for the Security of an Infant, the leſs ſecure he would be, becauſe upon the Death of any one of them the *Guardianſhip* would be at an End. *Ibid.*

7. *A.* deviſed the Guardianſhip of the Perſon and Eſtate of his Infant Child to *B.* and two others, (ſince deceaſed) without ſaying *and to the Survivor of them*, yet the *Survivor* ſhall have it. *Hil.* 1722. *Mr. Juſtice Eyre* and *Counteſs of Shaftſbury*, 2 *Will. Rep.* 102.

The Father by the Stat. 12 *Car.* 2. *c.* 24. has a Right to diſpoſe of the Guardianſhip of his Child until twenty-one, and having done ſo in the *preſent* Caſe, it will be binding, unleſs ſome *Miſbehaviour* be ſhewn in the Guardian, in which Caſe, it being a Matter of *Truſt*, the Court hath a Superintendency over it. *Per* Lord Chan. *Macclesfield*, *ibid.* 107.——And his *Lordſhip* ſaid, That as to the Objection that this Right of Guardianſhip does not ſurvive, becauſe it is *not* ſaid in the Will in expreſs Terms that *it ſhall go to the Survivor*, there ſeemed to him to be no Colour for it, becauſe where ſeveral Guardians are appointed by a Will, each of them ſeems to be a compleat Guardian, like the Caſe where there are two or three Church-Wardens of a Pariſh, each of them is a diſtinct Church-Warden; and it would be miſchievous, and of very ill Effect, if, where there are ſeveral Guardians appointed by a Will, and ſome refuſe to act, that the reſt ſhould not be able to do any Thing; and yet this muſt be the Conſequence, if a Guardianſhip deviſed to ſeveral ſhould be taken to be but one joint naked Authority; ſuch Conſtruction would make the Act of little Force. *Ibid.* 107, 108.

8. A Guardian has an Authority coupled with an Intereſt, and may bring a Writ of Raviſhment of Ward on the Infant's being taken from him; and tho' it is true, that the Damages recovered ſhall by the Statute go towards the Benefit of the Ward, yet the Declaration muſt lay it *ad damnum* of the Guardian. *Per Lord Chancellor*, *ibid.* 108.——A Guardianſhip is *not* aſſignable, neither will it go to the Executors or Adminiſtrators; but for all that it is coupled (*a*) with an Intereſt, and is not a naked Authority; and where an *Authority is coupled with an Intereſt, it does ſurvive* (*d*). *Per* Lord Commiſſioner *Jekyll*, *ibid.* 121.

(*a*) That a Guardianſhip is coupled with an Intereſt is moſt apparent, in that a Guardian may bring an Action, and avow in his own Name, may make (*b*) Leaſes during the Minority of the Infant, and make and grant Copyholds (*c*) even in Reverſion, as *Dominus pro tempore*. *Per* Lord Commiſſioner *Jekyll*, *ibid.* 122. (*b*) 2 *Roll. Abr.* 41. *Pl.* 3. (*c*) *Ibid.*——(*d*) 11 *Inſt.* 112, 113.

9. The Caſe of a Guardian is compared to that of an Executor or Adminiſtrator, which is not *aſſignable*, but yet ſurvives (*e*). *Per* Lord Commiſſioner *Jekyll*, *ibid.* 121.——And tho' a Guardian be not in all Reſpects to be compared to an Executor, in regard the latter may continue his Executorſhip by appointing an Executor by his Will, yet the Caſe of a Guardianſhip deviſed to two is ſtrictly like the Caſe of an Adminiſtration granted to two (*f*), (eſpecially where the Debts amount to ſo much as the Aſſets); for in that Caſe, as well as in the Caſe of two Guardians, an Adminiſtrator cannot aſſign his Adminiſtratorſhip, it will *not* go to his Executors or Adminiſtrators,

(*e*) Cites the Caſe of *Gardiner* and *Sheldon*, *Vaugh.* 182.

(*f*) *Vide* the Caſe of *Adams* and *Buckland*, 1 *Vol. Abr. Eq.* *P. Ca.* but more particularly the Caſe of *Hudſon* and *Hudſon*, *P. Ca.* of *this* Work.

tors, but to the ſurviving Adminiſtrator; ſuch an Adminiſtrator is accountable to the Creditors for every Thing, as much as the Guardian is to the Infant; and ſuch an Adminiſtrator can make no Profit. *Per* Lord Commiſſioner *Jekyll*, in the Caſe of *Mr. Juſtice Eyre* and *The Counteſs of Shaftſbury*, *Hil.* 1722. 2 *Will. Rep.* 121, 122.

10. The Court of *Chancery* has an original Juriſdiction of the Right of Guardianſhip, as formerly the Lord by *Priority*; (*i. e.*) that Lord of whoſe Manor the Lands which were firſt in the Family were held, had a Right to the Guardianſhip; ſo the Court of *Chancery* will determine touching that *Priority*. *Per* Lord Commiſſioner *Gilbert*, *ibid.* 123. in S. C.

a) The *Actions* given by the Law plainly ſhew that the Guardian has an Intereſt. *Per* Lord Com. *Gilbert*, *ibid.* 124.

11. The Stat. 12 *Car.* 2. (which was drawn by Lord Chief Juſtice *Hale*) gives the Guardian an Authority coupled with an Intereſt (*a*). ——A *Teſtamentary* Guardian takes Place of all other Guardians, and his Intereſt is for the *Good* and *Honour* of the Family; as the Father was the Head of the Family, ſo the *above* Statute puts ſuch a Guardian *in loco Patris*. *Per* Lord Commiſſioner *Gilbert*, *ibid.* 125.

Vin. Abr. Tit. *Guardian and Ward*, (O. 2.) *P.* 180. in a Note to *Ca.* 5. ſays, 20 *Mar.* 1740, S. P. in the Caſe of *Hughes* and *Science*.

12. Since the Statute which took away the Court of Wards, the Juriſdiction of Wardſhip returns to the Court of Chancery; and it appears by the *Regiſter* 21. *b.* 198. that a Writ may iſſue out of this Court to remove the Guardian of an Infant, and to put another Guardian in his Stead. *Per* Lord Commiſſioner *Jekyll*, *ibid.* 119.

13. The Right of a *Teſtamentary* Guardian takes Place of a Guardianſhip by Nature; by the expreſs Words of the Act of Parliament the Guardian will take Place of all other Guardians, and his Authority by the Law is a Continuation of the *Paternal* Authority. *Per* Lord Commiſſioner *Jekyll*, *ibid.* 115.

14. The Law has appointed Remedies both *Droitural* and *Poſſeſſory*, to recover the *Guardianſhip*. Firſt, *Droitural* as the Writ *de Cuſtodia Terræ & Hæredis*; and if the Ward was married, then by the Statute of *Merton*, *c.* 6. the Plaintiff ſhould recover the Value of the Marriage. Secondly, *Poſſeſſory*, as at Common Law *Treſpaſs*, in which he could only recover Damages, and not the Ward itſelf; but by the Statute, *Weſt.* 2. *c.* 35. which gives Raviſhment of Ward, he recovered the Body of the Heir, and not Damages only. *Eaſt.* 8 *Geo.* 1. *Earl of Shaftſbury* and *Shaftſbury*, *Gilb. Rep. in Eq.* 175.

15. Guardianſhip muſt be reckoned an Intereſt, as the Law has appointed Remedies *Droitural* and *Poſſeſſory* to recover it; and tho' a Guardian in *Socage* has not any Intereſt of Profit ſo as to be aſſignable, yet it is not a naked Authority, but an *Intereſt of Honour*, which a Man may as well have as an *Intereſt of Profit*. *Ibid.* 175.

16. A Petition was preferred to *Lord Chancellor* by the *Grandfather* of an Infant of the Age of ſeven Years, to have him taken out of the Cuſtody of his Mother, (the Defendant) being a Papiſt, and to be delivered to *B.* and *C.* named by the Petitioner, that he might be educated in the Proteſtant Religion. It appeared by Affidavits, that the Infant was intitled to 1700*l. per Annum* as Tenant in Tail in Remainder after the Determination of the Eſtate for Life of his ſaid Grandfather. It was inſiſted for the Petitioner, that it might be of very ill Conſequence that the Education of this Child ſhould be left with *a Papiſt*, who might inſtil the Principles of that Religion in an Infant. That the Infant's Father on his Death-bed ſaid, that he *expected his Father* (the Petitioner) would take Care to educate this Child in the *Proteſtant Religion*, and not leave the Education of it to his *Wife*; but he being now dead, and the Petitioner very old and unable to take the Guardianſhip on him, he deſired that *B.* and *C.* in whom he repoſed

an entire Confidence, and to whom he aſſigned the Guardianſhip, might have the Education of this Infant. And *B.* appearing in Court, and conſented to take upon himſelf this Charge, *Lord Chancellor* ordered that the Infant ſhould be delivered to *B.* and *C.* whom the Petitioner had appointed to be *Guardians*, but ſo as the Mother might ſee him at any Time. *Trin.* 9 *Geo.* 1. *Reynolds* and *The Lady Tenham, MS. Rep.* 2 *Mod. Caſes in Law and Eq.* 40. S. C. and Decree, *per Lord Chancellor*. But this Decree was reverſed in the Houſe of Lords upon the Appeal of Lady *Tenham*, and *there* reſolved, that theſe Words of her Huſband on his Death-bed, (*viz.*) *That he expected his Father* (the Petitioner) *would take Care to ſee his Child educated in the Proteſtant Religion*, were a good Appointment to make the Grandfather *Guardian*. That the Appointment of a *Guardian is a bare Power* and *Truſt*, and *not aſſignable*, as it hath been reſolved in *Bedle* and *Conſtable*'s Caſe, *Vaugh. Rep.* And about *three* Years ſince in the Duke of *Beauford*'s Caſe, whoſe *Father* had appointed the Duke of *Ormond* Guardian, but he being attainted of High Treaſon, and ſo made incapable, another Guardian was appointed by Act of Parliament, it being not to be done by any other Power. Therefore the Grandfather was ordered to take the *Guardianſhip upon himſelf in Perſon*, for that *he could not aſſign his Power to another*. And this is agreeable to another Decree made in the Houſe of Lords in the Caſe of *Foſter* and *Denyſon*, 2 *Chan. Rep.* 237.

17. *A.* ſeiſed of an Eſtate of 400 *l. per Annum*, had a *Natural* Daughter by *B.* to which Daughter ſhe deviſed all her Eſtate, and made *C.* Executrix, and appointed her to be Guardian to the Infant, and died. This Executrix made her Will, and thereof the Petitioner Executrix. *B.* removed the Infant from School, and ſent her into the Country, for which Reaſon the Petitioner complained to the Court, that the Infant was removed from School where ſhe might have proper Education, and ſent into the Country where ſhe could have none; and this Petitioner being referred to a Maſter to name a proper School, and a *Guardian* for this Infant, he reported, the Petitioner to be a fit *Guardian*, and Mr. *D.*'s School a proper School for her Education; and therefore ſhe petitioned that the Infant might be delivered to her, and ſent to the ſaid School. The Infant's Father conſented to ſend the Child to Mr. *D.*'s School, but oppoſed the Delivery to the Petitioner, or that ſhe ſhould have the laying out any Money for Cloaths or other Neceſſaries for the Child, ſhe being very poor, and having already pretended that ſhe deſerved 180 *l.* for her Care in attending the Child; therefore the Money to be laid out for Neceſſaries ought rather to be paid to Mr. *D. or his Wife*, than the Petitioner. The Court was of Opinion, that removing this Child from School into the Country to her Father's Houſe, could neither be uſeful nor inſtructive to her, becauſe he was a ſingle Man, and kept no Perſons proper for her Education; yet it was not thought reaſonable to remove her from his Care ſince he owned her to be his Child, but that he ſhould pay the Petitioner's Coſts; for otherwiſe he might remove her from one School to another, and the Coſts of applying to this Court would be paid out of the Infant's Eſtate. *Mich.* 11 *Geo.* 1. *Ord* and *Blackett*, 2 *Mod. Caſes in Law and Eq.* 116.

18. *A.* deviſed his real Eſtate to his three Daughters and their Heirs, and then by a *Codicil* he deviſed it to his Wife, if his three Children ſhould die without Iſſue of their Bodies, and made his Wife Guardian to his Children, and died. The Wife was very young, and in ſix Months after *A.*'s Death married again. And the Court decreed, that the Children ſhould be removed from the Mother their Guardian, and that the Court would appoint ſome proper Perſon amongſt their Relations to receive them; but that the Mother ſhould be at Liberty to ſee them as often as ſhe would. *Eaſt.* 11 *Geo.* 1. *Morgan* and *Dillon*, before Lord Chan. *Weſt* in *Ireland*, 2 *Mod. Caſes in Law and Eq.* 135 to 143. But *Lord Chancellor*'s Decree was reverſed in the Houſe of Lords, and the Mother confirmed in the Guardianſhip. *Hil.* 2 *Geo.* 2. *ibid.* 210.

19. A

19. A Guardian *in Socage* is *purely for the Benefit of the Infant*, and accountable to him, and *removeable* by the Court of Chancery upon any *Miſbehaviour*, or obliged to give ſuch Security to account as the Court thinks proper. *Per Weſt* Lord Chancellor in *Ireland*. *Eaſt.* 11 *Geo.* 1. 2 *Mod. Caſes in Law and Eq.* 141.

20. One deviſed the Guardianſhip of his Child to his Wife and *A.* but if his Wife ſhould marry again, then the Wife and *A.* to fix upon another Guardian. The Wife did marry again, but would not agree with *A.* to choſe another Guardian. *Reſolved*, That it devolved upon the Court of Chancery to appoint a Guardian. *Per* Lord *King*, *Trin.* 1725. *Darcy* and *Lord Holderneſs*, 1 *Will. Rep.* 703. by way of Note.

2 *Will. Rep.* 278. *Eaſt.* 1725. *Jennings* and *Looks*, S. C. and P. ſays, the *Guardian* or his Executor (in Caſe of his Death) was decreed to anſwer the Intereſt out of the Profits. *Per* Lord Commiſſioners *Jekyll* and *Gilbert*.

21. The Guardian of an Infant, who is in the Poſſeſſion of an Eſtate *mortgaged* which came to the Infant, muſt out of the Profits keep down the Intereſt, and not let it run on to increaſe the perſonal Eſtate, which poſſibly the Guardian may be in Expectation of. *Eaſt.* 1725. *Anon. MS. Notes.*

22. *J. S.* by his Will appointed *M.* his Wife ſole Executrix and Guardian of his Son, and adds, "*If my Wife ſhall marry again before my Son ſhall attain his Age of twenty-one Years, then and from thenceforth I appoint my Brother Executor and ſole Guardian of my Son.*" *M.* dies, the Son being about thirteen Years of Age; and the only Queſtion was, Whether the Teſtator's Brother (who would have been Guardian in Caſe the Wife had married before the Son had been twenty-one Years of Age) ſhould be Guardian in this Caſe, or the next of Kin, to whom the Inheritance could *not* deſcend? Lord Chan. *King:* Here is no Limitation to the Wife of the Guardianſhip for Life. It ſeems the Uncle muſt have been Guardian and Executor at the ſame Time. I think the Uncle cannot be Guardian; but *Raym.* 4273. and *Lev.* 125. cauſe me to doubt; but a Caſe being made for the Opinion of the Court of Common Pleas, the Judges certified that the Uncle could not be Guardian, but that the Guardianſhip muſt go to the Guardian in *Socage*. 1731. *Selby* and *Selby*, *MS. Rep.*

23. The Court cannot appoint Guardians in any Caſe but *ad litem* for carrying on Suits there in Behalf of the Infant. 20 *Mar.* 1740. *Hughes* and *Science et al'*, *in Canc'*, *Vin. Abr.* Tit. *Guardian and Ward*, (N. 6.) in a Note to *Ca.* 7.

(B) What Act of a Guardian, with Conſent of the Infant, will bind the Infant.

1. *A.* As Heir to his Father and ſpecial Occupant, became intitled to a Leaſe for three Lives of certain Lands in *Hampſhire*, and being an Infant of about ſeventeen Years of Age, *B.* who was his *Guardian*, or acted as ſuch, in 1727 did, by *A.*'s Approbation, for 157 *l.* ſign a Demiſe of the ſaid Lands to the Plaintiff for twenty-one Years, to commence from *May* 1730, at which Time a Leaſe in Being would determine, about ſix Months before *A.* would come to Age. The Money was either paid to *A.* himſelf, or to his Guardian by his Conſent, and the Infant, to ſhew his Good-liking of the Bargain, witneſſed

One Perſon ſwore poſitively the Money was paid to the Infant himſelf, but he ſwore he did not receive it.

witneſſed the Deed and the Receipt of the Money. *B.* proving afterwards inſolvent, and having made ſeveral diſadvantageous Bargains for *A.* he would have ſet aſide this Leaſe, and actually demiſed the Lands to *C.* another Defendant, who entered upon and evicted the Plaintiff and took a Crop of Corn which the Plaintiff had ſowed. The Bill againſt *A.* was to make a new Leaſe of the Premiſſes for twenty-one Years, or to refund the 157 *l.* Fine; and againſt *C.* to have Satisfaction for the Crop. And it was objected for *A.* That no Intereſt paſſed by the Leaſe of the Guardian who was nominal, neither *Teſtamentary* Guardian, nor Guardian in *Socage*; and if he had been ſo, ſuch Leaſe could not be obligatory during *A.*'s Nonage, and that therefore the Leaſe in Point of Law was abſolutely void; and altho' *A.* witneſſed the Leaſe, yet that could not bind him any more than if he had really executed it, which he might have avoided at his coming to Age. *King*, Chancellor: Infants have no Privilege to cheat Men. This Leaſe was made with the Conſent and Approbation of *A.* the Infant, who was above the Age of Diſcretion, and knew what he was doing, and it's certain his conſenting to the Leaſe was the only Inducement the Plaintiff could have to take it at ſo large a Fine, being he was not to poſſeſs the Lands 'till ſix Months before the Determination of the Infancy, *&c.* and therefore whether ever the Money came to *A.*'s Hands or not, he ought to make good the Leaſe or refund the Fine, for otherwiſe the Plaintiff and all other Perſons would be defrauded by the Colluſion of an Infant and his Guardian; and ſo decreed, that on *A.*'s refuſing to make a Leaſe, he ſhould repay the Fine. But as to the Crop, his *Lordſhip* would not meddle about that, becauſe in Point of Law the Leaſe was abſolutely null (*a*). *Eaſt.* 6 *Geo.* 2. *Evroy* and *Nicholas et al'*, *MS. Rep.*

(*a*) *N. B. York*, Attorney General, in his Argument cited this Caſe: *A.* Tenant in Tail, wanting to mortgage his Eſtate, *B.* his Son and Heir, being an Infant of about ſixteen Years old, ſolicited the Loan of the Money, and a Mortgage was made without acquainting the Mortgagee of the Intail. Upon *A.*'s Death, *B.* ſet up the Intail againſt the Mortgagee; but Equity charged the Eſtate-tail with the Mortgage, becauſe of the Fraud which the Infant had been guilty of. *Ibid.*

(C) Guardian, in what Caſe chargeable;—— and how compellable to account.

1. A *Receiver* appointed by the Guardians of an Infant, with a Salary, is but a Servant to the Guardians, and as they had ſufficient Authority to employ him, ſo they had the ſame Power to diſcharge him, and allow his Accompts; and he having accounted with them, ſhall not be obliged to account again with the Infant when he comes of Age; but the Infant is at Liberty to require a full Account of the Guardians; and if the Servant they employed has embezzled any Money, the Guardians muſt anſwer it to the Infant. *Trin.* 1720. *Clavering's* (*b*) *Caſe*, *Prec. in Chan.* 535.

(*b*) *Vide P. Ca.*

2. Tho' the Infant *himſelf* cannot bring Account againſt his Guardian 'till he comes of Age, yet a third Perſon may bring a Bill for an Account againſt the Guardian, even during the Minority of the Infant. *Per* Lord Commiſſioner *Jekyll*, *Hil.* 1722. in the Caſe of *Eyre* and *Counteſs of Shaftſbury*, 2 *Will. Rep.* 119, 120.

Vide Tit. Wards, *P.*

CAP XLIX.

Hearing and Rehearing.

(A) Cases relating to Hearing, as what may be read, &c.
(B) Cases relating to Rehearing.

(A) Cases relating to Hearing, as What may be read, &c.

Prec. in Chan. 99. S. C. *in totidem verbis.* —1 *Vol. Abr. Eq.* 73. *Ca.* 17. S. C. but *not* ſo fully ſtated.

1. AT the Hearing it was objected by *Defendant B.* That *J. S.* who was a neceſſary Defendant, was not brought to Hearing. Plaintiff ſhewed he had proſecuted him to a Sequeſtration, and therefore might go on. Defendant anſwered, That the Affidavit on which the Proceſs of Sequeſtration was founded was inſufficient; and upon reading of it, it appeared that the *Subpœna* was left at a Place where *J. S.* had only lodged once, and that above two Years before the Service. *Cur'* held it not ſufficient Service to go on againſt the other Defendant alone, unleſs the Plaintiff would conſent to ſtand in the Place of *J. S.* to all Purpoſes, which he not doing, the Cauſe went off for want of Parties. *Mich.* 1699. *Parker* and *Blackbourne, MS. Rep.*

2. Lord Keep. *Wright* declared, That where on a Bill brought by *A.* againſt *B. C.* and *D. et al'*, the Defendants had examined ſome Witneſſes, that *B.* being *now* Plaintiff, may read thoſe Depoſitions againſt *A.* or any of the Defendants in the *firſt* Cauſe. *Mich.* 1704. *Barſtow* and *Palmes, Prec. in Chan.* 233.

3. Where *Plaintiff* in his Bill ſet forth that Letters of Adminiſtration were granted to him, *as by the ſame, ready to be produced, may appear*, and this *not denied by the Defendant's Anſwer*, the Letters of Adminiſtration may be read in Court without examining them. *Hil.* 8 *Ann. Brown* and *Pitman, Gilb. Eq. Rep.* 75.

4. A Bond for Performance of Articles, *tho' cancelled*, was made an Exhibit, and allowed (at the Hearing) as Evidence to prove the Execution of the Articles, the *Limitation* being inſerted and recited in the Condition of the Bond. *Hil.* 12 *Geo.* 1. *Anon. Gilb. Eq. Rep.* 183.

5. After the Bill and Anſwer came in, and Replication filed, ſeveral Witneſſes were examined, and their Depoſitions taken; then the Plaintiff moved to withdraw his Replication, and took Exceptions to the Anſwer, and got a ſecond Anſwer; and then replied, and examined other Witneſſes, and on the *Hearing* would read *other* Depoſitions; but the other Side inſiſting they could not be read, by reaſon the Replication was withdrawn, and ſo taken without any Replication, they were irregular, and ought to be ſuppreſſed; which *Lord Chancellor* ordered accordingly; for that it was ſaid, they ſhould have examined them anew after the ſecond Anſwer came in, and Replication

filed, or have moved the Court to have had Liberty to make uſe of them at the Hearing. *Eaſt.* 1714. *Andrews* and *Brown* (*a*), *Prec. in Chan.* 386.

(*a*) 1 *Vol. Abr. Eq. P.* 233. *Ca.* 6. S. C. but not S. P. 2 *Vern. Rep.* 699. S. C.

6. Where a Witneſs is examined who at that Time is diſintereſted, but afterwards becomes intereſted, and Plaintiff in the Cauſe, his Depoſitions may be read at the Hearing. *Cowper* Lord Chancellor. *Mich.* 1715. *Goſs* and *Tracey*, 1 *Will. Rep.* 289.

7. A Bill was brought by the Deviſee of Lands to perpetuate the Teſtimony of a Will, and to eſtabliſh the Will. His *Honour* diſmiſſed the Bill with Coſts, declaring, that this Cauſe being only for perpetuating the Teſtimony, ought not to have been ſet down for Hearing. *Trin.* 1723. *Hall* and *Hoddeſdon*, 2 *Will. Rep.* 162.

8. The Depoſitions of a Perſon who was made a Defendant, and ſtruck out, and examined as a Witneſs, were ordered to be read; and the Caſe of *Coke* and *Gaugh* was cited, where it was ſo done. But *King* C. ſaid, he would not do it 'till he ſaw that Caſe, and ſaid he had no great Reverence for the Rule, but if it be a Rule, he muſt purſue it. *Trin.* 1725. *Stephens* and *Craven*, *Select Caſes in Chan.* 41.

9. All Depoſitions taken in a Cauſe, but not read at the *Hearing*, may be read at the *Rehearing*; and this is the conſtant Practice of the Court. But in *Appeals* to the Lords, nothing is read but what was read below. *Trin.* 11 *Geo.* 1. 1725. in the Caſe of *Chriſtmas* and *Chriſtmas*, *Select Caſes in Chan.* 21.

Vide Tit. **Evidence and Witneſſes**, (D) *P.* 417.

(B) Caſes relating to Rehearing (*b*).

(*b*) *Vide* (A) *Ca.* 9. *this Page.*

1. NO Proofs to be read at a Rehearing that were not read at the firſt Hearing. *Feb.* 1706 or 1726. *Williams* and *Lane*, *Vin. Abr.* Tit. *Rehearing*, *Ca.* 5.

2. Upon the Plaintiff's petitioning to *rehear*, the Cauſe is open as to the whole and every Part of it, with reſpect to the Defendant; while, in reſpect to the Plaintiff, it is only open as to thoſe Parts of it complained of in the Petition. *Per Cowper* C. *in Caſu Rawlins* and *Powel*, 1 *Will. Rep.* 300.

3. A Decree *Niſi* by Default, was afterwards made abſolute by Default; alſo the Court refuſed to *rehear* the Cauſe, becauſe the Coſts upon the firſt Decree *Niſi* were not paid, for the Party cannot ſhew Cauſe againſt a Decree *Niſi* by Default, unleſs he pays the Coſts of the Hearing *Niſi*. *Per Macclesfield* C. *Mich.* 9 *Geo. Hoyle* and *Hoyle*, *Vin. Abr.* Tit. *Coſts*, (Q) *Ca.* 17.

4. It is in the *Diſcretion* of the Court whether or no they will grant a Rehearing (*c*). *Per* Lord Chan. *Macclesfield*, *Trin.* 1724. *in Caſu Mills* and *Banks*, 3 *Will. Rep.* 8.

(*c*) And it is equally ſo whether they will do any thing thereon. *Ibid.*

5. On a new Bill to carry a Decree into Execution, the Court may vary and alter what is thought proper, but on a Rehearing no further than the Petition extends; but if the Petition be againſt the Decree in general, tho' particular Reaſons are given, the whole is open; but otherwiſe it is if the Petition be only againſt one or two Particulars. *May* 3, 1725. *Colcheſter* and *Colcheſter*, *Select Caſes in Chan.* 13.

6. The Rule of Court is, that on a *Rehearing* only ſo much of the Caſe is open as is petitioned againſt; and if all do not petition, only

only to the Petitioners it is open. *Trin.* 1725. *Hayward* and *Colley*, *Select Caſes in Chan.* 24.

7. In the Caſe of Mr. *Onſlow*, the preſent Speaker of the *Houſe of Commons*, the Court, on the Circumſtances of the Caſe, and the Decree not being inrolled, refuſed to diſcharge an Order for a Rehearing, tho' at the Diſtance of above twenty-four Years. By Lord *King* the laſt Seal after *Hil.* Term 1732, 3 *Will. Rep.* 8. by way of Note.

8. An Agreement was ſigned by the Parties, and by Conſent made an Order of Court, to ſubmit to ſuch Decree as the Court ſhould make, and neither Party to bring an Appeal; yet the Cauſe was allowed to be reheard. *Per* Lord Chan. *Talbot*, *Hil.* 1733. *Buck* and *Fawcett*, 3 *Will. Rep.* 242.

CAP. L.

Heir.

(A) In what Caſes an Heir ſhall be charged, and what will be a Charge (*a*) on the real Eſtate, &c. in his Hands; ——How an Heir is favoured in general;——Where he ſhall have the Aid of the perſonal Eſtate in Eaſe of the real (*b*);——And where he ſhall have the Surplus, &c.

(B) Where the Words Heirs of the Body are only a Deſignatio perſonæ.

(C) Heir and Executor.

(D) Of an implied and reſulting Truſt for the Benefit of the Heir.

(E) What ſhall be Aſſets in the Hands of the Heir.

(F) Where unreaſonable Bargains are obtained from Heirs, in what Caſes they are relieved.

(a) *Vide* Tit. *Deviſe*, (T) *P.* 369.

(b) *Vide* (C) *P.*

(A) In what Caſes an Heir ſhall be charged, and what will be a Charge (*c*) on the real Eſtate, &c. in his Hands;---How an Heir is favoured in general;---Where he ſhall have the Aid of the perſonal Eſtate in Eaſe of the real (*d*);---And where he ſhall have the Surplus, &c.

(c) *Vide* Tit. *Deviſe*, (T) *P.* 369. *Heir* is *Nomen Collectivum*, and the ſame with the Word *Heirs*. *Cro. Eliz.* 313. *Ca.* 1. *Rol. Abr.* 626.

(d) *Vide* (C) *P.*

1. *A.* Deviſes to *Turner* and his Heirs, Upon Truſt that he ſhould convey it to ſuch of the Relations of the Teſtator as he ſhould think beſt, and moſt reputable for his Family. *A.* dies without Iſſue, and the Heir at Law, who was the Teſtator's Brother, prefers a Bill againſt the Defendant to have him convey the Eſtate to him. It was in Proof on the Defendant's Part, that the

2 *Freem. Rep.* 198. S. C. *in totidem verbis.*

Teſtator before the making of his Will did ſeveral Times declare that the Plaintiff was an ill Huſband, would ſpend his Eſtate if he ſhould leave it to him, and ſeveral other Expreſſions, ſhewing the Diſlike of the Teſtator to the Plaintiff. But *per Cur'*, There being nothing in Proof againſt the Plaintiff of any Miſbehaviour ſince the Teſtator's Deceaſe, this Court will judge it moſt reputable for the Family that the Heir at Law ſhould have it; and as for the Diſcourſes which were before the making of the Will, thoſe were all at an End by the making of the Will, and that notwithſtanding all thoſe Diſcourſes, it cannot be denied but if the Truſtee would give it him, he was not diſabled to take it. *Trin.* 1694. *Clarke* and *Turner*, *MS. Rep.*

2. *A.* by Will *ſubjected both his real* and *perſonal Eſtate to the Payment of his Debts.* Decreed that the Heir ſhould pay the Debt by ſuch a Time, or in Default thereof the real Eſtate to be ſold, and Liberty given to the Heir to ſue for the perſonal Eſtate (*a*). 23 *February* 1705. *Stydolph* and *Langham* (*b*), *Vin. Abr.* Tit. *Heir*, (U) *Ca.* 16.

(*a*) Seems to have been ſo decreed on an Appeal.

(*b*) *Vin. Abr.* Tit. *Charge*, (E) *Ca.* 8. S. C. *accord'*.

3. An Eſtate being *conſiderably mortgaged, was deviſed to* A. *and ſeveral ſpecifick Legacies were left to others.* The *Surplus is not ſufficient to diſcharge the Debt.* All the ſpecifick Legatees ſhall contribute towards the diſcharging the Mortgage, before the mortgaged Premiſſes ſhall be affected, for the Covenant to pay the Money makes it a perſonal Debt, and the *real Eſtate ſhall never be put in Average with the perſonal.* 1706. *Warner* and *Hayes*, *Vin. Abr.* Tit. *Charge*, (E) *Ca.* 9.

4. *A.* ſeiſed in Fee makes a Mortgage, and then deviſes the Lands to *B.* and gives ſeveral Money Legacies to *C. D. &c.* and wills, that all his Debts ſhall be paid out of his perſonal Eſtate; and if that be not ſufficient, then the Legatees to abate in Proportion. The Queſtion was, Whether the Mortgage ſhould be paid out of the perſonal Eſtate, ſo as to diſappoint the Legatees, there not being ſufficient to pay both, *&c.* *Per* his *Honour:* It is a *Rule* in this Court that *a Hæres factus* as well as *natus, ſhall have Aid of the perſonal Eſtate,* but *not to diſappoint Legatees*; and therefore, if the *Heir* or *Deviſee* does exhauſt the perſonal Eſtate, *as they may at Law*, this Court will turn the Legatees upon the Land, *&c.* But this Caſe turns upon the particular Wording of the Will; and tho' the Teſtator, *willing his Debts ſhould be paid out of his perſonal Eſtate*, and *if that falls ſhort*, then *the Legatees ſhould abate in Proportion*, ſeems *primâ facie* to import no more than the Law ſays, and ſo are to be conſidered as Surpluſage; yet it holds upon Conſideration that theſe Words do really import more; for *if the perſonal Eſtate was exhauſted by the Deviſee to pay the Mortgage, as it might at Law*, the Legatees ſhould come upon the Land without any Abatement; but here the Teſtator ſays they ſhould abate in Proportion, and conſequently to give them a Remedy upon the Land is to contradict the Will; wherefore *the Debt upon the Mortgage is to be computed amongſt the other Debts of the Teſtator*, and *the Surplus only to be divided amongſt the Legatees.* *Mich.* 4 *Geo.* 2. *Reeves* and *Herne*, *Vin. Abr.* Tit. *Charge*, (C) *Ca.* 12.

5. *A.* conveyed *all his Lands, In Truſt for Payment of his Debts* and *Legacies*, and by his Will *deviſed all his perſonal Eſtate to his Wife*, yet the perſonal Eſtate ſhall come in Aid of the real. *February* 1707. *French* and *Chicheſter*, *Vin. Abr.* Tit. *Charge*, (E) *Ca.* 10.

6. *A.* by Will gave Lands to *J. S.* and having, after his Will made, purchaſed other Lands, he on his Death-bed deſired *B.* his Heir at Law, not to hinder his Nephew *J. S.* from enjoying the new-purchaſed Lands, tho' he had not by any Writing declared the Truſt for *J. S.* and his Heirs. *B.* ſuffers *J. S.* to enjoy it eleven Years, and pretends he thought the *after-purchaſed* Lands had paſſed by the Will. *Cowper* C. decreed that this was out of the Statute of Frauds, and that *B.* letting *J. S.* enjoy it ſo long, was an Execution of the Truſt, and ſo out of the Statute; and tho' no expreſs Fraud was proved, yet the Poſſeſſion for eleven Years was a ſtrong Preſumption that he ſuffered it as an Execution of the Teſtator's Declaration. *Mich.* 7 *Ann. Harris* and *Horwell*, *Gilb. Eq. Rep.* 11.

Prec. in Chan. Mich. 1711. S. C.

7. A Feme purchaſed a Church Leaſe to her and her Heirs, for three Lives, and dies, leaving an Infant Daughter. Two of the Lives die. The Guardian renews the Leaſe, and then the Infant dies. This new Leaſe is a new Acquiſition, and veſted in the Daughter as a Purchaſer, and ſhall go to the Heirs of the Part of the Father, this Renewal by the Archbiſhop being *ſpontaneous* and *gratuitous*, and not like a *Copyhold*, for there the Lord is only a Truſtee for the Heir, and his Admittance of him, tho' it be original, yet is only in Virtue of the Truſt repoſed in him by the Law for that Purpoſe; and decreed accordingly *per* his *Honour*; and Lord *Harcourt* was of the ſame Opinion. *Hil.* 9 *Ann. Maſon* and *Day*, *Gilb. Eq. Rep.* 77.

8. It was agreed by the Court and all the Bar, that the Caſes wherein the perſonal Eſtate has ever been applied in Eaſe and Exoneration of the real, are only where there was no expreſs Exemption of the perſonal Eſtate; for, if a Deviſe be of ſuch Lands to be ſold for the Payment of *Debts* and *Legacies*, and then the Teſtator ſays, *I will that my perſonal Eſtate ſhall* not *ſtand charged on, or, be liable thereunto*; or, if the Deviſe be for Sale of Lands for Payment of Debts in general, and he afterwards deviſes all the reſt and Reſidue of his perſonal Eſtate, having already made Proviſion for the Payment of his *Debts* and *Legacies* out of his real Eſtate, or out of ſuch particular Lands, *&c.* or ſuch like Clauſes, in ſuch Caſes the real Eſtate, ſo ſubjected, ſhall not be exonerated by the perſonal (*a*). *Mich.* 9 *Ann. in Caſu Hall* and *Brooker*, *Gilb. Eq. Rep.* 73, 74.

(*a*) Cites the Caſe of *Lady Gainſborough* and one *Yarway*, and ſeveral others. *Ibid.*

See *Lady Gainſborough*'s Caſe, *Hungerford*'s Caſe, *Cook* and *Moor*, all *in Dom. Proc*'; *Chriſt's Hoſpital* and *Garroway*, *Hale* and *Hale*, both *in Canc*'. *Temp. Cowper* C. cited for the Heir at Law, to prove that where there are no negative Words in the Will, an expreſs Deviſe of all the perſonal Eſtate to the Executors does not exempt the perſonal Eſtate from Payment of the Teſtator's Debts, tho' there be a Deviſe of Lands for Payment of Debts. *Ibid.*

9. Bill to have a ſpecifick Performance of an Agreement of a Purchaſe of Lands againſt the Heir and Executors of *A.* to whom Lands were deviſed for Payment of Debts. Croſs Bill by the Heir againſt the Executors to account for the perſonal Eſtate of the Teſtator, to come in Aid of the real Eſtate, deviſed to be ſold for Payment of Debts. The Teſtator deviſed particular Lands to his Executors, to be ſold for Payment of all his proper Debts, and makes *A.* and *B.* Executors. Decreed that the Executors account for the perſonal Eſtate of the Teſtator, for that is liable to Payment of Debts in Aid of the real Eſtate; and ſince the perſonal Eſtate is not ſufficient to pay off the Debts and Mortgage, the Lands muſt be ſold to pay the Reſidue of the Debts, and the Surplus of the Money raiſed by the Sale, after the Debts paid, to go to the Heir. *Per Harcourt* C. *Mich.* 12 *Ann. Gale* and *Crofts et al'*, *Vin. Abr.* Tit. *Charge*, (E) *Ca.* 11.

10. Bill by the Heir at Law againſt the Executors, to have an Account of the perſonal Eſtate of the Teſtator, and that it might be applied in Exoneration of the real Eſtate deviſed to Truſtees to be ſold for Payment of Debts and Legacies. The Caſe was, *Waiſe* deviſed ſeveral *Lands to Truſtees to be ſold for Payment of his Debts and Legacies, and* deviſes *all the Reſidue of his perſonal Eſtate to his Wife,* and gives her *alſo* 600 l. *out of the Money to be raiſed by Sale of the Truſt Eſtate,* and *makes her Executrix. Harcourt* C. ſaid, here is not only a Deviſe over of the Reſidue of his perſonal Eſtate to his Executrix, but he gives her further the Sum of 600 *l.* out of the real Eſtate, ſo that he did not think the Reſidue of his perſonal Eſtate ſufficient for her, but gave her 600 *l.* out of his real Eſtate, which is the ſtrongeſt Preſumption imaginable of the Intent of the Teſtator, that his Wife ſhould have the Reſidue of his perſonal Eſtate; and this makes it differ from the Caſe of *Garroway* and *Chriſt's Hoſpital,* for there was no Deviſe unto his Executors out of his real Eſtate. Bill diſmiſſed, *quoad* Account of the perſonal Eſtate. *Mich.* 12 *Ann. Waiſe* and *Whitfield, Vin. Abr.* Tit. *Deviſe,* (Z. d.) *Ca.* 19.

11. Plaintiff's Bill was to have an Account of the perſonal Eſtate of *J. S.* the Defendant's Teſtatrix, and a Satisfaction thereout for 400 *l.* and to have an Account of the Rents, *&c.* of the Eſtate in *Q.* from the Death of *J. S.* and on the Anſwer and Proofs, the Caſe appeared to be this: *B.* the Plaintiff's Grandmother, and Mother of *J. S.* being ſeiſed in Fee of the Eſtate in *Q.* and poſſeſſed of a perſonal Eſtate of about 200 *l.* Value died inteſtate, upon whoſe Death the real Eſtate came equally between them as next of Kin. Plaintiff being in an ill State of Health, and intending to go to *Montpellier* for the Recovery thereof, releaſes and conveys her Moiety of the ſaid Eſtate to her Aunt and her Heirs, in Conſideration of 400 *l.* ſecured to her by her Aunt's Bond; but on her going abroad ſhe leaves this Bond with her Aunt. Afterwards *J. S.* the Aunt, conveyed the Land to *C.* to the Uſe of him, his Executors or Adminiſtrators, for ninety-nine Years, if ſhe and the Plaintiff her Niece, or either of them, ſhould ſo long live, Remainder to the Uſe of herſelf and her Heirs; and then declares the Truſt of the Term to be that ſhe the ſaid *J. S.* ſhould receive the Rents and Profits thereof for ſo many Years of the Term as ſhe ſhould live; Proviſo, that if *J. S.* her Executors or Adminiſtrators, ſhould pay the Plaintiff 400 *l.* then the Term was to be void. And the ſame Day *J. S.* made her Will, and deviſes to the Plaintiff 400 *l.* and therein mentioning to be the ſame Sum of 400 *l.* ſecured to her by Bond, and likewiſe by Indenture of Releaſe, bearing even Date with the Will. And after by another Clauſe in the Will ſhe deviſes the Eſtate to Defendant *H.* (*her Son and Heir*) and the Heirs of his Body, after the Death of the Plaintiff, with Remainder over, and died. The Defendant *H.* enters and ſuffers a Recovery of this Eſtate, and limits the Uſes to himſelf and his Heirs. And now Plaintiff brought her Bill as before mentioned, and *H.* brought a Croſs Bill to be let into a Redemption of the Term upon Payment of the 400 *l.* and Intereſt. And the Queſtion was, Whether the Plaintiff was to have this Eſtate for Life by Virtue of the Deviſe to her for Life by Implication, or whether that Clauſe meant only to continue it as a Security to her for the 400 *l.* and Intereſt? The Plaintiff read one Witneſs to prove that *J. S.* declared ſhe ſhould have the Eſtate for Life. It was inſiſted for *H.* that upon the Circumſtances of this Caſe, it might be reaſonably intended no other Eſtate than what the Plaintiff had before by the Term; that as that was for Life, it was natural and reaſonable not to give away the Eſtate 'till after her Death; that

that as the Term was redeemable, ſo muſt this Eſtate too; becauſe it might be intended no other, and therefore no ſuch neceſſary Implication of an abſolute Eſtate for Life, as is allowed of in the Books of Law, to the Diſheriſon of the Heir. *Lord Chancellor* was of the ſame Opinion; and eſpecially for this laſt Reaſon, that here was no neceſſary Implication; and therefore decreed the Plaintiff her 400 *l.* and Intereſt, and diſmiſſed her Bill as to the Account of the Rents and Profits, but *without Coſts*, for the Colour ſhe had to make ſuch Demand. *Eaſt.* 1714. *Boutell* and *Mohun*, *Tilden et al'*, *Prec. in Chan.* 381.

Gilb. Eq. Rep. 115. 12. An Heir at Law cannot be diſinherited but by a neceſſary Implication. *Per Lord Chancellor*, *Mich.* 1716. in the Caſe of *Sympſon* and *Hornſby*, *Prec. in Chan.* 440.

13. *A.* directed his Debts, Legacies and Funerals, to be paid out of the Rents of his real Eſtate, and that his Executors ſhould receive the Rents until his *Nephew* ſhould attain his Age of twenty-one Years, and then to pay the Reſidue of the Rents to him; and afterwards deviſes all the Reſidue of his perſonal Eſtate, *before unbequeathed*, to his Nephew. The Nephew dies an Infant, and *Cowper* C. decreed the perſonal Eſtate, in the firſt Place, to be ſubject to the Debts, *&c.* for that there was *no expreſs Clauſe to exempt the perſonal Eſtate* (*a*), and that has always been the Diſtinction in this Court.——If the *perſonal Eſtate had been deviſed to a Stranger*, his *Lordſhip* held it might have had another Conſideration from the Meaning of the Words *before unbequeathed*, but *here* he thought it could not. *Hil.* 1716. *Dolman* and *Smith* (*b*), *Prec. in Chan.* 456.

(*a*) *Gilb. Eq. Rep.* 72. *Hall* and *Brooker*, S. C. *Mich.* 9 *Ann.*

(*b*) *Gilb. Eq. Rep.* 128.

S. C. *in totidem verbis*, with *Prec. in Chan.*——2 *Vern.* 740. S. C. ſays, *Lord Chancellor* ſaid if the Reſidue of the perſonal Eſtate *unbequeathed* had been *deviſed to a Stranger*, or to a third Perſon, he ſhould have had it exempt from Debts; but the Deviſe of the Surplus of the Land and of the perſonal Eſtate being to *one* and the *ſame Perſon*, he thought the Surplus of the perſonal Eſtate was not intended to be deviſed to the *Nephew* exempt to Payment of Debts. *Ibid.*

14. *J. S.* being ſeiſed in Fee, deviſes his Lands to his two Executors, (who were no Relations to him) and their Heirs, *In Truſt* to be ſold by them or the Survivor of them, for the beſt Price, and with the Money to pay his Debts, Legacies and Funerals, ſo far as the ſame will extend; and (*int' al'*) he gives 40 *l.* to *Jane Styles*, and 10 *l.* to *Eliz. S.* (who were his Couſins and Coheirs) and 100 *l.* to the Children of one of his Executors, but nothing to his Executors. The Surplus ariſing by the Sale being 500 *l.* the Queſtion was, Whether it ſhould go to the Executors or to the Heirs at Law, who brought a Bill againſt the Executors for an Account of the Surplus; and for the Executors it was objected, That here were expreſs Legacies given to the Coheirs, which implied that they ſhould have no more; and the Caſe of *Crompton* and *North*, *Chan. Rep.* 196. was cited as a Caſe in Point. But *Cowper* C. decreed the Executors to account for the Surplus to the Heirs at Law (*a*). *Hil.* 1717. *Starkey* and *Brooks*, 1 *Will. Rep.* 390.

(*a*) Saying, that in Caſes of this Nature the Circumſtances muſt govern; and his *Lordſhip* obſerved that the chief Objection was, that here are expreſs Legacies given to the Heirs at Law, and none to the Executors; but *per* his *Lordſhip*, the Will being that the Executors ſhould ſell the Eſtate for the beſt Price, *&c.* this Clauſe need not to have been put in, if the *Deviſees* were intended to be Owners. Suppoſing the perſonal Eſtate had been ſufficient to have paid the Debts, and that there had been no Need of any Sale, ſurely the *Deviſees* ſhould not have gone away with the Eſtate from the Heirs at Law. It is *material* alſo that the Truſtees are to apply the Money in Payment of Debts, *&c.* by which is implied the whole Money; and that ſhews it was not deſigned to be a *beneficial* Truſt. Deviſing the Eſtate, and Power of Sale to the Survivor, is a further Argument of its being rather a Truſt than an Ownerſhip, and that the Truſt was intended to follow the Eſtate. *Per Lord Chancellor*, *ibid.* 391. who, for theſe Reaſons, decreed as above.

15. *J. S.* having five Sons and two Daughters, made his Will, which begins thus, *viz. As to my Eſtate I diſpoſe of it in Manner following*; and then he *gives ſeveral ſpecifick Legacies to his Children*, and *deviſes his Lands to his eldeſt Son* C. (the Defendant) *and to the Heirs Male of his Body*, Remainder *to his ſecond Son in Tail Male*, and ſo on to his other three Sons in Tail Male ſucceſſively. He alſo *deviſes ſeveral Debts and Cattel Intereſts to his eldeſt Son* C. and *then he gives* 1500 l. *apiece to his two Daughters at twenty-one Years of Age* or *Day of Marriage, to be paid by his ſaid Son* C. and *makes him ſole Executor.* The Queſtion was, If the *real* Eſtate expreſsly deviſed to *C.* in Tail, with Remainders over in Tail Male to his other Sons, is chargeable with this Portion of 1500 *l.* deviſed to the Plaintiff, being directed by the Will to be paid by his Son *C.* the firſt Deviſee in Tail, and Executor? For Plaintiff was cited *Cloudeſley* and *Pelham, in Chan.* 1686. The Deviſe there was to *Truſtees in Tail*, yet the Court held that the Lands were chargeable with Payment of Debts *implicitly* by that Will. Lord Chan. *Cowper* ſaid, This was a very doubtful Caſe. The Lands are ſettled by this Will upon the Teſtator's Sons ſucceſſively in Tail Male, which makes it very different from the Caſe of a Deviſe in Fee. That Caſes of this Nature have been carried very far already in this Court, to charge Land by *Implication*, out of an Inclination in the Court to make every Part of the Will take Effect, and if there be Precedents ſufficient to warrant a Charge upon Lands ſettled, and Intail by the Will, his *Lordſhip* ſaid he ſhould be willing to do it now out of the ſame Inclination. The Lands are not *directly* and *abſolutely* given to the Defendant, who is directed by the Will to pay the 1500 *l.* to the Plaintiff, but only *ſub modo*, with Limitations over to the other Sons in Tail Male ſucceſſively. Suppoſe the Defendant had died without Iſſue before the 1500 *l.* had become payable, would this 1500 *l.* be a Charge upon the Eſtate-tail of the ſecond Son, who is next in Remainder? His *Lordſhip* ſaid, he would take Time to conſider of the Caſe, and in the mean while the Maſter to take an Account of the *perſonal* Eſtate of the Teſtator, and make an Eſtimate of the *Quantum* thereof at the Time of making the Will, for that may give ſome Light to find out the Meaning of the Teſtator. It might *then* be *ſufficient* to ſatisfy all Debts and Legacies, tho' ſince it may be *inſufficient* by ſubſequent Loſſes or Accidents. *Curia adviſare vult. Mich.* 3 *Geo. Lord Henry Pawlet et Ux'* and *Parry, Vin. Abr.* Tit. *Charge.* (D) *Ca.* 16.

16. *As to all my worldy Eſtate I give and diſpoſe thereof in Manner following*; and *then the Teſtator gives ſeveral pecuniary Legacies, and ſeveral Annuities for Lives, to be paid by his Executor*, and then *he deviſes all the reſt and Reſidue of his Goods and Chattels, and Eſtate, to his Nephew* Middleton, (the Defendant and *Heir at Law* to the Teſtator) and makes him ſole Executor. The Will was duly executed according to the Statute of Frauds. (*Note*; There was an expreſs Deviſe in the Will to a Relation of the Teſtator.) The Queſtion was, If the *real* Eſtate be chargeable with the Legacies and Annuities in Default of the *perſonal* Eſtate? And *Cowper* C. was of Opinion, that by the *Deviſe of all the reſt and Reſidue of his Goods, Chattels and Eſtate*, all his Lands do paſs to his Executor, and that he *takes by the Will*, and *not* from the whole Frame of the Will, that the Teſtator meant to diſpoſe of all his Eſtate both *real* and *perſonal*; for in the Beginning of the Will he ſays, *As to all his worldly Eſtate*, &c. Then comes laſt the Clauſe, *All the reſt and Reſidue*, &c. Now the Words [*reſt* and *Reſiduc*] in this Place may have ſome Streſs laid upon them, and ſeem to refer to the introductive Clauſe in the Will, (*As to all his wordly Eſtate*, &c.) which certainly extend to Lands in a Will, and will bear a larger Conſtruction by Reference to the firſt Clauſe, by which he intimates, that

Lord Chancellor obſerved, that it was certainly the Intent of the Teſtator, that the Annuities and Legacies ſhould be paid, and ſaid, he would endeavour to ſupport the plain and expreſs Intent. That it was alſo certain

that he intended to diſpoſe of all his Eſtate, both real and perſonal, by his Will; and therefore his *Lordſhip* was of Opinion, and decreed as above. *Ibid.*

not by Deſcent as Heir at Law; and that the Lands ſo deviſed to him are chargeable with the pecuniary Legacies and Annuities, when the perſonal Eſtate falls ſhort to ſatisfy the ſame; and decreed accordingly. *Mich.* 3 *Geo. Awbrey* and *Middleton*, *Vin. Abr.* Tit. *Charge*, (D) *Ca.* 15.

17. *J. S.* being ſeiſed of Lands in Fee, in Conſideration of 300 *l.* by Leaſe and Releaſe conveyed the ſame to *R.* in Fee, with a Covenant for quiet Poſſeſſion, and alſo that they were free from Incumbrances. In the Releaſe there was a Proviſo, that if *J. S.* his Heirs or Aſſigns, ſhould, upon *Michaelmas-Day* 1702, or any other *Michaelmas-Day*, pay the ſaid 300 *l.* with the Rents and Arrears which ſhould grow due for the ſame, it ſhould be lawful for him, his Heirs and Aſſigns, to enter; but there was no Covenant for Payment of the 300 *l.* *J. S.* continued in Poſſeſſion, and paid the Intereſt to *R.* as it became due. Afterwards *J. S.* upon his Marriage, ſettled theſe Lands on his Wife, and the Iſſue of that Marriage, and covenanted, that it was free from all Incumbrances, except *R.*'s Mortgage. Afterwards *J. S.* made his Will, and thereby gave ſeveral Legacies; and all the reſt of his Goods and Chattels he gave to his Wife and Daughter, whom he made his Executrixes, and appointed them to pay his Debts. *J. S.* died, leaving the ſaid Daughter who was his only Child, who, dying within Age, Plaintiff became Heir at Law to *J. S.* and brought his Bill againſt *J. S.*'s Widow to have his perſonal Eſtate (which amounted to 600 *l.* beſides the Legacies) applied in Exoneration of the ſaid Land. *Cowper* C. was clearly of Opinion, That the Land was conveyed by *J. S.* to *R.* as a Mortgage, becauſe *J. S.* had by the Proviſo reſerved to himſelf, his Heirs or Aſſigns, a Power of redeeming, and had upon his Marriage ſettled the Lands as his own, and in the Marriage Deed called the Land conveyed to *R.* a Mortgage; and he was of Opinion, that the Rent and Arrears expreſſed in the Proviſo, ſignified the Intereſt of the 300 *l.* and ſaid, that the Word (*Rent*) taken in it's largeſt Senſe, was not improperly uſed to denote Intereſt. Decreed that the perſonal Eſtate ſhould be applied to the Exoneration of the real. *Mich.* 4 *Geo. Powel* and *Price*, *Vin. Abr.* Tit. *Charge*, (E) *Ca.* 12. Mr. *Viner* ſays, ſeveral Precedents were cited, where only real Eſtates were charged, and yet the perſonal Eſtates given to others had been applied to the Diſcharge of the real.

His *Lordſhip* ſaid, that *J. S.* appointing his Executrixes to pay his Debts, is a Proof that he deſigned them to pay his Debts in Exoneration of the Inheritance, for the Redemption whereof he had ſo large a Power by the Proviſo; and the perſonal Eſtate is not diſcharged by its being given to the Heir at Law, becauſe it was given to her jointly with the Wife, upon which Reaſon he ſeems to found this Decree. *Ibid.*

18. Land was given to *A.* and *B. ſo long as they lived jointly together*, the *Remainder to the right Heirs of him that died firſt*; *A.* dies; the Heir of *A.* ſhall have the Lands by Deſcent; and yet the Remainder did not veſt during the Life of *A.* for the Death of *A.* muſt precede the Remainder. *Per* Sir *J. Jekyll*, *Mich.* 5. 1 *Lucas's Rep.* 421. who cited *Co. Litt.* 378. *b.*

19. The Law of *England* in Suits againſt Heirs, imitates the Civil Law; where an Heir ſued by a Bond Creditor is ſued as for his own Debt in the *Debet* and *Detinet*, and is *primâ facie* ſuppoſed to have Aſſets; but the Heir might diſcharge himſelf, by ſaying, that at the Time of the Writ brought he had no Aſſets, or if he has Aſſets deſcended, may ſhew thoſe Aſſets, of which the Plaintiff may, if he pleaſes, take Judgment; and in Caſe the Heir hath aliened before

Action brought, tho' at Law there was no Remedy againſt him, yet in Equity he was reſponſible for the Value of the Land aliened; but now the Heir is made liable at Law (*a*) for the Value of the Aſſets he has aliened. *Per* Lord Chan. *Macclesfield*, *Hil.* 1721. *in Caſu Coleman* and *Winch*, 1 *Will. Rep.* 777.

(*a*) By Stat. 3 & 4 *W. & M. cap.* 14. *ſect.* 5.

20. Lord *Macclesfield* denied it to be a Rule, that in all Caſes the perſonal Eſtate is applicable in Eaſe of the real Eſtate; for he ſaid, it ſhall not be ſo applied, if thereby the Payment of any Legacy will be prevented, much leſs where it will deprive the Widow of her *Bona Paraphernalia* (*b*). *Mich.* 1721. *Tipping* and *Tipping*, 1 *Will. Rep.* 730, 731.

(*b*) So decreed by his *Lordſhip* in the Caſe of *Puckering* and *Johnſon*, the ſame Term.

21. In all Caſes where there is a Meaſuring Caſt between an Executor and an Heir, the latter ſhall in Equity have the Preference. *Per Macclesfield* C. *Trin.* 1723. *in Caſu Edwards* and *Lady Warwick*, 2 *Will. Rep.* 176.

22. *J. S.* ſeiſed in Fee as Heir of the Mother's Mother, deviſes the Lands to Truſtees, *In Truſt* to pay ſeveral Annuities, and the Reſidue to go to *J. S.*'s right Heirs of his Mother's Side for ever. The Heir of the Mother's Mother's Side is intitled to the Eſtate, and Surplus of the Profits, after the Annuities paid. *Eaſt.* 1723. *Harris* and *Biſhop of Lincoln* (*c*), 2 *Will. Rep.* 135.

(*c*) *Vide P. Ca.* this Caſe more fully abridg'd.

23. "As touching all ſuch worldly Eſtate as God has bleſſed me "with, I diſpoſe of the ſame as follows: *Imprimis*, *I will that all* "*my juſt Debts be paid and ſatisfied.*" It was argued, that it is a general Preface to make a general Diſpoſition of his real and perſonal Eſtate, as is mentioned after in the Will; that it is an independent Clauſe, and means only an Intention of a general Diſpoſition. He after deviſes his Freehold and Copyhold Eſtate to his Son and his Heirs when he comes to twenty-one, paying his Wife 100*l.* a Year for her Dower in the mean Time. After 100*l.* *per Annum* to his Wife for Dower, the reſt of the Profits to be put out for the Benefit of all his Children; but made no Proviſion for Debts. It was inſiſted, that if a Man deviſes Lands after Debts paid, that is a Charge; but decreed, that this was not a Charge of Debts upon the real Eſtate. *Trin.* 9 *Geo.* 1. 1723. *Barton* and *Wilcocks*, *Vin. Abr.* Tit. *Charge*, (D) *Ca.* 19.

24. *J. S.* begins his Will thus: *As to my worldly Eſtate I diſpoſe of the ſame as follows: After my Debts and Legacies paid*; and then he gives ſeveral Legacies to his Daughters; and then ſays, *after all my Legacies paid, I give the Reſidue of my perſonal Eſtate to my only Son*; then he deviſed his Fee-ſimple Lands to his Son and his Heirs; and if his Son ſhould die without Iſſue in the Life-time of any of his Daughters, he deviſed his *real* Eſtate to his Daughters; and ordered Intereſt to be paid by his Executors for the Daughters Portions, and made his Son and *D.* Executors. There is out of the perſonal Eſtate a Sufficiency to pay the greateſt Part, tho' not all the Daughters Portions. Lord Chan. *Macclesfied* ſaid, As *plain Words are neceſſary to diſinherit an Heir*, ſo *Words equally plain are requiſite to charge the Eſtate of an Heir*; for a Charge, ſo far as the Value of it amounts to, is, *pro tanto*, a Diſinheriſon. His *Lordſhip* obſerved, that it was material that the Intereſt of the Daughters Portions was ordered to be paid by the Executors, without mentioning the Heir, and that here was not ſuch a Deficiency of the *perſonal* Aſſets as to leave the Daughters deſtitute; for which Reaſon he decreed the real Eſtate not liable (*d*). *Trin.* 1723. *Davis* and *Gardiner*, 2 *Will. Rep.* 187.

(*d*) If in this Caſe there had been a want of Aſſets for the Payment of the Teſtator's Debts, it ſeems the Lands would have been charged therewith, by Virtue of the Words, *After my Debts and Legacies paid I give*, &c.—So if the Teſtator had owed a Debt,

Debt, for which his real and Leaſehold Eſtates were mortgaged, Equity would, in this Caſe, have charged all this Debt on the real Eſtate, in order to have inlarged the Fund for the Payment of the Legacies (*a*) as well as Debts. *Ibid.* 190. by way of Note.

(*a*) *Vide* the Caſe of *Sir Barkham Ryder* and *Sir Charles Wager*, 2 *Will. Rep.*

25. Defendant was Executor and Deviſee of the real Eſtate of *M.* The Bill was to be paid 30 *l.* which Plaintiff had lent to *M.* either out of the perſonal Eſtate, if ſufficient, or if not, then out of the real Eſtate; for this Reaſon, becauſe *upon lending of the Money the Title Deeds of the real Eſtate were put into the Hands of the Plaintiff*, and *it was indorſed upon them*, that *it was agreed that the Deeds were ſo depoſited as a Security for the Payment of ſo much Money.* And the Court declared the real Eſtate, in this Caſe, charged with the ſaid Debt. *Hil.* 1723. *Atkinſon* and *Swift*, *Vin. Abr.* Tit. *Charge*, (D) *Ca.* 20.

26. If a Man dies indebted by Bond, in which he has bound himſelf and his Heirs, and leaves real and perſonal Aſſets, of each enough to pay the Bond, and the Obligee, as he has an Election to come upon the real Aſſets, does accordingly ſue the Heir, and recovers the Debt againſt him; yet the Heir ſhall recover back the Money againſt the Executor out of the perſonal Eſtate. Lord *Macclesfield*'s Opinion, *Trin.* 1723. 2 *Will. Rep.* 175.

27. It is a poſitive Rule, that where there is any Doubt on the Proofs, a *Will* will not be eſtabliſhed againſt an Heir without a Trial at Law. *Hil.* 10 *Geo.* 1. *Dawſon* and *Chutir*, 2 *Mod. Caſes in Law and Eq.* 90.

Ibid. 286. *Angell* and *Brown*, S. P.

28. Upon a Bill brought by a Deviſee of Lands againſt the *Heir* to perpetuate the Evidence of the Will, the Heir anſwer'd and put the Plaintiff to his Proof, and the *Heir croſs-examined one of the Witneſſes*; yet the Heir ſhall have his Coſts, but it may be reaſonable that he ſhould not have Coſts where he examined Witneſſes of his own. *Per* Lord Chan. *King*; *Trin.* 1725. *Bidulph* and *Bidulph*, 2 *Will. Rep.* 285.

29. Lands were deviſed by Will for Payment of Debts. The Heir at Law was a Creditor, and oppoſed the Will as to Part of the Lands deviſed for Payment of Debts, and which the Teſtator had no Power to deviſe; yet he was not by this excluded from being let into the Reſidue of the Fund given by the Teſtator for Payment of Debts. *Per* Lord Chan. *King*, *Trin.* 1727. *Deg* and *Deg*, 2 *Will. Rep.* 418.

30. Altho' *a real Eſtate is made liable to Debts*, yet it ſhall only come in *Aid of the perſonal*, and the *perſonal ſhall be firſt applied apart.* 1727. *Nokes* and *Darby*, *Vin. Abr.* Tit. *Executors*, (Z) *Ca.* 53.

31. The real Eſtate is expreſsly charged with the Payment of Debts, and the perſonal Eſtate is given to the Executrix; adjudged, that the Executrix takes not the perſonal Eſtate to her own Uſe, but as Executrix; and that it ſhall be applied to diſcharge the real Eſtate, in Favour of the Heir at Law (*b*). The Decree was directed to be of the Surplus of the perſonal Eſtate after the Legacies paid. *Hil.* 2 *Geo.* 2. *in Scac'*, *Lucey* and *Bromley*, *Fitz-Gib. Rep.* 41, 42.

(*b*) *Pengelly* B. ſaid, that if theſe Words, *to her own Uſe*, or the *like had been added*, it might have given ſome Cauſe of Doubt, but little Streſs was laid on the Manner of creating her Executrix. *Ibid.*

(*c*) *Vide* the Caſe of *Reeves* and *Ferne*, *P. Ca.*

32. *Hæres natus* or *factus* (*c*) may have the perſonal Eſtate applied in Exoneration of the real; but not a Remainder Man; for the firſt comes to diſcharge the Eſtate which deſcended to him, or was given him by the ſame Perſon who owned both real and perſonal Eſtate; but in the other Caſe the Remainder Man is a Stranger, and

does not claim the Eſtate from the ſame Perſon who owned the perſonal Eſtate. *Mich.* 1730. *Evelyn* and *Evelyn*, *Select Caſes in Chan.* 80.

33. Where it is ſaid, that a Decree is equal to a Judgment, or to be paid next thereto, this muſt be intended only out of the perſonal Eſtate; for a Decree for a Debt does not bind the real Eſtate, acting only *in Perſonam*, not *in Rem*; and the Remedy upon a Decree to affect the Land, is only for a Contempt, whereupon the Party proceeds to a Sequeſtration; and if the Defendant dies, leaving no perſonal Eſtate, the real Eſtate in Fee will not be affected in the Hands of the Heir. *Per* his *Honour*, *Trin.* 1731. *in Caſu Bligh et al'* and *Earl of Darnley*, 2 *Will. Rep.* 621.

34. Mortgagor died, and after his Death Part of his Eſtate was ſettled by a private Act of Parliament, in Truſtees, as a Fund to pay all his Debts; his *Heir* diſpoſing of that Fund, his perſonal Eſtate is liable to his Father's Debts. Cited *per Cur'*, as Sir *John Napier*'s Caſe. ——But where no Fund came to the Heir for Payment of Debts, as where Tenant for Life made a Mortgage by Virtue of a Power, and upon Aſſignment thereof his Heir, being the next in Remainder in Tail, covenanted to pay the Money, and the Father died, and then the Son died, *B.* the next in Remainder, ſhall not charge the Son's perſonal Eſtate with Payment in Eaſe of the real, becauſe the Land was the original Debtor, and muſt continue ſo, there being nothing ſubſtituted in its Place, as in Sir *John Napier*'s Caſe there was. *Hil.* 1731. *Evelyn* and *Evelyn*, 2 *Will. Rep.* 596 (*a*).

(*a*) So in the Original, but it ſhould be P. 664.

35. *A.* covenants for *himſelf* and *his Heirs*, that he will purchaſe Lands and ſettle the ſame on *himſelf for Life*, Remainder *to his Wife for Life*, Remainder *to his firſt*, &c. *Son*, Remainder *to himſelf in Fee*. Equity will compel the Executor to lay out the Money, tho' the Heir is both Debtor and Creditor. *Mich.* 1733. *Lechmere* and *Lord Carliſle*, 3 *Will. Rep.* 224.

36. *J. S.* deviſed Lands to Truſtees and their Heirs, *In Truſt* for *A.* Son of *B.* (who was Heir at Law of *J. S.*) for Life, and after, *In Truſt* for the firſt, *&c.* Son of the Body of *A.* and the Heirs Male of the Body of every ſuch Son. And for want of ſuch Iſſue, then for all and every other Son and Sons, reſpectively and ſucceſſively for their Lives, *&c.* if any ſuch ſhould be; and for want of ſuch Iſſue, then *In Truſt* for the firſt and every Son of *C.* with like Remainders to *D.* and for want of ſuch Iſſue, then *In Truſt* for the firſt, *&c.* Son of *E.* with like Remainders to the Heirs Male of the Body of every ſuch Son of the ſaid *E.* and for Default of ſuch Iſſue, then *In Truſt* for his own right Heirs for ever. Provided, that none, *&c.* to whom the Eſtates are limited ſhall be in actual Poſſeſſion of the Rents, *&c.* until they ſhall reſpectively attain the Age of twenty-one; and that in the mean Time the Truſtees ſhould make ſuch Allowance thereout for Maintenance as they ſhall think ſuitable. And then he wills, that the Overplus of ſuch Rents and Profits do go to ſuch Perſon as ſhall be intitled unto, and come to the actual Poſſeſſion of the Eſtate, *&c.* *A.* died in the Life-time of *J. S.* without Iſſue; *B.* had no other Son but *A.* and no other Remainder Man was *in Eſſe* at *J. S.*'s Death but a Son of *E.* This was held firſt at the Rolls, and afterwards by Lord *Talbot*, to be an *executory* Deviſe. And *Lord Chancellor* held, that 'till Somebody is *in Eſſe* to take under the executory Deviſe, the Rents and Profits muſt be looked upon as a *Reſidue* undiſpoſed of, and conſequently

quently muſt deſcend upon the Heir at Law; the Caſe being the ſame, where the whole legal Eſtate is given to the Truſtees, and but Part of the Truſt diſpoſed of, as in this Caſe, and where but Part of the legal Eſtate is given away, and ſo the Reſidue, undiſpoſed of, deſcends upon the Heir.——In this Caſe *J. S.* had deviſed to *B.* (his Heir at Law) *another* Eſtate; and then it was objected, that he could never be ſuppoſed to have intended *B.* this Surplus; and cited *Chan. Caſes* 196. *North* and *Crompton*. But his *Lordſhip* anſwered, that in this Caſe the Heir does not take by Reaſon of the Teſtator's Intent, but the Law throws it upon him; and wherever the Teſtator has not diſpoſed, (be his Intent that the Heir ſhould take or not take) yet ſtill he ſhall take, for Somebody muſt take, and none being appointed by the Teſtator, the Law throws it upon the Heir (*a*). *Mich.* 1734. *Hopkins* and *Hopkins*, *Caſes in Chan. Temp. Lord Talbot* 44, 52.

(*a*) And his *Lordſhip* ſaid, it was ſo held by Lord *King* in the Caſe of *Lady Hertford* and *Weymouth*.

37. By Marriage Articles 400 *l.* was to be veſted in *A.* and *B.* *In Truſt*, but neither of them to be anſwerable for the other; *B.* received the whole, and gave a Receipt for it, and by Writing under his Hand and Seal declared that *A.* had received none of it. *B.* dies inteſtate, without ever placing out the 400 *l.* His *Honour* decreed this a Specialty Debt, but to affect the *Executor* only, and not the *Heir*, he not being bound, nor the ſaid Declaration extending to him. Lord Chan. *Talbot* affirmed the Decree, ſaying, that this (without all Doubt) was a Debt by Specialty. *Trin.* 1735. *Gifford* and *Manley*, *Caſes in Eq. Temp. Talbot*, 109, 110.

38. Teſtator *deviſes*, *as to all his worldly Eſtate*, *that his Debts be paid within a Year after his Deceaſe*, and then *deviſes his real Eſtate to Truſtees for a Term*, *In Truſt for his Wife for Life*, Remainder *to his Sons ſucceſſively in Tail Male*, and gives ſeveral Legacies. *Per* Lord Chan. *Talbot:* The real Eſtate is chargeable with the Debts in Caſe the perſonal Eſtate be deficient. *Trin.* 1735. *Hatton* and *Nichol*, *Caſes in Eq. Temp. Talbot* 110.

39. *J. S.* the Uncle, ſeiſed in Fee of *a Cuſtomary* Eſtate at *C.* in *Cumberland*, and of *a Freehold* Eſtate at *T.* in the ſame County, mortgaged his Eſtate at *C.* to Defendant for 130 *l.* and took his Bond for the Money. *J. S.* afterwards made his Will, and deviſed his Freehold Eſtate to Defendant, and, after ſeveral Legacies, gave all the reſt of his Goods and Chattels, and perſonal Eſtate, to Defendant, and made him ſole Executor. *A.* Nephew and Heir of *J. S.* brought his Bill againſt Defendant to redeem the mortgaged Premiſſes, and to have the Benefit of the perſonal Eſtate in Exoneration of the real; and the ſingle Queſtion was, Whether Plaintiff, as Heir, was intitled to the Benefit of the 130 *l.* Bond given by Defendant to the Teſtator; for, if this Bond was extinguiſhed by making the Obligor Executor and reſiduary Legatee, Defendant had not ſufficient Aſſets to ſatisfy the Mortgage? But Lord Chan. *Hardwicke* held, that in Equity the Heir was intitled to the perſonal Eſtate in Exoneration of the real, and ſo is a Cuſtomary Heir or *Hæres factus*; and this is in Favour of the Inheritance, to preſerve it intire. It is alſo clear that the Obligee, by making the Obligor Executor, at Law extinguiſhes the Debt, tho' in the Caſe of an Adminiſtrator it is otherwiſe, that being only a Suſpenſion of it ſo long as the Adminiſtration continues. But in Equity, where an Obligor is made Executor or reſiduary Legatee, the Bond is conſidered as Money received by him, and is Aſſets to ſatisfy Debts and Legacies, if the other Part of the perſonal Eſtate

is deficient. In the Caſe of *Brown* and *Selwyn*, an Obligor was made Executor and one of the reſiduary Legatees; and yet the Bond in the Houſe of Lords was held not to be extinguiſhed, but that his Fellow reſiduary Legatee ſhould come in for a Share of it; and if the Law is ſo in the Caſe of a reſiduary Legatee, much more in the Caſe of an Heir at Law, who is always intitled to draw out the perſonal Eſtate in Diſcharge of the real. What ſtuck with me at firſt, was that the Heir ſtood in the Anceſtor's Place, and therefore could not have the Benefit of the perſonal Eſtate againſt the Teſtator's own Gift; but ſo does a reſiduary Legatee as to the perſonal Eſtate; and as an Heir at Law is to have the Preference before a Legatee, the Plaintiff is intitled to have the Benefit of this Bond as Aſſets in the Hands of the Executor; and therefore decreed an Account of what was due upon the Mortgage, and of what Defendant had received, or might without his Default have received out of the Rents and Profits; that an Account ſhould be taken of the perſonal Eſtate of the Teſtator come to Defendant's Hands; and alſo of his Debts, Funeral Charges and Legacies; and the perſonal Eſtate to be applied in a Courſe of Adminiſtration; that the 130 *l.* be brought into the Account of the Teſtator's perſonal Eſtate, and if any Thing remain after Payment of other Debts, Funeral Expences and Legacies, the Reſidue to be employed in Satisfaction of the Mortgage; and if that proves ſufficient to diſcharge the Mortgage, Defendant to reconvey at Plaintiff's Expence; but if the Reſidue does not prove ſufficient, then upon Plaintiff's paying the Reſidue, Defendant to reconvey, and in Default of Payment, Plaintiff's Bill to be diſmiſſed *with Coſts*. *Mich.* 11 *Geo.* 2. *Fox* and *Fox*, *MS. Rep.*

40. Teſtator ſeiſed in Fee of a Farm called *Hills Tenement*, and of another called *Bowry Hays*, in Tail, by Will deviſes as follows, *viz. As to all my worldly Goods, I will all that Tenement called* Hills Tenement *to my Wife* Joan *for her Life, and after her Deceaſe then to my Son* Robert, *and his Heirs for ever.* Item, *I give to my ſecond Son* Henry 150 l. *to be paid when* Robert *ſhall come into Poſſeſſion.* Item, *I give to my Daughter* Mary 150 l. *to be paid in twelve Months at and upon the Time that my Son* Robert *ſhall come to and enjoy the Premiſſes above-mentioned; and in Caſe my Son* Robert *die before my Wife* Joan, *my Son* Henry *coming into Poſſeſſion and ſurviving his ſaid Mother, ſhall pay to my Daughter* Mary 200 l. Item, *all the reſt and Reſidue of my Goods and Chattels I give to my Wife* Joan, *whom I appoint ſole Executrix of this my laſt Will and Teſtament. Robert* and *Henry* died in the Life-time of *Joan*. Upon *Joan*'s Death *Henry* the Son of *Henry* the younger Brother, enters on the Premiſſes. *Mary* brings her Bill againſt him to have her Legacy of 150 *l.* or 200 *l.* out of the Land, according to the Directions of the Will; but, upon Conſideration, Plaintiff's Counſel thought proper to waive their Demand of the laſt Legacy, and to inſiſt rather upon the firſt. The *Maſter of the Rolls* took this to be a Charge on the real Eſtate in the Hands of the Heir, and decreed that the Eſtate ſhould be ſold, and the 150 *l.* paid to the Plaintiff, with Intereſt. At the Rolls, 4 *Nov.* 1738. *Miles* and *Leigh*. Affirmed on Appeal to *Lord Chancellor* 27 *July* 1739. *Vin. Abr.* Tit. *Charge*, (D) *Ca.* 21.

41. It is now a *ſettled* Point in Courts of Equity, that if Lands be ſettled, or a Term of Years created on Truſt to raiſe Portions for Daughters, to be paid at twenty-one or Marriage, and the Daughter dies before the Time of Payment, the Portion ſhall not go to the Executor

ecutor or Adminiſtrator of the Daughter, but ſink in the Eſtate for the Benefit of the Heir. *Per* Lord Chan. *Hardwicke, Eaſt.* 13 *Geo.* 2. *in Caſu Harvey* and *Aſton, Comyns's Rep.* 742.

42. *J. S.* by his Will gave to *A.* his eldeſt Son an Annuity of 100 *l. per Annum* for Life, and thereby took Notice of an Annuity of 200 *l. per Annum* limited by Deed to *A.*'s Wife for her Jointure, and then charged all his real Eſtate for the Payment of theſe Annuities; and then he ſays, *I do hereby give, direct, limit and appoint unto* B. *my ſecond Son the Manor of* H. &c. *in ſtrict Settlement*, Remainder *to* C. *my third Son in like Manner*; and then deviſes to his Son *B.* all his other Eſtates real and perſonal whatſoever, to him, his Heirs, Executors, Adminiſtrators and Aſſigns, for ever. *And farther, my Will is, and I do hereby direct that my ſaid Son* B. *ſhall pay all ſuch Debts as I ſhall owe at the Time of my Death, and all Legacies bequeathed by this my Will*; and then bequeaths to his Son *N.* and his other younger Children, 2000 *l.* apiece. *J. S.* died ſeiſed of no other real Eſtate but the Manor of *H.* only; and the principal Queſtion was, Whether the Eſtate deviſed in ſtrict Settlement was ſubject to the Payment of the younger Childrens Portions? And Mr. Juſtice *Parker*, who ſat for Lord Chan. *Harwicke*, was of Opinion, That this real Eſtate was chargeable with the Payment of theſe Portions. Theſe Portions are for the Benefit of younger Children, and younger Children are conſidered as Creditors in a Court of Equity. Now in the Caſe of Creditors it has been held, that where a Teſtator in the Beginning of his Will declares that he is diſpoſing of all his worldly Eſtate, and then gives a Direction that his Debts ſhall be paid, the Debts thereby become chargeable on the real Eſtate as well as the perſonal; and as to an Objection, that *J. S.* had uſed proper Words to charge his real Eſtate with Payment of the Annuities of 100 *l.* and 200 *l.* but had not in relation to theſe Portions, and that therefore his Intent was not the ſame; his *Lordſhip* ſaid, that Objection was not concluſive, for a Teſtator may uſe expreſs Words of charging in one Part of his Will, and may create a Charge by Implication in another Part of it; and as to the Objection that *J. S.* had made a different Fund for Payment of his Legacies out of the Reſidue of his real Eſtate, which he gave to *B.* his *Lordſhip* ſaid, that if the Fact was ſo, that there was any ſuch Reſidue, the Argument would be good, but that there was no ſuch Reſidue in Fact. And decreed accordingly. *Eaſt.* 1740. *Webb* and *Webb, Barnard. Rep. in Chan.* 86.

43. "*As to my Temporal Eſtate wherewith God hath bleſſed me, I* "*give and diſpoſe thereof as followeth:* Firſt, *I will that all my Debts* "*be juſtly paid which I ſhall at my Death owe or ſtand indebted in to* "*any Perſon or Perſons whatſoever*; *alſo, I deviſe all my Eſtate in* G. "*to* A. B." And this was *all* the *real Eſtate* the Teſtator had. And *per* Lord Keep. *Wright:* This will create a Charge on the real Eſtate for Payment of Debts. *Mich.* 1706 (*a*). *Bowdler* and *Smith, Prec. in Chan.* 264.

(*a*) This Caſe is *miſplaced* in Point of Time.

44. If any particular Legacy, as *an Houſe*, or 500 l. *in Money*, or *any Part only of the perſonal Eſtate, be bequeathed to an Executor*, ſuch *particular* Legacy, *not being caſt upon him by the Law only*, ſhall *not* come in *Aid* in Caſe of a Deficiency, but he ſhall be *chargeable only in reſpect of the Surplus caſt upon him by the Law.* 9 *Ann* (*b*). in the Caſe of *Hall* and *Brooker, Gilb. Eq. Rep.* 73.

(*b*) And ſo is this Caſe.

(B) Where

(B) Where the Words Heirs of the Body are only a Deſignatio perſonæ.

1. IN Marriage Articles there was a Limitation to *A. for Life*, without *Impeachment of Waſte*, and then *to the Uſe of the Heirs Male of the Body of* A. *to be begotten*, and *of the Heirs Male of the Body of ſuch Heirs Male*. The firſt Words (*Heirs Male*) are only a Deſcription of the Perſons who are to take, *viz. the firſt and other Sons*, and the ſubſequent Words denote what Eſtate they were to take, *viz. to the Heirs Male of their Bodies*. 5 *Feb.* 1719. *Trevor* and *Trevor*, *Vin. Abr.* Tit. *Iſſue*, (C) *Ca.* 1. 2 *Will. Rep.* 622. S. C.—1 *Vol. Abr. Eq.* 387. *Ca.* 7. S. C.

2. *Heirs Male* muſt be intended *Heirs Male of the Body*. *Per* Lord Chan. *Macclesfield*, *Eaſt.* 1722. in the Caſe of *Dawes* and *Ferrers* (*a*), 2 *Will. Rep.* 1, 3. (*a*) *Vide P. Ca.*

3. *J. S.* on the Marriage of *B.* with *M.* his Niece, by Marriage Articles agreed that *he would*, *at the Time of his Death*, *leave*, *deviſe or otherwiſe convey* Lands and Tenements of the yearly Value of 30 *l. to the Heirs of the Body of* M. *his Niece by her ſaid Huſband*, and *to their Heirs*; provided, *that if there ſhould be more than one Child of the Marriage*, then *J. S. ſhould be at Liberty to diſpoſe of this* 30 l. per Annum *to ſuch of the Children of* M. *as he ſhould think fit*; and in the Beginning of the Articles it was ſaid to be for the *better Advancement of* B. *and his intended Wife*, and *the Iſſue of the Marriage*. *J. S.* died; *B.* and his Wife were living, and had ſeven Children, and demanded for the Children the 30 *l. per Annum*, with the Arrears thereof from *J. S.*'s Death. Objected, That the 30 *l. per Annum* is to be left *to the Heirs of the Body of* M. *by* B. *& nemo eſt Hæres Viventis*, ſo that this 30 *l. per Annum* is not to commence 'till after *M.*'s Death, at which Time all her Children may be dead, conſequently it is uncertain whether ſhe will then have any Heir of her Body by *B.* or who will be that Heir. But *per* Lord Chan. *King*, The Court of Equity has a much greater Latitude in the Conſtruction of Articles than in the Conſtruction of Limitations of Eſtates. Thus in the Caſe of (*b*) Marriage Articles to ſettle Lands on the *Huſband and Wife for their Lives*, Remainder *to the Heirs Male of their Bodies*, it ſhall be underſtood to have been intended the *firſt and every other Son*; ſo *here* the Words (*Heirs of the Body of the Niece by her Huſband*) ſhall be conſtrued Children, and the rather becauſe it is juſt afterwards *and to their Heirs*; whereas if there be a Son of the Marriage, it muſt be *his* Heirs alone that muſt take; and tho' in Caſe there had been Daughters only, the Words (*their Heirs*) had been proper; yet here are Sons, and it cannot be intended that the Proviſion was for Daughters only, when not ſo expreſſed; and the Proviſo that reſerves a Power to *J. S.* if he thought fit to give Preference to any of the Children before the reſt, ſhews, that all the Children were to take, unleſs *J. S.* ſhould think proper to interpoſe and make an Appointment of the 30 *l. per Annum* to any one of the Children; and that the Preamble to the Articles was, that the *Iſſue ſhould be advanced as well as the Huſband and Wife*; for which Reaſon all the Children of *B.* by *M.* that were born at the Time of *J. S.*'s Death, ought to take this 30 *l. per Annum*, and are intitled to the Arrears from the Death of *J. S.* *Hil.* 1725. *Thomas* and *Bennet*, 2 *Will. Rep.* 341. (*b*) *Vide* 1 *Will. Rep. Bale* and *Coleman.*

(C) Heir and Executor.

1. *A.* By Will *ſubjected both his real and perſonal Eſtate to the Payment of his Debts.* Decreed that the Heir ſhould pay the Debt by ſuch a Time, or in Default thereof the real Eſtate to be ſold, and Liberty given to the Heir to ſue for the perſonal Eſtate. 23 *Feb.* 1705. *Stydolph* and *Langham*, *Vin. Abr.* Tit. *Heir*, (U) *Ca.* 16.

2. If an Heir is *forced* to pay a Debt of his Anceſtor, he ſhall recover againſt the Executor as far as perſonal Aſſets come to the Executor's Hands. *Vide Hil.* 2 *Geo. Lucy* and *Bromley*, *in Scac'*, *Fitz-Gibb. Rep.* 41.

Vide 2 *Will. Rep.* 291.

3. If a *Vendee* of Lands of Inheritance dies *before* all the Purchaſe Money is paid, the *Vendor* may come againſt the Executor for the Money, tho' the *Heir* is to have the Benefit of the Purchaſe. *Per* Lord Chan. *King*, *Trin.* 11 *Geo.* 1. in the Caſe of *Coppin* and *Coppin*, *Select Caſes in Chan.* 30.

In the *principal* Caſe the ſame Perſon was *Vendor*, *Heir* and *Executor to the Vendee*, and therefore his *Lordſhip* decreed the *Reſidue* of the Purchaſe Money to him, and not to the Legatees. *Ibid.* 28, 30.——*Vide* 2 *Will. Rep.* 291.

4. So if the *Vendee*, after Payment of the Purchaſe Money, dies, leaving an Executor, and the *Vendor* is *Heir* at Law, yet the *Vendor* will have the Reſidue of the Purchaſe Money againſt the Executor, tho' it be ſo much for his Benefit. *Per* Lord Chan. *King*, *ibid.*

(*a*) *Salk.* 450. 1 *Vern.* 436.—*Prec. in Chan.* 2.—*Ibid.* 61. Heir of the *Mortgagor* ſhall have the perſonal Eſtate applied in the firſt Place to pay off the Mortgage, *tho' no Covenant in the Mortgage Deed for the Payment of it*, and tho' the *perſonal Eſtate is deviſed away* by the Mortgagor to his Relations. *Trin.* 1696. *Meynell* and *Howard.*——And it was ſaid, that Sir *Edward Moor* had made ſuch a Mortgage, and afterwards *raiſed a Term in other Lands for Payment of his Debts*, and the Mortgage Money was held to be a Debt payable out of that Truſt. *Ibid.*

5. If a Mortgagor borrows Money, tho' there be *no* (*a*) *Covenant in the Mortgage Deed to pay it*, yet his Executor has been decreed to pay the Money, in Diſcharge of the Land deſcended to the Heir. *Per* Lord Chan. *King*, in the Caſe of *Blaſh* and *Hyham*, *Eaſt.* 1728. 2 *Will. Rep.* 453, 455.

6. If one mortgages Lands and dies, his perſonal Eſtate ſhall go in Eaſe of the real; but if *A.* ſeiſed in Fee mortgages his Land, leaving *B.* his Son and Heir, and *B.* dies, leaving *C.* his Heir, *B.*'s perſonal Eſtate ſhall not be applied to pay this Mortgage, becauſe it was not *B.*'s Debt. So, tho' the Mortgage be transferred in *B.*'s Time, and *B.* covenants to pay the Money, yet the Debt not being originally the Debt of *B.* his Covenant is only a Surety, and the Land the original Debtor, which *C.* ſhall therefore take *cum onere*. *Per* Lord Chan. *King*, Lord Chief Juſtice *Raymond*, and the *Maſter of the Rolls*, *Hil.* 1731. *Evelyn* and *Evelyn*, 2 *Will. Rep.* 596 (*b*).

(*b*) Should be 664.

(D) Of an implied and reſulting Truſt for the Benefit of the Heir.

1. *J. S.* by his Will *gives to his Son*, the Plaintiff, *certain Lands, he paying* 100*l. to the Teſtator's Wife*, (the Defendant); and *all the reſt and Reſidue of his real Eſtate he deviſeth to his Wife and her Heirs, to the Intent to pay all his Debts and Legacies*; he further deviſeth, *that if his Son had a Mind he ſhould exchange Lands of the*

Value of 100 l. per Annum *with the Teſtator's Wife for other Lands not exceeding that yearly Value*, and *appointed two Perſons to ſettle the Matter between them*; provided, *that if the Wife thought fit, ſhe ſhould live in the Capital Meſſuage during her Life*; and made his Wife his Executrix, and died. Evidence was produced for the Defendant (which the *Lord Chancellor* allowed to be read) to ſhew that the Teſtator's Intent was that his Son ſhould have no more than what was expreſsly given him; and that the Reaſon of giving his Wife ſo much was, becauſe that the Deviſor talking with the Witneſs about the Settlement of his Affairs, and telling him, he deſigned his Heir (the Plaintiff) the ſame Lands which are given him by the Will; and that he did deſign other Lands for his younger Son; whereupon the Witneſs ſaid, that that would be a Means to ſet the two Sons at Difference, and therefore he had better give them to the Defendant, and depend upon her Generoſity to the younger Son; which he then did approve of, and ſaid he would do. The Heir's Bill was to have what was over and above paying the Debts and Legacies, which was 2000 *l.* For Plaintiff it was ſaid, that in all Caſes where Lands are given to a Man for any particular Purpoſe, when that Purpoſe is ſatisfied, the Truſt ſhall reſult to the Benefit of the Heir at Law. And Sir *Thomas Powis* cited a Caſe, which was, A Man deviſed Lands to his Executors for Payment of Debts, and that it ſhould be ſold and turned into Money; yet the Heir at Law exhibited his Bill and prayed, that no more might be ſold than would pay the Debts, and that he might have the Overplus; and it was accordingly decreed at the Rolls, and after affirmed in this Court. On the other Side was cited *North* v. *Crompton*, 1 *Chan. Ca.* 196 (*a*). *Lord Chancellor:* This would at Law certainly have been a Diſinheritance of the Heir. Now the Queſtion is, Whether this is not an implied Truſt for the Benefit of the Heir? Here would have been an implied Truſt for the Benefit of the Heir, after the particular Purpoſe ſatisfied, if that Implication had not been deſtroyed; but it is deſtroyed, as appears from the Will itſelf. Firſt, He hath expreſsly given Lands to the Son, which is a much ſtronger Caſe than if he had only given a Rent. Secondly, He has appointed an Exchange to be made, and that is with a moſt critical Exactneſs, which is 100 *l. per Annum* for 100 *l. per Annum*, and no more, and appointed two Perſons to ſettle it. Now can it be imagined that he would be ſo nicely exact upon the Exchange, if he deſigned him to have 100 *l. per Annum* back again; for there appears to be the Value of 2000 *l.* over and above paying the Debts and Legacies: So that thereby the Implication is deſtroyed by the other Part of the Will. But there have been other Matters read, which ſtill make it much plainer; which, I think, may be read to explain any Implication; altho' it is a *general* Rule, That *Matter* dehors *ought not to be averred*. And it was accordingly decreed. *Hil.* 6 *Ann. Dockſey* v. *Dockſey* (*b*), *MS. Rep.*

(*a*) 1 *Vol. Abr. Eq.* 272. *Ca.* 3.

(*b*) *Vide P. Ca.*

2. Deviſe of a Rent-charge to his Wife *for thirteen Years, In Truſt nevertheleſs for Payment of Debts and Legacies*; and *then he gives his Wife other Lands in Augmentation of her Jointure*. The *Surplus of the Rent-charge*, after Debts and Legacies paid, *is not a beneficial Truſt for the Wife*, but *a reſulting Truſt to the Heir*. *May* 25, 1712. *Wych* and *Packington*, *Vin. Abr.* Tit. *Truſt*, (E) *Ca.* 18.

3. Deviſe of *perſonal Eſtate for Payment of Debts and Legacies*, and the *Overplus* to be diſpoſed of as the Teſtator ſhould by *Codicil* direct; and further *deviſed Part of his real Eſtate to be ſold for Payment of particular Debts*, and the *Reſidue* as he ſhould by *Codicil* direct.

direct. *Then* by *Codicil* he directs that the *Overplus of ſuch real Eſtate ſhall go to his Executors for Performance of his Will*, and then adds, "*I hope I have made a ſufficient Proviſion for Performance of my "Will, and if there be any Overplus of my perſonal Eſtate after full "Performance, I give it to* J. S." Adjudged that the *Surplus* of ſuch *real* Eſtate ſhall go to *J. S.* and *not reſult to the Heir*. *Mar.* 11, 1717. *Tyrwith* and *Trottman*, *Vin. Abr.* Tit. *Truſt*, (E) *Ca.* 20.

Where a Deviſe of Lands is to Truſtees and their Heirs, for Payment of Debts and Legacies, there is a reſulting Truſt for the Heir, and he may properly come into Court and offer to pay the Debts

4. *J. S.* being ſeiſed in Fee of Lands, *deviſed the ſame to his Wife*, and *to her Heirs and Aſſigns for ever*, *to be ſold to pay his Debts and Legacies* in *Aid of his perſonal Eſtate*. But the *perſonal* Eſtate being ſufficient to diſcharge *all* his *Debts* and *Legacies*, and the *real* Eſtate not being ſold, the Court was of Opinion, That where Lands are deviſed *ut ſupra*, and the Lands are not ſold, for that the perſonal Eſtate is ſufficient to diſcharge the whole Debts and Legacies, 'tis plainly an implied Truſt in the Deviſee for the Heir at Law, and he is intitled to come into this Court to have a Reconveyance, and an Account of the Profits. *Hil.* 11 *Geo. Buggins* and *Yates*, 2 *Mod. Caſes in Law and Eq.* 122.

and Legacies, and pray a Conveyance of the whole Eſtate to him, for the Deviſees are only Truſtees for Teſtator, to pay his Debts and Legacies. *Roper* and *Radcliff*, *in Dom. Proc'*, 2 *Mod. Caſes in Law and Eq.* 171.——This is a Privilege which has always been allowed in Equity to a *reſiduary Legatee*, for if he comes into Court and tenders what will be ſufficient to diſcharge all Debts and Legacies, or prays that ſo much of the Lands, and no more, may be ſold, than what will raiſe Money to diſcharge them, this is always decreed in his Favour. *Ibid.*

5. A Deviſe to *A. upon ſpecial Truſt* and *Confidence*, that *he ſhould pay all the Teſtator's juſt Debts*, is a reſulting Truſt to the Heir, after Debts paid. *Mar.* 11, 1727. *Kiricke* and *Branſbey*, *Vin. Abr.* Tit. *Truſt*, (E) in a *Note* to *Ca.* 18.

Caſes Temp. Talbot 78.

6. Teſtator gave all his Lands, *&c.* to *his Siſter* H. *and her Heirs*, In Truſt nevertheleſs *to ſell for the beſt Price ſhe can for Payment of his Debts and Legacies*, and gives a Legacy of 500 *l.* to the Plaintiff his Heir at Law, and then deviſes, that after his Debts and Legacies paid and ſubject to the ſame, his Siſter *H.* ſhould have the Reſidue of his perſonal Eſtate. Decreed that the Surplus Money ariſing from the Sale of the Land ſhould be looked upon as perſonal Eſtate, and go to *H.* and that there was no *reſulting* Truſt. *Eaſt.* 8 *Geo.* 2. *Mallabar* and *Mallabar*, *MS. Notes.*

Vide Tit. Truſt, *P.*

(E) What ſhall be Aſſets in the Hands of the Heir (*a*).

(*a*) Truſt of a *Surplus*, where Lands are deviſed for Payment of Debts, *&c. if it be a reſulting Truſt to the Heir*, and *is not deviſed away*, is *Aſſets by Deſcent in the Hands of the Heir*, upon the Statute of *Frauds*. *Per Pratt* C. J. in the Caſe of *Roper* and *Radcliffe*, 2 *Mod. Caſes in Law and Eq.* 190.

By the 29 *Car.* 2. *c.* 3. *ſ.* 10. If any *Ceſtuy que Truſt* ſhall die leaving a Truſt in Fee-

1. IF *Ceſtuy que Truſt* of an Inheritance binds himſelf and his Heirs in a Bond, this Truſt is not Aſſets to the Heir, tho' ſince queſtioned in Lord Chan. *Hide*'s Time; but clearly the Truſt of a Leaſe for Years, is Aſſets to charge an Executor in Equity. *Attorney General*

ſimple to deſcend to his Heirs, ſuch Truſt ſhall be Aſſets by Deſcent, and the Heir ſhall be chargeable with the Obligation of his Anceſtor, as if the Eſtate in Land had deſcended to him.——*ſ.* 11. provided, that no Heir, that ſhall be chargeable by reaſon of any Eſtate or Truſt made *Aſſets* by this Law, ſhall, by reaſon of any Plea, Confeſſion of the Action, or ſuffering Judgment by *Nient dedire*, or other Matter, be chargeable to pay the Condemnation out of his own Eſtate, but Execution ſhall be ſued of the whole Eſtate ſo made

General and *Sands*, *Eaſt.* 21 *Car.* 2. *in Scac'*, 2 *Freem. Rep.* 131. *Ca.* 157. Aſſets, in whoſe Hands ſoever it ſhall come after the Writ purchaſed, in the ſame Manner as by the Common Law, where the Heir pleading a true Plea, Judgment is prayed againſt him thereupon.

2. Mortgagor and Mortgagee; the Mortgagor died, and the Heir of the Mortgagor and Mortgagee join in a Sale of thoſe Lands. *Quære*, Whether the Money that comes to the Hands of the Heir by this Sale, ſhall be Aſſets to charge him in Equity? And by *Finch* Lord Keeper, it ſhall not, no more than he ſhall be charged at Law after Alienation *bona fide*. *Hil.* 1673. *Anon.* 1 *Freem. Rep.* 303. *Ca.* 369.

3. A *Term is aſſigned* In Truſt *for the Huſband for Life*, and then to Truſtees for *raiſing an Annuity for the Wife*, and then to *the Heirs Male of the Huſband, begotten on that Wife*. The Huſband died, and then the Wife. And *Lord Chancellor* held, that if this had been a Limitation of an Eſtate at Law, the Father taking an Eſtate for Life, the Limitation over to the Heirs Male of his Body would have made an Eſtate-tail *executed in the Father*, and the *Heirs Male of his Body would have taken by Deſcent*; but being a *Truſt of a Term*, altho' the Father did take an Eſtate for Life, yet the *Heir Male takes by Purchaſe*, and is *not* Aſſets. *Trin.* 7 *Ann. Anon. MS. Rep.*

4. It was inſiſted in the Caſe of *Helley* and *Helley*, *Trin.* 7 *Ann.* that a Truſt of a Copyhold cannot be Aſſets in the Hands of the Heir, becauſe the Copyhold itſelf cannot be Aſſets; and therefore that being a privileged Eſtate, the Truſt will follow the Nature of it, and will not be Aſſets. But by *Lord Chancellor*, A Surrender to one and his Heirs, In Truſt for another and his Heirs, breaks the Cuſtom; he ſaid, if a Copyholder in *Borough Engliſh* ſurrenders In Truſt for himſelf and his Heirs, the Truſt goes to the Heirs at Law; therefore, he took it, that the Truſt in the Hands of the Heir is Aſſets. *MS. Rep.*

5. The Equity of Redemption of a mortgaged Term is Aſſets to pay *ſimple* contract Debts. *Per* Lord Chan. *Macclesfield*, in the Caſe of *Coleman* and *Winch*, *Hil.* 1721. 1 *Will. Rep.* 775.

6. *A.* being ſeiſed of the Truſt of an Advowſon in Groſs in Fee, dies indebted by Specialty, *&c.* The Creditors bring a Bill againſt the Heir at Law and the Truſtees of the Adowſon, and pray a Sale of the Advowſon. *Lord Chancellor* held, that the Advowſon was Aſſets, and decreed it to be ſold, *&c.* He held that it was a Rule, that all Lands, Tenements and Hereditaments, were extendable; and that an Advowſon was ſo in the Caſe of the King, he cited Sir *William Jones* 24. An Advowſon was a Thing valuable, and lay in Tenure, and might be held in Knight Service, *&c.* He referred to *Fleta* and *Britton*. 23d of *March* following the Decree was affirmed *in Dom. Proc'*. *Eyres* C. J. of *C. B. Price* J. and *Comyns* B. attended, and being aſked their Opinion, Whether an Advowſon in Groſs was Aſſets in ſuch Caſe at Law (*a*), declared it was; and the Houſe did not divide. *Mich.* 1730. *Robinſon* and *Tong*, *Vin. Abr.* Tit. *Aſſets*, *P.* 145. *Ca.* 28. See 3 *Will. Rep.* 401.

(*a*) If an Advowſon be not Aſſets at Law, Equity will not make it ſo, becauſe that would be to alter the Law. By *Lord Chancellor* in S. C. *Ibid.*

(F) Where unreaſonable Bargains are obtained from Heirs, in what Caſes they are relieved.

1. *A.*'s *Father was Tenant for Life*, Remainder *to* A. *in Tail*, Remainder *over*. *A.* having incurred his Father's Diſpleaſure, was adviſed by *B.* (the Defendant) who had been an Attorney, and who pretended great Friendſhip for him. And after *A.*'s Father had been reconciled to him, and *A.* being in Debt, and the Father offering to give him 1000 *l.* for this Reverſion, he was diſſuaded by *B.* from accepting the Father's Offer, *B.* declaring that this was no valuable Conſideration. But in about a Year afterwards, when *A.*'s Father was *ancient* and *ſickly*, and in a very declining Life, *B.* bought this Reverſion of *A.* for 1050 *l.* when the Eſtate was worth 150 *l.* *per Annum*; and *A.* at this Time was thirty-four Years of Age, and had a Child about ten Years old, who was inheritable to the Intail; and *A.* levied a Fine of this Reverſion to *B.* About two Years after, *A.*'s Father died, and upon *A.*'s Bill to ſet aſide this Conveyance, he, in order to gain an Injunction, by the Direction of the Court ſuffered a Recovery, and declared the Uſes of it to the two ſenior Six Clerks, ſubject to the Order of the Court. And Lord Chan. *Cowper* directed *A.* to be relieved on Payment of Principal, Intereſt, and full Coſts; but his *Lordſhip* ſaid, he meant *liberal* Coſts. *Eaſt.* 1716. *Twiſleton* and *Griffith*, 1 *Will. Rep.* 310.

Ibid. 312. His *Lordſhip* ſaid, he grounded his Opinion for Relief chiefly upon the Caſe of *Berney* and *Pitt*, 2 *Vern.* 14. where the Plaintiff's Father was Tenant for Life of a conſiderable Eſtate, Remainder in Tail to the Plaintiff, Remainder over, and the Defendant lent Plaintiff the two ſeveral Sums of 1000 *l.* and 1000 *l.* upon which Plaintiff gave two Judgments of 5000 *l.* apiece defeazanced, each of them to pay 5000 *l.* in Caſe the Plaintiff ſhould ſurvive his Father, and to pay Intereſt for the ſame; but if he ſhould die in the Life-time of his Father, then the Principle was to be loſt. This Cauſe was heard 33 *Car.* 2. by Lord *Nottingham*, who denied Relief; and after that the then Plaintiff had been conſtrained to pay the Money, *viz.* 5390 *l.* upon the Decree; yet upon the *Rehearing*, *Hil.* 2 *Jac.* 2. Lord *Jeffereys* did relieve; declaring, that theſe Bargains were *corrupt* and *fraudulent*, and tended to the Deſtruction of Heirs ſent to Town for their Education, and to the utter Ruin of Families; and that the Relief of the Court ought to be extended to meet with ſuch corrupt Bargains and unconſcionable Practices. And accordingly Lord *Cowper*, in the preſent Caſe, ſaid, *this* alſo was in the Caſe of an Heir, and who was the leſs upon his Guard with *B.* as he pretended nothing to him but Friendſhip, by encouraging him to leave his Father's Houſe, and diſſuading him from ſelling the Reverſion to his Father for 1000 *l.* which was but 50 *l.* leſs, and that a Year before. That the Reaſon inducing Lord *Jeffereys*'s Decree, was, (probably) to diſcourage a growing Practice of devouring an Heir on a Confidence on Lord *Nottingham*'s Decree; but Lord *Jeffereys*'s Decree ſtanding, ſhewed, that every one thought the ſame very juſt; and that there was therefore no Attempt in *Parliament* to reverſe it. And his *Lordſhip* ſaid, he ſaw no Inconvenience in the Objection, that at this Rate an Heir, without Difficulty, could not ſell a Reverſion; for this might force an Heir to go home and ſubmit to his Father, or to bite on the Bridle, and indure ſome Hardſhips; and, in the mean Time, he might grow wiſer, and be reclaimed. *Ibid.* 313.

2. *A.* ſeventy-two Years of Age, conveyed Lands of 40 *l.* a Year for an Annuity for his Life of 20 *l.* a Year; *A.* lived but two Years after. The Conveyance was ſet aſide upon a Bill brought by the Heir at Law, it appearing that *A.* was weak, and eaſily to be impoſed upon. *At the Rolls*, *Mich.* 1723. *Clarkſon* and *Hanway et al'*, 2 *Will. Rep.* 203.

3. *J. S.* was Tenant for Life, Remainder to *A.* in Tail, Remainder to *J. S.* in Fee, of an Eſtate computed worth 7000 *l.* *A.* at thirty Years of Age, in the Life-time of *J. S.* articled to ſell the Eſtate for 3300 *l.* when he ſhould come into Poſſeſſion of it, and to have Intereſt for the ſame from the Time of the Articles to the Time of his coming in Poſſeſſion. *J. S.* died within two Years, ſo that the Intereſt

tereſt amounted to little. *A.* on his coming into Poſſeſſion, compleated his Agreement, and brings a Bill to be relieved. Inſiſted for the Purchaſer, That there was a great Difference between defeating an Agreement, and carrying it into Execution. And *Raymond* and *Gilbert*, Lord Commiſſioners, were of the ſame Opinion, and ſaid, that had the Bargain been to pay ſo much down in Ready Money, it would undoubtedly have been good, otherwiſe there is an End of all Sales of Reverſions; and that this is the ſame as buying the Reverſion for preſent Money, and will be conſidered as ſo much Money put out at Intereſt by himſelf, and the ſame as if he had received it, and immediately lent it to the Vendor at Intereſt; that the Intereſt might have run to the Value of the Eſtate, tho' it has happened otherwiſe, which was a Chance on both Sides; and that it is not conſiſtent with Common Senſe, that a *preſent* Agreement ſhould be varied by *future* Accidents; that it muſt be conſidered as it is in itſelf, without any Thing extrinſick, that *Bargains for Sales of reverſionary Eſtates by Heirs are never ſet aſide but on account of Prodigality*; that nothing of that appeared in the preſent Caſe, but the reverſe, for it appeared that both the Father and Son were in bad Circumſtances. *Eaſt.* 11 *Geo. Dews* and *Brandt*, *Select Caſes in Chan.* 7, 8.——But had the Bargain been to pay down 3300*l.* when he ſhould come into Poſſeſſion, this would not have really been a Purchaſe of the Reverſion, but of an Eſtate in Poſſeſſion, as the Payment and Poſſeſſion would be at the ſame Time; and in that Caſe, on account of the great Over-value, Chancery would relieve. *Per* Lord Commiſſioners *Raymond* and *Gilbert*, *ibid.* in S. C.

CAP. LI.

Hypothecation.

1. IF a Ship be in the River *Thames*, and Money be laid out there, either in repairing, fitting out, new rigging, or Apparel of the Ship, this is no Charge upon the Ship; but the Perſon thus employed, or who finds theſe Neceſſaries, muſt reſort to the Owner thereof for Payment. And in ſuch a Caſe, in a Suit in the Admiralty to condemn the Ship for Nonpayment of the Money, the Courts of Law will grant a Prohibition; and therefore if the *Owner*, after Money thus laid out, *mortgages* the Ship, tho' it be to one who has Notice that the Money was ſo laid out and not paid, yet ſuch *Mortgagee* is well intitled, without being liable to any of the Money thus laid out for the Benefit of the Ship as aforeſaid, and the Ship is not liable for this Money (*a*). Decreed *at the Rolls*, and ſeemed admitted by the Counſel on the other Side. *Trin.* 1726. *Watkinſon* and *Bernadiſton*, 2 *Will. Rep.* 367.———But if this be done at Sea, where no *Treaty* or *Contract* can be made with the *Owner*, and the *Maſter* employs any Perſon to do Work on the Ship, or to new rig or repair the ſame, this, for *Neceſſity*, and *Encouragement of Trade*, is a Lien upon the Ship, and in ſuch Caſe the *Maſter*, by the *Maritime* Law, is allowed to *Hypothecate* the Ship. *Ibid.*

(*a*) No more than a *Carpenter*, laying out Money in the Building of an *Houſe*, has a *Lien* upon the Houſe in reſpect thereof, tho' by the Law of *Holland* he has; but this not being the Law of *England*, ſuch Carpenter muſt reſort to thoſe who employed him, or to the Owner of the Houſe, for his Money. *Ibid.*

CAP. LII.

Jew.

1. STAT. 1 *Ann. c.* 10. If any *Jewiſh* Parent, in order to the compelling his Proteſtant Child to change his Religion, ſhall refuſe to allow ſuch Child a fitting Maintenance ſuitable to the Ability of ſuch Parent, and the Age and Education of ſuch Child, upon Complaint it ſhall be lawful for the *Lord Chancellor*, *&c.* to make ſuch Order for the Maintenance of ſuch Proteſtant Child as he ſhall think fit.

2. A *Jew* had a Daughter who turned Proteſtant; the *Jew* had a very conſiderable perſonal Eſtate, and died, leaving ſeveral Legacies to *Charities*, and gave his perſonal Eſtate from his Daughter to his Executor. She petitioned Lord Chan. *Parker* for a Maintenance upon the above Statute. Objected, That this Caſe was not *within* the Act. Firſt, That this Child is above forty Years old, and ſo the Care of her Education over. Secondly, That ſhe is married, and not now to be called a *Child*, but to be provided for by her Huſband. Thirdly, That the Parent being dead, he could not be ſaid to have *refuſed*, &c. and ſo the Power given by the Act at an End. But his *Lordſhip* ſaid, he ſtrongly inclined to think this Caſe to be *within* the Act, for the ſeveral Reaſons (*a*) mentioned in the Margin; and that poſſibly theſe Charities given by the *Jew*'s Will may be under ſome ſecret Truſt for the Child if ſhe ſhould turn *Jew*; wherefore he directed, that it be inquired into by the Maſter (*b*). *Hil.* 1718. *Vincent* and *Harmandez*, 1 *Will. Rep.* 524.

(*a*) Firſt, For that the Petitioner is a Proteſtant Child of a *Jewiſh* Parent, tho' the Parent be dead. Suppoſe the Child of a *Jew* turns Proteſtant, and the *Jew* Parent by Will gives his Eſtate to Truſtees, upon a ſecret Truſt that if the Child turns *Jew* the Child ſhall have the Eſtate, and not otherwiſe; as this would be clearly within the Miſchief, ſo every one muſt wiſh it to be within the Meaning of the Act. It is not ſaid the Complaint ſhall be againſt the *Father*; that would take this Caſe out of the Act; neither is it ſaid, that the Order ſhall be made upon or againſt the *Father*; ſo that this Caſe fits every Word made uſe of by the Legiſlature. Suppoſe a *Suit* or *Petition* had been exhibited, and the *Jew* Parent had died *pending* the Petition, and had given all away from his Proteſtant Child, doubtleſs the Complaint might be againſt the *Executor*, and the Order likewiſe againſt the *Executor*; every one will allow this to be a hard Caſe, and if the Words be large enough (as they are) why ſhould they not be conſtrued to extend to it? As to the *Refuſal* of the Parent, it is not to be intended that the Parent the *Jew* muſt make an actual *Refuſal in Words*, for by that Conſtruction the Statute might eaſily be *evaded* and *rendered* uſeleſs. If the *Jewiſh* Father does by Will diſpoſe of all his Eſtate from his Child, this is in Law a Refuſal; and unleſs ſome other Reaſon be made appear, it ſhall be intended, becauſe the Child was a Proteſtant. The Obligations of Nature plead ſo ſtrongly on Behalf of a Child, that when ſuch a Caſe happens, ſome great Provocation muſt be ſuppoſed to have occaſioned it; and if no other Reaſon be made appear, this Difference in Religion ſhall be intended the Reaſon. *Per Lord Chancellor. Ibid.* 525, 526.

(*b*) Tho' this was the Opinion of the Court, it does not appear that on this Petition the Court made any Order; and as nothing further is to be traced in this Matter, it is probable the Parties came to ſome Agreement. *Ibid.* 526. in a *Note* by the *Editor*.

CAP. LIII.

Incumbrances.

1. WHERE there were Articles, and in them a Covenant to covenant in the Conveyance, that the Lands were free from Incumbrances. Lord Chan. *Cowper* ſaid, This is not a Covenant that the Lands are free, but only that in the Conveyance he would covenant ſo. But in the Caſe of ſuch a Covenant, if any Incumbrance is diſcovered between the Executing the Articles and Sealing the Conveyance or Deed of Settlement, whereof the Party had no Notice, that Incumbrance ſhall be diſcharged, even before the Sealing the Deed of Settlement, both as the Concealment is a Fraud, and becauſe it would be needleſs to enter into a Covenant, which, before entering into, is already known to be broken, but againſt all other Incumbrances diſcovered afterwards, there is the Party's Covenant only. *Trin. 7 Ann. Vane* and *Lord Bernard, Gilb. Rep. in Eq.* 6.

1 *Vol. Abr. Eq.* 399. *Ca.* 3. S. C. but *not* S. P.

Vide Tit. Mortgages, *P.*

CAP. LIV.

Infant.

(A) How far an Infant is bound or favoured in Equity;—And here of Allowances, &c. to Infants.

(B) What Acts of an Infant are good, void or voidable;—And where the Parol may demur.

(C) Caſes upon the Stat. 7 Ann. c. 19. ſect. 1. where an Infant is a Truſtee.

(A) How far an Infant is bound or favoured in Equity;—And here of Allowances, &c. to Infants.

1. A Seiſed of Freehold and Copyhold Lands, ſurrenders to the Uſe of his Will, and then deviſes to his Wife all his *Goods, Chattels and Eſtate whatſoever*, on Condition to pay his Debts and Legacies. On a Bill by the Creditors and Legatees for Sale of the Eſtate, the perſonal Eſtate falling ſhort, the Words *Goods*, &c. with

the other Circumſtances of the Caſe, would paſs the Lands; and decreed a Sale, and the Heir to join when he came of Age; but he being an *Infant*, they gave him a Day to ſhew Cauſe after he came of Age. *Mich.* 1691. *Lumley* and *May et al'*, *Prec. in Chan.* 37.

2. Lord *Burlington* having a Kindeſs for Lady *Barrimore*, took her, when an Infant, and maintained her; and being ſeiſed of Lands, ſettled them upon her, but kept the Writings himſelf; and ſtill continued to take the Profits of the Land. Afterwards he made his Will, and thereby deviſed to her a Portion in Lieu of all other Proviſions made to her by the Settlement. Then ſhe married.—Lord *Burlington* died.—And Lady *Barrimore* accepts the Portion deviſed her. The Queſtion was, Whether the Accepting of the Legacy was a Deveſting of the Inheritance veſted in her? *Lord Chancellor* aſked, if ſhe was of full Age at the Time ſhe accepted the Legacy; for, he ſaid, the Queſtion would turn upon that, it being much more advantageous to her to have the Inheritance than to elect Money in Lieu thereof, for Money may be diſpoſed of by her Huſband. The Lord *Burlington* cannot deveſt the Inheritance given to the Lady *Barrimore*, by deviſing to her a greater Value in full Satisfaction of all Proviſions, yet her Acceptance of this Deviſe is a tacit Contract, and ſo a Waiver of her Inheritance *ex Contractu*. *Trin.* 7 *Ann. Franklin* and *Barrimore*.

3. Bill to have a Diſcovery of Defendant's Title to Lands in *B.* mortgaged to Plaintiff, and to have an Account of the Rents and Profits thereof, *&c.* The Caſe was, the Defendant's Father having Occaſion to borrow 300 *l.* the Defendant was employed by his Father to ſolicit Plaintiff to lend that Sum upon a Mortgage of the Lands in *B.* which the Father made Affidavit of that he was ſeiſed in Fee, and that the Lands were free from Incumbrances. The Defendant, being then about the Age of twenty Years, did carry a Feoffment in Fee, and Fine of the Lands of Defendant's Father to Plaintiff's Counſel, and the Title was approved of, and the Money lent, and a Mortgage made to Plaintiff, and the *Defendant was a Witneſs to the Execution of the Mortgage Deed*, and *alſo to the Payment of the Money*. Defendant's Father, after Defendant came of full Age, took 100 *l.* more upon the ſame Mortgage, and the *Defendant was privy to that Tranſaction*, but *not a Witneſs to the Deed* or *Payment of the Money*. Defendant, by his Anſwer, ſays, *that at the Time of making the original Mortgage he had heard the Lands were ſettled upon him after his Father's Death, but had never ſeen the Settlement*; and after his Father's Death he refuſed to pay the Mortgage, and *claims the Lands as Remainder Man in Tail, by Virtue of a Settlement by his Grandfather upon the Marriage of his Father*, &c. And *Cowper* C. ſaid, That if an *Infant*, having a Remainder upon an Eſtate for Life, be a Witneſs to a Mortgage made by Tenant for Life, he did not think this would bind the *Infant*, becauſe, if he was made a Party to the Deed and ſealed it, yet that would not bind him; and that that was a much ſtronger Caſe; yet his *Lordſhip* was of Opinion in this Caſe, that the Defendant was liable and ought to make Satisfaction to the Mortgagee, becauſe at the Time of this Tranſaction he was very near being of full Age, and ſolicited the Plaintiff to lend the Money, and produced this Feoffment in Fee to his Father (which appears now to be forged) and was principally concerned all along in the Fraud, when he knew at the ſame Time, as he admits by his Anſwer, that his Father was but Tenant for Life, with Remainder to himſelf. If *an Infant is old and cunning enough to contrive and carry*

carry on a Fraud, his *Lordſhip* thought in Equity *he ought to make Satisfaction for it.* Decreed *accord'*. *Mich.* 1 *Geo.* (*a*) *Watts* and *Creſwell*, *Vin. Abr.* Tit. *Enfant*, (N) *Ca.* 24.

(*a*) This Caſe is *miſplaced* in Point of Time.

4. Bill to have a ſpecifick Performance of an Agreement upon this Caſe. A. *during his Minority*, *by himſelf* and *Guardian*, enters into Articles with Defendant to lett him a Farm at a certain Rent, *&c.* Defendant enters upon the Farm, and continues the Poſſeſſion, and pays the Rent after *A.* came of full Age. After that *A.* conveys the Inheritance to the Plaintiff, and then Defendant quits the Farm, inſiſting that he was only a Tenant at Will, and refuſes to accept a Leaſe or execute a Counterpart, *becauſe* A. *being an Infant at the Time of making the Agreement*, *was not bound by it*, and *therefore Defendant ought not to be bound by it.* And *Harcourt* C. decreed, That the Plaintiff ſhould execute a Leaſe to the Defendant, and the Defendant execute a Counterpart of ſuch Leaſe to the Plaintiff, in Purſuance of the Articles; and Defendant to pay Coſts. *Trin.* 13 *Ann. Clayton* and *Aſhdown*, *Vin. Ar.* Tit. *Enfant*, (G. 4.) *Ca.* 1.

5. Where there is a Decree *Niſi Cauſa* againſt an Infant, he may on *his coming of Age*, and *before the Decree made abſolute*, put in a new Anſwer. *Mich.* 1718. *Fountain* and *Caine et al'*, 1 *Will. Rep.* 504.

6. Tho' at Law if one actually lends Money to an Infant, even to pay for *Neceſſaries*, yet as the Infant in ſuch Caſe may *waſte* or *miſapply* it, he is therefore not liable according to the Reſolution in *Salk.* 279. Yet it is otherwiſe in Equity, for if one lends Money to an Infant to pay a Debt for *Neceſſaries*, and he pays the Debt, here, altho' he be *not* liable at Law, yet he is in Equity, becauſe in this Caſe the Lender of the Money ſtands in the Place of the Perſon paid (*b*), *viz.* the Creditor for Neceſſaries, and ſhall recover in Equity as the other ſhould have done at Law. *Per* his *Honour*, *Trin.* 1719. *Marlow* and *Pitfield*, 2 *Will. Rep.* 559.

(*b*) *Vide Harris* and *Lee.*

7. 600 *l. per Annum* was allowed by the Court of Chancery for the Maintenance of an Infant out of her Eſtate. A Fit of Sickneſs coſt 143 *l.* extraordinary, which was allowed above her Quarterly Maintenance. *Per Lord Chancellor*, *Hil.* 1720. *Lady Shaftſbury's Caſe*, *Prec. in Chan.* 559.

8. An Infant aggrieved by a Decree not bound to ſtay 'till he is of Age, but may apply as ſoon as he thinks fit to reverſe it; neither is he bound to proceed by way of Rehearing or Bill of Review, but may impeach the former Decree by an original Bill, in which it will be enough for him to ſay the Decree was obtained by Fraud and Colluſion, *or* that no Day was given him to ſhew Cauſe againſt it. Held *per* Lord Chan. *Macclesfield*, *Mich.* 1721, in the Caſe of *Richmond et Ux'* and *Tayleur*.——And his *Lordſhip*'s Secretary acquainted the Court, that Mr. *Vernon*, in Caſe of an erroneous Decree againſt an Infant, uſed always to adviſe the bringing of an *original* Bill to ſet it aſide, but in ſuch Bill to alledge *ſpecially* the Errors in the former Decree. 1 *Will. Rep.* 737.

9. On a Bill to ſet aſide a Decree againſt an Infant, if the ſame be not fraudulent, tho' in every Reſpect not ſo equitable, the Court willl *not* ſet it aſide. *Mich.* 1721. *Richmond et Ux'* and *Tayleur*, 1 *Will. Rep.* 734.

10. In all Decrees againſt *Infants*, even in the *plaineſt* Caſes, a Day muſt be given to ſhew Cauſe when they come of Age. *Per Lords Commiſſioners*, *Hil.* 1722. 2 *Will. Rep.* 120.

11. If an Infant, ſeiſed in Fee, upon a Marriage with her Guardian's Conſent, ſhould covenant, in Conſideration of a Settlement, to

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convey her Inheritance to her Huſband, *Parker* C. ſaid, That Equity would execute the Agreement, if the Conſideration was a competent Settlement. *Mich.* 1724. *in Caſu Cannel* and *Buckle*, 2 *Will. Rep.* 244.

12. In Caſes of Truſt *Infants* are always bound by Decrees of this Court; and ſo they are where the Will of the Anceſtor is conteſted; and there is ſcarce any Caſe where an *Infant* has Time to ſhew Cauſe againſt a Decree, but where it is neceſſary he ſhould join in a Conveyance to compleat the Eſtate, and where ſuch Conveyance is of the Inheritance, as in Decrees of Foreclоſure of Mortgagors, *&c.* *Per Cur'*, *Hil.* 11 *Geo.* 1. in the Caſe of *Whitchurch* and *Whitchurch*, 2 *Mod. Caſes in Law and Eq.* 128.

13. An *Infant* made a Contract, *with Conſent of Friends*, that Intereſt Money ſhould become Principal, *upon Condition that the Creditor would not at that Time extend the Lands of the Debtor*, and it was decreed good. Cited *per Lord Chancellor*, *Mich.* 11 *Geo.* 1. as *Lady Betty Cromwell's Caſe*, 2 *Mod. Caſes in Law and Eq.* 103.

14. Where an Infant in his Bill by Miſtake of his *Agent* (or Guardian) ſubmits to any Thing which will be prejudicial to him, this will not be binding, but he will (on paying the Coſts of the Day) be allowed to amend. *Mich.* 1726. *Serle* and *St. Eloy*, at the Rolls, 2 *Will. Rep.* 386, 387.

15. An Infant, *when Plaintiff*, is as much bound, and as little privileged, as one of full Age. *Per* Lord *King*, *Hil.* 1728. *in Caſu Lord Brook* and *Lord and Lady Hertford*, 2 *Will. Rep.* 519.

16. (*a*) An Infant's Anſwer by his Guardian cannot be received in Evidence againſt him, and the true Reaſon is, becauſe in Reality it is not the Infant's Anſwer, but the Guardian's, who is ſworn, and not the Infant; and the Infant may know nothing of the Contents of the Anſwer put in for him by his Guardian, or may be of thoſe tender Years as not to be able to judge of it. *Per* Lord Chan. *Talbot*, *Hil.* 1733. in the Caſe of *Wrotteſley* and *Bendiſh*, 3 *Will. Rep.* 237.

(*a*) An Infant's Anſwer by his Guardian is not Evidence againſt him, becauſe the Infant is not ſworn; and it is only for making proper Parties. Cites *Carth.* 79. And where an Infant is Defendant, the Service of the *Subpœna* to hear Judgment muſt be on the Guardian, and not on the Infant. See 1 *Will. Rep.* 643. *Taylor* and *Atwood*. But where a Defendant puts in an Anſwer to a Bill brought by an Infant who does not reply to it, in ſuch Caſe it ſeems the Anſwer muſt be taken to be true, in regard the Defendant, for want of a Replication, is deprived of an Opportunity of examining Witneſſes to prove his Anſwer; and he ought not to ſuffer for ſuch Omiſſion in the Plaintiff. So ruled at the Rolls, with ſome Warmth, by Sir *J. Jekyll*, in the Caſe of *Thurſton* and *Dechair* an Infant, and *Nutton et Ux'*, *Trin.* 1733, in which Mr. *P. Williams* was of Counſel, and much oppoſed the reading of the Anſwer; for that the *Plaintiff, being an Infant, could admit nothing*, and it might be very miſchievous, if, by reaſon of the Neglect of the Plaintiff, the Infant's Guardian or *Prochein amy*, in not putting in a Replication to the Anſwer, ſuch Anſwer ſhould be read, and admitted to be true, tho' never ſo detrimental to the Infant's Inheritance. *Ideo quære*, ſays the *Editor*. *Ibid.* in a *Note*.

17. If an *Executor*, *Adminiſtrator* or *Truſtee for an Infant*, neglects to ſue within ſix Years, the Statute of Limitations ſhall bind the Infant. *Per* Lord Chan. *Talbot*, *Trin.* 1734. *Wych* and *Eaſt-India Company*, 3 *Will. Rep.* 309.

18. In a Foreclоſure againſt an Infant, tho' the Infant has ſix Months after he comes of Age to ſhew Cauſe, *&c.* yet he cannot ravel into the Accounts, nor even redeem, but only ſhew any Error in the Decree. This Point was *clearly* laid down by Lord Chan. *Talbot* as agreeable to the conſtant Practice (*b*). *Hil.* 1734. *Mallack* and *Galton*, 3 *Will. Rep.* 352.

(*b*) In the Caſe of *Lyne* v. *Willis*, heard at the Rolls 13 *May* 1730, this was admitted by Counſel on both Sides, and alſo *per Cur'*, to be the ſettled Practice. *Ibid.*

19. An Allowance of Maintenance to a Guardian, muſt be in regard to what the Infant then had, and not to what falls in afterwards. *Trin.* 1735. *in Caſu Chaplin* and *Chaplin*, 3 *Will. Rep.* 368.

(B) What Acts of an Infant are good, void or voidable;—And Where the Parol may demur.

1. WHERE an Incroachment of a Water-Courſe was made in the Infancy of the Anceſtor, who after *full* Age *acquieſced* under it twenty-one Years, tho' ſuch Infancy was urged, yet Lord Chan. *Cowper* took no Notice of it. *Hil.* 6 *Ann. Guernſey* and *Rodbridges*, *Gilb. Rep. in Eq.*

2. The Parol ſhall *not* demur in *prior* Incumbrances, *nor* in Truſts for Sale, but in Equities of Redemption *only*. *Eaſt.* 7 *Ann. in Canc'*, *Gilb. Rep. in Eq.* 66 (*a*).

(*a*) Bill by a Bond Creditor againſt the Heir and the Executor of the Obligor, to have a Satisfaction of a Debt due upon the Bond out of *perſonal* and *real* Aſſets. The Heir inſiſts, that as to him the Parol ought to demur, for that he is an Infant, and the Bill ſeeks to charge his Inheritance, which came to him by Deſcent from the Obligor. The Parol ſhall demur until the Defendant comes to his full Age, as well in this Court as at Law; which was *not* denied by the Attorney General, Counſel *pro Quer'*. Ordered that the Cauſe ſhould ſtand *in ſtatu quo* until the Infant Heir come to full Age; but as to the other Defendant the Executor, decreed to account and make a Satisfaction out of the *perſonal* Aſſets as far as they would go. *Per King* C. *Trin.* 12 *Geo. Hazard* and *Dixon*, *Vin. Ab.* Tit. *Enfant*, (Q) *Ca.* 3.———Lands are given to *H.* and his Heirs for three Lives. *A.* dies. His Heir does not take by Deſcent, ſo as to have his Age, or to make the Parol demur, but takes as *ſpecial* Occupant; tho' had it been in the Caſe of Lands in Fee deſcending on an Infant, the Parol ſhould have demurred in *Equity* as well as at *Law*. *Trin.* 1735. *in Caſu Chaplin* and *Chaplin*, 3 *Will. Rep.* 368.

3. *Cyril Arthington*, the Plaintiff's Father, conveyed the Advowſon of the Church of *Addle in Com' Ebor'* to the Defendants, In Truſt to preſent, upon the firſt Vacancy, ſuch Son of —— *Jackſon* as ſhould be then qualified to take the ſame, and in Caſe he ſhould have two or more Sons qualified, then ſuch one as the Grantor, his Heirs or Aſſigns ſhould by Writing under his or their Hands and Seals nominate and appoint; and in Caſe Mr. *Jackſon* ſhould not have any Son of an Age capable of being preſented, then Upon Truſt to preſent ſuch Perſon as the Grantor, his Heirs or Aſſigns ſhould by like Writing under his or their Hands and Seals nominate and appoint, ſo that ſuch Nominee ſhall become bound in a Sum to be approved of by the Truſtees for his Reſignation when Mr. *Jackſon* ſhall have a Son capable of a Preſentation; and in Default of ſuch Nomination by the Grantor and his Aſſigns, that the Truſtees ſhould preſent a Perſon of their own Chuſing, under ſuch Reſtrictions as aforeſaid. The Grantor died, leaving the Plaintiff his Son and Heir, an Infant of ſix Months old; then the Living becomes vacant, and the eldeſt Son of Mr. *Jackſon* being but fourteen Years of Age, the Guardian of the Plaintiff took him in his Arms and guided his Pen in making his Mark, and ſealing a Writing, whereby one *Hitch* was nominated and appointed to the Truſtees in order to be preſented by them to the Living. The Truſtees ſuppoſing the Plaintiff as an Infant, unable to make ſuch Appointment, refuſed to preſent Mr. *Hitch*, and preſented another Perſon; upon which the Plaintiff brought his Bill againſt the Truſtees to have them execute their Truſt in preſenting his Nominee, and againſt the Archbiſhop, to prevent him from admitting their Preſentee, and to compel him to admit Mr. *Hitch*. Upon the coming in of the Anſwer, the Archbiſhop claiming nothing but as Ordinary, the Plaintiff had an Injunction to reſtrain him from admitting the Preſentee of the Truſtees, and on the Hearing they were decreed to preſent Mr. *Hitch*. And now on a Petition of Rehearing, it was ſaid for the Defendants, that the Preſentation of Clerks to Biſhops for Admiſſion to Churches

is an Act that requires Judgment and Diſcretion, which an Infant is not Maſter of; and tho' the Law ſuffers them to preſent to their own Livings, yet it is of Neceſſity, becauſe there's nobody elſe to do it; and if they could not, then a Lapſe muſt incur; for a Preſentation to a Living being a Thing of no Value, and therefore not to be accounted for, a Guardian cannot have it; whereas in the preſent Caſe, if the Grantor or his Heirs neglect or are incapable of preſenting, the Truſtees are expreſsly authorized to preſent, whoſe Act will be conſidered as the Act of the Infant; ſo that no Injury will be done to any Body; and tho' in Caſes of evident Neceſſity, Equity may ſquare itſelf by Law, yet where no ſuch Neceſſity appears, Reaſon and Common Senſe ought to prevail; from whence it was inferred that the Nomination being an Act requiring Diſcretion and Judgment, was void, and the Truſtees intitled to preſent their own Clerk.——Beſides, in Support of the Reaſon of the Thing, it was argued, that by the whole Tenor of the Deed Judgment and Diſcretion in the Perſon who was to name a Clerk to the Truſtees, was required, for it was ſaid, in Caſe *Jackſon* had two Sons qualified; now an Infant could not on any reaſonable Ground prefer one to the other; an Infant could not take Care that the Perſon in the preſent Caſe ſhould reſign at a proper Time.——It was inſiſted that an Infant could not make any Appointment at all; that if the Caſe were ſent to be tried at Law, the Jury could not find an Appointment to be under his Hand and Seal; and it was conſidered as a Power which ought to be taken ſtrictly. *Blackaille* v. *Arſcott*, in *C. B. Eaſt.* 8 *W.* One *Roberts* had a Power to make Leaſes under Hand and Seal, but being afflicted with the Gout, he could not uſe his Hand to write, ſo he only ſealed the Leaſes; and tho' it was urged, that Sealing was Signing within the Statute of Frauds, yet the Court held the Leaſes void, for Power ought to be exactly obſerved.——Sir *Philip York* Attorney, and *Talbot* Solicitor, *pro Quer'*: If this were a Power, it ought to be conſtrued reaſonably; yet it is not a bare Power, but an equitable Eſtate in the Grantor and his Heirs, and gives them an Intereſt accordingly; which it is unreaſonable an Infant ſhould loſe. Equity determines upon Eſtates of her Creation, as the Law does on legal Eſtates; and if an Infant may preſent at Law, or nominate upon a legal Right of Nomination, why may he not nominate upon an equitable one? Infants are in many Caſes permitted to act; they may perform a Condition, declare the Uſes of a Fine, and, if the Fine be not reverſed during the Nonage, the Declaration is good, and Equity will not afterwards interpoſe.—In the 7 *Ann. c.* 19. Infant Truſtees of any Age may be decreed to convey, ſo that tho' the legal Age of Diſcretion be not 'till fourteen, yet many Acts done before that Time are good. If an Infant under the Age of Aſſent, marries and has Children, no Diſſent can be afterwards. And in the Caſe of Preſentation, as an Infant juſt born may preſent at Law, ſo the Law does not look on it as an Act which requires Diſcretion in the Patron, nor indeed is it requiſite; for Infants, being ſuppoſed to follow the Directions of their Guardians, may be informed by them who is a proper Perſon, or if they are not, yet a Preſentation being only a bare Recommendation of a Clerk to the Biſhop, and not an Act which gives any Intereſt in the Living, and the Biſhop being abſolute Judge of the Perſon's Abilities, there does not appear any great Reaſon why an Infant may not make it as well as a Perſon of full Age; and it is not of Neceſſity that they muſt preſent, for tho' a Lapſe might inſue, yet the Preſentation of the Minor on the the next Vacancy is reſerved, and nothing diveſted out of him by the Biſhop's Collation; ſo that as to the Infant,

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it is the ſame whether the Biſhop collates, or the Truſtees preſent; wherefore they inferred, Equity ought to be bound to the Law, ſince the Caſe and Reaſon of the Thing is alike, for otherwiſe the greateſt Confuſion and Uncertainty muſt follow.——*King* Lord Chancellor: An Infant of one or two Years old may preſent at Law; then why may they not nominate? Does the putting a Mark and Seal to a Nomination require more Diſcretion than to a Preſentation? The Guardian is ſuppoſed to find a fit Perſon, and the Biſhop to confirm his Choice; and if this is permitted at Law, why ſhould a Court of Equity act otherwiſe in equitable Eſtates?——Upon hearing the Cauſe, the Court decreed for the Plaintiff, but without Coſts; and now the Defendants prayed to have their Coſts allowed them, being Truſtees, and not claiming any Intereſt, becauſe a Right of Preſentation is a Thing not ſaleable. *Sed Cur' contra':* A Preſentation is an Honorary Intereſt, tho' not a Pecuniary one; the Owner of it may oblige a Friend or Relation; and if Coſts had been given to the Plaintiff, who was oppoſed by his Truſtees in the very Point in which the Truſtees ought to have obeyed him, and eſpecially as the Truſtees claimed a Right to preſent themſelves, the Decree would not have been unjuſt. So the Decree was affirmed in all Points. *Hil.* 6 *Geo.* 2. *Arthington* and *Coverly et al'*, *MS. Rep.*

4. An *Infant*'s Deed is not void, but only voidable; for which Reaſon an Infant cannot plead *Non eſt factum* to his Deed, as a *Feme Covert* may. Said *arg' Mich.* 1733. *in Caſu Nightingale et al'* and *Ferrers*, 3 *Will. Rep.* 208.

(C) Caſes upon the Stat. 7 Ann. c. 19. ſect. 1. Where an Infant is a Truſtee.

1. STAT. 7 *Ann. c.* 19. *ſect.* 1. ſays, that it ſhall be lawful for any Perſon under the Age of twenty-one, by the Direction of the Court of *Chancery* or *Exchequer*, by an Order made upon hearing all Parties on the Petition of the Perſon for whom ſuch Infant ſhall be ſeiſed or poſſeſſed in Truſt, or of the Mortgagor or Guardian of ſuch Infant, or Perſon intitled to the Monies ſecured upon any Lands wherof any Infant ſhall be ſeiſed or poſſeſſed by way of Mortgage, or of the Perſon intitled to the Redemption, to convey any ſuch Lands as the Court ſhall by Order direct; and ſuch Conveyance ſhall be good in Law.

2. *Sect.* 2. Such Infants being only Truſtees or Mortgagees, may be compelled by ſuch Order to make ſuch Conveyances in like Manner as Truſtees or Mortgagees of full Age.

3. A Petition upon the 7 *Ann. c.* 19. being exhibited, ſetting out the Conveyances in Truſt to three Perſons, and that ſuch an one being the Survivor, was dead, and the Eſtate in Law devolved upon an Infant, who was in Court; the Declaration of Truſt was read, and the Conſent of the next Heir at Law to the Infant required; and then an Order was made for the Infant by her *Guardian* to convey over the Truſt Eſtate to the *Ceſtui que Truſt*, and the Conveyance to be ſettled by the Maſter. *Trin.* 1709. *Anon. in Canc'*, *Prec. in Chan.* 284. *Ca.* 226.

4. Upon a Reference to a Maſter, to examine whether an Infant was a bare Truſtee within the 7 *Ann.* the Maſter reported, that the Father, from whom the Eſtate deſcended to the Infant, had frequently acknowledged he was only a bare Truſtee, and Proof was read that the

the Purchaſe Money was paid by *A.* who deviſed the Eſtate to the Petitioner, but the Receipt in Writing had been given to the Infant's Father; that the *Ceſtui que Truſt*, and thoſe under him, had been all along in the Poſſeſſion of the Writings and of the Eſtate, which was 40 *s. per Annum*, being a Burgage Houſe. Lord Chan. *King* ſaid, he was ſatisfied that this was but a reſulting Truſt, by reaſon of the Payment of the Money by *A.* the Teſtator, and it being an Eſtate of ſmall Value, and it being ſaid that his *Lordſhip* had made a like Order before for ſuch a Conveyance of a Burgage from *A.*'s Truſtees, he ordered that the Infant ſhould convey, ſince a Decree would coſt the Value of the Fee-ſimple of the Houſe. However, where there is no Declaration of a Truſt in Writing, he ſaid, he would, for the future, leave the *Ceſtui que Truſt* to bring his Bill, and have a Decree againſt the Infant to convey, becauſe theſe Orders for an Infant Truſtee to convey ought to be in the (*a*) plaineſt Caſes, and not in ſuch as are ſubject to the Diſputes, which Truſts, *without* Writing, may be liable to. *Trin.* 1729. *Ex parte Vernon*, 2 *Will. Rep.* 549.

(*a*) So held by Lord *Talbot* in the Caſe of *Goodwyn* and *Liſter*, 7 *Nov.* 1735, *ibid. Vide this Page, Ca.* 7.

5. The Act of the 7 *Ann. c.* 19. is a *remedial* Law, and extends only to Caſes where the Infant is a *bare* Truſtee originally, and at the Death of the Teſtator, not where he is made ſo by ſubſequent Acts. *Per Cur'. Vide* 3 *Will. Rep.* 389. Cites *Trin. Vac.* 1730, at the Rolls, *Anon.*

See 4 *Geo.* 2. *c.* 10. whereby Ideots, Lunaticks, *&c.* or their Committees, by the Direction of the *Lord Chancellor*, may aſſign over their *Truſts* or *Mortgages*, and be ordered to make ſuch Conveyances in like Manner as *Truſtees* or *Mortgagees* of *ſane* Memory.

6. Where Land *is given to an Infant, charged with the Payment of Money*, the Infant is *in Equity* a Truſtee for him to whom the Money is payable, but he is not within the Stat. 7 *Ann. c.* 19. *becauſe he takes an Intereſt in the Land*; and ſo it is in all Caſes where the *Infant claims an Intereſt. Per King* C. *Hil.* 6 *Geo.* 2. *MS. Rep.*

7. *J. S.* Plaintiff's Father, *entered into Articles with* B. *for the Purchaſe of a Tenement*, which *B.* covenanted, for himſelf and his Heirs, to convey before ſuch a Day, and in Conſideration thereof *J. S.* covenanted to pay 705 *l. B.* died before any Conveyance was made, and the Tenement deſcended to *C.* and *D.* (two of *B.*'s Daughters) and *E.* an Infant, the eldeſt Son of *F.* the third Daughter of *B. J. S.* died, and Plaintiff, as his eldeſt Son and Heir at Law, brought this Bill to have the Eſtate conveyed according to the Directions of his Father's Will, upon Payment of the Purchaſe Money by the Executors therein named, and amicable Anſwers were put in, ſubmitting to the Direction of the Court. The only Queſtion was, Whether the two Daughters of *B.* and *E.* the Heir at Law of the third Daughter, were Truſtees within the 7 *Ann. c.* 19. Lord Chan. *Talbot* took this to be only a *conſtructive* Truſt, and that ſuch Truſts were not *within* the View of the ſaid Act, which *does not make Proviſions for Infants to convey in Purſuance of the Decrees of this Court*, but *only gives Power to make Orders in a Summary Way, in Caſes that are originally* plain *and* uncontroverted *by the Parties*; wherefore this Caſe ſeeming to his *Lordſhip* to be left to the Common Law, as it ſtood before the making of the Act, it was decreed that *C.* and *D.* ſhould convey immediately, and that a Day ſhould be given for *E.* the Infant Heir to ſhew Cauſe within ſix Months, *&c.* with Liberty to the Plaintiff to apply to the Court in Caſe any Precedents ſhould be found where ſuch *conſtructive* Truſts had been held to be within that Statute. *Mich.* 1735. *Goodwyn* and *Liſter*, 3 *Will. Rep.* 387.

CAP. LV.

Injunction.

(A) Injunctions, in what Cases granted; —— And here of granting perpetual Injunctions.

(B) What shall not be a Breach of an Injunction.

(A) Injunctions, in What Cases granted; —— And here of granting perpetual Injunctions.

Lucas's Rep. 1. *Anon.* S. C.— Since this Case of *Sherman* and *Earl of Bath* it has been taken that after *three* Trials had, a perpetual Injunction has been allowed. *Select Cases in Chan.* 13. *May* 13, 1725.

1. CHANCERY will not grant a perpetual Injunction, tho' the Party has had five Verdicts in Ejectments at Law, unless there be *Fraud* or *Trust*, or some *Accident* fell out to give the Court a Jurisdiction. *Per Lord Keeper, Trin.* 1706, *Earl of Bath* and *Sherwin*, *Prec. in Chan.* 261.

2. A Bill was brought by the Plaintiff as Assignee of the Copy of the *Dunciad* against the Defendants, for an Injunction to stay them from printing and selling the *Dunciad*, and to be quieted in the Enjoyment of the sole Printing of that Book for fourteen Years, according to the Stat. 8 *Ann. c.* 19. and upon filing the Bill, and upon an Affidavit that the Plaintiff had purchased, or legally acquired the Copy of that Book, an Injunction was granted *Nisi Causa*. It was shewed for Cause, that the Plaintiff had not set forth a good Title to the sole Printing of this Book, either in the Bill or in the Affidavit, for he only says, that he has purchased or legally acquired the Copy, but does not say of the Author, or who was the Author; and by the Statute the Author, or the Assignee of the Author, are only intitled to the sole Right of Printing the Book, and no other Person; and it is not sufficient to say he purchased or legally acquired the Copy, without saying he purchased it of the Author. Lord Chan. *King* allowed the Cause, and dissolved the Injunction. *Trin.* 2 *Geo.* 2. (*a*) *Gilliver* and *Snaggs*.—Afterwards, in the same Term, an Injunction was granted in the Case of *Gay*, Author of *The Sequel of the Beggar's Opera*, against the publishing and selling that Book, upon a Bill founded upon the Stat. 8 *Ann. c.* 19. *Vin. Abr.* Tit. *Books and Authors*, (A) *Ca.* 4.

(*a*) This Case is *misplaced* in Point of Time.

3. *A.* diverted a Water-Course, which put *B.* to great Expences in laying of Sooths, *&c.* and the Diversion being a Nuisance to *B.* he brought his Action, and an Injunction was decreed upon a Bill exhibited for that Purpose, it being proved that *B.* did see the Work when it was carrying on, and connived at it, without shewing the least Disagreement, but rather the contrary. *Short* v. *Taylor*, in Lord *Somers*'s Time, was cited, which was, *Short* built a fine House; *Taylor* began to build another; but laid Part of his Foundation upon *Short*'s Land. *Short*, seeing this, did not forbid him, but on the contrary very much encouraged it; and when the House was built, he brought an Action; and Lord *Somers* granted an Injunction, and said, It was but just and reasonable; for, being a Nuisance, every Continuance

tinuance is a freſh Nuiſance, and ſo he would be perpetually liable to Actions, which would be hard, when he was encouraged by the Party himſelf. *Mich.* 8 *Ann.* (*a*) *Anon. MS. Rep.*

(*a*) This Caſe is *miſplaced* in Point of Time.

4. Defendant's Father mortgaged and afterwards ſold Land to *B.* his Brother, the Plaintiff, and upon his Death Defendant ſet up an old Intail created about two hundred Years ſince, and got into Poſſeſſion. The Plaintiff brought an Ejectment, and a Verdict paſſed for the now Defendant upon producing an old Inquiſition finding the Intail; but there was no Deed produced creating this Intail. The Plaintiff at Law brought his Bill, ſetting forth that the Writings were all in the Defendant's Hands, and praying that they might be produced, and that the Defendant might not ſet up a Title under any Truſt Term; and decreed by Lord *Cowper*, that the Trial ſhould be upon the *mere Right* in an Ejectment, and that no Truſt Term, Mortgage or Leaſe, ſhall be ſet up, but that the Defendant ſhould make Title only under the Intail. Upon ſuch Trial it was found again for Defendant; but the Judge certifying againſt the Verdict, a third Trial (after two Verdicts for Defendant) was heard at the Bar of the Exchequer; and after that another Trial in *B. R.* in both which the Verdict was for the Plaintiff; and now on the Equity reſerved it was prayed that the Plaintiff ſhould have a perpetual Injunction, with Coſts. Lord Chan. *Parker* obſerved that the Plaintiff had no Reaſon to complain (as he did) of the Inconvenience that there is no End of Trials in Ejectment, the two firſt having been found againſt him; but that the two Trials at Bar, by Direction of the Court, being for him, his *Lordſhip* ſaid, he did not ſee what this Court had been doing, in directing Trials, and ordering Writings to be produced, unleſs it ſhould now grant a perpetual Injunction, which really, after ſo many Trials, ſeems to be for the Benefit of both Parties; and that the Caſe in its Nature is ſuch as not to be intitled to any Favour in reſpect of the Purchaſe, the long Enjoyment, and the endeavouring to defeat it by an old Intail of above two hundred Years; and that if there was not the cleareſt Proof imaginable of ſuch an Intail (as poſſibly there was not) the Jury were in the Right not to find it; but as to the Coſts in this Court, the Plaintiff has had Relief by producing the Writing, and preventing the Defendant from ſetting up any old Terms; and it does not appear that the Defendant (the Heir of an antient Family) has ſo far miſbehaved as that he ought to pay Coſts; tho' his *Lordſhip* ſaid, he ſhould loſe his own Coſts, the Right appearing againſt him; but the Plaintiff to have the Coſts at Law for all the Trials. *Mich.* 1720. *Leighton* and *Leighton*, 1 *Will. Rep.* 671.

Ibid. 674. ſays, that this Decree was affirmed *in Dom. Proc'*, with 40 *l.* Coſts, *March* 1720.

5. Bill to be quieted in the Enjoyment of the Right of ſole Printing Dr. *Prideaux*'s Book called *Directions to Church-Wardens*; and for a perpetual Injunction againſt the Defendant to prevent his Printing and Publiſhing the ſame. The Plaintiffs claim the ſole Right of Printing by Grant of the Copy from the Author, *per* the Stat. 8 *Ann.* The Defendant claims a Title under the original Printer of the Book, to whom the Author firſt delivered the Copy to be printed. And *per Macclesfield* C. the bare Delivery of the Copy by the Author to be printed, doth not deveſt the Right of the Copy out of the Author, but is only an Authority to the Printer to print that Edition, and the Author may afterwards grant the Right of the Copy to another Perſon. And a perpetual Injunction was granted againſt the Defendant not to print and publiſh the ſaid Book. *Mich.* 9 *Geo. Knaplock* and *Tonſon* and *Curle*, *Vin. Abr.* Tit. *Books and Authors*, (A) *Ca.* 3.

6. Plaintiff

6. Plaintiff prayed an Injunction to ſtay Defendant's Proceedings at Law upon this Caſe. Duke *Hamilton* brought an Ejectment in his own and his Wife's Name, for certain Lands that deſcended to the Dutcheſs during the Coverture, and employed the Defendant Mr. *Incledon* as his Attorney. The Duke died pending the Suit, and the Dutcheſs continued Mr. *Incledon* Attorney, to proſecute the Suit. Mr. *Incledon* brought his Action for all the Money expended in that Suit, as well in the Duke's Time as in the Dutcheſs's, againſt the Dutcheſs, and recovered a Verdict at Law. And *Lord Chief Baron* ſaid, That this Bill is not brought to be relieved againſt the Verdict, but againſt the Action. In Actions that ſound in Damages, if the Party makes Defence at Law, he cannot afterwards have Relief in Equity. The only Queſtion is, Whether at Law he can recover this againſt the Dutcheſs? This is proper to be determined at Law, and it has been there debated and determined. If the Judge who tried the Cauſe had been miſtaken in his Opinion, you would have had a new Trial. The Dutcheſs has the Benefit of what was done before the Duke's Death. We are not now determining the Cauſe, but only, Whether we ſhall ſtop their Proceedings; and, I think, we ought not to ſtop them. All Attorneys Bills are Matters of Account, and the proper Method is to have them taxed; and Defendant does not ſubmit to Account. B. *Price* went away before the Court gave their Opinions, but told his Brethren, he was of Opinion againſt an Injunction. B. *Montague* ſaid, That if this was the Caſe of a Common Tradeſman, who delivered Goods after the Huſband's Death, he could not recover what was due before; or, ſuppoſe the Dutcheſs had never employed Mr. *Incledon* after the Duke's Death, then he could not have recovered againſt her; and deſiring him to go on, is a ſeparate Contract. This is a Charge all in her own Right, and he having recovered more than is confeſſed to be due in her Time, he has recovered ſo much wrongfully, and therefore, in Conſcience, ought to ſtay Execution. B. *Page* thought there ought not to be an Injunction. It is often a good Rule, that when more is recovered than ought to be, this Court will ſtay Proceedings at Law. If there has been Dealings which cannot be diſcovered at the Trial, it is proper for to be examined in a Court of Equity; but here is nothing in this Caſe but what was proper for a Defence at Law; but here is no Diſpute whether paid or received, but only who is chargeable; and this has been determined by the Chief Juſtice of the Common Pleas, and agreed to by the whole Court, for otherwiſe a new Trial would have been granted; and ſhall we condemn their Judgment upon a Motion? As to the Queſtion, Whether ſhe is chargeable; Suppoſe it had been a Suit upon a Bond made to the Dutcheſs before Marriage, would that not ſurvive to her, and ſhe have the Benefit? Then ought not ſhe, in Conſcience, to pay the Charges? She by her Act has made it her Debt; it was commenced for their joint Benefit. Suppoſe the Duke had bought a Piece of Silk for a Gown for the Dutcheſs, and ſent it to the Maker's, muſt not ſhe pay for the Making before ſhe can have it, yet it was originally the Duke's Debt? Defendant has ſubmitted only to the ſtating of it in his Anſwer. No Injunction was granted. *Dutcheſs of Hamilton* and *Incledon, in Scac'*, *Vin. Abr.* Tit. *Baron and Feme*, (Z) *Ca.* 20. but does not ſay what Term and Year.

7. A Bill of Exchange was drawn upon the Plaintiff at *Leghorn*, which he accepted, but by the Law there, if a Bill be accepted, and the Drawer fails, and the Acceptor hath not ſufficient Effects of the Drawer in his Hands at the Time of Acceptance, the Acceptance

becomes void. And this happening to be the Plaintiff's Caſe, in order to diſcharge himſelf from this Acceptance, he inſtituted a Suit at *Leghorn*, and his Acceptance was thereupon vacated by a Sentence in that Court. Afterwards the Plaintiff returned to *England*, and was ſued here at Law upon this Bill, and thereupon he exhibited his Bill in this Court for an Injunction and Relief. *King* Lord Chancellor was clearly of Opinion, that this Cauſe was to be determined according to the local Laws of the Place where the Bill was negotiated; and the Plaintiff's Acceptance of the Bill having been vacated and declared void by a competent Juriſdiction, he thought that Sentence was concluſive, and bound the Court of Chancery here. And to this Purpoſe he inſtanced the Caſe of one *Hutchinſon*, in 29 of *Car.* 2. and is mentioned in *Show* 6. where *Hutchinſon* having killed a Perſon in *Spain*, was there proſecuted, tried and acquitted of the *Murder*; and afterwards returning to *England*, he was indicted again for the ſame *Murder* here, to which Indictment he pleaded his Acquittal in *Spain* in Bar, and the Plea was allowed to be a good Bar to any Proceedings here. And upon the *Attorney General*'s inſiſting that the Plaintiff might have taken Advantage of this upon a Trial at Law, and therefore not relievable in a Court of Equity, the *Chancellor* declared, that if he was to try the Cauſe at Law, he would allow the Plaintiff the Benefit of this Matter upon the Trial; but as other Judges might be of a different Opinion, he would not put the Plaintiff upon the Difficulty and Hazard of a Trial; and he ſaid, he remembred a Caſe which came before him in the Lord Mayor's Court, when he was Recorder of the City of *London*, where a Mariner ſued in the Admiralty Court for his Wages, and there being a Sentence againſt him there, he afterwards brought his Action in the Mayor's Court for the ſame Wages; and his Lordſhip, as Recorder, being doubtful whether he ſhould allow the Defendant to give the Sentence in the Admiralty Court in Evidence upon *Non Aſſumpſit*, aſked the Opinion of Chief Juſtice *Holt*, who ſaid, that whatever defeated the Promiſe might be given in Evidence on *Non Aſſumpſit*, and that the Sentence in the Admiralty Court would be good Evidence; and in this Caſe a perpetual Injunction was granted to enjoin the Defendant from ſuing upon this Bill. *In Canc'*, 22 *Nov.* 1726. *Burrows* and *Jemino*, *MS. Rep.*

8. In an Injunction the Words *pro defectu Placiti*, *&c.* are intended of an iſſuable Plea; and the Words *Judicium intrare* are intended of a final Judgment; therefore, if the Defendant be an Executor, and pleads *plene Adminiſtravit*, and the Plaintiff at Law enters Judgment *de bonis Teſtatoris cum Acciderint*, he may proceed to a *Scire Facias* to enquire of Aſſets, and enter Judgment thereupon; for the Meaning of the Injunction is, that the Defendant may proceed ſo far as that nothing ſhall remain but to take out Execution after the Injunction is diſſolved. *Mich.* 1732. *Vide* 3 *Will. Rep.* 146.

9. Plaintiff obtained an Injunction on Defendant's praying Time to anſwer, but before the Injunction ſerved, Defendant's Anſwer came in, and Defendant obtained a Verdict at Law, and ſued out a *Scire Facias* on the Judgment *quando Aſſets Acciderint*; after the Verdict, Plaintiff ſerved the Injunction; and on a Motion to diſcharge it abſolutely, *King* C. ſaid, It is an Abuſe of the Proceſs of the Court to keep it in a Man's Pocket thus, I muſt diſcharge this Injunction, and let Plaintiff move for an Injunction on the Merits. *Anon. MS. Notes.* *Quære* Term and Year.

10. Plaintiff's Teſtator *Cotton*, gave Defendant *Catlyn* a promiſſory Note for 250 *l.* payable ſix Months after Date; Defendant *Catlyn* indorſed it to *Woodcock* for 250 *l.* and he indorſed it to *Miller* (two

other Defendants) for 250*l.* as a Payment for ſome Goods that *Miller* ſold him. A Bill was brought ſetting forth, that the Note was obtained without any Conſideration, to diſcover it, and to have an Injunction. Defendant *Catlyn* by her Anſwer ſet forth, that *Cotton* courted her Miſtreſs, and married her, to his great Advantage; and by her good Offices, and for her Aſſiſtance, as a Recompence for her Services, the Day before he married he gave her this Note. As to her, Lord Chan. *Talbot* was clearly of Opinion that this Note was in Nature of a Marriage-Brocage Bond, and tho' it was not charged in the Bill, but came out upon her Anſwer, yet as an equitable Conſideration, this Court would have enjoined her from taking any Advantage of it. Defendant *Miller* ſets forth, that he ſold *Woodcock* ſome Yarn at a Market Price for 250*l.* and towards Payment he indorſed this Note to him; but as it does not appear that he had delivered the Goods, and if the Bill comes before, there is no Harm done him, and that it is not to be ſuppoſed that he would ſell his Goods at a Market Price, and take a Note of this Kind (which had been due ſix Weeks) without making any Enquiry, and that he actually arreſted the Party without making any Demand upon him for it, it ſeems plainly to have been indorſed to him on Purpoſe to arreſt him, and by that Means to elude the Equity, it would have been attended with in the Hands of the Indorſer, but, however, he thought there was Reaſon enough to continue the Injunction 'till the Hearing of the Cauſe. *The Executors of Cotton* v. *Catlyn et al'*, *Trin.* 9 *Geo.* 2. *MS. Rep.*

11. *John* Duke of *Buckingham*, in 1720, having made his Will, and thereby deviſed a Legacy to the Dutcheſs, and ſome other pecuniary Legacies, gave the Reſidue of his perſonal Eſtate to the Defendants the Truſtees, to be laid out in a Purchaſe of Lands, to be ſettled upon the Dutcheſs, Duke *Edmund* and Mr. *Sheffield*, in Remainder one after another. In 1721 the Plaintiffs brought their reſpective Bills againſt the Defendants for an Account of the perſonal Eſtate, and to have it laid out in Purſuance of the Will; and there being ſome Lands deviſed by the Will, to have it proved. Before this Suit the Will was proved in common Form in the Eccleſiaſtical Court, and the Dutcheſs upon her Anſwer expreſſed herſelf well ſatisfied with the Will, and acknowledged the Duke had made ſuch Will, and ſubmitted to have the ſeveral Truſts contained in it carried into Execution. Upon the coming in of the Dutcheſs's Anſwer, and the reſt of the Defendants, the Parties proceeded to prove the Duke's Will; and upon the Hearing of the Cauſe the Will was declared to be well proved; and in Purſuance of the Decree the Dutcheſs received her Legacy, and near 70,000*l.* was laid out in Land, which the Dutcheſs has enjoyed ever ſince the Purchaſe. In 1735 Duke *Edmund* died, and the Dutcheſs taking out Adminiſtration to him, appealed againſt the Decree to the Houſe of Lords, where the Decree was confirmed. And being inclined to diſpute the Duke's Will, ſhe now applied to the Spiritual Court, and cited the Executors of Duke *John* to prove his Will there *per Teſtes*; whereupon Mr. *Sheffield* moved this Court for an Injunction to ſtay her Proceedings in the Eccleſiaſtical Court; and it was alledged for the Dutcheſs, againſt the Injunction, that the Cauſe here was cloſed by the Decree; that no ſuch Injunction therefore could be granted, becauſe there was no Suit before the Court; that the Decree of this Court, declaring the Will of Duke *John* to be well proved, could be no Impediment to the Proceedings of the Dutcheſs, which were only to try the Effect of the Will as to the perſonal Eſtate, over which

this Court had no Juriſdiction; that the Validity of the Probate only was in Queſtion, which this Court could not determine; that the Anſwers in the former Cauſes, and the Decrees therein, were founded only on a Preſumption that the Probate was good; that if the Dutcheſs had diſcovered any new Light, that might help to deſtroy that Preſumption, it was highly reaſonable that ſhe ſhould have an Opportunity to enquire into it, which ſhe could do only in the Eccleſiaſtical Court; and therefore, as after a Decree confirmed in the Houſe of Lords, a Bill of Review with Supplemental Matter may be proper, if any Thing new ariſes, that may vary the former Decree; ſo this Suit inſtituted in the Eccleſiaſtical Court was as reaſonable, it not being poſſible to bring any ſuch new Bills of Review, tho' the Parties were able to diſtinguiſh their Caſe, unleſs the Dutcheſs could obtain a Repeal of the Probate, which muſt be the Foundation of ſuch Supplemental Matter. *Hardwick* Lord C. I don't think myſelf authorized to grant an Injunction in this Caſe; that cannot be done, as I know, without a Bill for that Purpoſe; the Suit is certainly at an End. It is likewiſe certain that the Court has nothing to do with the Probate of Wills of perſonal Eſtates; this belongs to another Juriſdiction; and the Declaration made in the former Cauſes that the Will was well proved, refers only to the Land. It is alſo true that the Anſwers and Decrees are founded upon the preſumptive Strength of the Probate; and if that had been repealed, no ſuch Decree would have been made; and I won't ſay, but that ſtill the Probate may be vacated, which might of Conſequence alter the Nature of the Eſtates purchaſed and convert them into Perſonalty. But then a Conſideration ariſes what Equity there is in this Caſe to hinder ſuch a Proceeding, or at leaſt to ſuſpend it 'till this Court is informed and ſatisfied of the Reaſon of commencing it; for any Thing that appears now on the Side of the Dutcheſs, the Will ſtands unimpeached; and conſidering her Grace's Submiſſion to it by her Anſwers, the Decree of this Court to perform the Truſts, and an actual Performance of that Decree, by inveſting the Money in Land, her Acquieſence in the Will, her Acceptance of her Legacy, and her Enjoyment of theſe Lands according to the Truſt of the Will; I ſay, conſidering all theſe Circumſtances, it would appear exceeding ſtrange if this Court, without any Reaſon aſſigned, ſhould ſit ſtill and overlook a Proceeding in another Court that tends directly to defeat its own Decrees. It is ſaid we have nothing to do with Probates, and ſo the Validity of this Will, for any Thing done here, remains quite untried; it is true. But this of itſelf ſeems to be an Argument of very little Weight in Favour of the Dutcheſs, who by her own Anſwer has confeſs'd the Validity of the Will, and thereby drawn the Court in to make ſuch a Decree. In the Caſe of *Vernon* and *Acherley*, which aroſe upon the Will of Mr. *Vernon*, where the Queſtion was, Whether ſome Fee-Farm Rents paſſed by the Will, this Court held they did, and decreed the Truſtees to convey; accordingly upon an Appeal to the Houſe of Lords, this Decree was confirmed; and afterwards Mr. *Acherley*, having a Mind to try the Opinion of the Judges of the Common Law, took a Diſtreſs for Nonpayment of theſe Rents; and tho' this was a Proceeding that by Law he might commence, yet this Queſtion having been before determined here, upon an Application for an Injunction, as in the preſent Caſe, tho' my Lord *King* thought himſelf not warranted in awarding an Injunction without a Bill, yet he would not endure to ſee the Juſtice of this Court queſtioned, but made an Order to ſtay the Proceedings at Law 'till a Bill was brought for a perpetual Injunction. And my

Lord

Lord *Talbot* afterwards, upon the Hearing, granted a perpetual Injunction. And ſo I think, in the preſent Caſe, here appears Reaſon enough to ſtay the Dutcheſs's Proceedings by ſuch an Order; and then, if her Grace upon a Bill filed, can lay before the Court ſufficient Objections why a perpetual Injunction ſhould not be granted, ſhe may then be permitted to proceed in her Suit. And ſo ſuch an Order was made. 3 *Mar.* 1737. *The Duke of Buckingham and the Dutcheſs of Buckingham, a Legatee*, and *Others Executors and Truſtees of John Duke of Buckingham, MS. Rep.*

The Queſtion was, Whether a Codicil amounted to the Republication of a Will? And it having been decreed ſo in Chancery, and in the Houſe of Lords upon an Appeal, and an Ejectment being afterwards brought for the ſame Thing, Lord *Talbot* granted a perpetual Injunction. *Vernon* and *Acherley*. But there muſt be a Bill on Purpoſe for ſuch an Injunction. As where the Dutcheſs of *Buckingham* had ſubmitted to the Will of her Huſband, which was proved in Chancery, and the Decree affirmed by the Lords; and afterwards the Duke her Son dying, ſhe cited Mr. *Sheffield*, the Remainder Man, for whoſe Benefit the perſonal Eſtate was to be veſted in Land, to prove the Will *per Teſtes* in the Eccleſiaſtical Court, and he prayed an Injunction, which the Court would not grant on ſuch Motion, but made an Order to ſtay the Proceedings in the Eccleſiaſtical Court 'till a Bill ſhould be brought here for a perpetual Injunction. And ſo it was done in the Caſe of *Acherley* and *Vernon ſupra*. *Sheffield* and *The Dutcheſs of Buckingham*, in another *MS. Rep.* of this Caſe.

12. A Man deviſed to the now Defendant by the Name of *his youngeſt Son* John, *and his Heirs, all his Eſtates in* W. *and in Caſe his Son ſhould not live to attain twenty-one, leaving no Iſſue lawfully begotten, he deviſed the Eſtates to the Plaintiff* E. *his eldeſt Daughter and the Heirs Males of her Body, with like Limitations over to his other Daughters*; and *in Caſe his Son ſhould attain twenty-one*, then *he deviſed the Eſtates to be ſold*, and *the Money ariſing therefrom he deviſed amongſt all his Daughters as an Augmentation to their Fortunes.* There was a great deal of Timber upon the Eſtate, which *John* the Son was cutting down; and now they moved for an Injunction to ſtay him. And Lord Chan. *Hardwicke* was of Opinion that he ought to grant an Injunction; his *Lordſhip* ſaid, he thought *John* was to be conſidered as a Truſtee of the Inheritance for the Benefit of the Daughters, and that it was the Intention of the Teſtator, he thought, to give him the beneficial Intereſt, but that it would be ſtrange if he was to take away under ſuch a Deviſe the greater Part perhaps of the Eſtate. His *Lordſhip* ſaid, that tho' there had been no Caſe determined where this Court had granted an Injunction to ſtay Waſte for an Infant *in Ventre ſa mere*, yet he ſhould not ſcruple to do it, if ſuch a Caſe ſhould happen; and that he ſhould be inclined to reſtrain an Heir at Law in Caſe of an *executory* Deviſe. Injunction granted, and made perpetual (*a*). 19 *Dec.* 1744. *Robinſon* and *Lytton* at *Lincoln's Inn Hall*, *Vin. Abr.* Tit. *Deviſe*, (W. e.) *Ca.* 16.

(*a*) The particular Reaſon upon which his *Lordſhip* founded his Judgment he declared to be, becauſe he looked upon the Deviſee *John* as a Truſtee by the Intention of the Teſtator. *Ibid.*

(B) What ſhall not be a Breach of an Injunction.

1. IF a Perſon is not Plaintiff to a Suit, nor acquired any Right *pendente lite* from any one as Party, but is only exerciſing an antecedent Right, inaſmuch as he is not Party, this is no Breach of an Injunction. *Bootle* and *Stanley*, *MS. Notes.*

Quære Term and Year.

2. Plaintiff obtained an Injunction to Defendant's Proceedings at Law, but with Leave to proceed to Judgment, with Stay of Execution; and Defendant took out a *Scire Facias quare executio non, &c.* which was held no Breach, for this was only proceeding to Judgment. *Hankey* and *Morris*, *MS. Notes.*

Quære Term and Year.

3. Plaintiff

3. Plaintiff before filing his Bill was arreſted, and gave Bail to the Sheriff; then he obtained an Injunction on a *Dedimus*. It was moved to extend the Injunction to the Proceedings againſt the Bail, Plaintiff having taken an Aſſignment of the Bail Bond. *King* C. If a Declaration is delivered, the Party may proceed to Judgment, notwithſtanding an Injunction, and Execution is only ſtayed; but if no Declaration delivered, all Proceedings at Law are ſtayed. This is the Practice, and the Conſtruction that has been always put on the Words in the latter End of the Writ. So the Motion was granted. *Anon.* (*a*) 1731. *MS. Notes.*

(*a*) *Quære* Term.

CAP. LVI.

Intereſt Money.

(A) What Debts, &c. ſhall carry Intereſt, and from what Time and in what Caſes Intereſt ſhall be made Principal.

(B) Where the Intereſt may exceed the Penalty.

(C) What Intereſt a Debt contracted in a Foreign Country ſhall carry here.

(D) In what Caſe Intereſt ſhall be applied to ſink the Principal.

(A) What Debts, &c. ſhall carry Intereſt, and from what Time and in what Caſes Intereſt ſhall be made Principal (*b*).

(*b*) If a Mortgage be made with a Covenant for making the Intereſt Principal, and to carry Intereſt, Equity relieves againſt it. *Sir George Meres* and *Lord Sturton*, and again in the Caſe of *Broadway* and *Moorcroft*.—*Quære* Terms and Years.

1. INTEREST to be made Principal from the Time of ſtating the Account. 28 *Feb.* 1707. *Kelley* and *Lord Bellew*, *Vin. Abr.* Tit. *Intereſt*, (C) in a Note to *Ca.* 4.

2. When a Truſt Term is raiſed to pay Debts *equally*, Lord Chan. *Harcourt* declared, that the ſimple Contract Debts became as Debts due by Mortgage, and ſhould carry Intereſt as well as Debts ſecured by Bond. *Trin.* 1713. *Car* and *The Counteſs of Burlington*, 1 *Will. Rep.* 228.

3. Where by a *general* and *national* Calamity nothing is made out of Lands which are aſſigned for Payment of Intereſt, it ought not to run on during the Time of ſuch Calamity. 25 *June* 1715. *Baſil* and *Acheſon*, *Vin. Abr.* Tit. *Intereſt*, (C) *Ca.* 7.

4. Stated Accounts ſhall carry Intereſt, eſpecially in the Caſe of Mortgages, and more ſtrongly when ſettled by a Maſter purſuant to any Order. 25 *Feb.* 1717. *Stroud* and *Moor*, *Vin. Abr.* Tit. *Intereſt*, (C) by way of Note to *Ca.* 4.

5. *A.* entered into a Recognizance to pay 100*l.* a Year Annuity to a third Perſon. The Annuity was in Arrear ſeveral Years, and Lord Chan. *Cowper* decreed, that the Recognizance being in Nature of a Bond, the Arrears were a Debt ſecured thereby, and ſo muſt carry Intereſt from the Time they became reſpectively due. *Mich.* 3 *Geo.* 1. *Legate* and *Shewell*, *Gilb. Rep. in Eq.* 142.

6. Defendant inſiſted on 800*l.* to be due to him, but upon the Maſter's Report only 180*l.* appearing due, the Court ordered Intereſt for that Sum from the Time of confirming the Report and not before, becauſe 'till then it was not any liquidated Sum. *Trin.* 1717. *Attorney General*, at the Relation of *Iſlington* Overſeers, and *The Brewers Company*, 1 *Will. Rep.* 376, 377.

7. *No* Intereſt to be allowed for Coſts. 6 *Feb.* 1719. *Butler* and *Burk*, *Vin. Abr.* Tit. *Intereſt*, (C) *Ca.* 9.

8. *J. S.* married *B.* (with whom he had no Portion, but an Expectation of a real Eſtate), and having no Iſſue by her, deviſed 500*l.* a Year to her for her Life, iſſuing *out of all his Eſtate*, and ſubject to this Annuity gave his real Eſtate (which was a very large one) to the Plaintiff, and made *B.* his Executrix and reſiduary Legatee, and ſoon after died. Plaintiff the Deviſee upon the Repreſentation (as was ſaid) of *B.*'s Father, that the perſonal Eſtate was very conſiderable, entered into Articles with *B.* that on her renouncing the Executorſhip, and delivering over the perſonal Eſtate to the Plaintiff, he, in Conſideration thereof, would indemnify *B.* from all the Teſtator's Debts, and pay her an additional Annuity of 40*l.* *per Annum*; the Annuity of 540*l.* a Year was to be paid free from Taxes, and *B.* agreed to accept of a Security for the 540*l.* *per Annum* out of *Part of the Eſtate only*. And it appearing by the Maſter's Report, that the Arrears of the 540*l.* a Year amounted to 820*l.* Lord Chan. *Cowper* decreed *Intereſt from the very Day of Payment*. Upon an Appeal to Lord Chan. *Parker* it was inſiſted, that according to the Rule of the Court, in Caſe of an Annuity, tho' granted for a Jointure, the *Intereſt ſhould be computed only from the Day when the ſubſequent Payment, after the Arrears incurred, became due*; but Lord *Parker* ſaid, that Intereſt is a Thing pretty much in the Diſcretion of the Court, and that ſince Lord *Cowper*, (*that great Maſter of Equity*), who heard the Circumſtances and Merits of the Cauſe, appointed Payment from the very Day that it became due, and ſince this appears to be the Widow's Bread, the Decree ſhall ſtand. But his *Lordſhip* added, that he did not approve of the Diverſity that the Intereſt ſhould only be carried from the half Year after the Default of Payment; for ſuppoſing the Payment were but yearly, ſhould it carry Intereſt but from a Year after the Expiration of the Year, when what became due for this Annuity was all the Widow had to ſubſiſt upon (*a*)? *Trin.* 1719. *Litton* and *Litton*, 1 *Will. Rep.* 541.

(*a*) The Reporter adds a *Quære* as to this, and ſays, it ſeems the *Arrears ſhould carry Intereſt* only *from the firſt Day of Payment next after the Arrears of the Annuity became due*; if *payable Half-yearly*, then *from the next Half-year Day*; if *Quarterly*, then *from the next Quarter Day*; and ſo has been the common Rule in theſe Caſes; but the Hardſhip of the principal Caſe (tho' untruly ſuggeſted) and the Weight of Lord *Cowper*'s Decree, before whom the whole Merits of the Cauſe were heard, ſeemed to influence the Court in this Matter. *Ibid.* 544.

9. A Maſter's Report, computing Intereſt, makes that Intereſt Principal, and to carry (*b*) Intereſt; for a Report is as the Judgment of the Court, and appoints a Day for the Payment, carrying on Intereſt to that Day; and the Party's Diſobedience to the Court, in not complying with the Time of Payment, ought to ſubject him to Intereſt. *Per* Lord Chan. *Parker*.——But where a Mortgagor ſigns an Account, whereby

(*b*) *Bacon* and *Clerk*, 1 *Will. Rep.* 478.

whereby he owns ſo much due for Intereſt, his *Lordſhip* ſaid, he queſtioned whether this will make the Intereſt Principal, becauſe of itſelf it does not ſhew any Agreement or Intent to alter the Intereſt, or the Nature of that Part of the Debt, or turn it into Principal; neither does it appear to have been ever ſo determined. That to make Intereſt on a Mortgage Principal, it is requiſite there ſhould be a Writing ſigned by the Parties, foraſmuch as the Eſtate in the Land is to be charged therewith. *Trin.* 1720. in the Caſe of *Brown* and *Barkham*, 1 *Will. Rep.* 653.

10. By Marriage Articles the Lady's 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 Children for two Years*; ſuch Money and Allowance for Maintenance ſhall be added to the Foot of the Account, and not carry Intereſt. 1721. *Kirwin* and *Blake*, *Vin. Abr.* Tit. *Intereſt*, (C) *Ca.* 10.

11. Intereſt was allowed from the Time of *Calculation of the Report*, *to the Time of confirming it.* 1721. *Kirwin* and *Blake*, *Vin. Abr.* Tit. *Intereſt*, (D) by way of Note to *Ca.* 1.

12. If a Man deviſes his Lands for the Payment of his Debts, this Deviſe makes the Land as a Security or Mortgage for all the Teſtator's Debts, as well thoſe by ſimple Contract or otherwiſe, and the *ſimple* Contract Debts ſhall carry Intereſt, as the Land, which is the Fund, yields annual Profits. *Per* Lord Chan. *Macclesfield*, who ſaid that this was the daily Practice. *Trin.* 1722. *in Caſu Maxwell* and *Wettenhall*, 2 *Will. Rep.* 26, 27.

13. Where exceſſive Rates are allowed for Work in reſpect of ſlow Payment, there ſhould be no Intereſt allowed; for Intereſt is only allowed to ſupply the Want of prompt Payments. 27 *Feb.* 1723. *Dutcheſs of Marlborough* and *Strong*, *Vin. Abr.* Tit. *Intereſt*, (C) *Ca.* 11.

14. *J. S.* deviſed an Annuity of 20 *l. per Annum* out of his perſonal Eſtate to *A.* for his Life, payable Quarterly. The Annuity being three Years in Arrears, it was inſiſted for the Annuitant, that theſe Arrears ſhould carry Intereſt. But the Court ſaid, that this is only done where there are great Arrears, but that it is not uſual to compute Intereſt for ſo ſmall a Sum. *Trin.* 1723. *Batton* and *Earnley*, *at the Rolls*, 2 *Will. Rep.* 163.

15. Money was due to the Teſtatrix which was out at Intereſt; the Executor laid out conſiderable Sums of his own Money in Payment of the Teſtatrix's Debts before any Money came to his Hands out of her Eſtate, as he ſuggeſted. And *King* C. decreed him his Money, and all juſt Allowances (*a*). *Mich.* 1725. *Macarte* and *Gibſon*, *Select Caſes in Chan.* 50.

(*a*) It being inſiſted that he ſhould have Intereſt for the Money ſo laid out, but his *Lordſhip* ſaid, if Intereſt be a juſt Allowance, the Maſter will allow it, but if not (and he allows it) except to his Report. Tho' his *Lordſhip* ſaid, he would not ſay, that in no Caſe an Executor ſhould have Intereſt allowed, yet he ſhould be extremely cautious of doing it for Money expended before he receives it out of the Eſtate, the Conſequence whereof, he ſaid, he very well ſaw. But the *Maſter* informing the Court, that he never allowed Intereſt unleſs a particular Order was for that Purpoſe, the Court reſerved the Conſideration of Intereſt and Coſts 'till after the Report. *Ibid.*

16. A Jointure was made of Lands and Houſes, leaſed out at 17 *l.* a Year for five Years to come, but worth 108 *l.* a Year. The Huſband covenanted that ſhe (the Jointreſs) ſhould be paid 22 *l.* 10 *s.* Quarterly to make up the preſent Rent 108 *l. per Annum*, in Caſe of his dying within the five Years. On a Bill for Payment of ſeveral Quarters Rent and Intereſt, it was inſiſted that the Intent was to put the Jointreſs in as good Condition before the Rent advanced, as if it actually was

was advanced, but not in a better; and that therefore ſhe ſhould allow Taxes for the Quarterly Payments. But *King* C. ſaid, he knew nothing what was the Intent; but he ſaw here a Specialty, whereby a Man obliges himſelf to pay ſo much Quarterly, for which he did not find he paid any Taxes, and ſo could allow none; and this being a perſonal Covenant for Payment of a Sum in Groſs, Intereſt muſt be allowed from the Time each reſpective Sum became due. *Trin.* 11 *Geo.* 1. *Lyſons* and *Vernon*, *Select Caſes in Chan.* 25.

17. Intereſt was decreed for the yearly Ballance of a renewing Account. 1 *Mar.* 1726. *Aſhton* and *Smith*, *Vin. Abr.* Tit. *Intereſt*, (C) *Ca.* 14.

18. Judgment Debts carry Intereſt. 28 *Ap.* 1726. *Parker* and *Harvey*, *Vin. Abr.* Tit. *Intereſt*, (C) *Ca.* 15.

19. *A.* was the Deviſee for Life of a Church Leaſe for twenty-one Years, with Remainders over. *A.* after the Death of the Teſtator, and after ten Years of the twenty-one were expired, renewed the Leaſe, and paid 36*l.* for a Fine, and a *Guinea* for the Leaſe. It was inſiſted that *A.*'s Executrix ſhould have Intereſt for ſuch Fine. But Lord Chan. *King* denied this, in regard *A.* was to have her Life in the renewed Leaſe by Virtue of the Will; and tho' ſhe perhaps might not out-live the firſt Year of the Leaſe, yet ſhe had her Chance for it; and ſo the Court denied Intereſt for the Fine, but allowed the Charges of the Renewal. *Eaſt.* 1728. *Addis* and *Clement*, 2 *Will. Rep.* 456, 459.

20. Intereſt was allowed upon Demands due by Covenant, tho' objected that they were *not liquidated*, and *only found in Damages*. 28 *April* 1729. *Parker* and *Harvey*, *Vin. Abr.* Tit. *Intereſt*, (C) *Ca.* 16.

21. The Arrears of an Annuity or Rent-charge are never decreed to be paid with Intereſt, but where the Sum is certain and fixed; and alſo where there is either a Clauſe of Entry, or *Nomine Pœnæ*, or ſome Penalty upon the Grantor, which he muſt undergo if the Grantee ſued at Law, and which would oblige him to come into this Court for Relief, which the Court will not grant but upon equal Terms, and thoſe can be no other but decreeing the Arrears with Intereſt. *Per Talbot* C. *Mich.* 1733. *in Caſu Lady Ferrers* and *Lord Ferrers*, *Caſes in Eq. Temp. Lord Talbot* 2.

22. A Widow by Settlement and Will of *B.* her late Huſband was intitled to a Jointure of 1000*l. per Annum*, but was kept out of Poſſeſſion by the Heir at Law, (*B.*'s Son by a former *Venter*) and therefore inſiſted upon the Arrears and Intereſt from her Huſband's Death. But *per Talbot* C. Intereſt for the Rents and Profits of an Eſtate was never yet deceed, the Sum being uncertain (*a*). *Mich.* 1735. *Lady Ferrers* and *Lord Ferrers*, *Caſes in Eq. Temp. Lord Talbot* 2.

(*a*) And tho' it may be ſaid, that the Lady is intitled to an Eſtate of 1000*l. per Annum*, yet that is not ſufficiently certain, being only the Perception of the Profits of an Eſtate, which are not to be paid at any one certain Time, but only as the Tenants of the Land bring them in, ſome at one Time and ſome at another. *Per* his *Lordſhip*. *Ibid.*

23. If a Woman before Marriage aſſigns her perſonal Eſtate In Truſt, with a Power, if ſhe die without Iſſue, to give 1500*l.* by Will or Deed, and after the Marriage by Deed in due Form executed, ſhe limits 1500*l.* to a Truſtee to pay the ſame to *A.* at her Age of twenty-one or Marriage, the Money being payable by Virtue of a Power, which, when executed, draws the Money out of the firſt Truſtee in ſuch a Manner as if it had never been compriſed in the Truſt; therefore the whole Capital Money being in the Hands of the Truſtee for the

the Benefit of the *Ceſtuy que Truſt*, draws the Intereſt along with it, and *A.* ſhall have that immediately. *Manſell* and *Price*, *Trin.* 9 *Geo.* 2. and this confirmed on Appeal to Lord *Talbot*. *MS. Rep.*

24. Where the Party prays his Satisfaction for a ſimple Contract Debt meerly out of perſonal Aſſets, a Court of Equity will of Courſe direct the Debt to be paid with Intereſt, to be computed for one Year after Teſtator's Death. *Per Lord Chancellor.*——But where a real Eſtate is charged with the Payment of Debts, as well as the perſonal, his *Lordſhip* ſaid he did not know that it was abſolutely fixed that ſimple Contract Debts ſhould carry Intereſt from that Time. *Mich.* 1740. *Lloyd* and *Williams*, *Barnard. Chan. Rep.* 229.

(B) Where the Intereſt may exceed the Penalty.

1. WHERE Advantage is made of the Money, Intereſt ſhall be carried beyond the Penalty. 8 *Feb.* 1720. *Lord Dunſaney* and *Plunket*, *Vin. Abr.* Tit. *Intereſt*, (E) *Ca.* 3.

2. Equity will never carry Intereſt beyond the Penalty, where there has been no Demand for many Years. 29 *April* 1721. *Galway* and *Ruſſel*, *ibid.* (E) *Ca.* 4.

3. Where a Bond is only *collateral* Security, Intereſt may be carried beyond the Principal. 1721. *Kerwin* and *Blake*, *ibid.* (E) *Ca.* 4.

(C) What Intereſt a Debt contracted in a Foreign Country ſhall carry here.

1. PLAINTIFF was poſſeſſed of a Ship, and the *Eaſt-India* Company's Agent bought the Ship and the Cargo in her in the *Indies*, of the Commander, who had no Power to ſell her; and there was ſome Proof of the Treachery of the Commander, and of ſome indirect Practices of the Agent; but this ſeemed to have been done without the Privity of the Company, tho' for their Uſe and Benefit. Plaintiff brings his Bill to have an Account of the Ship and Cargo from the Company, who were decreed to account for the ſame; and upon an Iſſue directed, the Value of the Ship and Cargo (at the Time they came to the Hands of the Company's Agent) was found to be 3600 *l.* and now upon the Equity reſerved it was inſiſted that the Plaintiff ought to have *Indian* Intereſt, which was about 12 *l. per Cent.* It was objected, That the Value of the Ship and Cargo being uncertain, it could not, in the Nature of it, carry Intereſt but from the Time it was aſcertained by the Jury: That the Plaintiff had at this Time reſted thirteen Years upon his own Bill, and therefore to allow him *Indian* Intereſt would be to make him a Gainer by his own Delay. But Lord Chan. *Cowper* decreed the Company to pay *Indian* Intereſt (*a*), and the Maſter to ſee what was the Intereſt of Money during theſe Years in the *Indies*, and what is the Charge of returning Money from the *Indies* to *England*, and he to allow *Indian* Intereſt, deducting out of it the Charge of returning, it being to be paid *here*. *Hil.* 1717. *Ekins* and *The Eaſt-India Company*, 1 *Will. Rep.* 395.

(*a*) *Ibid.* 396. This Affair being tranſacted in the *Indies*, where the Perſon, who acted by Authority under the Company, and for their Uſe, muſt be preſumed to have made the common Advantage that Money yields there, the Company muſt therefore anſwer the Intereſt of *that* Country. *Per* his *Lordſhip*.

2. If a Man has my Money by way of Loan, he ought to anſwer Intereſt; but if he detains my Money from me wrongfully, he ought *a fortiori* to anſwer Intereſt; and it is ſtill ſtronger, where one by Wrong takes from me either my Money, or my Goods, which I am trading with, in order to turn them into Money. *Per* Lord Chan. *Parker*, *Hil.* 1717. in the Caſe of *Ekins* and *The Eaſt-India Company*, 2 *Will. Rep.* 396.

(D) In what Caſe Intereſt ſhall be applied to ſink the Principal.

1. PLAINTIFFS as Aſſignees of Meſſrs. *Samuel* and *John Cotton*, Bankrupts, brought their Bill to be relieved againſt ſeveral Bonds, amounting to 5990 *l.* 13 *s.* 4 *d.* made to Sir *Francis Daſhwood*, and to be paid the Sum of 5000 *l.* which was charged to be overpaid by receiving 10 *l. per Cent.* from the Year 1710 to 1724; and it appearing in the Cauſe that the Bonds were originally taken at 6 *l. per Cent.* and that the Intereſt had been afterwards raiſed to 10 *l.* and ſo paid for many Years, Sir *Joſeph Jekyll* Maſter of the Rolls decreed that an Account ſhould be taken of what had been paid for Intereſt, and that ſo much as was really overpaid above the legal Intereſt ſhould be applied to ſink the Principal; and that if Defendants were overpaid, they ſhould refund; or if any Thing due to them, that upon Payment of it the Bonds ſhould be delivered up. And upon Appeal to Lord *Talbot*, the Decree was affirmed. *Mich.* 8 *Geo.* 2. *Boſanquet*, *&c.* and *The Executors of Sir Francis Daſhwood*, *MS. Rep.*

Vide Tit. **Legacy**, *P.*

CAP. LVII.

Jointenants and Tenants in Common.

(A) What ſhall be a Jointenancy, and what a Tenancy in Common.

(B) Of Severance of a Jointenancy.

(C) Where one Jointenant is bound by the Act of the other.

(A) What ſhall be a Jointenancy, and What a Tenancy in Common.

1. THERE is no Diverſity betwixt a Grant to two and their Heirs, and a Grant to two and their reſpective Heirs, or to two and their Heirs *reſpectively*, ſince the Limitation muſt be to both their Heirs, or they cannot both take a Fee-ſimple; and if the Fee enures to both their Heirs, it muſt be to both their Heirs reſpectively. *Per Holt* C. J. to which *Turton* and *Gould* J. agreed. *Hil.* 1700. *in Caſu Fiſher* and *Wigg*, 1 *Will. Rep.* 18.

2. *J. S.* aſſigns a Term to Truſtees, *In Truſt* to permit himſelf to receive the Profits thereof during his Life, and after his Death, *In Truſt* to permit his two Daughters *B.* and *C.* their Executors and Adminiſtrators, to receive the Profits during the Reſidue of the Term, *equally to be divided between them*, they paying two certain Sums within two Years to his two other Daughters. *B.* dies. *C.* mortgages to *D.* And the only Doubt was, Whether theſe two Siſters were Jointenants or Tenants in Common? And his *Honour* held, that this be a Truſt of a perſonal Thing, they were Tenants in Common; and that the Father's Intention appears ſo in the Conſideration, which was, to make ſeveral and diſtinct Proviſions for his two Daughters, and the paying of the Sums appointed to their two Siſters makes them Purchaſers. *Eaſt.* 1701. *Hamell* and *Hunt*, *Prec. in Chan.* 163.

3. *J. S.* by Will bequeathed a Debt of 20,000 *l.* [due to him from the Crown] to his five Grandchildren, *Share and Share alike, equally to be divided between them*, and *if any of them died*, then *his Share to go to the Survivors and Survivor of them.* Lord Chan. *Cowper*, on Debate, held and decreed that the Grandchildren were Tenants in Common and not Jointenants; ſo that if one died, his Share ſhould go to his Executors, and not to the Survivors; and his *Lordſhip* ſaid, the Reaſons on which he grounded his Opinion were, that by the firſt Words [*Share and Share alike*] it was very plain the Legatees were Tenants in Common, and by the ſubſequent Words [*that if any of them died, his Share ſhould go to the Survivor*] it muſt be intended if any of them ſhould die *in the Life-time of the Teſtator*, for by that Conſtruction every Word of the Will would have its Effect and Operation; for were

it not for this Clauſe, if any of the Granchildren had died in the Life-time of the Teſtator, that Grandchild's fifth Part would have been a (*a*) *lapſed Legacy*, and have gone to the Executor as undiſpoſed of by the Will; but by this Deviſe over, if it ſhould ſo happen that any of the Grandchildren ſhould die *in the Life-time of the Teſtator*, ſuch Share would go to the Survivors. That the Will was *inchoate* tho' not *conſummate* from the Execution of it, and that to many Purpoſes in Law it did relate to the (*b*) Time of the Making, and the Words [*if any of my Grandchildren die*] muſt not be taken *indefinitely*, for it is moſt certain that they and all others muſt die; and to underſtand it thus, (*viz.*) if any of my Grandchildren ſhould die before the Receipt of the Money, that was entirely *dehors*, there being nothing in the Will tending to juſtify ſuch Conſtruction. *Trin.* 1707. *Lord Bindon* and *Lord Suffolk* (*c*), 1 *Will. Rep.* 96.——This Decree was reverſed by the Lords, tho' the *Reporter* ſays *Quære* Whether in the Caſe of *Strainger* and *Phillips* (*d*), which was decreed at the Rolls *Mich.* 1730, Lord *Cowper*'s Opinion be not adhered to? *Ibid.* 97.

(*a*) See the Caſe of *Blackwell* and *Day*.

(*b*) *Salk.* 237.

(*c*) The Word *(Survivor)* muſt ſignify ſomething; and therefore it ſhall be conſtrued, *if any of them die* before *the Money received*. *Vin. Abr.* Tit. *Jointenants*, (K) by way of Note to the Abridgment of this Caſe of *Lord Bindon* and *Lord Suffolk*; and cites it from a MS. Table as S.C. and ſays, the Debt bequeathed is *there* ſtated to have been a ſeparate Debt.

(*d*) 1 *Vol. Abr. Eq.* 292. *Ca.* 11.

4. *J. S.* deviſes his Lands to be ſold for Payment of his Debts and Legacies, and the Surplus to be veſted in Lands, *to be ſettled on* A. *and* B. *and the Survivor of them*, and *their Heirs*, *equally to be divided between them Share and Share alike*. *A.* dies in the Teſtator's Life-time, and then the Teſtator dies, leaving *P.* Wife of *T.* his Heir at Law. The Queſtion was, Whether *A.*'s Moiety ſhould deſcend as a *lapſed* Legacy, and undiſpoſed of, to the Teſtator's Heir at Law, or go to *B.* the ſurviving Deviſee the Plaintiff? This Cauſe was argued before the Lords Commiſſioners *Gilbert* and *Raymond*, who adjourning it over for it's Difficulty, it was the firſt Cauſe that came before Lord Chan. *King*, who held that the firſt Part of the Deviſe being to two and the Survivor of them, makes them plainly Jointenants for Life, and therefore they ſhall be ſo taken; and that as to the Words [*and to their Heirs*, *equally to be divided between them Share and Share alike*] theſe are plainly Words importing a Tenancy in Common, and ſhall operate accordingly, ſo as to make them Tenants in Common of the Inheritance, by which Conſtruction of the Will every Word takes Effect, and *A. dying in the Life-time of the Teſtator*, *B.* became intitled to the whole for Life, and the Inheritance being deviſed in Common, the one Moiety having lapſed by *A.*'s Death in the Teſtator's Life-time, *B.* ſhall take all for Life, and a Moiety of the Inheritance ſhall deſcend to the Teſtator's Heir at Law expectant on *B.*'s Death, and the other Moiety of the Fee to *B.*'s Heir. *Eaſt.* 1725. *Barker* and *Giles*, 2 *Will. Rep.* 280, 283.

His *Lordſhip* ſaid, that if the Bar were not ſatisfied with this Opinion, he would take Time to conſider of it 'till next Morning; but his *Lordſhip* delivered his Thoughts with ſo much Clearneſs that both Sides acquieſced, and thereupon it was decreed as above. *Ibid.* And this Decree was affirmed by the Lords. *Ibid.*——2 *Mod. Caſes in Law and Eq.* 157. S.C.

5. Deviſe to Truſtees and their Heirs, *In Truſt* for *A.* for Life, Remainder to her Children by her then Huſband, *In Truſt* that they ſhall receive the Profits thereof when they come of Age. *A.* had then *one* Child; and four Years afterwards the Teſtator made a Codicil, by which he changed one of the Truſtees in the Will, and confirmed all the Deviſes therein; and then *A.* had two Children more, who died. The Children had an Eſtate in Fee as Tenants in Common. 11 *Geo.* 1. *Bateman* and *Roach* (*e*), 2 *Mod. Caſes in Law and Eq.* 104.

(*e*) *Vide P. Ca.*

6. *A.*

6. *A.* being ſeiſed of a Term, and having three Daughters, did by Indenture aſſign the ſame to *J. S.* his Executors and Adminiſtrators, *Upon Truſt* that he and they ſhould permit *A.* to take the Profits during her Life, and after her Deceaſe, *Upon Truſt* for the Uſe and Benefit of her three Daughters *equally amongſt them*, and *the Survivors and Survivor of them, her and their Executors, Adminiſtrators and Aſſigns.* And the Queſtion was, If the Daughters took as Jointenants or Tenants in Common? Lord Chan. *King* held that the Words *equally amongſt them* being coupled with the ſubſequent Words *and to the Survivors and Survivor of them*, made them Jointenants, and conſequently the whole muſt go to the ſurviving Siſter. And decreed accordingly. *Mich.* 6 *Geo.* 2. *Oakley* and *Young*, *MS. Rep.*

7. *J. S.* had three Sons and two Daughters *A.* and *B.* and deviſed three Fourths of his *perſonal* Eſtate to his *three Sons equally*, and the other Fourth he deviſed to the Sons, *In Truſt only for his two Daughters*, and by their Approbation to be put out at Intereſt in the Name of his three Sons, and the Intereſt to be paid to his two Daughters reſpectively during their natural Lives, and afterwards to their or either of their Child or Children; and for Default of ſuch Iſſue, he deviſed it to his three Sons equally, *&c.* *B.* dies, leaving a Son. *A.* died without Iſſue. His *Honour* decreed the Moiety of *B.* to her Son, and the Moiety of *A.* to the Teſtator's three Sons. And upon a Rehearing the Queſtion was, Who ſhould have the Moiety of *A.* And Lord Chan. *Talbot* held that tho' the Sons had the abſolute Property in the three Fourths, yet *A.* and *B.* had not the abſolute Property in the other Fourth, but only *in the Intereſt, which was to be paid to them reſpectively during their Lives*, and that by this Word (*reſpectively*) they are Tenants in Common, and that the next Limitation veſts the whole Property in the Children, and they take as Purchaſers according to *Wild*'s Caſe, 6 *Rep.* 16. *a.* And that he ſaw no Reaſon why they muſt take reſpectively as well as their Mothers, there being no Words of Diviſion in the Deviſe to them, but the whole is to go over either to their Child or Children, and that wherever the Teſtator intended a Tenancy in Common he expreſſed it, as by the Words (*reſpectively*) in the Caſe of the Daughters, and the Words (*equally to be divided*) in Caſe of the Sons; and his *Lordſhip* declared that *J. S.*'s Intention was that any Child of either *A.* or *B.* ſhould take the whole of this fourth Part, and no Part to go over to the three Sons 'till Failure of ſuch Iſſue. And decreed accordingly. *Eaſt.* 1734. *Stephens* and *Hide*, *Caſes in Eq. Temp. Lord Talbot* 27.

(B) Of Severance of a Jointenancy.

1. A Right of Survivorſhip is as good as a Right by Deſcent, neither is there any Thing *unreaſonable* or *unequal* in the Law of Jointenancy, each having an equal Chance to ſurvive; and the Duration of all Lives being uncertain, if either Party has an ill Opinion of his own Life, he may *ſever* the Jointenancy by a Deed *granting over a Moiety in Truſt for himſelf*, ſo that Survivorſhip can be no Hardſhip where either Side may at Pleaſure prevent it. *Trin.* 1729. *Per* his *Honour*, in the Caſe of *Cray* and *Willis*, 2 *Will. Rep.* 529.

2. It is plain that at Law in Caſe of a Grant of a Term for Years to two, the Thing granted muſt ſurvive, if the Jointenancy be not *ſevered.* *Per* his *Honour*, in the above Caſe, *ibid.*

3. Upon a *Severance* of the Jointenancy in Land, the Eſtate does *not* continue during the Life of each Donee, but determines upon the Death of one, for his Moiety. *Per* his *Honour*. *Mich.* 1734. in the Caſe of *Cowper* and *Cowper*. Cites *Dyer* 67. *a.* and 1 *Inſt.* 197. *a.* 2 *Will. Rep.* 672.

4. If *A.* and *B.* jointly purchaſe a Leaſe, and convey it to *C.* without any Conſideration, ſo that *C.* is in Equity a Truſtee for them, but no Declaration of Truſt is made, the Survivor ſhall have this Truſt, and the Aſſignment is no *Severance* of the Jointenancy. *Rex* and *Williams*, *in Scac'*, *Hil.* 9 *Geo.* 2. *MS. Rep.*

(C) Where one Jointenant is bound by the Act of the other.

1. TWO Jointenants of the Office of Fines for original Writs in *Wales*, commit the Cuſtody of the Seal of the Office to *B.* Both of them commence a Suit againſt *B.* in Equity for an Account; one releaſes all Actions and Accounts to *B.* On this the other Jointenant brings the Bill againſt his Companion and *B.* ſurmiſing the Releaſe to be obtained by Fraud; *B.* pleads the Releaſe, and held a good Plea, tho' the Bill ſeeks Relief againſt it; for a general Allegation of Combination is not ſufficient, without ſpecifying ſome Fraud in particular, or Combination in particular, in obtaining it; and the Releaſe here is good at Law, and no Fault in *B.* to get it; and if Plaintiff has Remedy, 'tis only againſt his Companion. *Hardr.* 168.

2. Several named Defendants; one is not ſerved nor did appear; and yet Coſts taxed for him with the others by Miſtake; he releaſes, this ſhall not bar the others. *Hardr.* 183.

CAP. LVIII.

Legacies.

(A) Of veſted and lapſed Legacies, being to be paid at a future Time or certain Age, to which the Legatees never arrive;——Of lapſed Legacies by the Legatees dying in the Life-time of the Teſtator;——And here in what Caſes a lapſed Legacy ſhall ſurvive to the other Legatees.

(B) Of ſpecifick and pecuniary Legacies;——And here of abating and refunding by Legatees;——And in what Caſes Security ſhall be given for the Payment of a Legacy.

(C) Of the Time of Payment of a Legacy.

(D) Concerning reſiduary Legatees.

(E) What Legatees ſhall have Intereſt and Maintenance.

(F) Ademption of a Legacy.

(G) In what Caſe a Legacy given by a Codicil ſhall not be conſtrued in Satisfaction of a Legacy given by a Will, &c. ——In what Caſe a Legacy by a Will ſhall not be in Satisfaction of an Annuity.

(H) Of joint Bequeſts.

(I) Remedy for Legatees, in what Caſes, and in what Court, &c. *Vide* (B) *P.*

(K) Donatio Cauſâ Mortis.

(A) Of veſted and lapſed (*a*) Legacies, being to be paid at a future Time or certain Age, to which the Legatees never arrive;—Of lapſed Legacies by the Legatees dying in the Life-time of the Teſtator;—And here in what Caſes a lapſed Legacy ſhall ſurvive to the other Legatees.

(*a*) Where a Deviſe is to one, payable at a Time which muſt ſome Time or other come, there the Legacy is immediately a veſted Legacy; but if deviſed upon an uncertain Event, which may or may not happen, and the Party dies before it comes, the Legacy is lapſed. *Harvey* and *Aſton* (*b*), *MS. Rep.*——If a Legacy be limited to *A.* In Truſt for *B.* to be laid out by the Direction of *C.* tho' *A.* and *C.* die in the Teſtator's Life-time, yet the Legacy is good. *MS. Notes.*——Teſtator deviſed the Reſidue of his Eſtate among his Children equally, but they were to pay their Shares equally among their Children. If any of the Children die without having Iſſue, yet their Share is not lapſed, but ſhall go among their Repreſentatives; ſuch a Gift being to be looked upon as beneficial to the Children, with a contingent Limitation to determine their Intereſt on the Birth of a Child. *Salt* and *Chambers* (*c*), *MS. Rep.*——A Legacy given at twenty-one or Marriage, is contingent; and if the Legatee die before, the Legacy is lapſed, for the Contingency can never exiſt. *MS. Notes.*

(*b*) *Quære* Term and Year.

(*c*) *Quære* Term and Year.

1. *A.* GIVES to *B.* 500 *l. when he ſhall attain the Age of twenty-one* or *be married*, which ſhall firſt happen, to be paid with Intereſt. *A.* dies; and *B.* dies *before twenty-one* or *Marriage*. Reſolved, That the Executor of *B.* ſhould have the Legacy; *this Caſe* that the Executor, being of full Age, ſhould have it preſently, for the Deſignation of the Payment of it at the Age of twenty-one Years

2 *Freem. Rep.* 24. S. C. *in totidem verbis*, ſays, that it was ruled in

Years was by Reaſon of the *Incapacity* of the Legatee before that Time to manage it, which Reaſon ceaſes in the Executor; and *when it is to be paid with Intereſt*, it is the ſame Thing to the Executor, for it will be no Advantage to him to keep it in his Hands, ſo long as he pays Intereſt for it. *Ibid.* 25.——2 *Chan. Caſes* 155. *Lampen* and *Cloberry*, *Mich.* 35 *Car.* 2. decreed that the Legacy belonged to *B.*'s Adminiſtrator, ſays, Lord Keep. *North* once pronounced a *Reverſal* of the Decree, but being much preſſed that Teſtator's Intention would be clear in the Proofs, he ſuſpended it to hear the Proofs.——2 *Vern.* 199. S. C. cited and ſays, that it was decreed that *B.*'s Adminiſtrator ſhould have the Legacy, but that he muſt wait and expect for it 'till *B.* ſhould have been twenty-one; and that this was confirmed on an Appeal to the Lords, tho' Lord *Nottingham* for ſome Time doubted if it ſhould not be paid preſently.——2 *Vent.* 342. S. C.

gacy; for this is a *preſent Duty*, tho' the *Solvendum* be *in futuro*; and it is not a *contingent* Gift, as it would have been, if the Words, *to be paid with Intereſt*, had been omitted, for now it is all one as if he had ſaid, *I give* B. 500 l. *to be paid with Intereſt when he ſhall attain the Age of twenty-one Years* or *be married*; which, without Queſtion, had veſted in *B.* and his Executor ſhould have had it if he had died. *Trin.* 1677. *Cloberry* and *Lampen*, *MS. Rep.*

Vern. 255. *Mich.* 1684. *Barlow* and *Grant*, S. C. *accord'*.

2. *A.* deviſed to *B.* 20 *l.* to *put him out Apprentice* when he ſhould come to the Age of ſeventeen Years, and he died before that Age; and reſolved, That his Adminiſtrator ſhould have it. *Mich.* 1684. *Anon.* 2 *Freem. Rep.* 89.

3. A Deviſe of a Legacy to a Mother for Maintenance of her Child; tho' the Child die, the Mother ſhall have the Legacy. *Per Lord Keeper*, *Eaſt.* 1703. in the Caſe of *Buſhnell* and *Parſons*, *Prec. in Chan.* 219.

4. Where *A.* gives a Legacy to *B. his Executors, Adminiſtrators and Aſſigns*, if, in ſuch Caſe, the Legatee dies in the Life-time of the Teſtator, tho' the Executors are named, yet the Legacy is loſt; for the Words [*Executors, Adminiſtrators and Aſſigns*] are void, being but *Surpluſage*, and *expreſſio eorum, &c.* and *they are by Suppoſition of Law named only to take in Succeſſion*, and *by way of Repreſentation*, as an Heir repreſents the Anceſtor in Caſe of an Inheritance. Agreed *per Cur'* and Counſel on both Sides (*a*). *Mich.* 1705. in the Caſe of *Elliot* and *Davenport*, 1 *Will. Rep.* 84.

(*a*) But it was held that a Will may be ſo penned, as that, tho' the Legatee died in the Life-time of the Teſtator, yet his Executors ſhould have the Legacy; but then it ought to appear in the Will plainly and by direct Words that this was the Teſtator's Intention. *Ibid.* 85.

Gilb. Rep. in Eq. 11. S. C. —*Prec. in Chan.* 267. S. C.—— 2 *Vern.* 617. S. C.

5. *A.* deviſes his Lands to his eldeſt Son *B.* in Fee, and adds, "*But my Will and Mind nevertheleſs is, that* B. *ſhall pay out of the* "*Lands ſo deviſed to him, the Sum of* 600 l. viz. *to my Daughter* M. "200 l. *at her Age of twenty-one Years, and to my Son* J. 200 l. *at* "*his Age of twenty-one, and to my Son* N. 200 l. *at his Age of twenty-*"*one; and if my Son* B. *ſhall die before he attain the Age of twenty-*"*one Years, then my Will is, that my Son* J. *ſhall not have the* 200 l. "*ſettled on him, but that it ſhall be paid to my Daughter* M. *and Son* "N. *to be added to their Portions, and* J. *to have all the Eſtate given* "*to* B. *paying the* 600 l. *as before expreſſed; and my ſaid Children* "*ſhall be allowed* 4 l. per Annum *Maintenance for every* 100 l. *'till* "*their ſeveral Portions are paid.*" *B.* dies before twenty-one. Plaintiff married *M.* and has Iſſue by her. *M.* died two Months before her Age of twenty-one. And the Queſtion was, Whether this was not a ſubſiſting Charge upon the Land, and an Intereſt ſo veſted in *M.* as to intitle the Plaintiff, as her Adminiſtrator, to the Legacies? But Lord Chan. *Cowper* diſmiſſed the Bill as to both Demands, becauſe there were no Words in the Will which veſted any Intereſt in thoſe Legacies before the Age of twenty-one Years; and as to the other 100 *l.* that was governed by the other Legacies. *Mich.* 1708. *Carter* and *Bletſoe*, *MS. Rep.*

6. A Man deviſes all his Lands to his Executors for ten Years, and that after the ten Years 100 *l.* ſhould be paid out of them to *H.* and *A.* provided, that if neither of them were living, then nothing was to be raiſed. *H.* dies before the ten Years are expired; his Executors or Adminiſtrators ſhall have nothing, for the Legacy is lapſed; but *A.* ſhall have her Portion. *Per* Lord Chan. *Cowper*, *Mich.* 6 *Ann. Vin. Abr.* Tit. *Deviſe*, (B. d.) *Ca.* 19. *P.* 389.

7. Lord Chancellor held in the Caſe of *Langley* and *Oates*, *Trin.* 7 *Ann.* that if Lands are deviſed in Fee, In Truſt to raiſe 300 *l.* to be paid for a Portion to *J. S.* at twenty-one or Marriage, and the Legatee dies before twenty-one or Marriage, it ſinks into the real Eſtate. *MS. Rep.*

8. *A.* poſſeſſed of a perſonal Eſtate, deviſed it to Defendant, In Truſt to pay his three Grandchildren 300 *l.* each at twenty-one, or Time of Marriage, which ſhould firſt happen, directing, that if any of them died before twenty-one, or Marriage, that the Legacy of the Deceaſed ſhould ſurvive. One died before the Teſtator, unmarried, and under Age; another died after the Teſtator unmarried. Defendant paid the Survivor his 300 *l.* upon his attaining twenty-one, and alſo 300 *l.* for the Child that died after the Teſtator, but refuſed to pay the 300 *l.* for that which died before the Teſtator. The Survivor preferred his Bill for the Payment of that Legacy. *Lord Chancellor:* A Will in a hundred Caſes ſpeaks before Death; and his *Lordſhip* put a Caſe of a Deviſe of a perſonal Eſtate to *A.* when he comes to the Age of twenty-one, and if *A.* does not attain that Age, then over to *B.* *A.* dies before twenty-one in the Life of the Teſtator; (by his Opinion) the Deviſe to *B.* is good, and he ſhall take as the primary Legatee, and not by way of Remainder. The ſame in Caſe of ſuch Deviſe of Lands; as if a Manor is deviſed to *A.* and his Heirs, if he attain the Age of twenty-one, if not, then over to *B.* *A.* dies before that Age in the Life of the Deviſor; the Deviſe to *B.* is good. Decreed for Plaintiff. *Trin.* 7 *Ann. Hickman* and *Stroud*, *MS. Rep.*

9. In Caſe of a Deviſe of 1000 *l.* which the Deviſor had upon a Mortgage on a College Leaſe, to be paid when the Deviſee comes of full Age, Firſt Queſtion was, Whether this was a veſted Legacy? And held it was. Secondly, Whether this Legacy carried Intereſt from the Deviſor's Death? And by *Lord Chancellor*, It will not, but only from the Time the Deviſee comes of Age. If a Mortgagee doth deviſe his Principal, the Intereſt doth not paſs, becauſe it is a different Thing; and here the Deviſe is not of the Mortgage but of 1000 *l.* to be raiſed out of the Profits. His *Lordſhip* ſaid the Executor is to receive the Profits, and to give Security for what he ſhall receive. Thirdly, Whether this is a ſpecifick Legacy, and only chargeable upon the Mortgage, and not upon the Reſidue of the Teſtator's perſonal Eſtate? And his *Lordſhip* held it to be a Legacy chargeable upon the Mortgage. *Eaſt.* 8 *Ann. Chambers* and *Jeoffery*, *MS. Rep.*

10. If a Legacy be deviſed to one, generally to be *paid* or *payable* at the Age of twenty-one, or any other Age, and the Legatee die before that Age, yet this is ſuch an Intereſt veſted in the Legatee, that his Executors or Adminiſtrators may ſue for and recover it; and with this agrees the Law of the Spiritual Court, as was reported by Dr. *Awberry*, 1 *Leon.* 177. *Godb.* 182. for this is *Debitum in præſenti*, tho' *Solvendum in futuro.*——But if a Legacy be deviſed to one, *at twenty-one*, agreed *per Cur'*.——But that if ſuch Legacy were to ariſe out of *Lands*, or a *Term for Years*, tho' it were limited to the Party generally to be *paid*, or *payable* at ſuch an Age, there for the Benefit of the Heir the Legacy ſhould *ſink*, and not go to the Repreſentatives of the Party ſo dying. *Ibid.* 318.

Prec. in Chan. 317. *Mich.* 1711. *Stapleton* and *Cheales*, S. C. *in totidem verbis*, and ſays, it was ſo argued by Counſel, and

one, or *if* or *when he ſhall attain the Age of twenty-one, and the Legatee die before that Age*, in this Caſe the Legacy is *lapſed*, and ſhall not go to his Executors or Adminiſtrators.——But if in that Caſe the ☞ Teſtator had added, that in the mean Time, or 'till the Legatee attains that Age, that *he ſhall have Intereſt for the ſaid Legacy*, at ſuch a Rate, *from the Time of his the Teſtator's Deceaſe*, this ſubſequent Clauſe explains the Intent of the Teſtator, ſo as to make the Legacy, which was the Principal, an Intereſt *veſted* which ſhall go to his Executor or Adminiſtrator, tho' the Legatee die before that Age; becauſe, if the Principal were not due preſently upon the Teſtator's Deceaſe, there could be no Intereſt accrue to the Legatee. And this has been ſettled in *Cloberry*'s Caſe, 2 *Vent.* and *Yates* and *Fettiplace*, *Mich.* 1711. *Anon. MS. Rep.*

11. *J. S.* the Defendant's Father, had two Sons *A.* and *B.* and two Daughters *C.* and *D.* and by Will gave 1500*l.* to *B.* and 1000*l.* apiece to *C.* and *D.* and directed, that if any of the ſaid three younger Children ſhould die before twenty-one or Marriage, then the Portion of the Child ſo dying ſhould go over to the Survivors; and gave his *real* Eſtate to *A.* his eldeſt Son, chargeable with theſe Portions. *C.* died within Age, and before Marriage; afterwards *B.* died alſo within Age, and *before* Marriage, in the Life-time of the Teſtator; afterwards the Teſtator had another Son, whom he named *B.* and afterwards wrote a Codicil at the Bottom of his Will, by which he confirmed the Will, thereby taking Notice that ſince the laſt it had pleaſed God to give him another Son, and gave 500*l.* apiece to his Son *B.* and his ſurviving Daughter, *over and above what he had given them by his ſaid Will.* Upon this Cauſe coming on before Lord Chan. *Harcourt*, the Queſtion was, Whether upon the Death of *B.* the Share of the deceaſed Daughter that was veſted in *B.* ſhould ſurvive with *B.*'s Portion? And his *Lordſhip* decreed it ſhould not; becauſe the Portion of the deceaſed Daughter became veſted in *diſtinct Shares* in the ſurviving Children, and there were no Words for creating a Jointenancy of theſe Shares (*a*). Afterwards, upon arguing the other Points reſerved before Lord *Cowper*, it was objected, That by the Death of *B.* in the Life-time of the Teſtator the 1500*l.* given to him became a lapſed Legacy, and ſhould ſink into the Eſtate. But his *Lordſhip* ſaid, It was improper to call this a lapſed Legacy; that it was a Portion given over (*b*), and ſhould take Effect; that the making of the Codicil was a Republication of the Will, and did amount to a ſubſtituting the ſecond *B.* in the Place of the firſt *B.* as if the Teſtator had made his Will anew, and had wrote it over again, by which new Will the ſecond *B.* muſt take; and that the fixed Intention of the Teſtator appeared to be, that *B.* ſhould have more than his Daughter; whereas, if the 1500*l.* Legacy ſhould be taken to be a lapſed Legacy, then the ſurviving Daughter ſhould have twice as much as *B.* *Hil.* 1714. *Perkins* and *Micklethwaite*, 1 *Will. Rep.* 274.

(*a*) The *Reporter* here puts a *Quære*, for (ſays he) a Deviſe over to two or more, is a joint Deviſe of Courſe, unleſs there be Words to ſever the Jointenancy.

(*b*) *Vide Lord Bindon* and *Lord Suffolk*, and *Northey* and *Stranger*.

12. *J. S.* having a Wife and three Daughters, *A. B.* and *C.* and being poſſeſſed of a perſonal Eſtate, deviſed all to his Wife, upon Condition that ſhe would immediately after his Death pay 900*l.* into the Hands of *D.* *In Truſt* to lay out the ſame at Intereſt, and pay the Intereſt thereof to his Wife for her Life, if ſhe continued ſo long a Widow, and after her Death or Marriage, *In Truſt* that *D.* ſhould divide the 900*l.* equally among his three Daughters at their reſpective Ages of twenty-one or Marriage, *provided, that if all his three Daughters ſhould die before their Legacies ſhould become payable, then the Mother, whom the Teſtator alſo made Executrix, ſhould have the whole* 900 l. The Wife pays the 900*l.* to *D.* and marries Defendant. *A.*

and *B.* die under Age and unmarried, and *C.* attains to twenty-one. And *per* Lord *Macclesfield*, *C.* is intitled to the whole 900 *l.* by Virtue of the Clauſe in the Will which ſays, " If all the three Daugh-" ters ſhall die before their Age of twenty-one or Marriage, then the " Wife ſhall have the whole 900 *l.*" For this plainly excludes the Mother from having the 900 *l.* or any Part of it, unleſs theſe Contingencies had happened; and the Share of 300 *l.* apiece did not veſt abſolutely in any of the three under Age ſo as to be ſubject to the Statute of Diſtributions, in regard it was poſſible all the three Daughters might die before their Ages of twenty-one or Marriage, in which Caſe the whole 900 *l.* is deviſed over to the Mother. And ſo decreed the whole to belong to the ſurviving Daughter. *Trin.* 1722. *Scott* and *Bargeman*, 2 *Will. Rep.* 69.

13. It is a ſtanding Rule in the Court of Chancery, that where a Portion or *Legacy* is to be paid out of an Eſtate *in Lands*, at *ſuch a Time or at ſuch an Age*, there, in Favour of the Heir at Law, if the Legatee dies *before* the Day, the *Legacy* or Portion is ſunk and gone; but 'tis otherwiſe if the Legacy is to be paid out of the *perſonal* Eſtate, for there it veſts immediately, and not to be deveſted, tho' the Legatee die before the Day appointed for the Payment. *Mich.* 11 *Geo. Per Cur'*, in the Caſe of *Bateman* and *Roach*, 2 *Mod. Caſes in Law and Eq.* 106.

14. A Legacy deviſed to *J. S.* to be paid at twenty-one or Marriage, which ſhall firſt happen, ſo as ſuch Marriage be *with* the Conſent of *B.* if not, deviſed over. *J. S.* marries in the Life-time of *B. without* his Conſent, and dies before twenty-one, leaving Iſſue. The Legacy is gone. *Trin.* 11 *Geo.* 1. *Piggot* and *Morris*, *Select Caſes in Chan.* 26.

15. *J. S.* has two Sons *A.* and *B.* and three Daughters *C. D.* and *E.* and deviſes his Lands to be ſold to pay his Debts; and as to the Monies ariſing by Sale after Debts paid, he gives 200 *l.* thereout to his eldeſt Son *A. at twenty-one*, the Reſidue to ſaid *B. C. D.* and *E.* equally, at their reſpective Ages of twenty-one or Marriage. *A.* died before twenty-one, without having been ever married. And Sir *J. Jekyll* at firſt inclined to think that this 200 *l.* would *not* go to the younger Children, becauſe only *the Reſidue* of the Money ariſing by Sale is given to them, which ſeemed to have excluded the 200 *l.* Legacy; ſo that his *preſent* Opinion was that the 200 *l.* belonged to the Heir; and afterwards (on looking into Precedents) decreed, that the 200 *l.* ſhould be conſtrued as Land, and deſcend to the Heir; for that it was the ſame as if ſo much Land as was of the Value of 200 *l.* was *not* directed to be ſold, but ſuffered to deſcend. *Mich.* 1727. *Cruſe et al'* and *Barley* and *Banſon*, *at the Rolls*, 3 *Will. Rep.* 20.

16. *J. S.* by Will in 1715 (*int' al'*) deviſed to *A.* and *B.* an Annuity of 200 *l.* a Year, iſſuing out of the Exchequer, In Truſt that they ſhould pay the ſame from Time to Time unto *C.* his Siſter Wife of Defendant, for her Life, and after her Deceaſe that they ſhould aſſign the ſame unto and for the Uſe of all the Children of the ſaid *C.* equally to be divided amongſt them; and if ſhe ſhould leave but one Child, then that they ſhould aſſign all to that one Child; and declared the ſaid Annuity for *his* ſeparate Uſe; and Teſtator likewiſe deviſed another Exchequer Annuity of 50 *l.* a Year to the ſame Truſtees, In Truſt to apply the ſame to the Maintenance and Education of *D.* his Niece until ſhe ſhould arrive at her Age of twenty-one; and after ſhe ſhould arrive at that Age, then In Truſt to aſſign the ſaid Annuity to ſaid *D.* her Executors and Adminiſtrators. Teſtator made the ſaid Truſtees *A.* and *B.* Executors,

his in the Original.

Executors, and ſaid *A.* and *C.* his Siſter reſiduary Legatees. Teſtator died; and *D.* died before twenty-one inteſtate; and *C.* the Teſtator's Siſter likewiſe died, without leaving any Child at her Death; and having never had but one Child, *viz. D.* the Legatee of the 50 *l.* a Year, and who died an Infant as before, two Queſtions were made, Firſt, Whether the 50 *l.* a Year Annuity given in Truſt to *D.* veſted in her ſo as to go to her Repreſentative, or was lapſed by her Death and fell in to the *Reſiduum* of Teſtator's Eſtate? And, Secondly, As to the 200 *l.* a Year Annuity given In Truſt for *C.* whether the reverſionary Intereſt in that after *C.*'s Deceaſe veſted in *D.* the Daughter during *C.* the Mother's Life, or was likewiſe lapſed into the reſiduary Eſtate upon *C.*'s leaving *no* Child at her Death? As to the firſt Queſtion, upon the 50 *l.* a Year to *D.* it was very little debated, and given up, that it was a veſted Legacy in reſpect of the Profits given for the Maintenance, *&c.* of the Legatee during her Infancy, *&c.* and compared to the Caſe of a Legacy given at twenty-one, and Intereſt given in the mean Time. But the other Queſtion upon the 200 *l.* was much debated; and his *Honour*, after Argument, held, that it was lapſed, and did not veſt in *D.* the Daughter, but was merely contingent during *C.* the Mother's Life, and that the Time of her Death was the Time when the Children were to take; for that the Will is clear that the Teſtator intended *C.* his Siſter's Children, if more than one, ſhould take as Tenants in Common, and if but one at her Death, then that one to have all; whereas if this were to veſt in the Children that might be in the Mother's Life-time, then it would follow, that their Shares would go to their Repreſentatives, in Caſe they died before their Mother; when yet if there was but one living at the Death of the Mother, that Child was to have the whole, and therefore the Diviſion muſt be at the Death of the Mother amongſt the Children as they ſhould then happen to be; and that is making the Words of the Will conſiſtent in every Part. That the Expreſſion of leaving Children, *&c.* has always been underſtood leaving at the Death of the Party, and not to leaving generally. That there is no poſſible Way to preſerve a Tenancy in Common to all, and yet the whole to go to one Child only that ſhould ſurvive the Mother. And therefore held that no Child was to take but ſuch as was living at the Death of the Mother; and in this Caſe there being none, the remaining Intereſt in the Annuity is to be conſidered as undiſpoſed of, and to fall into the *Reſiduum* of the Teſtator's Eſtate. Held the Annuity here being given to Truſtees, makes no Difference. *Dec.* 7, 1729. *Smith* and *Vaughan*, *Vin. Abr.* Tit. *Deviſe*, (Z. c.) *Ca.* 32. *P.* 381.

That a reverſionary Intereſt may veſt immediately and be tranſmiſſable to Repreſentatives, was cited, *Corbet* and *Palmer*, 26 *Feb.* 1734, before Lord *Talbot*, where the Caſe was, that *J. C* by his Will gave ſeveral ſpecifick Legacies, and the Reſidue of his perſonal Eſtate to his Wife for her Life, and directed, that after her Deceaſe, and the other Legatees paid, the Reſidue ſhould be divided amongſt ſix Perſons, named in his Will; and two of them died after the Teſtator in the Life-time of the Wife. And Lord Chan. *Talbot* held, that the Shares of thoſe two belonged to their Repreſentatives; and declared, that if a Legacy is given at twenty-one or Marriage, and the Legatees die before, in that Caſe the Legacy is gone, becauſe the Condition can never exiſt. Otherwiſe where upon a Condition that may exiſt after the Death of the Legatee; as in the Caſe in 2 *Vern.* 347. *Anon.* a Legacy to *J. S.* at twenty-one, and if he die before, then to *A. B.* and *J. N.* and they both die before *J. S.* and who likewiſe dies before twenty-one; and decreed the Legacy to the Repreſentative of the Survivor of *A. B.* and *J. N.* *Ibid.*

17. *J. S.* makes his Will, and gives 600 *l.* to his Son *A. to be paid with all convenient Speed*, and gives 500 *l.* to his Son *B. to be paid in convenient Time*, and appoints his *real* Eſtate to come in *Aid* of the *perſonal*; and goes on, and ſays, *But in Caſe either of his ſaid Sons ſhould happen to die before they have received all or any Part of their Legacy, then the remaining Sum or Sums of Money ſhould go and be paid to the Survivor.* A. *died in the Teſtator's Life-time*, and a Bill is brought by *B.* the Survivor for the Legacy left to *A.* In this Caſe there was no Difference.

Difference. The *Attorney General* ſaid, it had been frequently determined, that if a Legatee dies in the Life-time of the Teſtator, and there be a Survivor created, it ſhall *not* be conſidered a lapſed Legacy, becauſe there was a Survivor created, but be looked on as an immediate Deviſe, and the Survivor ſhall receive both. And ſo it was decreed. *Per King* C. *Trin.* 2 *Geo.* 2. *Hornſley* and *Hornſley*, *Select Caſes in Chan.* 73.

18. If a Legacy is payable *at twenty-one, or Marriage with Conſent of* A. *teſtified in Writing under his Hand*, but *not otherwiſe*; at twenty-one the Legacy is payable at all Events, tho' the Marriage is without Conſent, but not ſooner, unleſs the Marriage is *with* Conſent. 13 *June* 1730. *Dobbins* and *Bland*, *cor'* Lord Chan. *King*, *MS. Rep.*

19. *J. H.* deviſed to Plaintiff his Grandaughter *the annual Sum of* 100 l. *for five Years, to commence from and after her Marriage with Conſent of his Executors and Truſtees, teſtified in Writing*; the firſt of which annual Payments ſhall begin to be made unto the Plaintiff at the Expiration of the firſt Year after Marriage with ſuch Conſent. The Plaintiff married *without* Conſent, and it was inſiſted for Defendant that this was not merely a Deviſe *in terrorem*, but a Condition precedent of a Limitation of the Time when the Annuity ſhould commence. And *King* Lord Chancellor was inclined to be of that Opinion, but the reſiduary Legatee, who was an Infant, not being before the Court, he ordered it to ſtand over. (Refers to 2 *Vern.* 293, 333, 572.) 13 *June* 1730. *Anon. MS. Rep.*

20. A Legacy out of a perſonal Eſtate payable to an Infant at twenty-five, if the Infant dies *before* twenty-five, his Repreſentatives may have it, it being a veſted Legacy. *Otherwiſe* if the Legacy is charged upon a real Eſtate, for then it ſhall ſink into the Land for the Benefit of the Heir. *Eaſt.* 1731. *Duke of Chandos* and *Talbot*, *cor'* Lord Chan. *King*, 2 *Will. Rep.* 601.

MS. Rep. S. C. ſays, upon the Maſter's Report the Queſtion was, If a Sum is *deviſed to* A. *payable at two-and-twenty*, and Teſtator *charges his real* and *perſonal Eſtate with the Payment of it*, and the *perſonal falls ſhort*, and *A. dies before twenty-one*, whether, in ſuch Caſe, it *is lapſed*, and *ſhall ſink for the Benefit of the Heir? Per* Mr. *Solicitor General*, If this was a Legacy to come out of the *perſonal* Eſtate, it would be veſted, and ought according to the *Practice of the Eccleſiaſtical Courts* to be raiſed for the Benefit of the Repreſentatives of the Legatee; but *when charged on the Land, if the Legatee dies before the Time of Payment*, it ſhall *never* be raiſed. And of this Opinion was Lord Chan. *King*, and decreed *accord'*. *Vide* 2 *Vent. Pawlett* and *Pawlett*.——2 *Vern.* 92, 248, 416, 457.——1 *Vern.* 72.——*Dy.* 59. *Pl.* 15. *b.*——1 *Salk.* 415.

21. Deviſe of Lands to Truſtees in Fee, *In Truſt* within ſix Years after the Teſtator's Death to raiſe and pay 1500 *l.* to his Daughter *A.* *A.* dies within the ſix Years; the 1500 *l.* ſhall go to her Adminiſtrator; here being no certain Time limited when, but only the ultimate Time within which it ſhall be raiſed. *Hil.* 1731. *Cowper* and *Scot et al'*, 3 *Will. Rep.* 119.

22. (*a*) A. *deviſed* 300 l. *to* M. 300 l. *to* A. *and* 100 l. *to* B. *all Infants, payable at twenty-one*, and *if any of them died before twenty-one, his Share to go to the Survivors.* *A.* died in Teſtator's Life-time. And the Queſtion was, If this was a *lapſed* Legacy? *King* C. *A Legacy can never be lapſed where it can take Effect according to the Will*; if *Lands* are deviſed to *A.* for Life, Remainder to *B.* tho' *A.* dies in the Life-time of the Teſtator, yet *B.* ſhall take; and ſo decreed the Legacy ſhould go to the other Legatees. (Refers to 2 *Vern.* 207, 467, 611.) *June* 21, 1731. *Willing* and *Baine*, *MS. Rep.*—*Quære* If the

(*a*) 3 *Will. Rep.* 113. *Trin.* 1731. S. C. ſtates it thus: *A.* deviſed 200 *l.* apiece to his Children, payable at their reſpective Ages of twenty-one, and if any of them died before twenty-one, then the Legacy given to the Perſon ſo dying to go over to the ſurviving Children. *A.* deviſed the Reſidue of his perſonal Eſtate to *A. B.* and *C.* (being three of his Children) and having made them Executors, died. One of the Children died in the Teſtator's Life-time, and after the Teſtator's Death one of the Executors and reſiduary Legatee died. Upon this two Queſtions aroſe; *Firſt*, Whether the Legacy of the Child that died in the Life of the Teſtator ſhould go to the ſurviving Children, or ſhould be a lapſed Legacy and ſink into the Surplus? *Secondly*, Whether, when one of the Executors and reſiduary Legatees died, his Share of the

the *Reſiduum* belonged to his Executor, or to the ſurviving reſiduary Legatees? the Legacy ſhall carry Intereſt from the Time of the Teſtator's Death? *Ibid.*

Reſolved per Cur'. That the Rule is, that *where the Legatee dies in the Life-time of the Teſtator, his Legacy lapſes*, i. e. it lapſes as to the Legatee ſo dying; but that in this Caſe the *Legacy was well given over to the ſurviving Children.* As to the ſecond Point, it was held *per Cur'*, That there might be a joint Legacy, as well as a joint Grant; and that as the *Executorſhip* ſurvived, there was the ſame why Reaſon the Deviſe of the *Reſiduum* ſhould do ſo too; wherefore it was decreed (*b*), that the ſurviving Deviſees of the *Reſiduum* ſhould have the Benefit of ſuch Surplus, except as to what had been received and divided. *Ibid.* 115. (*b*) See the Caſe of *Webſter* and *Webſter*, (*P. Ca.*) but more *particularly* that of *Cray* and *Willis*, (*P. Ca.*) both in 2 *Will. Rep.* 347 and 529, and Sir *Joſeph Jekyll*'s Argument on this Point.

23. Teſtator deviſed *out of Lands* a Legacy of 500 *l.* to his Niece, provided, that ſhe ſhould not marry in the Life-time of his Wife without her Conſent, and if ſhe did, the Legacy to ſink into the Eſtate for the Benefit of the Deviſee of the Land. The Niece married in the Wife's Life-time directly againſt her Conſent; and it was inſiſted, that there being no Limitation over, the Direction that it ſhould ſink not amounting to one, (refers to 2 *Vern.* 293.) this Proviſo was only *in terrorem*, and did not forfeit the Legacy. Sir *Joſeph Jekyll:* This is a Deviſe out of Lands, which is different from perſonal Legacies; the Legacy is become forfeited; and ſo the Plaintiff's Bill muſt be diſmiſſed. (Refers to 1 *Mod.* 300. 2 *Vern.* 333. 1 *Roll. Abr.* 418. *Pl.* 6.) *Dec.* 2, 1731. *Sheriff* and *Morlock*, *MS. Rep.*

24. *A.* by Will duly executed, deviſed to his Wife *Elizabeth* 3000 *l.* to be paid in ſix Months after his Death, in Caſe ſhe ſhould in that Time at the Charges of his Executors, and by ſuch Deed as they and their Counſel ſhould adviſe, releaſe all Right of Dower and Claim whatſoever that ſhe might have out of any Eſtate he died ſeiſed or poſſeſſed of; and by his Will charged all his Eſtate, real and perſonal, with the Payment of this Legacy. The Teſtator died; and before any Releaſe was tendered to the Widow by the Executors, or any Refuſal or Declaration on her Part that ſhe would not execute a Releaſe, or accept of the Legacy given by the Will in Satisfaction of her Dower or other Claim out of her Huſband's Eſtate, ſhe died, within the ſix Months, which was the Time limited by the Will for Payment of the Legacy and for her executing the Releaſe. A Bill was brought by the Repreſentative of the Wife, and the Queſtion before the *Maſter of the Rolls* was, Whether this was a Legacy veſted in the Wife ſo as to paſs to her Repreſentatives? The *Attorney General pro Quer'* inſiſted, That it was a veſted Legacy, it being given to the Wife by expreſs Words, altho' payable at a future Day, and comes within the Reaſon of thoſe Caſes which are determined every Day in this Court, where Legacies are given payable at a future Day; and altho' it may be objected, that he hath charged his real Eſtate with the Payment, and therefore the Legatee dying before the Day on which it is appointed to be paid, it ſhall ſink into the Land, yet in this Caſe the Deviſee is not meerly a Volunteer; ſhe is in the Nature of a Purchaſer; and ſo the Legacy is given to her in Conſideration that ſhe relinquiſh her Dower and all other Claims which ſhe hath out of his Eſtate; and it is not the Fault of her that the Releaſe is not yet executed; ſhe hath never refuſed, and the Executors were to do the firſt Act; for ſhe was to execute ſuch Deed or Releaſe as they ſhould adviſe, and it was their Duty to have prepared a Releaſe, and tendered to her. There was no other Way to forfeit or loſe the Legacy, but refuſing to comply with Terms impoſed by the Will, which ſhe hath not done. Sir *Joſeph Jekyll* Maſter of the Rolls:

The Queſtion in this Caſe is, Whether this is a Legacy payable at all Events or not? Which plainly it is not; for it was in her Power whether ſhe would comply with the Terms on which the Legacy was given; ſhe might have refuſed to execute a Releaſe of her Dower, and then to be ſure the Legacy never veſted. It is no more than an Overture of the Huſband to buy out her Dower, for it is given in Lieu and Compenſation of it. I think the Condition is annexed to the Body of the Deviſe; and altho' the Executors were to do the firſt Act, by preparing a Releaſe and tendering it to her to be executed, yet it was in her Power to have refuſed, and ſhe had her Election either to take the Legacy or ſtick to her Dower; if the Executors had not prepared the Releaſe, and ſix Months had elapſed without any Act done by the Executor, or Requeſt made by them within that Time, and the Widow had ſurvived that Time, I ſhould have thought that at the End of the ſix Months the Legacy had veſted. It was inſiſted by the *Attorney General*, that altho' the real Eſtate was charged as well as the perſonal with the Legacy, yet to take off from the Objection that the Legacies ariſing out of Land, and the Legatee's dying before the Time of Payment, that it ſhould not be raiſed, he ſaid, the perſonal Eſtate was alſo liable; and therefore if it was a veſted Legacy, it ought to be anſwered out of the perſonal Eſtate as far as the ſame could extend. But the Court declaring it not to be a veſted Legacy, this Diſtinction was not conſidered. 9 *July* 1731. *Wheddon* and *Oxenham*, *at the Rolls*, *MS. Rep.*

25. *J. S.* by his Will deviſed, *that all his juſt Debts and pecuniary Legacies ſhould be paid by his Executor out of his perſonal Eſtate as far as the ſame would extend*, and *in Default of that Fund, by and out of his real Eſtate*; for which Purpoſe he willed that his Executor *within twelve Months after his Deceaſe*, ſhould raiſe out of the *perſonal* Eſtate not otherwiſe ſpecifically deviſed, and in Default of ſuch Fund and in Aid thereof, by and out of his *real* Eſtate, or by Mortgage or Sale of ſuch Part thereof as might be ſufficient, the Sum of 1000 *l.* which Sum of 1000 *l.* *he thereby gave to* A. *to be paid him by his Executor immediately after the ſame ſhould be raiſed*, and charged all his *real* Eſtate with the Payment of the ſaid Legacy, in Caſe the *perſonal* ſhould prove deficient. The *perſonal* Eſtate was not ſufficient to raiſe this 1000 *l.* And *A.* died *within the Year*. *A.*'s Executor brings a Bill for the 1000 *l.* And Lord Chan. *King* decreed that the Legacy ſhould be *raiſed with Intereſt from the End of the Year*, and the Land being deviſed to *B.* for Life only, Remainder to *C.* in Fee, the Court would not direct the Legacy to be raiſed out of the annual Profits, for that might wholly defeat the Eſtate for Life; but that the Tenant for Life ſhould keep down the Intereſt, and that the 1000 *l.* ſhould be raiſed by a Sale of ſo much as would be ſufficient to pay the ſame with Intereſt and Coſts. *Hil.* 1732. *Wilſon* and *Spencer*, 3 *Will. Rep.* 172. The *Reporter* ſays by way of *Note*, That the *Maſter of the Rolls* was preſent in Court when this Cauſe was heard, and declared himſelf of the ſame (*a*) Opinion. *Ibid.* 175.

His *Lordſhip* took Notice, that in all the former Caſes wherein a Portion was ſecured out of Land, payable to a Daughter at eighteen or Marriage, and the Daughter died before that Age or Marriage, it was highly reaſonable the Land ſhould be eaſed of the Charge, when the original Motive and Inducement for making the ſame was at an End and determined by the Daughter's dying under eighteen or unmarried, and conſequently before ſhe had any Occaſion for a Portion. But that in the *preſent* Caſe, the Legacies were all veſted by the firſt Words of the Will, whereby the Teſtator deviſed that all his Legacies ſhould be paid by his Executors out of the *perſonal* Eſtate, if ſufficient, or elſe out of the Land, and that the ſubſequent Direction that they ſhould be paid within twelve Months after the Teſtator's Death, was ſaying no more than a Court of Equity would ſay without theſe Words, mere *Surpluſage*, and therefore could make no Alteration. His *Lordſhip* ſaid, the Caſe of *Jackſon* and *Farrant*, 2 *Vern.* 424. and *Prec. in Chan.* 109. was a ſtrong Caſe to this Purpoſe. *Ibid.* 174. the Caſe of *Cowper* and *Scot ante*. *Ibid.* 119. *Vide P.*

(*a*) His *Honour* made the like Determination in *Ca.* of *this* Work.

26. This

26. This Cauſe came by Appeal from the Rolls, where the Plaintiff's Bill was diſmiſſed with Coſts. And the Caſe was, that *Thornton*, Mrs. *Berry*'s Uncle, after deviſing the Intereſt of his perſonal to Defendant's Mother for her Life, and ſome Legacies, had theſe Words in his Will: "*And then as to the Reſidue, I give the ſame to* "*my Niece, provided ſhe marry with the Advice and Conſent of Mr.* "Lyddell *and Mr.* Clark, *and if ſhe married otherwiſe, he deviſed the* "*ſame to the Plaintiff* Painter." *Clark* died in 1717; and afterwards in 1729 Mrs. *Berry* intermarried without any previous Application made to Mr. *Lyddell* the Survivor, and this Bill was brought to have the Reſidue paid to the Plaintiff. For the Plaintiff was cited 1 *Vent.* 199. and *Berty* v. *Falkland*, 2 *Vern.* that this was a Condition precedent; and tho' the Lady could not have the joint Conſent of both Perſons by reaſon of *Clark*'s Death, yet the Conſent was a Condition precedent, and it was her Uncle's Intent to give them the Care over her, which ſhe ought to have performed as near as ſhe could. *King* Lord Chancellor: On the Death of the Defendant's Mother the Reſidue of the Teſtator's perſonal Eſtate veſted in the Defendant, and could not go over to the Plaintiff, but in Caſe of her Marriage contrary to the Direction of the Will, if the Reſidue did not veſt, the Teſtator as to this muſt be ſaid to die inteſtate; the Proviſo therefore is a Condition ſubſequent, and to deveſt an Intereſt; but the Death of Mr. *Clark* made the joint Conſent impoſſible, and ſuch Conſent is not as was ſaid an Intereſt that can ſurvive, but a naked Power; and there can be no Doubt but a Condition ſubſequent becoming impoſſible by the Act of God, muſt be diſpenſed with. So the Decree was affirmed as to the principal Matter, and reverſed only as to the Coſts. *May* 6, 1732. *Painter* and *Berry et Ux' et al' Adminiſtrators of Thornton*, *MS. Rep.*

27. *Joſeph Corbett* deviſed his perſonal Eſtate to his Wife for her Life, and gives ſeveral particular Legacies after her Death, and then declares that the Reſidue at her Deceaſe, and after the Legacies paid, ſhall be divided among his Relations, *viz. A. B. C.* and *D.*——*A.* and *B.* died in the Life-time of the Wife, and after her Deceaſe the Adminiſtrator of *A.* and *B.* had a Decree for their Shares; for, by *Talbot* Lord C. *the Time of Payment was future*, but *the Right to the Legacies veſted upon the Death of the Teſtator. Corbett* and *Palmer et Ux'*, *Eaſt.* 8 *Geo.* 2. *MS. Rep.*

28. "*I give to* A. B. *and* C. 1000 l. *apiece of my Capital Stock in* "*the* Eaſt-India *Company, and the Intereſt thereof to them for their* "*Uſe, and if any die, then to the Survivors or Survivor Share and* "*Share alike; and my Meaning is, that the Intereſt ſhall be paid to* "*their Father, to be improved for their Uſe.*" C. *died an Infant, by which his Share ſurvived to* A. *and* B. *Afterwards* B. *died.* His *Honour* held, that the *Share which* B. *took upon* C.*'s Death does not ſurvive to* A. *but will go to* B.*'s Adminiſtrator*, which was her Father; and his *Honour* ſaid, had they not been *diſtinct* Legacies, it might have been another Queſtion; but being entirely *diſtinct*, and not even ſo much as Tenants in Common, the Caſe is the ſame as that of *Barnes* and *Ballard*, before *King* C. *June* 1, 1727, where it was decreed for the Adminiſtrators, and agreed with Lord Chief Juſtice *Holt*'s Opinion, cited in the Caſe of *Woodward* and *Glaſbrook*, 2 *Vern.* 388. And his *Honour* ſaid, that this Share goes to the Adminiſtrator, by the Words *Share and Share alike*, which are *tantamount* to the Words *equally to be divided. Trin.* 1735. *Rudge* and *Barker*, *Caſes in Eq. Temp. Lord Talbot* 124.

29. *John*

29. *John Cox* made his Will 23 *Dec.* 1729, and thereby (amongſt other Things) deviſed as follows: *I give and bequeath to my Nephew* Charles Cox, *his Heirs and Aſſigns, all my Meſſuages, Lands, Tenements and Hereditaments, in the Pariſh of* Oddington *in the County of* Glouceſter, and (reciting that he had promiſed to give to his Niece —— *Whaley* 500 *l.* to be paid to her within ſix Months after his Deceaſe) he goes on, and ſays, *And my Will is, that my ſaid Eſtate at* Oddington *ſhall ſtand charged with the ſaid Sum of* 500 l. *to be paid at the Time aforeſaid; and I have deviſed the ſaid Eſtate to my Nephew* Charles Cox, *his Heirs and Aſſigns, upon Condition he pay the ſaid Sum of* 500 l. *at the Time aforeſaid.* He alſo gave to *Richard Plummer*, Gent. 300 *l.* to be paid within three Years next after the Teſtator's Death In Truſt that he place the ſame out at Intereſt by the Direction of his Executor, and that the ſaid *Plummer* ſhould apply the Intereſt thereof to the ſeparate Uſe of his ſaid Niece —— *Whaley*, for her Life, and after her Deceaſe he gave 200 *l.* Part of the ſaid 300 *l.* to *John Whaley*, Son of *Peter Whaley*, and the remaining Sum of 100 *l.* to another Son of the ſaid *Peter Whaley*. Then the Will goes on, *And I do hereby charge all my ſaid Meſſuages, Lands and Tenements, in* Oddington, *with the Payment of all and every the afore-mentioned Legacies, Annuities and Sums of Money, at the Times they are reſpectively given and appointed to be paid by this my Will*; and charges all his Meſſuages, Lands and Tenements, with and for the Payment thereof; and made the ſaid *Charles Cox* (the Defendant) his Executor and reſiduary Legatee. The Teſtator died 14 *Feb.* 1730, and the Executor proved the Will. Mrs. *Whaley*, the Teſtator's Niece, and *John Whaley* the Plaintiff's Son, died before the three Years expired; and now *Peter Whaley*, the Father, as Adminiſtrator to his Son *John*, brings his Bill againſt the Defendant *Charles Cox*, to have the Legacy of 300 *l.* raiſed, and inſiſts by the Bill, Firſt, That the 500 *l.* was charged on the real Eſtate in the firſt Place, to which the Defendant is intitled as Heir at Law to the Teſtator; and that the 200 *l.* Legacy ought to be charged on the perſonal Eſtate in the firſt Place; and if that be not ſufficient, then on the real Eſtate. Defendant *Cox*, by his Anſwer, ſays, he has paid the 500 *l.* to the Plaintiff; but with regard to the 200 *l.* he inſiſts, as the Legatee died before the Time of Payment, it was a lapſed Legacy, and ought to ſink into the Lands for the Benefit of the Defendant, who had not perſonal Aſſets to anſwer it. At the Hearing there were two Queſtions made, *Firſt*, Whether this 500 *l.* was charged upon the real or perſonal Eſtate in the firſt Place? *Secondly*, Whether, if this 200 *l.* (the Plaintiff's Demand) is charged upon the perſonal Eſtate in the firſt Place, the real Eſtate ſhall be charged, as there is a Neceſſity to reſort to the Land? Sir *Joſeph Jekyll* Maſter of the Rolls, (after taking Time to conſider of it): *Firſt*, I am of Opinion the 500 *l.* ought to be taken as a Charge upon the Lands at *Oddington* in the firſt Place; and I believe that both the real and perſonal Eſtate is given to the ſame Perſon, ſubject to this Charge; and that the perſonal Eſtate will not be exempt, but come in Aid of the real Eſtate, according to the Caſe of *Doleman* and *Smith*, 2 *Vern.* 740. and *Prec. in Chan.* 156. The Teſtator doth not only charge his Lands at *Oddington* with this 500 *l.* as he doth with ſeveral Legacies and Annuities, but he diſtinguiſhes this 500 *l.* by deviſing theſe Lands to the Defendant in Fee, on Condition that he pay the 500 *l.* Now tho' this is a *void Condition, as the Deviſee is Heir at Law*, and *none but the Heir can take Advantage of a Condition*, and ſo *indeed is the Deviſe void for the*

ſame Reaſon, and the Lands deſcend to the Defendant as Heir at Law; yet this *Particularity* in the Will ſerves to ſhew the Intention of the Teſtator that theſe Lands at *Oddington* ſhould be appointed to the *Payment* of this 500 *l.* in the firſt Place, and not the perſonal Eſtate. ——As there will not be perſonal Aſſets to ſatisfy the Plaintiff's whole Demand, it makes it neceſſary to conſider, *Secondly*, Whether the Plaintiff's Demand of 200 *l.* (it being neceſſary to reſort to the Land) ſhall be a Charge upon the Land, or ſink in the Land for the Benefit of the Heir? This is *primarily* a veſted Intereſt; the 300 *l.* being given to *Richard Plummer* to be paid within three Years after the Teſtator's Death, veſted an immediate Intereſt in him, for the Time of Payment is certain; the Length of Time before the Legacy is to be paid is not material, but the Certainty or Incertainty with reſpect to the Payment of it will determine whether it is a veſted Intereſt or not. When the Day of Payment is certain, the Legacy is due at the Time of the Death of the Teſtator, tho' it is not to be paid before the Day comes, and if the Legatee dies before the Day of Payment, it will go to his Executors or Adminiſtrators. If a Legacy of 100 *l.* be given to be paid the Party at the Day of Marriage, there, the Time is uncertain; and there, if the Legatee dies before he is married, the Legacy ſhall not go to his Executors or Adminiſtrators. But if 100 *l.* is bequeathed to be paid at a certain Day to come, (*viz.*) next *Eaſter*, or next *Eaſter* three Years, there, it is a veſted Intereſt, and ſhall go to the Repreſentatives of the Party, tho' he dies before the Day of Payment. *Swinburne* 463. So that the Legacy veſted in *Richard Plummer*, and he or his Repreſentatives might, after three Years, have ſued for the Legacy either in this or the Spiritual Court, tho' he was a Truſtee for a Truſtee, and may recover for the Benefit of the *Ceſtui que Truſt*; the equitable Intereſt is in the *Ceſtui que Truſt* as the legal Intereſt is in the Truſtee. The Caſe of *Powlett* and *Powlett* was the Caſe of a Portion, which as it aroſe out of a real Eſtate, payable at a future Day, and the Child dying before the Time appointed, *viz.* at eight Years old, before the Portion was wanted, the Opinion of the Court was, that it ſhould ſink into the Land. But there is a material Difference between a Portion and a Legacy given by a Stranger or a collateral Relation; the firſt ariſes from a natural Obligation the Parent lies under to make a Proviſion for his Child, but the Legacy is a meer Act of Bounty. He relied upon the Caſe of *Wilſon* and *Spencer*, and decreed the Legacy to be raiſed with *Intereſt* and *Coſts*. 8 *Mar.* 1736-7. *Whaley* and *Cox*, *MS. Rep.*

30. *M. T.* by Will gives to *S. T.* and his Heirs, his Moiety of the Manor of *J.* and the Advowſon and Right of Preſentation, ſubject to the Settlement made on the Marriage of his Wife, ſo as the ſaid *S. T.* and his Heirs do, within one Year next after the ſaid Manor and Premiſſes ſhall come into Poſſeſſion, pay divers Sums to divers Perſons therein named, and particularly to his Executors, and to *E. O.* and others, 100 *l.* each, and directs that the ſaid *Manor and Premiſſes ſhall be charged with the Payment of the ſame*; and after giving divers pecuniary Legacies, gives the Reſidue of his *real* and *perſonal* Eſtates (his Debts and Legacies being firſt thereout paid and diſcharged) to *T. T.* and the ſaid *S. T.* whom he makes his Executors. *E. O.* died in the Life-time of the Teſtator's Wife the Jointreſs, who died in and Plaintiff, as Repreſentative of *E. O.* brings her Bill againſt *T. T.* and *S. T.* to have *E. O.*'s Legacy given to her by the Will, and they admit Aſſets, but inſiſt that this was not to be paid out of the perſonal Eſtate, and *S. T.* inſiſts that this Sum of Money is not to be raiſed at

all, *E. O.* dying in the Life-time of the Jointreſs, and before the Premiſſes came into his Poſſeſſion. *Lord Chancellor* diſmiſſed the Bill, ſaying, that the Direction of the Payment is the Gift, and the Time of Payment is annexed to the Gift; and the Party dying before, it is lapſed, and ſo here is no Gift (*a*). *Mich.* 12 *Geo.* 2. *Hall* and *Terry*, *Vin. Abr.* Tit. *Deviſe*, (Z. c.) *Ca.* 36. *P.* 383.

(*a*) It is plain the 100*l.* cannot take Place on this Will, for the Money is *not made payable out of the perſonal Eſtate*, but *chargeable only on the real.* As to the *Diſtinction* between Annexing the Time to the Subſtance of a Legacy and the Payment of it, it is *not* allowed on Legacies charged on Land; but if there was any Thing in that Diſtinction, the Words of the Will will not bear it, for *here* is no Gift of the Money, but only a Direction to the Deviſee to pay this Money when he ſhall be in Poſſeſſion of the Premiſſes; ſo that this is not like the Caſe of an original Gift of a Sum of Money, and where the Time of Payment is poſtponed, which is *Debitum in præſenti Solvendum in futuro*; and if a Teſtator ſhould direct an Executor to pay a Legacy, as this is, out of the *perſonal* Eſtate, and the Legatee ſhould die before, his *Lordſhip* ſaid, he ſhould make no Doubt but that it would have been *tranſmiſſable*. *Per Lord Chancellor, ibid.*

31. Where a Sum of Money is given by Will to be paid out of the *real* Eſtate, and the Legatee dies *before* the Time of Payment, it ſhall ſink into the Inheritance; and this is ſo whether the Money is given as a Portion, or not. *Per Lord Chancellor*, who ſaid, that this is the general Rule of this Court. *Ibid.*

32. Where a Legacy is charged on *Land* and *perſonal* Eſtate, it ſhall ſo far partake of the *Nature* of a Sum of Money iſſuing out of Land, that if the Legatee dies *before* the Time of Payment, it ſhall not be raiſed. *Per Lord Chancellor, ibid.* who cited 2 *Vern.* 416. *Jennings* and *Rock*, *Duke of Chandois* and *Talbot*, and *Prouſe* and *Abington.*

33. *A. B.* Plaintiff's Grandfather, had by his Will given 400*l.* among his younger Children, payable at twenty-one, and had ſubjected his *real* and *perſonal* Eſtate for the Payment of it; the *perſonal* Eſtate was ſufficient. And the Queſtion was, Whether the Legacy being to be raiſed out of a *mixed* Fund, and *one of the Children dying before ſhe came of Age*, whether her Part of the Legacy was to ſink for the Benefit of the real Eſtate, or was tranſmiſſable for the Benefit of the other Children? Lord Chan. *Hardwicke:* As there has been no Caſe cited, that where a Legacy has been made payable out of *both perſonal* and *real Eſtate*, and the perſonal ſufficient, that the Legacy has been loſt, I will not make ſuch a Caſe, and indeed the Authorities are to the contrary; and cited 2 *Will. Rep.* 276, 601. *Mich. Vac.* 1744. *Anon. MS. Rep.*

Vin. Abr. Tit. *Deviſe*, (B. d.) *Ca.* 26. *P.* 391. *cor'* Lord *Hardwicke* in *Lincoln's Inn*, *Dec.* 19, 1744. S. C. *in totidem verbis*, and adds, that his *Lordſhip* ſaid, if we were to determine otherwiſe, we muſt go into the Eccleſiaſtical Court for it.

(B) Of ſpecifick and pecuniary (a) Legacies;—And here of abating and refunding by Legatees;—And in what Caſes Security ſhall be given for the Payment of a Legacy.

(a) There are two Sorts of ſpecifick Legacies, Firſt, Where a certain individual Thing is given, as a particular Horſe. Secondly, Where a Thing of particular Species is given, without referring to any Individual of that Species, as a Horſe in general. If the Teſtator has not the firſt Sort at his Death, the Legacy is lapſed; or if he has deviſed the ſame Thing to two Perſons, without any Intention to revoke the firſt Bequeſt, they muſt hold it jointly; but in the latter Caſe, if the Teſtator was not poſſeſſed of what he has deviſed, the Executor muſt procure it.——If *A.* deviſes 5000 *l. South-Sea* Stock to *B.* and 5000 *l. South-Sea* Stock to *C.* and dies, leaving Aſſets, and but one 5000 *l.* Stock in Specie, the Executor ſhall purchaſe as much as will make up both the Legacies; ſaid in *Partridge* and *Partridge* (*b*), by Lord *Talbot*; but reſolved otherwiſe by Sir *J. Jekyll* in *Pearſe* and *Snablin* (*c*); which Decree was reverſed, on Appeal to Lord *Harwicke*; for in this Caſe he does not point out any particular Stock he then had, but only deſcribes the Quantity of Stock which he then had, and would give to each Legatee. *MS. Notes.*

(*b*) *Quære* Term and Year.

(*c*) *Quære* Term and Year.

1. THE Suit was for a Legacy; the Defendants demanded Allowances for their own Legacies firſt; but it was denied, and ordered, that an Account be taken of the whole Eſtate, and the Defendants and Plaintiffs to abate *equally* and proportionably for what the Eſtate falls ſhort; and ſo *not* like the Caſe where Executors pay their own Debts firſt at Common Law, or him that firſt ſues his Debt in *equal* Degree, before the other. 1670. *Butler*, and *Wallis* and *Coole*, *Executors of Bowyer*, 2 *Freem. Rep.* 134.

2. *J. S.* deviſed *all his perſonal Eſtate to his Wife for Life*, and *what ſhe has left at the Time of her Death, it is my Will, and I do deſire her that it may be equally divided between my own Kindred and hers.* Teſtator died; and the Widow married again. If the Eſtate be ſo ſmall that ſhe cannot live upon it without ſpending the Stock, it ſeems ſhe ſhall *not* be obliged to give Security, *otherwiſe* ſhe ſhall. *Eaſt.* 1697. *Cooper* and *Williams*, *cor'* the *Maſter of the Rolls*, *Prec. in Chan.* 71.

3. *A.* having pawned a *Jewel* for a Sum of Money, deviſed *the Jewel to* B. *and made* C. *his Executor*, and *gave him all his Goods, Chattels and perſonal Eſtate, after his Debts and Legacies paid.* And the Queſtion was, Whether *B.* ſhould pay the Debt for which the Jewel was pawned, or whether it ſhould be paid out of the *perſonal* Eſtate by the Executor? And decreed that it ſhould be paid out of the *perſonal* Eſtate, and that the Legatee ſhould have the *Jewel* diſcharged of it. This Decree was affirmed *in Dom. Proc'*, as the *Reporter* ſays he was informed by Mr. *Crawford*, who was of Counſel in it. This was a *Scotch* Cauſe. *Hil.* 1703. *Anon.* 2 *Freem. Rep.* 272. *Ca.* 341.

4. An Eſtate being conſiderably mortgaged, was deviſed to *A.* and ſeveral *ſpecifick* Legacies were left to others. The Overplus is not ſufficient to diſcharge the Debt. *Quære*, Whether the ſpecifick Legacies ſhall contribute towards Diſcharging the Mortgage before the mortgaged Premiſſes ſhall be affected? For the Covenant to pay the Money makes it a *perſonal* Eſtate, and the *real Eſtate ſhall never be put in Average with the perſonal.* 1706. *Warner* and *Hayes*, *Vin. Abr.* Tit. *Deviſe*, (A. e.) *Ca.* 5. *P.* 442.

Ibid. in S. C. ſays, that all the *ſpecifick* Legacies ſhall contribute. *Ibid.*

5. *A.* deviſes 3400 *l. to be laid out by his Executor in Exchequer Annuities for ninety-nine Years Term, and to be enjoyed by his Wife for*

His *Lordſhip* ſaid, It was of ſome Weight, that theſe Annuities were to go to the Children after the Wife's Death, but *eſpecially* as the Wife is a *Purchaſer* of the Annuities for her Life by her releaſing her Dower; and for that Money ordered by Will, or articled to be laid out in an Annuity, is

for her Life, ſhe releaſing her Dower, and afterwards to go *equally* to his two Daughters *B.* and *C.* and bequeaths 1000 *l.* apiece to *B.* and *C.* payable, *&c.* And *per* Lord Chan. *Cowper*, The 3400 *l.* ſhall have the Preference, and if there be *not* Aſſets enough to pay the other Legacies, they muſt be loſt. *Trin.* 1710. *Burridge* and *Bradyl*, 1 *Will. Rep.* 127.

is in *Equity* looked upon as an Annuity *or* Land, and conſequently to take for a *ſpecifick* Deviſe, and not a *pecuniary*

Legacy; and it is therefore to be preferred before a *pecuniary* Legacy (*a*). *Ibid.*

(*a*) *Note*; The Authority of this Decree was queſtioned by Lord Chan. *Parker*, *Trin.* 1719. in the Caſe of *Hinton* and *Pinke*, his *Lordſhip* ſaying, he could not come into Lord *Cowper*'s Reſolution. *Vide* 1 *Will. Rep.* 541.——The Legatee of 1500 *l.* to be laid out in the Purchaſe of Lands, has not a Right to the 1500 *l. in Specie*; indeed if the Money *in ſuch a Hand* were deviſed, this would be a ſpecifick Legacy. A *ſpecifick Legacy is where by the Aſſent of the Executor the Property of the Legacy would veſt. Per* Lord C. *Parker*, *Trin.* 1719. in the Caſe of *Hinton* and *Pinke*, 1 *Will. Rep.* 540. and his *Lordſhip* aſked if it were poſſible, ſuppoſing there were 1500 *l.* of the Teſtator's Money lying upon the Table, that the Plaintiff the Legatee ſhould ſay, *I have a Right to this very Money in Specie*; and if not, then it is no *ſpecifick* Legacy. *Ibid.*

6. The Caſe may ſo happen, that a *ſpecifick* Legacy ſhall be chargeable with the Payment of a *pecuniary* Legacy; as if a Man deviſes his *perſonal* Eſtate at *D.* to *B.* and his *perſonal* Eſtate at *E.* to *C.* and then gives 300 *l.* Legacy out of his *perſonal* Eſtate, and dies, leaving no other *perſonal* Eſtate than at *D.* and *E.* the 300 *l.* muſt come out of the Eſtate at large in both Places. *Per Lord Chancellor* (*a*), *Mich.* 1714. in the Caſe of *Sayer* and *Sayer* (*b*), *Prec. in Chan.* 393.

(*a*) But *pecuniary* Legatees ſhall have *no*

Aid of the *ſpecifick* Legatees, eſpecially if the *pecuniary* Legacies are deviſed generally and at large, *without* ſaying out of his *perſonal* Eſtate, and the Teſtator dies leaving no other *perſonal*, or out of all his perſonal Eſtate whatſoever, *or* Words to that Effect. *Ibid.* (*b*) *Vide* 1 *Vol. Abr. Eq.* 200. *Ca.* 9.

7. If a Man by his Will gives ſeveral *ſpecifick* Legacies, and deviſes the Reſidue of his Eſtate to *B.* and his Circumſtances vary ſo that the reſiduary Part becomes very inconſiderable, yet the reſiduary Legatee muſt content himſelf with it, and ſhall have no Aſſiſtance from the *ſpecifick* Legatees. *Per* Lord Chan. *Cowper*, (who ſaid it had been ſo held ſeveral Times in *this* Court). *Eaſt.* 1715. in the Caſe of *Linguen* and *Souray*, *Prec. in Chan.* 401.

8. *J. S.* had a Wife and three Sons, and having a *perſonal* Eſtate of 20,000 *l.* by Will gave 3000 *l.* apiece to his two younger Sons, and the Surplus to his eldeſt, and made his Wife Executrix and Guardian to his Children, who were then all Infants. The Bulk of his *perſonal* Eſtate conſiſted in Stocks. Afterwards the Wife married *L.* who converted great Part of *this* Eſtate, and went beyond Sea; and the two younger Sons brought a Bill for their 3000 *l.* Legacies. And Lord Chan. *Cowper* directed the *Maſter* to take an Account of what was the clear perſonal Eſtate of the Teſtator at his Death, and it conſiſting but of few *Items*, his *Lordſhip* was of Opinion that the Teſtator muſt at the making of his Will know what his Surplus would amount unto after his Debts and Legacies paid, and that he meant the Surplus as a Legacy to his eldeſt Son; wherefore his *Lordſhip* declared that it ought to be looked upon as ſuch, and directed the *Maſter* to compute *Intereſt* as well for what was the Surplus of the Teſtator's perſonal Eſtate at his Death, for the eldeſt Son, as for the two Legacies of 3000 *l.* apiece to the younger Sons, and if any of the three Sons had received any Part of their Father's perſonal Eſtate, the other two were in the firſt Place to receive as much, ſo as to put them all upon an *equal* Foot; and afterwards all the three Sons were to receive *Pari Paſſu* in reſpect of the Value of the Surplus given to the eldeſt, which was to be taken as a Legacy, and in regard to the Legacies of 3000 *l.* each to the two younger Sons. *Hil.* 1715. *Dyoſe* and *Dyoſe*, 1 *Will. Rep.* 305.

9. If the Executors of a Freeman of *London* prove inſolvent, ſo that a Loſs happen to the Eſtate, it ſhall be born out of the *Teſtamentary* Part only. *Per* Lord Chan. *Cowper*, *Trin.* 1715. in the Caſe of *Read* and *Duck*, *Prec. in Chan.* 409.

10. *J. S.* gives Legacies by his *Will*, and other Legacies by his *Codicil*, and the Lands are charged with the Legacies in the Will only, the *Codicil* not being atteſted by any Witneſs. His *Honour* decreed that the Legatees in the Will ſhould be paid out of the real Eſtate, and if that ſhould be deficient, they muſt as to the Surplus come in Average with the Legatees in the Codicil, to be paid out of the *perſonal* Eſtate; and there being admitted to be a Deficiency, that the Land ſhould be forthwith ſold to prevent a greater Deficiency; but that the *ſpecifick* Legacies muſt be all paid, and not (*a*) abate in Proportion. But that *Charities* deviſed, tho' preferred by the *Civil* Law, ought to abate in Proportion; for they are but Legacies. *Eaſt.* 1718. *Maſters* and *Maſters*, 1 *Will. Rep.* 421, 422.

(*a*) *Vide Hinton* and *Pinke.*

The Teſtatrix having bequeathed 200 *l.* for a *Monument* for her Mother, it was objected, That that ought not to abate in Proportion, this being a Debt of *Piety* for the Memory of her Mother, from whom the Teſtatrix received the greateſt Part of her Eſtate. And to this the *Court* inclined, but however reſerved that Point. *Ibid.* 423.

11. As *all the Legatees are on a Deficiency of Aſſets to be paid in Proportion*, ſo if the Executor pays one of the Legatees, yet the reſt ſhall make him refund in Proportion; nay, if one of the Legatees get a Decree for his Legacy, and is paid, and afterwards a Deficiency happens, the Legatee who recovered ſhall refund notwithſtanding, in Imitation of the Spiritual Court, where a Legatee recovering his Legacy, is made to give Security to refund in Proportion, if, *&c.* (*b*) *Per* Sir *Joſeph Jekyll* Maſter of the Rolls, *Mich.* 1718. *Anon.* 1 *Will. Rep.* 495.

(*b*) *Vide* 1 *Vern.* 26 and 93.

12. But if the Executor had at *firſt* enough to pay all the Legacies, and afterwards by his waſting the Aſſets, occaſions a Deficiency, the Legatee who has recovered his Legacy has certainly the Advantage of his *legal* Diligence, which the other Legatees neglected by not bringing their Suit in Time, before the Waſting of the Executor; whereas, if they had commenced their Suit, they might have met with the like Succeſs. *Et Vigilantibus non Dormientibus jura ſubveniunt. Ibid.*

13. Bill by an Executor againſt a Legatee to refund a Legacy voluntarily paid him by the Executor, the *Aſſets falling ſhort to ſatisfy the Teſtator's Debts.* Decreed that the Defendant ſhould refund to the Plaintiff, and that an Executor may bring a Bill againſt a Legatee to refund a Legacy *voluntarily* paid, as well as a Creditor; for the Executor paying a Debt of the Teſtator out of his own Pocket, ſtands in the Place of the Creditor, and has the ſame Equity againſt the Legatee, to compel him to refund, contrary to the Opinion in 2 *Vent.* 358. *Noell* and *Robinſon*, and 2 *Vent.* 360. *Hodges* and *Waddington*. *Per* Sir *Joſeph Jekyll* Maſter of the Rolls, *Eaſt.* 4 *Geo. Davis* and *Davis*, *Vin. Abr.* Tit. *Deviſe*, (Q. d.) *Ca.* 35. *P.* 423.

14. As there is a Benefit one Way to a *ſpecifick* Legatee, as that he ſhall not contribute to the Loſs of a *pecuniary* Legatee, ſo there is an Hazard the other Way; for if ſuch *ſpecifick* Legacy (*being a Leaſe*) be evicted, or (*being Goods*) be loſt or burnt, or (*being a Debt*) be loſt by the Inſolvency of the Debtor, in all theſe Caſes ſuch *ſpecifick* Legatee ſhall have no Contribution from the other Legatees, and therefore ſhall pay no Contribution towards them. *Per* Lord Chan. *Parker*, in the Caſe of *Hinton* and *Pinke*, *Trin.* 1719. 1 *Will. Rep.* 540.

15. If a Freeman of *London* dies without Iſſue, his Wife is intitled by the Cuſtom to the Moiety of her Huſband's perſonal Eſtate *in Value*, but not *in Specie*. If ſuch a Freeman makes his Will, and diſpoſes of his whole Eſtate, without any Notice of the Cuſtom, and gives ſeveral *ſpecifick* Legacies and ſeveral *pecuniary* Legacies, and deviſes the *Reſiduum* to *A.* and the Widow waives her Legacy, and claims a Moiety of his *perſonal* Eſtate by the Cuſtom, if the *Reſiduum* be ſufficient to anſwer her Moiety, her Share ſhall be taken out of the *Reſiduum*; but if that fall ſhort, then the *pecuniary* Legatees ſhall abate in Proportion; and if the *Reſiduum* and *pecuniary* Legacies be ſufficient to anſwer her Moiety, the *ſpecifick* Legatees ſhall *not* be brought in to contribute, but enjoy their Legacies entire. *Per Parker* C. *Trin.* 5 *Geo. Kitſon* and *Robins*, *Vin. Abr.* Tit. *Deviſe*, (Q. d.) *Ca.* 37. *P.* 423.

16. *J. S.* bequeathed ſeveral *pecuniary* Legacies, and (*int' al'*) gave 1500 *l.* to his eldeſt Son, *In Truſt* to lay it out in a Purchaſe of Lands in Fee, and to grant a Rent-charge of 50 *l. per Annum* thereout to *M.* his Daughter for her *ſeparate* Uſe; but that if the Teſtatrix's eldeſt Son ſhould refuſe *or* nelect to lay out 1500 *l.* in the Purchaſe of Lands, and grant this Rent-charge, then he to have but 500 *l.* of the Money, and the remaining 1000 *l.* to be laid out in the Purchaſe of an Annuity, as far as it would go, for the ſeparate Uſe of *M.* There being a Deficiency of Aſſets, the Queſtion was, Whether the 1500 *l.* Legacy, or at leaſt the 50 *l.* a Year Annuity, ſhould abate in Proportion? Lord Chan. *Parker* agreed that this 1500 *l.* Legacy ſhould be taken as Land, but that the Legatee of the 1500 *l.* cannot ſay he has a Right to the 1500 *l.* in *Specie*; if the Money *in ſuch a Hand* were deviſed, this would be a *ſpecifick* Legacy. A *ſpecifick Legacy is where by the Aſſent of the Executor the Property of the Legacy would veſt*; and if upon Suppoſition that 1500 *l.* of the Teſtator's Money was lying on the Table the Legatee cannot ſay, *I have a Right to this very Money in Specie*, it is no *ſpecifick* Legacy. That the Will ſaying, that in Caſe of the Son's *refuſing* or *neglecting* to make this Purchaſe, then he is to have but 500 *l.* of the 1500 *l.* and *M.* the remaining 1000 *l.* therefore his *Lordſhip* took *M.* to be a Legatee for 1000 *l.* which is to abate in Proportion, and as far as it will go to be laid out in an Annuity for *M.* for *her Life*, and *for her ſeparate Uſe*. And his *Lordſhip* ſaid, that he could not come into the Reſolution of Lord Chan. *Cowper*, in the Caſe of *Burridge* and *Bradyl* (*a*). *Trin.* 1719. *Hinton* and *Pinke*, 1 *Will. Rep.* 539.

(*a*) *Vide P.* 552. *Ca.* 5.

17. (*b*) *J. S.* ſeiſed in Fee of Lands, and alſo of ſome Copyholds, which he had *not* ſurrendered to the Uſe of his Will, and being indebted by Bond, in which his Heirs were bound, by his Will deviſed his Freehold Lands to *B.* in Fee, without charging them with his Debts and Legacies, and gave his Copyhold Lands to *C.* in Fee, *In Truſt* to ſell to pay his Debts and Legacies; and having given a Legacy of 500 *l.* to *D.* died, leaving *E.* his Executor. *D.* brought his Bill for his Legacy. And Lord *Harcourt* decreed that as to ſo much of the *perſonal* Eſtate as was exhauſted by the Bond Debt, *D.* ſhould ſtand in the Place of the Bond Creditor againſt the Land, and that the *Freehold* Eſtate ſhould be liable, in Default of perſonal Aſſets, to pay the Legacy. But upon Appeal, Lord *Parker* (having taken Time to

(*a*) It is a *Rule*, that if one gives a *ſpecifick* Legacy of an Horſe or a Diamond, and alſo a *pecuniary* Legacy of 500 *l.* to *B.* and there are *not* Aſſets to pay both, ſtill the *ſpecifick* Legatee ſhall be preferred, and have his whole Legacy; for were the Executor to make him contribute towards the *pecuniary* Legacy, this would be *pro tanto* to make ſuch *ſpecifick* Legatee buy his Legacy, againſt the manifeſt Intention of the Teſtator; and if a *ſpecifick* perſonal Legatee ſhall not contribute towards a *pecuniary* Legacy, much leſs ſhall a *ſpecifick* Deviſee of Land. That in the preſent Caſe, the Teſtator had appointed a Fund for the Payment of the Legacies, *viz.* the

to conſider of it) *reverſed* that Part of the Decree; for tho' Equity will *marſhal Aſſets in Favour of a Legatee* as well as *of a ſimple Contract Creditor*, yet every *Deviſee of Land is a ſpecifick Legatee*, and ſhall not be broken in upon, or made to contribute towards a *pecuniary Legacy*; and had the Teſtator deviſed the 500 *l.* to *A.* and a Term of five hundred Years to *B.* without leaving Aſſets to pay the 500 *l.* ſtill the *ſpecifick* Legatee of the Leaſe ought to prevail, without contributing towards the *pecuniary* Legatee; and if ſuch *pecuniary* Legatee ſhall not break in upon a *ſpecifick* Legatee of a Term, *a fortiori* he ſhall not diſappoint the Will as to a Deviſe in Fee, which is more to be favoured than a Deviſe of a Term, in regard it is with *more Difficulty* that a Court of Equity in any Caſe *breaks in upon*, or *charges*, *a real Eſtate* (*a*). *Mich.* 1720. *Clifton* and *Burt*, 1 *Will. Rep.* 678.

the Copyhold Eſtate, and tho' that had failed for want of a Surrender, the Conſequence would be, that the Fund failing, the Legacy muſt alſo fail. Indeed the Bond Creditor might elect to have his Debt out of the Aſſets in the *Hands of the Heir* or *of the Deviſee*, but in ſuch Caſe the *Heir* or *Deviſee* ſhould have Relief, *viz.* to ſtand in the Place of the Bond Creditor, and reimburſe himſelf out of the perſonal Eſtate. *Per* Lord Chan. *Parker*, *ibid.* 679, 680.

(*a*) *Note*; The Decretal Order in the Caſe of *Hern* and *Merrick* (*b*) was produced, whereby it appeared that Lord *Harcourt* did not *then* determine *this* Point, but reſerved it for farther Conſideration. *Ibid.* 681.

(*b*) 1 *Will. Rep.* 201.

18. The Teſtator having two Sons and a Daughter, by Will gives 2000 *l.* apiece to his Sons, and 2000 *l.* to his Daughter, payable at twenty-one, or Marriage, *Proviſo*, That if Aſſets ſhall fall ſhort, ſtill the Daughter ſhall be paid her full Legacy, and that the Abatement ſhall be born proportionably out of the Sons Legacies only. The Teſtator leaves Aſſets to pay all the Legacies, but the Executrix (the Teſtator's Wife) waſted them, and by that Means a Deficiency happened. Decreed *per* his *Honour*, that in this Caſe the Daughter ought to abate in Proportion. But on Appeal to Lord Chan. *Parker* this Decree was reverſed; and decreed the Daughter to have her *full* Portion, and the Abatement (on Account of the Deficiency of Aſſets) to be made out of the Sons Legacies. *Mich.* 1720. *Marſh* and *Evans*, 1 *Will. Rep.* 668.

19. *J. S.* ſeiſed of an Eſtate in Fee, which he had mortgaged for 500 *l.* and poſſeſſed of a Leaſehold, deviſed the *former* to his eldeſt Son in Fee, and the *latter* to *M.* his Wife, and died, leaving Debts, which would exhauſt all his *perſonal* Eſtate, except the Leaſehold given to *M.* The Queſtion was, Whether there being (as uſual) a Covenant to pay the Mortgage Monies, the Leaſehold Premiſſes deviſed to *M.* ſhould be liable to diſcharge the Mortgage? His *Honour* (after taking Time to conſider of it, and being attended with Precedents) decreed that as the Teſtator had charged his *real* Eſtate by this Mortgage, and alſo *ſpecifically* bequeathed the Leaſehold to his Wife, the Heir ſhall not diſappoint her Legacy, by laying the Mortgage Debt upon it, as he might have done had it *not* been *ſpecifically* deviſed; and tho' the mortgaged Premiſſes were alſo *ſpecifically* given to the Heir, yet he muſt take them *cum onere*, as probably they were intended; and that by this Conſtruction (*c*) each Deviſe would take Effect. And that this Reſolution did not in the leaſt interfere with that of *Clifton* and *Birt*, becauſe in the *latter* there was *no* Mortgage. *Hil.* 1720. *Oneale* and *Meade*, 1 *Will. Rep.* 693.

(*c*) *Vide Long* and *Short*, 1 *Will. Rep.* 403.

20. *A.* deviſes his real and perſonal Eſtate to his four Daughters, and *their Heirs*, *Executors and Adminiſtrators*. One of the Daughters died. Decreed that her Share ſhall go in the ſame Manner as a *real* Eſtate to the ſurviving Daughters. *Per Lord Chancellor*, who cites it as the Caſe of *Blackwell* and *Dry*, *Trin.* 1721. *Prec. in Chan.* 567.

1 *Will. Rep.* 700. *Trin.* 1721. S. C. but *differently* ſtated. *Vide P. Ca.* of *this* Work.

21. *J. S.* gave 60 *l.* apiece to his Executors for their Care and Pains, and 3 *l.* apiece to the Poor of three ſeveral Pariſhes, and 5 *l.* apiece to his Servants, and at the End of the Will, apprehending, as he ſaid, there would be a conſiderable Surplus of his perſonal Eſtate, gives further Legacies. After this he makes a Codicil, whereby he gave ſeveral other Legacies, and provided thereby that if a Deficiency ſhould happen, then 200 *l.* given by his Will for rebuilding a Chapel for St. *John*'s College in *Cambridge* ſhould not take Effect, but only ſo much as ſhould be thought neceſſary ſhould be laid out in beautifying the old Chapel there. There happened to be a great Deficiency of Aſſets by reaſon of the Fall of *South-Sea* Stocks. Upon which it was decreed *per* his *Honour*, that the Legacies given at the latter End of the Will being upon a Preſumption that there would be a Surplus, and there happening to be none, the *former* Legacies in the Will ſhould be preferred, and thoſe in the *latter* End ſhould be loſt, and alſo the Legacies in the *Codicil* ſhould abate in Proportion; and that the *Charity* Legacies (*a*), being but Legacies, muſt abate in Proportion, notwithſtanding that by the *Civil* Law Charity Legacies have the Preference to all others. But with reſpect to the 3 *l.* given to the Poor, *&c.* theſe the Court looked upon as Part of the Funeral, and as *Doles* at the Funeral, and therefore held that no Abatement ought to be made out of them; but the Legacies of 5 *l.* apiece given to the Servants were to abate in Proportion. *Eaſt.* 1722. *Attorney General* and *Robins*, 2 *Will. Rep.* 23.

(*a*) *Vide Attorney General* and *Hudſon*, *Tate* and *Auſtin*, and *Maſters* and *Maſters*.

22. Where ſeveral Legacies are given out of Bonds, Securities, *&c.* and theſe fall deficient, there ſhall be an Abatement amongſt them only, and not affect other Legatees; where there are ſeveral *pecuniary* Legatees they muſt abate in Proportion; but no *ſpecifick* Legatee, except in Caſe of his Legacy. *Per* his *Honour*, *Hil. Vac.* 1723. *Anon. Vin. Abr.* Tit. *Deviſe*, (Q. d.) *Ca.* 39. *P.* 424.

23. Specifick Legacies were left to *A.* to be paid him after the Death of *B.* the Executrix. Decreed *per Cur'*, That *B.* ſhould give Security that the ſpecifick Legacies ſhould be paid after her Death. *Eaſt.* 10 *Geo.* 1. *Burdett* and *Young*, 2 *Mod. Caſes in Law and Eq.* 93. —— Affirmed *in Dom. Proc'*. *Ibid.* 94.

24. The Teſtator deviſed ſeveral *ſpecifick* Legacies to ſeveral Perſons, and in particular he deviſed *ſpecifick* Legacies to each of his Grandchildren, *to be paid at their reſpective Ages of twenty-one*, or *Days of Marriage*; and by a ſubſequent Clauſe in his Will, he appoints *that all the Legacies* thereby deviſed, ſhould be paid *within one Year after his Deceaſe*. The Grandchildren, tho' *under Age* and *unmarried*, exhibited their Bill, and inſiſted, That by Virtue of this laſt Clauſe their Legacies ought to be paid *within a Year* after the Death of the Teſtator. *Per Cur'*, The ſubſequent Clauſe in this Will, which ſeemingly contradicts the Payment of the Legacies to the Grandchildren in Point of Time, muſt be conſtrued ſo as it may not be repugnant to any *former* Clauſe in the ſame Will; and therefore that laſt Clauſe muſt only relate to the other ſpecifick Legacies given to the other Legatees, and not to the Legacies deviſed to the Grandchildren. *Trin.* 11 *Geo.* 1. *Adams* and *Clarke*, 2 *Mod. Caſes in Law and Eq.* 154.

25. *J. S.* poſſeſſed of a Term for Years, and a Fortune in Money, made his Will, and left all his Children *pecuniary* Legacies, *payable at different Times*; and after the Deceaſe of his Wife, he deviſed one Moiety of the Term to his Son *B.* and the other Moiety to his Son *C.* And then came this Clauſe: " *And if any of my Children die before their* " *Portion becomes payable, then that to fall equally between my Wife and* " *the*

"*the ſurviving Children.*" *B.* died in the Life-time of the Wife. The Queſtion was, Whether his Moiety of the Term ſhould be divided among the Wife and the ſurviving Children? It was *reſolved* by Lord Chan. *King*, That as in common Parlance Portion is not ſaid of a Term, and there being *pecuniary* Legacies on which it may operate, the Word (*payable*) ſhall be applicable to and be confined to that; this Contingency of the Wife's dying, might happen when the Sons were very old, and long after the Money became payable; and the Sons, by this Contingency hanging over them, could not diſpoſe of their Intereſt for the Advantage, or perhaps the Neceſſities of their Families, which would therefore be to their Prejudice, which could not be ſuppoſed to be done by a Father. *Eaſt.* 11 *Geo.* 1. *Richards* and *Cock*, *Select Caſes in Chan.* 12.

In this Caſe the Executor by his Croſs Bill prayed to be repaid the Legacies which thro' *Miſrepreſentation* he had paid, *the Aſſets being beyond Sea.* But Lord *King* taking Notice that no *Fraud* or *Miſrepreſentation* appearing to have been made Uſe of by the Legatees, to whom theſe Payments had been made, and there being much more Reaſon to think that the Executor was better informed concerning the Teſtator's Circumſtances than the Legatees, his *Lordſhip* would order no Refunding or Coſts on either Side, it being a hard Caſe. *Ibid.* 296, 297.

26. If an Executor pays beyond Aſſets, he cannot make the Legatee refund. *Trin.* 1725. *Coppin* and *Coppin*, 2 *Will. Rep.* 291, 296.

27. *J. S. on* the Marriage of *M.* his Niece with *B.* by Articles agreed, that he would at the Time of his Death leave 30 *l.* a Year in Lands to the Heirs of the Body of the ſaid *M.* by *B.* and *to their Heirs*, provided, that if there ſhould be more than one Child of the Marriage, then *J. S.* ſhould be at Liberty to diſpoſe of this 30 *l. per Annum* to ſuch of the Children of *M.* as he ſhould think fit; and in the Beginning of the Articles it was ſaid, to be for the better Advancement of the ſaid *B.* and *M.* his intended Wife, and the Iſſue of the Marriage. Afterwards *J. S.* makes his Will, and thereby deviſes an Eſtate to his younger Niece *D.* and adds, "*That if the Eſtate given* "*to* D. *ſhould prove of greater Value than what he had before given to* "*his Niece* M. *then ſo much ſhould be taken from his Niece* D. *and be* "refunded *to* M. *as ſhould make them equal.*" Objected, That what *M.*'s Children were intitled to by the Marriage Articles could not be taken as given to *M.* But Lord Chan. *King* held clearly, that what by the Marriage Articles was provided for the Children of *M.* ought to be looked upon as Part of the Proviſion for *M.* and as done for her, ſince it was doing that for her Children, which otherwiſe ſhe or her Huſband would have been obliged to do themſelves. *Hil.* 1725. *Thomas* and *Bennet*, 2 *Will. Rep.* 341, 343.

3 *Will. Rep.* 384. S. C. on an Appeal from a Decree at the Rolls, and ſays, his *Lordſhip* obſerved, Firſt, That tho' *ſpecifick* Legacies have in ſome Reſpects the Advantage of thoſe that are *pecuniary*, ſo as to be paid *in toto*, and not in Average, on a Deficiency of Aſſets; yet in other Reſpects they are diſtinguiſhed to their (*a*) Diſadvantage from *pecuniary* Legacies; as ſuppoſe they ſhall have been *loſt* or *aliened* by the Teſtator in his Life-time, they muſt then fail *in toto*. *Ibid.* 385.
(*a*) *Vide* the Caſe of *Hinton* and *Pinke*, *P.* 554. *Ca.* 14.

28. *J. S.* deviſed 6000 *l. South-Sea* Annuities to *A. B.* and *C.* to be laid out in Land, and ſettled on *A.* for Life, *&c.* And by Codicil three Days after, taking Notice of this Deviſe, gives 1200 *l.* to be laid out in Land, to the ſame Uſes, and makes *A.* Executor. *J. S.* left conſiderable *perſonal* Eſtate, but had only 5360 *l.* in Annuities at the Time of making of the Will. Decreed at the Rolls, and affirmed by Lord Chan. *Talbot*, that nothing paſſed more than *J. S.* had in *South-Sea* Annuities. *Mich.* 1735. *Aſhton* and *Aſhton*, *Caſes in Eq. Temp. Talbot* 152.

29. *A.* bequeathed 500 *l.* Bank Stock to *B.* and 500 *l.* Bank Stock to *C.* whereas he had only 500 *l.* Bank Stock in the whole. It was inſiſted that the Teſtator probably intended to buy another 500 *l.* Bank

Stock, and that there being Aſſets left ſufficient over and above all Debts and Legacies to anſwer both 500 *l.* both ought to be made good out of the Eſtate. And Lord *Hardwicke* was either of the ſame Opinion, *or* decreed accordingly. *Vin. Abr.* Tit. *Deviſe*, (Q. d.) by way of *Note* to *Ca.* 1. *P.* 418.

Mr. *Viner* ſays, he *thinks* that he was informed that this was *firſt* at the *Rolls*, and after that Lord *Hardwicke* held *or* decreed accordingly; and that this was about *Michaelmas* or *Trinity* Term 1738. *Ibid.*

30. Where a Legacy is given to Executors for Care and Pains, *it* is wrong that that Caſe ſhould receive a different Determination from the Caſe of a Legacy being given to Executors generally, in which it is admitted that the Executors ought to abate in Proportion with the other Legatees; and where a Legacy is given to Executors generally, it is underſtood to be for their Care and Pains; and when theſe Words are expreſſed in the Will, *declaring that the Legacy is given for their Care and Pains*, they are rather the Words of the Drawer of the Will, than the Maker of it; for which Reaſon, the making a Difference between one Caſe and the other, would be to make a Diſtinction on too ſlight a Foundation; and tho' the Bequeſt is expreſſed *to be for Care and Pains*, yet ſtill it is but a Legacy which muſt proceed from the Bounty of the Teſtator. It is not to be conſidered as a Debt or Contract, for the *Care and Trouble of the Executor* is only the Motive on which the Teſtator exerciſes his Bounty by way of Legacy; and let the Motive or the Bounty be what it will, whether paſt and executed, or *future* and *executory*, it is all the ſame; an Executor, when he proves the Will, may be ſuppoſed in ſome Meaſure to know the State of the Teſtator's Affairs; and if he does prove the Will, he takes the Legacy ſubject to the Contingency of abating, in Caſe the Eſtate proves deficient. *Eaſt.* 1741. *Herne* and *Herne*, *Barnard. Rep. in Chan.* 435, 436.

(C) Of the Time of Payment of a Legacy.

1. IF a Legacy be given to an Infant to be paid at his Age of twenty-one, and the Executor to pay Intereſt for it until it become payable; if the Infant die *before* twenty-one, it is due preſently to the Executor or Adminiſtrator of the Infant; but if no Intereſt was to be paid for it, then it ſhall *not* be paid until ſuch Time as the Infant would have come to twenty-one in Caſe he had lived, becauſe there it is a Benefit the Teſtator intended to the Executor by keeping it in his Hands; but in the other Caſe it could be none, when Intereſt was payable. *Hil.* 1680. *Anon.* 2 *Freem. Rep.* 64.

2. If a Legacy be given to a young Girl *when ſhe marries*, and *ſhe marries* before ſhe is *Viri Potens*, ſhe ſhall *not* have it, for it muſt be intended a compleat Marriage. *Per Wright* Lord Keeper, *Hil.* 1700. in the Caſe of *Yates* and *Fettyplace*, 2 *Freem. Rep.* 244.

3. A *perſonal* Legacy ſhall be paid preſently, tho' the Child dies before the appointed Time. *Per* Lord Keep. *Wright*, *Eaſt.* 1702. in the Caſe of *Brewen* and *Brewen*, *Prec. in Chan.* 196.

4. *J. S.* by Will gives certain *Lands to be ſold for the Payment of his Debts*, and the *Reſidue he gives to* M. *his Wife for Life*, and *after her Death to* T. *his Son, his Heirs and Aſſigns for ever*; provided, *that if* T. *ſhould depart this Life without Iſſue of his Body*, then *he gave to his two God-Daughters* (the Plaintiffs) 200 *l. to be equally divided between them, and paid out of the Eſtate laſt mentioned within ſix Months*

1 *Will. Rep.* 198. — 2 *Vern.* 686.

Months after the Deceaſe of the Survivor of his ſaid Wife and his Son T. by ſuch Perſon as ſhould inherit or enjoy the ſame; *and for Non-payment thereof he gave the Eſtate to his ſaid God-Daughters for Payment thereof.* The Teſtator dies, and his Widow dies. *T.* enters upon the Lands laſt mentioned, and *levies a Fine*, and *ſettles the Lands upon his Wife for a Jointure, and his Heirs by her*; and for want of ſuch Iſſue, to his own right Heir; and he having one Child, a Daughter, by that Marriage, he by Will gives the Eſtate to his Wife *S.* and her Heirs, after the Death of his ſaid Daughter, and then dies, leaving his Wife and one Daughter living; and then the Daughter dies. And *S.* the Widow, having the Land for her Life by the Settlement, and the Inheritance thereof by the Will of *T.* ſhe afterwards marries Defendant, by whom ſhe had Children, and then ſhe dies, and the Defendant enjoys the Land by the Curteſy of *England.* The Bill was for a Satisfaction of the 200 *l.* And the Queſtion was, *Whether the Legacy was payable by reaſon* T. *left Iſſue at his Death*, or *whether it did not become payable at any Time upon the Failure of Iſſue of* T.? And Lord Keep. *Harcourt* was of Opinion, That the Legacy was *not* payable; taking the Meaning of the Words of the Will to be, that if *T.* ſhould have no Iſſue living at his Death, then to be paid; for that the Teſtator having limited it to be paid in ſix Months after the Death of the Survivor, which, if it ſhould be interpreted to be paid upon the Failure of Iſſue of *T.* that might be many Years after; but told the Plaintiffs, that as the Eſtate was deviſed for Payment of the Debts, they might and ſhould have the Liberty to bring an Ejectment and try it, and he would retain the Bill in the mean Time. An Ejectment was brought to try it at the Aſſizes, but the Plaintiffs would not proceed (*a*). *Eaſt.* 11 *Ann. Nicholls et al'* and *Hooper*, *Vin. Abr.* Tit. *Deviſe*, (G. d.) *Ca.* 29. *P.* 402. cites it as from a MS. Rep.

(*a*) This Decree was afterwards *reverſed in Dom. Proc'. Ibid.*

5. " I give all my perſonal Eſtate to my Wife, and to both my " Grandchildren 100 *l.* apiece if they arrive at the Age of twenty-one " Years, or Marriage." Theſe Legacies are payable at twenty-one, or Marriage, and is *not* to wait the Death of the Wife. *Eaſt.* 10 *Geo.* 1. *Burdet* and *Young*, 2 *Mod. Caſes in Law and Eq.* 93.

6. *J. S.* bequeathed 100 *l.* to *A.* payable at twenty-one, and in the mean Time *A.* to have the yearly Sum of ———, which did not amount to the Intereſt of the Legacy given to him. *A.* died before twenty-one, and the Queſtion was, Whether the Executors of *A.* ſhould be paid this Legacy preſently, or wait until ſuch Time as *A.* would, if he had lived, have attained twenty-one? And Lord Chief Juſtice *Raymond*, Sir *Joſeph Jekyll* Maſter of the Rolls, and Lord Chief Juſtice *Eyre*, held *unanimouſly* (after Time taken to conſider of it) That the Executors of *A.* ſhould (*b*) wait for their Legacy 'till ſuch Time as their Teſtator ſhould, in Caſe he had lived, have attained twenty-one, it being unreaſonable that *A.*'s Executors, ſtanding in his Place, ſhould be in a better Condition than *A.* himſelf would have been, had he been living; and that it was to be preſumed that *J. S.* had made a Computation of his Eſtate, and conſidered when the ſame would beſt bear and allow of the Payment of this Legacy; and that there could be no Reaſon given why an *uncertain* Accident ſhould accelerate the Payment of this Legacy before the Time which was at firſt intended for that Purpoſe (*c*). *Hil.* 1725. *Cheſter* and *Painter*, upon an Appeal to the King in Council from a Decree in the Court of *Chancery* in the Iſland of *Antigua*, 2 *Will. Rep.* 335, 337.

(*b*) *Vide* 2 *Will. Rep.* 478. *Laundy* and *Williams*, and the Diſtinction there taken between the *Executors* or *Adminiſtrators* of a Legatee dying *before* the Day of Payment and the Deviſe over.

(*c*) See in Support of this Reſolution 2 *Vern.* 94, 199. but 1 *Lev.* 277. *Lady Lodge's* Caſe *cont'*.

7. A Deviſe was *In Truſt* that the Deviſees ſhall have the Profits of the Land when they come of Age; they have a Right to it in their Minority, at leaſt to ſo much thereof as may be ſufficient for their Support and Maintenance; and what is not then paid, ſhall go to their Adminiſtrators. *Mich.* 11 *Geo.* 1. *Bateman* and *Roach*, 2 *Mod. Caſes in Law and Eq.* 104.

8. *J. S.* deviſed ſeveral *ſpecifick* Legacies to ſeveral Perſons, and in particular he deviſed ſpecifick Legacies to each of his Grandchildren, *to be paid at their reſpective Ages of twenty-one*, or *Days of Marriage*, which ſhould firſt happen; and by a ſubſequent Clauſe appoints, that all the *Legacies thereby deviſed, ſhall be paid within one Year after his Deceaſe* (*a*). *Per Cur'*, The ſubſequent Clauſe in the Will, which ſeemingly contradicts the Payment of the Legacies to the Grandchildren in Point of Time, muſt be conſtrued ſo as it may not be *repugnant* to any *former* Clauſe in the ſame Will; and therefore that *laſt Clauſe* muſt only relate to the other *ſpecifick* Legacies given to the other Legatees, and *not to the Legacies deviſed to the Grandchildren*. *Trin.* 11 *Geo.* 1. *Adams* and *Clerke*, 2 *Mod. Caſes in Law and Eq.* 154.

(*a*) The Grandchildren, *tho' under twenty-one*, and *unmarried*, brought their Bill, and inſiſted, that by the *laſt* Clauſe their Legacies ought to be paid within one Year, *&c.*

9. *A.* by Will gives a *Legacy to his Son* B. *at twenty-one*, and *if he died before*, then *to go over to* C. *and* D. (two other Children).—— Teſtator dies, *and* B. *dies before twenty-one*. And the Bill is brought by *C.* and *D.* (who are alſo Infants) for this Legacy. And the Queſtion was, Whether this Legacy ſhould wait 'till *B.* would have been twenty-one (if he had lived), or ſhould be paid immediately? *Lord Chancellor* at the firſt Hearing declared, that if this had been a *ſubſtantive* veſted Legacy, and no Clauſe of Survivorſhip or Limitation over, it muſt according to the *late* Authorities have waited 'till *B.* the Legatee would have been twenty-one, and would not have been recoverable ſooner by the Executors, becauſe that would be to accelerate the Payment ſooner than the Donor intended it; and it ſeems here *C.* and *D.* are ſubſtituted only in the Place of the Executors of *B.* His *Lordſhip* thought, that tho' the Legacy is given to *B.* at twenty-one, yet it is a veſted Legacy, and the ſame as if it had been given to be paid *at* twenty-one, all the Legacies to the other Children being given in that Manner; and this ſmall varying of the Expreſſion does not ſufficiently ſhew that the Teſtator intended any Difference. But *Note*; And it ſeems this Point is not material to the main Queſtion as to Time of Payment over; for whether veſted or not, it was plainly to go over upon the Legatee's dying *before* twenty-one, which happened. At another Day his *Lordſhip* declared, that tho' he could ſee no real *Difference* between a *Deviſee over* and an *Executor or Adminiſtrator*, yet as there was a *modern* Precedent to the contrary, and that the *Deviſee over* ſhould be paid preſently, and that the Executor ſhould wait, *&c. he* thought he was bound by that Precedent; and ſaid, that ſo long ago as the Time of *E.* 6. in *And. Rep.* ſuch a *Deviſee over* maintained an Action, *&c.* And 25 *July* 1728 his *Lordſhip* decreed that the Legacy ſhould be paid immediately, without waiting 'till *B.* ſhould have been twenty-one. And cited *Papworth* and *Moor*, 2 *Vern.* 283.

Mr. *Solicitor General pro Quer'*, cited 2 *Vent.* 347. *Leon.* 278. and argued, that the Difference was between an an *Executor* and a *Deviſee over*, for that in Caſe of ſuch a Legacy *veſted*, and the Legatee died before twenty-one, there the *Executor* ſhould wait, and not be paid the Legacy 'till the Legatee would have been twenty-one, if he had lived; becauſe the *Executor* claiming under the Legatee, can be in no better Condition than the Legatee himſelf would have been, *&c.* And that the *Executor* ſhould thus expect, was lately reſolved in a Plantation (*b*) Cauſe before the Lords of the Council, upon a Reference to the two *Chief Juſtices* and the *Maſter of the Rolls*. But it is otherwiſe *in Caſe of a Deviſe over*, for the *Deviſee over* does *not* claim or come in *under* the Legatee, but his Right accrues immediately upon the Contingency happening, *viz.* the Death of the firſt Legatee *before* twenty-one. *Ibid.*

(*b*) *Viz.* the Caſe of *Cheſter* and *Cheſter*, *P. Ca.*

(a) 2 *Will. Rep.* 478. *Laundy* and *Williams, Trin.* 1728. S. C. ſtates it, that *J. S.* gave to *A.* 230*l.* to *B.* 210*l.* to *C.* (yet an Infant) 210*l.* and to *D.* 150*l.* all *payable at their reſpective Ages of twenty-one*, Proviſo, *that if any of the Legatees ſhould die before his, her, or their reſpective Ages of twenty-one, then the Legacy or Legacies of him, her or them, ſo dying, ſhould be paid to the Survivors or Survivor of ſuch Legatees.* *D.* and *A.* attained to twenty-one, and were paid their Legacies. *B.* died an Infant, and *A.* and *D.* who had attained their Ages of twenty-one, brought their Bill againſt the Teſtator's Widow and Executrix, to have their two Thirds of *B.*'s 210*l.* paid over to them, *C.* being yet an Infant of about twelve Years old. Lord Chan. *King*, on the Authorities *cited pro Quer'*, *viz.* 2 *Vern.* 199. 1 *And.* 33. 2 *Vern.* 283. *Papworth* and *Moor*, and the Caſe of *Cheſter* and *Painter*, (*P. Ca.*) varied the Decree which he had before pronounced, and ordered two Thirds of this 210*l.* to be paid to Plaintiffs (the Brother and Siſter of the deceaſed Legatee) and gave Intereſt for their two Thirds from the Death of the Infant Legatee; for tho' it was objected, That this being a new Legacy, the Executrix ought to have a Year's Time for the Payment of it; yet the Court held, That muſt be intended to be from the Death of the Teſtator; whereas in this Caſe the Teſtator had been dead ſeveral Years. *Ibid.* 481. The *Reporter* adds, by way of *Note*, That the Rule in Equity ſeems by this Reſolution to be ſettled accordingly. *Ibid.* 481.——1 *Vol. Abr. Eq.* 299. *Trin.* 1728. *Ca.* 3. S. C. (as a MS. Caſe) but *not* ſo *fully* reported.

(which was in Point), and 1 *And.* 33. *Vin. Abr.* Tit. *Deviſe*, (G. d.) *Landy* and *Williams* (a), *Ca.* 35. *P.* 404.

10. Lord *Dover* by Will dated 14 *Jan.* 1707, deviſed ſeveral Houſes, Ground Rents, *&c.* both in Poſſeſſion and Reverſion, to *Folkes et al'*, *Upon Truſt* that they and the Survivor of them ſhould (as ſoon as conveniently they might or could) ſell and diſpoſe of all the ſaid Houſes and Premiſſes to them deviſed, both in Poſſeſſion and Reverſion, for the beſt Price that could be got for the ſame, and out of the Monies ariſing by ſuch Sale, or by the Rents and Profits in the mean Time, ſhould pay ſeveral Legacies thereby given to ſeveral Perſons, which are directed to be paid within ſix Months after his Death; and after Payment of the ſaid Legacies, and reimburſing the ſaid Truſtees their Charges, to put all the Remainder of the Monies to be raiſed by Sale of the Premiſſes into five equal Parts or Shares, and out of the firſt fifth Part to pay unto the four youngeſt Daughters of his Niece Lady *D'Avers* 1000*l.* apiece at their reſpective Ages of twenty-one, or Days of Marriage, which ſhould firſt happen; and to pay the Reſidue of the ſaid fifth Part to the proper Hands of Lady *D'Avers*, or as ſhe ſhould direct, for her own proper Uſe, and her Receipt alone to be ſufficient for the ſame. And to pay another fifth Part to his Niece Lady *D'Ewes*, after Payment thereout of 1000*l.* apiece to her younger Children, in like Manner. And to pay the three other Fifths to his three other Nieces, in like Manner. *And if any of his ſaid Nieces ſhould happen to die before any Dividend ſhould be made* of the Sum or Sums of Money to be raiſed by Sale or Sales, *he appoints, that all and every the Sum and Sums of Money which ſhould or ought to have come and been paid to his ſaid Nieces, in Caſe they had lived, ſhould, in Caſe of their dying, be paid by his Truſtees to and amongſt all and every the younger Children of his ſaid Nieces Sons and Daughters, in equal Proportions, which ſhould be alive at the Time the Dividends are or ought to be paid by the Intent of this his Will; the Sums ſo to be divided to be paid as ſoon as they are raiſed.* In which Diſtribution of the Sums of Money intended for his ſaid Nieces, Care is to be taken that the younger Children of his ſaid Nieces do only claim and take the Share and Part intended for their own Mother, in Caſe ſhe had lived, and no more; and that after ſo much Money was raiſed as would pay the Legacies given by him, which were precedent in Point of Payment to the Legacies intended for his Nieces and their Children, that then and ſo often as 1000*l.* was raiſed by Virtue of the Truſt aforeſaid, that the ſaid Money ſhould from Time to Time be put out at Intereſt upon Land Security by his Truſtees, or the Survivor of them, and the Monies which ariſe and come from the Intereſt thereof ſhould be added to the Principal, to the Increaſe of the Sums intended for his ſaid Nieces and their

Children reſpectively. Lord *Dover* died 5 *April* 1708. Lady *D'Ewes* died ſoon after, *before any Sale made*, or *Bill brought for Execution of the Truſt*, leaving two Sons and four Daughters, *A. B. C. D. E.* and *F.* all Infants. Soon after the Death of Lady *D'Ewes*, Sir *R. D'Avers* and *D.* his Lady, one of the Nieces of Lord *Dover*, and all her younger Children then living, together with the younger Children of Lady *D'Ewes* and others, exhibited their Bill in this Court againſt the Truſtees to have the Truſt Eſtate ſold, and that the Money ariſing thereby might be divided according to the Directions of the Will. And it was decreed (*a*), that the Eſtate deviſed to be ſold, ſhould be ſold to the beſt Purchaſer, and the Money to be divided and paid in ſuch Manner and to ſuch Perſons, and ſubject to ſuch Contingencies, as the Will directs. Purſuant to the ſaid Decree, ſeveral Parts of the Truſt Eſtate were ſold, and the ſeveral Legacies by the Will given and directed to be paid in ſix Months, and alſo the ſeveral Legacies of 1000 *l.* apiece given to the Daughters of the Teſtator's Nieces were all paid. Lady *D'Avers* died inteſtate, leaving eight Children, *ſcil'*, three Sons and five Daughters; a great Part of the Truſt Eſtate ſtill remaining unſold. The younger Children of Lady *D'Avers* exhibited (*b*) their Bill againſt *Folkes* the ſurviving Truſtee, and the younger Children of the other Nieces of the Teſtator, to revive the former Suit and Proceedings. And it was decreed (*c*), that it be referred to the *Maſter* to take an Account of the ſeveral Contracts made for the Sale of the Truſt Eſtate, purſuant to the former Decree, ſince the Death of Lady *D'Avers*, and of the Times when ſuch Contracts were made, and for what Sums reſpectively, and what younger Children of Lady *D'Avers* and Lady *D'Ewes* reſpectively were alive at the making of the Contracts for ſuch Sales, and that one fifth Part of the Money ariſing by ſuch Contracts reſpectively be paid to the younger Children of Lady *D'Avers* who were living at the Time of making ſuch Contracts, and if any of them are ſince dead, to their Repreſentatives; and that one other fifth Part of the Monies ariſing by ſuch Contracts reſpectively be paid to the younger Children of Lady *D'Ewes* who were then living, and if any of them are ſince dead, to their Repreſentatives; and that the Truſt Eſtate remaining unſold be forthwith ſold according to the former Decree; and that one fifth Part of the Monies ariſing thereby be paid equally to the younger Children of Lady *D'Avers* as ſhall be living at the Time of ſuch Sale, and that the other fifth Part be paid to the Defendants the younger Children of Lady *D'Ewes*, or to ſuch of them as ſhall be living at the Time of ſuch Sale; the other Fifths ariſing by ſuch Sale to be paid according to the Will of Lord *Dover*.——*H.* married *F.* one of the Daughters of Lady *D'Ewes*. She attained her Age of twenty-one 6 *July* 1721, and died in *April* 1725, leaving Iſſue one Son; and *H.* took out Adminiſtration to her, and thinking himſelf aggrieved by the ſaid Decree, petitioned to have the Caſe reheard, and inſiſted that his Wife's Right was a veſted Intereſt by the Death of her Mother Lady *D'Ewes*, and that he in Right and as Repreſentative of his Wife, is intitled by Virtue of the Will and *former* Decree, to his Wife's Proportion of her Mother's Share of the Monies ariſing and to ariſe by Sale of the Truſt Eſtate. This Cauſe was ſolemnly argued before *King* C. aſſiſted by *Raymond* C. J. and Mr. B. *Comyns*. The Queſtion did ariſe on the Clauſe of *Survivorſhip* in the Will, *ſcil'*, "*If any of my ſaid Nieces ſhall happen to die before any* "*Dividend can be made of the Sum or Sums of Money to be raiſed by* "*Sale or Sales of the Houſes and Premiſſes directed to be ſold, I appoint* "*that all and every the Sum and Sums of Money which ſhould or ought*

"*to*

(*a*) 28 *July* 1709.

(*b*) *Eaſt.* 1726.

(*c*) 9 *July* 1727.

" *to have come and been paid to my ſaid Nieces in Caſe they had lived,* " *ſhall, in ſuch Caſe of their dying, be paid by my ſaid Truſtees to and* " *amongſt all and every the younger Children of my ſaid Nieces, Sons* " *and Daughters, in equal Portions, which ſhall be alive at the Time* " *the Dividends are or ought to be made, by the Intent of this my Will;* " *and the Sums ſo to be divided to be paid as ſoon as they are raiſed.*"

(*a*) Decreed that the Monies raiſed or to be raiſed by the Sale of the Truſt Eſtate to be equally divided between the younger Children of Lady *D'Avers* and Lady *D'Ewes* reſpectively, or their Repreſentatives, purſuant to the Directions of the Will. *Trin.* 3 *Geo.* 2. *D'Avers et al'* and *Folkes et al'*, and *Helmes* and *D'Avers*, *Vin. Abr.* Tit. *Deviſe*, (G. d.) *Ca.* 36. *P.* 405.

(*a*) *Per* Mr. B. *Comyns*, Tho' the Queſtion ariſes upon the Clauſe of *Survivorſhip*, yet the whole Will ought to be taken into Conſideration. Lord *Dover* directs the Truſt Eſtate both in Poſſeſſion and Reverſion to be ſold ſo ſoon as conveniently it might or could; ſo it is plain he intended the Reverſion ſhould be ſold, and not to defer the Sale 'till it came into Poſſeſſion, which did not happen 'till the Death of Lady *Dover*, who died in 1726, and tho' it may be difficult to tie up the Sale on any preciſe and certain Time, no certain Time being fixed by the Teſtator, yet the Court muſt fix ſome reaſonable Time or other for the Sale, or ſet ſome Bounds to the Truſtees for a Sale, which they ought not to exceed; and *he* thought the utmoſt Period of the Time for the Sale cannot exceed the Time that the Daughters of the Nieces Lady *D'Avers* and Lady *D'Ewes* ſhould marry or attain their Age of twenty-one, for then their ſeveral Legacies of 1000*l.* apiece grow due to be paid out of their Mothers Shares. If it were diſcretionary in the Truſtees not to ſell 'till they thought fit, by delaying the Sale they might totally fruſtrate the Will, and not ſell at all. The Children are to take who ſhall be alive at the Time the Dividends are, or ought to be made; by the Intent of this Will there is certainly a Difference between the Words *(are)* and *(ought)*, and the Teſtator meant ſome Difference between them, and therefore not neceſſary that the younger Children ſhould be alive at the Time the Dividends were actually made, it is enough if they be living at the Time they ought to be made; and he thought the Eſtate ought to have been ſold ſooner, and conſequently the Dividends ought to have been made ſooner, for they are directed to be made as ſoon as the Money raiſed by Sale. He thought Mrs. *Helmes* being of Age before her Death, and a Party to the Bill in 1708 for an Execution of the Truſts in Lord *Dover*'s Will, by that Bill ſhe puts in her Claim to her Share, or her Mother's Share; under the Will, and that an Intereſt was veſted in her, and conſequently Mr. *Helmes*, as her Repreſentative, is intitled to her Share.——*Raymond* C. J. ſaid, the Will was dark and obſcure, but *he* thought the Teſtator intended the Truſt Eſtate both in Poſſeſſion and Reverſion ſhould be ſold in a reaſonable Time, and ſuch Time was long ſince lapſed and paſſed, and *he* did not think it neceſſary, in the *preſent* Caſe, to determine or fix any preciſe or determinate Point of Time; he was ſure a reaſonable Time was already paſt. Whenſoever the Sale ought to have been made by the Intent of the Teſtator, that was the Time the Dividends ought to have been made; and from that Time became a veſted Intereſt in the younger Children of the Teſtator's Nieces.——And Lord Chan. *King* was of the ſame Opinion, that the Intereſt attached in the younger Children at the Time the Truſt Eſtate ought to have been ſold by the Intent of the Teſtator; wherefore decreed *ut ſupra*. *Ibid.*

Vide Tit. *Deviſe, P.*

(D) Concerning reſiduary Legatees.

1. DEVISE of the Reſidue of his *real* and *perſonal* Eſtate to his Daughters, *their Heirs, Executors and Adminiſtrators.* One of the Daughters dies *in the Life-time of the Teſtator*; her Share of the *Reſiduum* ſhall go to the three ſurviving Daughters, as undiſpoſed of. *Per Parker* C. *Trin.* 7 *Geo. Backwell* and *Dry*, *Vin. Abr.* Tit. *Deviſe*, (C. e.) *Ca.* 10. *P.* 416.

(*b*) *Vide* Tit. *Intereſt, P.*

(E) What Legatees ſhall have Intereſt (*b*) and Maintenance.

1. IN Caſe of a Legacy, it was admitted that Intereſt was not due 'till demanded, and that the Executor or Adminiſtrator ſhould pay Intereſt but from the Time of the Demand, *et ſemble*, that if no Demand be proved in the Cauſe, it will be from the Time of the Bill exhibited. *Eaſt.* 1676. *Anon.* 2 *Freem. Rep.* 1.

2. A Legatee who has *not* Notice of his Legacy 'till the Executor publiſhes it in the *Gazette*, ſhall have no Intereſt for it. *Trin.* 1690. *Knap* and *Powell*, *Prec. in Chan.* 11.

3. A Legacy *payable at a certain Time*, ſhall, notwithſtanding, carry Intereſt only from the Time it is demanded. *Per* Lord Keep. *Wright*, *Eaſt.* 1701. *Jolliffe* and *Crew*, *Prec. in Chan.* 161.

4. In Caſe of a *perſonal* Legacy, *payable at twenty-one*, or *Marriage*, the Court has always appointed Maintenance out of the Intereſt of it, if not expreſsly limited otherwiſe in the mean Time. *Per Lord Keeper*, who ſaid he thought ſo. *Eaſt.* 1702. *Brewin* and *Brewin*, *Prec. in Chan.* 196.

2 *Freem. Rep.* 254. *Trin.* 1702. S. C. —1 *Vol. Abr. Eq.* 267. *Ca.* 2. S. C. and cites 2 *Vern.* 439. but is *ſilent* as to the *Maintenance.*

5. *J. S.* by Will (amongſt other Legacies) gave 1000 *l.* to *L. payable at her Age of eighteen*, or *Marriage*, and the Reſidue of his perſonal Eſtate, and all his real Eſtate, to Truſtees, In Truſt (the perſonal Eſtate being firſt inveſted in Land) to ſettle the whole on *B.* for ninety-nine Years, if he ſhould ſo long live, Remainder to Truſtees, during his Life, to preſerve contingent Remainders, Remainder to his firſt, *&c.* Son in Tail Male, Remainder over in like Manner to *C.* Afterwards by a Codicil he appointed that the 1000 *l.* given by the Will to *L.* ſhould be made up 6000 *l.* and *payable to her at her Age of twenty-one, or Marriage.* *L.* being eighteen, brought this Bill, praying that ſhe might have Intereſt for the 6000 *l.* 'till her Age of twenty-one, or Marriage. And Lord Chan. *Macclesfield* (having taken Time to conſider of it) decreed the Intereſt of the 6000 *l.* from the Death of the Teſtator, ſaying, It had Weight with him, that by the Will the 1000 *l.* Legacy left to *L.* was given her at eighteen, but ſhe coming to that Age in the Teſtator's Life-time, the Codicil ordered it to be made up 6000 *l.* yet not to be paid until twenty-one, or Marriage; ſo that tho' the *actual Payment was ſtopt until twenty-one, or Marriage, it was however veſted preſently*, and being ſevered from the reſt of the Eſtate, which *Reſiduum* only *B.* was concerned in; therefore the Intereſt of the 6000 *l.* from the Death of the Teſtator could belong to none but *L.* *Hil.* (*a*) 1721. *Acherly* and *Wheeler et al'*, 1 *Will. Rep.* 783 to 788.

(*a*) This Caſe is miſplaced in Point of Time, not having been decreed 'till *Trinity* Term following. *Ibid.* 788. in a *Note.*

6. If one gives a Legacy *charged upon Land*, which yields *Rents* and *Profits*, and there is *no Time of Payment mentioned in the Will*, the Legacy ſhall carry Intereſt from the Teſtator's Death, becauſe the Land yields Profits from that Time. Reſolved *per* Lord Chan. *Macclesfield*, *Trin.* 1722. *Maxwell* and *Wettenhall*, 2 *Will. Rep.* 26.

7. But if a Legacy be given *out of a perſonal Eſtate*, and *no Time of Payment mentioned in the Will*, this Legacy ſhall carry *Intereſt only from the End of the Year after the Death of the Teſtator.* *Per* Lord *Macclesfield.* And his *Lordſhip*, upon a Debate from what Time Intereſt ſhould commence, ſaid, that he took this to be the *ſettled* Difference. *Ibid.*

8. If a Legacy be *charged upon a dry Reverſion*, it ſhall carry Intereſt *only from a Year after the Death of the Teſtator*, a Year being a convenient Time for a Sale. *Per Lord Chancellor*, *ibid.* 27.

If out *of a perſonal Eſtate*, conſiſting of *Mortgages*, *carrying Intereſt*, or of *Stocks yielding Profits Half-yearly*, it ſeems, in this Caſe, the Legacy ſhall *carry Intereſt from the Death of the Teſtator.* *Per Lord Chancellor*, *ibid.* 27.

9. If a Legacy be brought into Court, and the Legatee has Notice of it, ſo that it is his Fault not to pray to have the Money, or that the Money ſhould be put out, the Legatee, in ſuch Caſe, ſhall loſe the Intereſt from the Time the Money was brought into Court; but if the Money was put out, the Legatee ſhall have the Intereſt which the Money put out by the Court did yield. *Per Lord Chancellor*, *ibid.* 27.

10. *A.* deviſed all his real and perſonal Eſtate to his eldeſt Son, *charging the ſame with* 1000 l. *apiece to his younger Children, payable at their reſpective Ages of twenty-one*; but in the Will *no Notice was taken of Maintenance for the younger Children in the mean Time.* The *Maſter of the Rolls*, taking Notice that *theſe were veſted Legacies*, and *no Deviſe over*, decreed (on Time taken to conſider of the Caſe) that the Children ſhould recover Maintenance, the Court doing but what the Father, if living, ought to have done, *i. e.* to provide Neceſſaries for his Children. *Per* his *Honour*, *Eaſt.* 1722. *Harvey* and *Harvey*, 2 *Will. Rep.* 21.

11. So where *younger* Children are left deſtitute, and the *eldeſt* an Infant, Equity will make ſuch a liberal (*a*) Allowance to the *Guardian* of the *eldeſt* as that he may thereout maintain all the Children. *Per* his *Honour*, *ibid.* 22.

(*a*) *Pierpont* and *Lord Cheyne*, *P. Ca.*

12. His *Honour* ſaid it had been held, that tho' a Legacy were *deviſed over in Caſe of the Legatee's dying before twenty-one*, yet the Infant Legatee ought to have Intereſt allowed him during his Infancy, for his Maintenance; with this Difference only, that where the *Eſtate is ſmall*, the Court, (in whoſe Diſcretion it always lies to determine the *Quantum* of Intereſt) has ordered the loweſt Intereſt. *Ibid.*

13. Deviſe of Lands, In Truſt *for the Mother for Life*, Remainder *to her Children*, In Truſt *that they ſhould have and receive the Profits thereof when they come of Age.* And *per Cur'*, The Children have an Eſtate in Fee as Tenants in Common, and the Mother being deceaſed, they have a Right to it in their Minority, at leaſt to ſo much thereof as may be ſufficient for their Support and Maintenance. *Mich.* 11 *Geo.* 1. *Bateman* and *Roach*, 2 *Mod. Caſes in Law and Eq.* 104.

14. *J. S.* deviſed to *A.* (an Infant about ſeventeen) the Surplus of her perſonal Eſtate, which was about 3000 *l. payable at twenty-one*; and if ſhe ſhould die before, then ſhe deviſed it over; and deviſed alſo to *A.* a ſmall Eſtate in Land in Poſſeſſion. His *Honour* decreed that *A.* was intitled to the Profits of the Eſtate, and the Intereſt of the Surplus which ſhould incur *from the Death of the Teſtatrix*, and in the Life-time of *A.* tho' ſhe ſhould die before twenty-one. *Trin.* 1727. *Nicholls* and *Oſborn*, 2 *Will. Rep.* 419.

15. A Legacy was left to an Infant. The Teſtator had a great deal of Money in Bank Stock. The Executor was reſiduary Legatee. On a Bill for the Legacy, the Queſtion was, Whether it ſhould bear Intereſt, and from what Time? And *per Pengelly* C. B. and *Hale* B. It is a certain Rule *that where the Fund is certain, as when charged on Lands, it ſhall bear Intereſt; becauſe it plainly appears the Rents are received; ſo the Fund on which it is charged produces a Profit here; it is equally certain, and therefore ſhould bear Intereſt* (cites *Salk.* 415. *Small* and *Dee*), *and ſhould be from the Teſtator's Death.* Oppoſed by *Carter* and *Comyns*, Barons; That it ſhould only bear *Intereſt from a Year after the Teſtator's Death*; for as Legacies are to be paid after Debts, the Executor has that Time to enquire, 'till which Time they are not payable, ſo not to bear Intereſt. To which it was agreed. *Mich.* 3 *Geo.* 1. *Bilſon* and *Saunders*, *Select Caſes in Chan.* 72.

Rule.

A Difference was offered to be made, that as this was a Legacy to an Infant, it could not be ſafely paid, and therefore ſhould not bear Intereſt. To which the *Chief Baron* anſwered, It might be ſafely paid into the Hands of an Infant, having proper Evidence of the Payment, as in *Went. Ex.* 313. And *per Carter* B. It may be paid into the Hands of the Guardian, having Evidence; but if he takes Security from the Guardian, which ſhould prove defective, there, as he does not rely on the Security the Law gives, he muſt depend on that taken at his Peril. *Ibid.*

16. *A.* deviſed 500 *l.* to his Infant Grandſon, *without mentioning any Time of Payment*; with a Proviſo, *That if the Grandſon ſhould die before twenty-one, then the Legacy to go over to another.* His *Honour*

held it extreamly clear, that this was a Condition ſubſequent, and therefore as the Infant's Death, before twenty-one, will only defeat the Legacy from the Time it happens, conſequently in the mean while it ſhall carry Intereſt, at leaſt from the End of the Year after the Death of the Teſtator. *Hil.* 1728. *Taylor* and *Johnſon*, 2 *Will. Rep.* 504, 506.

17. A Legacy of 500 *l.* was given to be paid in a *convenient* Time; it muſt *bear Intereſt only from the uſual Time of Payment of Legacies*, tho' *Land was charged with the Payment*. *Trin.* 2 *Geo.* 2. *Hornſly* and *Hornſly*, *Select Caſes in Chan.* 73.

18. The Bill was to recover the Arrears of Intereſt of a Legacy of 300 *l.* after the Legacy paid, and a Receipt given for it. The Caſe was, *J. S.* gave by Will to *M.* (now *D.*'s Wife) a Legacy of 300 *l. payable a Year after his Death*, and made *B.* and *C.* (then an Infant) Executors. *B.* died, and *C.* being but nine Years old, Adminiſtration, with the Will annexed, was granted during his Minority. *D.* and his Wife demanded the Legacy of *C.* who deſired them to let it continue in his Hands for about two Years longer, and paid Intereſt for the firſt Year after *D.*'s Marriage, taking his Receipt. Afterwards, another Year's Intereſt growing due, *C.* paid that Year's Intereſt, and the whole Principal, taking a Receipt from *D.* for 15 *l.* being a Year's Intereſt due for the Legacy of 300 *l.* to the 13 *April* 1723. And *D.* gave *C.* a Receipt for 300 *l.* left to Plaintiff *M.* by the ſaid *J. S.*'s Will. After *ſeven Years Acquieſcence*, *D.* demanded Intereſt for the 300 *l.* from the End of the Year after the Teſtator's Death in 1707, inſiſting by the Bill, that *D.* by Miſtake took the Legacy to have been made *payable by the Will at the Marriage of his Wife*. And *per* Sir *Joſeph Jekyll* Maſter of the Rolls, It is plain Intereſt for the Legacy was due; there is a certain Time appointed by the Will, *viz.* that it ſhould be *paid within a Year after the Teſtator's Death*, and as *D.* had a *clear* Right thereto, ſo he has done nothing to waive ſuch Right. *C.* admits the Intereſt has not been paid, which is to be preſumed was occaſioned by *D.*'s having apprehended that it was not due 'till after *M.*'s Marriage; wherefore, as the Intereſt is due, and admitted not to have been paid, and was not intended to have been waived, his *Honour* decreed *C.* to pay the Arrears of Intereſt from the Year after the Teſtator's Death, with Coſts. *Hil.* 1731. *Eaſt and Ux'* and *Thornbury*, 3 *Will. Rep.* 126.

19. A Legacy *out of a Rent-charge ſhall carry Intereſt*, but *then it muſt be only in Proportion to what the Rent-charge brings in*, not more; and if there be *a Surplus beyond the Rent-charge*, that muſt go to the Heir at Law. *Per* Sir *Joſeph Jekyll* Maſter of the Rolls, *Eaſt.* 1734. *Stonehouſe and Ux'* and *Sir John Evelyn*, 3 *Will. Rep.* 252.

20. On a Bill brought by a *Legatee* againſt an *Executor*, Intereſt ſhall *not* be given for the Legacy *'till a Year after the Teſtator's Death*, unleſs where the *Intereſt is expreſsly given from the Death of the Teſtator*. *Per* Lord Chan. *Hardwicke*, *Eaſt.* 1740, *in Caſu Neale* and *Willis*, *Barnard. Rep. in Chan.* 46.

(F) Ademption of a Legacy.

1. *A.* And *B.* (afterwards Counteſs of *Suffolk*, and ſince deceaſed) by Bond were each indebted to *J. S.* in 2000 *l.* Afterwards *J. S.* by Will gives theſe two Sums, and all Intereſt due for the ſame, to *C.* and deviſes away the Surplus of her Eſtate, with a Proviſo, " *That in Caſe all, or any Part of theſe two Sums ſhould be paid in*

" *before*

" *before the Teſtatrix's Death, then ſhe gives to the ſaid* C. 4000 l. *or* " *ſo much Money as the Principal Money ſo paid in ſhould amount unto,* " *as the Caſe ſhould fall out.*" Afterwards the Teſtatrix, in her Life-time, *releaſed to* A. *the* 2000 l. *due upon his Bond, without having received any Part of the Money*, and died; and *C.* died inteſtate; whereupon the ſaid *A.* (who was her Brother) adminiſtered to her, and demanded the 2000 l. *releaſed to himſelf upon his Bond*, and alſo the 2000 *l.* due upon *B.*'s Bond. The *firſt* he demanded out of the Aſſets of the Teſtatrix, and the *latter* he claimed againſt the Defendant the Earl of *Suffolk*, who, tho' he was *not Executor* or *Adminiſtrator* of *B.* his late Counteſs, nor had any legal Aſſets, yet (as Plaintiff inſiſted) remained ſtill chargeable therewith in Equity, in reſpect of a great Jointure which he had long enjoyed by his Lady, and divers rich Jewels, which ſhe brought him upon their Intermarriage. And *per* Lord Chan. *Parker*, The Teſtatrix intended to make a Proviſion of 4000 *l.* for *C.* and tho' ſhe has ſhewed her Kindneſs to *A.* yet this no way imports an *Alteration* or *Diminution* of her Kindneſs to *C.* And his *Lordſhip* ſaid, that he could not approve of the Diverſity (*a*); that if the Teſtator gave away a Debt by his Will, and afterwards calls it in, this muſt be a Revocation; *ſecus* if it be paid in to the Teſtator unaſked for; for ſuppoſing the Teſtator called in that Debt, fearing it might be loſt (*b*), and not liking the Security, is there any Reaſon that this ſhould deprive the Legatee of his Legacy? That the Caſe of *Orme* and *Smith* (*c*) proves, that the Teſtator's receiving the Debt is no *Revocation* or Ademption of the Legacy. As to the *Releaſe*, his *Lordſhip* ſaid, that implies Payment and Satisfaction of a Debt, being *tantamount* to the Teſtator's receiving it and giving it back again; and that in the *preſent* Caſe it was the ſame as if the Will had ſaid, *if theſe Debts be paid or diſcharged.* And as to an Objection, That *A.* (the Plaintiff) being Adminiſtrator to *C.* his Siſter, claims a double Advantage of his Debts; for, *firſt*, (ſay they) it is given him by the Releaſe, and then he takes it over again by the Will, as repreſenting *C.* his *Lordſhip* obſerved, that his Claim as Adminiſtrator is *in auter Droit* (*d*), and as if *C.* was alive, and made her Claim; and that it would be liable to her Debts, and is the ſame Thing as if any other Perſon had been her *Executor* or *Adminiſtrator*. *Trin.* 1718. *Earl of Thomond* and *Earl of Suffolk*, 1 *Will. Rep.* 461 to 465.

(*a*) Same *Diverſity* taken *arg*', and thereupon decreed in the Caſe of *Rider* and *Wager*, *P. Ca.*

(*b*) *Vide* 2 *Will. Rep.* 469. *Ford* and *Fleming accord*', and 1 *Vol. Abr. Eq.* 302.

(*c*) 2 *Vern.* 681.

(*d*) *Vide* 1 *Vern.* 284. *Jaſon* and *Jarvis*, and 2 *Will. Rep.* 291. *Copping* and *Copping.*

2. *J. S.* was Tenant for ninety-nine Years, if he ſo long lived, with Power of charging the Premiſſes with 2000 *l.* Remainder to *A.* in Tail. Afterwards *J. S.* and the Truſtees named in the Settlement, and *A.* joined in ſuffering a Recovery, and declared the Uſes to *J. S.* for Life, Remainder over, and ſo extinguiſhed the Power of charging the Eſtate. *J. S.* bequeathed 1000 *l.* Legacy to *C.* out of theſe Lands; and it was inſiſted, That tho' this might not be good as a Charge, it ſhould nevertheleſs take Effect as a Legacy, which was not hurt by making an additional Security for it. And Lord Chan. *Macclesfield* ſaid, That here is a particular Proviſion for this Legacy of 1000 *l.* and that it is poſſible a Legacy may be charged upon a certain Fund, as that, upon it's failing, the Legacy ſhall be loſt. That it is material, that this Bequeſt is grounded upon a Power, and may be thought no more than the Execution of that Power; which, if void, muſt of Courſe be a void Bequeſt alſo. And it is alſo obſervable, that the Will gives the Reſidue to the Teſtator's eldeſt Son; ſo that to make this Legacy good, the Legatee, who is otherwiſe provided for, muſt take it away from another Child; and what makes it ſtill harder, is, that the Legacy would by this Means be taken away from an Heir, in order

order to be given to a younger Child, and that *a Charge upon Land* ſeems *not ſo ſtrong as a Gift of a Legacy.* But at length it weighed with the Court, that the Value of this Land amounted to 1000 *l. per Annum*, and the Deſign appeared to be to leave the *younger* Child the two ſeveral Sums of 1000 *l.* one charged by expreſs Words upon the *perſonal* Eſtate, and the other upon the Land; and his *Lordſhip* ſaid, that if a Legacy was given to *J. S.* to be paid out of ſuch a particular Debt, and there ſhould not appear to be any ſuch Debt, or the Fund fail, ſtill the Legacy ought to be paid, and the failing of the *Modus* (*a*), appointed for the Payment, ſhall not defeat the Legacy itſelf. *Hil.* 1721. *Savile* and *Blacket*, 1 *Will. Rep.* 777.

(*a*) *Vide Swinb.* 127.

3. *J. S.* by Will gave to *B.* 550 *l.* then in the Hands of *E.* and died. *J. S.* had before the making of his Will *ordered* ſome Payments out of this 550 *l.* and which reduced it to 430 *l.* This is no Ademption of the Legacy, and none of the Payments being made, but the whole 550 *l.* ſtanding out in *E.*'s Hands, the whole was decreed to *B.* with Intereſt from the Time of filing the Bill. *Per* his *Honour*, *Trin.* 1723. *Crockat* and *Crockat*, 2 *Will. Rep.* 164.

4. But where a Teſtator by his Will gave a Legacy of 500 *l.* which is in the Hands of *J. S.* and after the making of the Will calls it in, or orders *J. S.* to pay to himſelf, or others, Part of the Money, which is accordingly done; this is an *Ademption* of ſuch Part of the Legacy; and the Diverſity is, where the Party who had the Money pays it in of his own Choice and uncalled for, and where the Teſtator (*b*) himſelf calls for it in; for it muſt be the Teſtator's own Act, and not the Act of a third Perſon, which is to revoke his Will. *Per* his *Honour*, *ibid.*

(*b*) But the Diverſity between a voluntary and compulſory Payment ſeems not to have been approved of by Lord *Macclesfield*, ſince the *latter* might be with an Intent to ſecure the Legacy in all Events. See the Caſe of *Earl of Thomond* and *Earl of Suffolk*, *P.* 568, *Ca.* 1. Alſo the Caſe of *Ford* and *Fleming*, 1 *Vol. Abr. Eq.* 302. And 2 *Will. Rep.* 469.

5. *A.* having a Debt due to him from *J. S.* deviſed 500 *l.* Part thereof, to *B.* the ſecond Son of *D.* and the Reſidue thereof to the younger Children of *D.* and the ſame to remain in *D.*'s Hands 'till the younger Children ſhould be capable of receiving it; and the Share of any dying before ſuch Time, to go to the Survivors or Survivor; but does not mention what the Debt is which is owing from *J. S.* *A.* receives the whole Debt in his Life-time; and *B.* died, living *A.* Then *A.* died in the Life-time of the younger Children. And *King* C. ſaid, he took it that it could not be intended that the Survivor ſhould take, unleſs *B.* the Legatee ſhould have ſurvived the Teſtator, ſo that the Right to the Legacy became veſted in him; but that *B.* dying in the Life-time of the Teſtator, as nothing could ever veſt in him, ſo neither could it ſurvive from him. ——— But the Court admitted, that where a Deviſe is to *A. for Life*, Remainder to *B.* and *A. dies in the Teſtator's Life-time*, *B.* ſhall take preſently; or if a Deviſe be to *A.* and *B.* (*c*) and *A. dies in the Teſtator's Life-time*, and *then the Teſtator dies*, there *B.* ſhall have the whole; for theſe Caſes ſeem to be within the plain Intent of the Teſtator; but that in the *principal* Caſe, it was quite a Strain to ſuppoſe a Legacy given out of a Fund which the Teſtator himſelf had by his own voluntary Act put an End to; for which Reaſon his *Lordſhip* declared, that theſe Legacies to the younger Children were extinct, and ſhould not be made good (*d*). *Hil.* 1725. *Sir Barnham Rider* and *Sir Charles Wager et al', et econt'*, 2 *Will. Rep.* 328, 331.

(*c*) *Show* 91. *Salk.* 238.

(*d*) Upon this Point were cited *Raym.* 335. *Pawlett*'s Caſe. *Swinb.* 7 *Part*, *cap.* 20, 447. And the Caſe of *Orm* and *Smith*, 2 *Vern.* 681. And 1 *Vol. Abr. Eq.* 302.

6. Where *A.* deviſes a Debt due to him, after which the Debtor, *uncalled* upon, pays in the Debt to *A.* in his Life-time, this will certainly be no Ademption of the Legacy, here being no Act done by the Teſtator himſelf, but by the Debtor, who might oblige the other to receive his Money (*a*). *Per* Lord Chan. *Talbot*, *Mich.* 1735. *in Caſu Aſhton* and *Aſhton*, 3 *Will. Rep.* 384, 386.

(*a*) And ſo his *Lordſhip* thought it would be where the Teſtator himſelf ſhould call for the Debt (*b*), ſeeing this might be done from an Apprehenſion of ſuch Debt being in Danger, and with a Deſign to ſecure it; and being *perſonal* Eſtate, and not diminiſhed, by being in the Teſtator's Coffer inſtead of the Hands of the Debtor, it may well paſs by the Will. *Per Lord Chancellor*, *ibid.* 386. (*b*) *Vide Earl of Thomond* and *Earl of Suffolk*, *P.* 568, *Ca.* 1. and *Ford* and *Fleming*, 1 *Vol. Abr. Eq.* 302.

7. *A.* deviſes 1000 *l.* Capital *South-Sea* Stock to *B.* At the Time of making his Will he had 1800 *l.* of ſuch Stock, and after, by Sale, reduced it to 200 *l.* which he after increaſed to 1600 *l.* and died. Between the making his Will and his Death, the *Act* took Place which changed three Fourths of the Capital *South-Sea* Stock into Annuities. This Legacy is not taken away or impaired by the Sale nor by the Act of Parliament. *Mich.* 1736. *Partridge* and *Partridge*, *Caſes in Eq. Temp. Lord Talbot* 226.

(G) In what Caſe a Legacy given by a Codicil ſhall not be conſtrued in Satisfaction of a Legacy given by a Will, &c.——In what Caſe a Legacy by a Will ſhall not be in Satisfaction of an Annuity.

1. *PEcuniary* Legacies are given by a Will, and after greater Legacies to the ſame Perſons by a Codicil, theſe ſhall not be taken to be a Satisfaction for the pecuniary Legacies given by the Will, *unleſs ſo expreſſed*, becauſe the Codicil is Part of the Will, and proved as Part thereof, and it is as if both the Legacies had been given by the ſame Will. *Per* his *Honour*, *Eaſt.* 1718. *Maſters* and *Sir Harcourt Maſters*, 1 *Will. Rep.* 421, 423, 424.

2. *Rupert Billingſley* upon his Marriage with *Mary* his intended Wife, makes a Settlement, dated *Auguſt* 1713, and after reciting that he was intitled to Exchequer Annuities of 300 *l. per Annum* for ninety-nine Years, and that it was agreed that they ſhould be ſettled *In Truſt* for himſelf for Life, then for his Wife for Life, then *In Truſt* for ſuch Child or Children in ſuch Shares and Proportions as he ſhould direct and appoint; and after the Deceaſe of him and his Wife, without Iſſue, *In Truſt* for his Executors; the ſaid *Rupert* thereby aſſigns the Exchequer Annuities to Truſtees and their Executors, *Upon Truſt* to permit him to receive the Produce thereof for his Life, and if his Wife ſhould ſurvive him, *In Truſt* for her for Life; and after the ſeveral Deceaſes of him and his Wife, then *Upon Truſt* that they ſhould transfer and ſet over the ſaid Annuities to ſuch Child or Children of him and his Wife as he ſhould direct or appoint by his laſt Will and Teſtament in Writing, or by any other Writing under his Hand and Seal duly executed; and for want of ſuch Child or Children, then to his Executors, *&c.* *Rupert* makes his Will, dated 20 *October* 1720, and amongſt other Legacies, deviſes to his Wife, her Executors, Adminiſtrators and Aſſigns, all his real and perſonal Eſtate, ſubject nevertheleſs to the Payment of 200 *l. per Annum* to *Bridget* their Daughter,

Daughter, for her Maintenance 'till ſhe came to eighteen, and ſubject alſo to the Payment of 10,000 *l.* to his ſaid Daughter when ſhe ſhould attain the Age of eighteen. *Rupert* dies, leaving *B.* his only Daughter, and makes no Appointment under the Marriage Settlement. *Mary* his Widow makes her Will, dated 22 *July* 1727, and after bequeathing Legacies, ſhe gives and deviſes all the reſt and Reſidue of her Eſtate, both real and perſonal, to ſaid *Bridget* her Daughter, her Heirs and Aſſigns, for ever; but in Caſe ſhe ſhould die before ſhe ſhould be of Age to diſpoſe thereof, then ſhe gives and deviſes the ſame to Truſtees and their Heirs, *In Truſt* to lay out 6000 *l.* to build an Hoſpital at *Drayton* for the Maintenance of ſo many Seamens Widows as the Truſtees ſhould think proper; and in Caſe her ſaid Daughter ſhould happen to die unmarried, then ſhe deſires that her Daughter ſhould be buried there, and the Reſidue above the 6000 *l.* to be divided amongſt her own Siſters and their Repreſentatives, and makes *Bridget* Executrix. *Bridget* was about twelve Years old when the Will was made and the Teſtatrix died, and afterwards *Bridget* married the Plaintiff *Billingſley*, and died between twenty and twenty-one, leaving a Daughter *Bridget*. Lord Chan. *Hardwicke:* There have been four Queſtions made at the Bar. *Firſt*, If under the Marriage Settlement the firſt *Bridget* was intitled to the Exchequer Annuities, as her Father had made no Appointment of them to her? *Secondly*, If ſhe was, whether the Legacy of 10,000 *l.* given her by her Father's Will is not to be deemed a Satisfaction for her Intereſt in thoſe Annuities? *Thirdly*, What Intereſt ſhe had in the Surplus of her Mother's real and perſonal Eſtate, as ſhe died before twenty-one? *Fourthly*, Upon what Contingency the Reſidue is given to the Siſters? As to the *firſt* Point, it is extreamly clear that *Bridget* was well intitled to the Annuities; that if it reſted upon the Declaration of the Truſt, perhaps there might be ſome Doubt whether the Appointment of the Father would not have been neceſſary to have intitled her, tho' that Objection was conſiderably abated by the Words, *for want of ſuch a Child or Children*, to whom no Appointment is made; but the recited Agreement puts it out of all Doubt; for there it is ſaid to be *In Truſt for ſuch Child or Children as he ſhould have*, which abſolutely veſts the Intereſt in the Children; and the ſubſequent Words, *to be diſpoſed of*, &c. only give a Power of Appointment, and no Truſt is declared for his Executors 'till after Default of his Iſſue generally; and as there was only one Child, there was no Room for the Father's Power of Diſtribution to operate, and ſhe was well intitled under the Settlement. Cites *Davey* v. *Hooper*, 2 *Vern.* *Secondly*, The Legacy ought not to be conſtrued as a Satisfaction, for theſe Annuities and the Legacy are both intended for Portions, and more or leſs ſo according to the Circumſtances of the Caſe; as where an eldeſt Son will be almoſt ſtripped of every Thing by allowing them. In the preſent Caſe, the Queſtion is, Whether it ſhall be conſtrued as an implied Satisfaction? And it hath been always held, that the Thing given ſhall be of the ſame Nature, and equally certain with the Thing for which the Satisfaction of the Thing is to be conſtrued to enure; and indeed in ſome Senſe they are both perſonal Eſtate, but the Annuities are to continue only for a Term, which might be worn out by the Mother, or the Daughter might out-live it; and the 10,000 *l.* is given abſolutely, and therefore not of the ſame Nature; the Legacy is alſo given upon a Contingency that might not have taken Place; for if ſhe had died before eighteen it had been a lapſed Legacy, as iſſuing out of a real and perſonal Eſtate together. Cites *Yeats* and *Fettyplace*, 2 *Vern.* 416. It would

be

be abſurd to conſtrue an uncertain contingent Intereſt as a Satisfaction for a certain Intereſt veſted; and there is only one Child, and therefore no Neceſſity for making any ſtrained Conſtruction; but if the Exchequer Annuities had been expreſsly given away by the Will, the Daughter ſhould not have had both, *viz.* the Legacy under the Will, and the Exchequer Annuities in Contradiction to it. As to the *third* Point, it appears the Will was made in Haſte, and is inaccurately penned; and if it had been well conſidered, probably no ſuch Contingency would have been inſerted; and no Conſtruction ought to be made in Diſheriſon of an Heir at Law, except the Words plainly compel ſuch a Conſtruction; the Words, therefore, include both real and perſonal Eſtate; and as to the perſonal Eſtate, it is clear the Contingency hath not happened, for ſhe was at Age to diſpoſe of it. It hath been ſaid, that *diſpoſe* means only enjoying the Fruits of the Eſtate; but, I think, the Teſtator did not underſtand the Word in that Senſe, becauſe, when the Teſtatrix died, ſhe was of Age to do that; neither was Marriage, and the Conſequence of it, the Diſpoſition in View of the Teſtatrix, beauſe ſhe was both at the Time of making of the Will, and the Teſtatrix's Death, about the Age of Conſent, and therefore, I think, the Diſpoſition meant by the Teſtatrix was the ſame as the Power of Diſpoſal in *Tomlinſon* v. *Dighton*, *Salk.* 239. and that it is the ſame as if ſhe had ſaid, if ſhe ſhould die before ſhe may diſpoſe of it, by reaſon of her Age; and the Words muſt be taken diſtributively *reddendo ſingula ſingulis*; and as by Law ſhe might act as Executrix, and diſpoſe of her perſonal Eſtate at ſeventeen, and of late it has been held that ſhe might make a Will even at fourteen, I think the Contingency hath not happened to carry over the perſonal Eſtate; but as to the real Eſtate, the Age of twenty-one is the fixed Period of Time for the Power of Diſpoſition to be exerciſed over it, and Marriage, and having Iſſue, and thereby intitling the Huſband to be Tenant by the Curteſy, was not the Diſpoſition in the View of of the Teſtatrix, and it is not properly a Diſpoſition, but a Privilege conferred by the Law; ſhe had a Power of forfeiting it at the Age of Diſcretion, but that was not ſuch a Diſpoſition as was intended; and therefore the Contingency as to the real Eſtate hath happened, and it muſt be ſubject to the Charity. *Hil.* 11 *Geo.* 2. *Billingſley* and *Eckerſhall* and *Attorney General*, *MS. Rep.*

(H) Of joint Bequeſts.

1. J. S. deviſed the *Reſiduum* of his *perſonal* Eſtate to three Perſons, and his *Honour*, on Time taken to conſider of it, decreed that the Survivor ſhould take the whole, and retain it in Equity in the ſame Manner as if it had been the Caſe of a Grant at Law. *Eaſt.* 1726. *Webſter* and *Webſter*, 2 *Will. Rep.* 347.

Ibid. 348. ſays, the like Decree was made by his *Honour* in the Caſe of *Cray* and *Willis* (*a*), 28 *June* 1729.

(*a*) 1 *Vol. Abr. Caſes in Eq.* 243. *Ca.* 3.—And 2 *Will. Rep.* 529. with the Reaſons upon which that Reſolution was grounded.

2. *A.* deviſes the Surplus of his perſonal Eſtate to his four Executors; this is a joint Bequeſt; and on the Death of one, ſhall go to the Survivors, as well in Caſe of a Legacy as of a Grant. *Trin.* 1731. *Willing* and *Baine*, 3 *Will. Rep.* 115.

(I) Remedy for Legatees, in what Cases, and in what Court, &c.

1. MR. *Vernon* ſaid, there had been Caſes decreed in this Court, that where a Legatee had been forced to abate of his perſonal Legacy towards Payment of Debts, he had been let in to ſtand in the Place of a Creditor, to recover his proportionable Satisfaction out of the real Eſtate deviſed to be ſold for Payment of Debts. *Mich.* 9 *Ann. in Caſu Hall* and *Brooker*, *Gilb. Rep. in Eq.* 73.

2. An *Injunction* may not be obtained *in Chancery* to ſtay a Suit in the *Spiritual* Court for a Legacy, upon a Suggeſtion of Payment, it being a Matter there determinable and triable; but *econt'* on Suggeſtion of a collateral Satisfaction, as a Gift of Land, *&c.* *Per* his *Honour*, *Eaſt.* 1718. *Anon. Vin. Abr.* Tit. *Deviſe*, (W. d.) *Ca.* 32.

3. Where the *Eccleſiaſtical Court* and *Chancery* have a *concurrent Juriſdiction*, which ever is firſt poſſeſſed of the Cauſe has a Right to proceed, and the ſame of all other Courts. But where the Huſband ſues in the Spiritual Court for a Legacy given to the Wife, Chancery has granted an Injunction to ſtay Proceedings, becauſe that Court cannot oblige him to make an adequate Settlement on her. *Mich.* 1720. *Nicholas* and *Nicholas*, *Prec. in Chan.* 546. *Nicholls* and *Nicholls*, 1 *Vol. Abr. Eq.* 160. *Ca.* 5. is not S. C.

4. If *A.* by Will gives a *Leaſe*, or an *Horſe*, or any other *ſpecifick* Legacy, and leaves a Debt by Mortgage or Bond, in which the Heir is bound, the Heir ſhall not compel the *ſpecifick* Legatee to part with his Legacy in Eaſe of the real Eſtate; but tho' the Creditor may ſubject this ſpecifick Legacy to his Debt, yet the *ſpecifick* or *other* Legatee ſhall in Equity ſtand in the Place of the Bond Creditor or Mortgage, and take as much out of the *real* Aſſets as ſuch Creditor by Bond or Mortgage ſhall have taken from ſuch *ſpecifick* or *other* Legatee. *Per* Lord Chan. *Macclesfield*, *Mich.* 1721. *in Caſu Tipping* and *Tipping*, 1 *Will. Rep.* 730. 2 *Will. Rep.* 81. *Trin.* 1722. S. P. in the Caſe of *Burton* and *Pierpoint*.

5. If a Legatee (*a*), not Party to the Cauſe, comes in before the *Maſter*, he ſhall have his Coſts; for it was in his Power to have brought a Bill for his Legacy (*b*), which would have put the Eſtate to further Charge. *Per* Lord Chan. *Macclesfield*, *Trin.* 1722. *Maxwell* and *Whettenham*, 2 *Will. Rep.* 27. (*a*) or Creditor, (*b*) or Debt,

(K) Donatio Cauſâ Mortis (*c*).

(*c*) If a Woman, by Virtue of a Power, appoints ſome Truſt Money to her Huſband, which, by the whole Tenor of the Inſtrument, is not to take Effect 'till after her Deceaſe, and the Huſband dies firſt, yet the Money, being veſted by Deed, ſhall go to his Executors. *Hungerford* and *Winter* (*d*), *MS. Rep.* (*d*) *Quære* Term and Year.

1. *Donatio Cauſâ Mortis*, is where a Man lies in Extremity, or being ſurprized with Sickneſs, and not having an Opportunity of making his Will; but leſt he ſhould die before he ſhould make it, he gives with his own Hands his Goods to his Friends about him; this, if he dies, ſhall operate as a Legacy; but if he recovers, then does the Property thereof revert to him. *Per Lord Chancellor*, *Mich.* 1708. in the Caſe of *Hedges* and *Hedges*, *Prec. in Chan.* 269.

2. Plaintiff was a *Relation* of and Houſekeeper to *J. S.* and had lived with him twenty Years. *J. S.* in 1702 made his Will, and thereby gives Plaintiff (whoſe Name was then *Wetherley*) 500 *l.* and

about three Months after he ſends for her, and calls up two of his Servants, and in their Preſence ſays, *I give to my Couſin Mrs.* Wetherley *this Hair Trunk*, (wherein were ſeveral Things of Value) *and all that is contained in it*, and delivers her the Key thereof, and bids the Servants take Notice and remember it, if they ſhould be at any Time called upon for that Purpoſe; and ſeveral Times after, as it was proved, aſked them if they remembered the Hair Trunk, and once took a Candle and ſhewed it them, that they might remember it. About three Years after *J. S.* makes another Will, whereby he revokes all other Wills, and by this Will gives the Plaintiff 1000 *l.* but takes *no Notice of the Gift of the Hair Trunk*, or any Thing in it, and dies. Four Days after his Death, upon opening of the Trunk in the Preſence of ſeveral Relations and others, there was found in it ſeveral Rings, Pieces of Gold, and (*int' al'*) a Tally upon the Government for 500 *l.* Plaintiff brought her Bill for the 1000 *l.* and for this 500 *l.* Tally. And *Lord Chancellor* decreed her the 1000 *l.* but the other Point, as to the *Tally*, being heard before his *Honour*, he decreed that to her. Upon this Point an Appeal was brought, and it was proved for the Appellant that the Trunk was never removed from the Place where it ſtood at firſt; that *J. S.* gave out the Order from Time to Time for the receiving of the Intereſt upon the Tally, and received it himſelf. And *Lord Chancellor* obſerved, that it was agreed that a *Donatio Cauſâ Mortis* is a Gift *in præſenti* to take Effect *in futuro*, after the Party's Death, as a Will, and that it is *revokable* during his Life, as a Will is, and ſo it differs in nothing from a Will, for 'tis not a preſent ſubſtantive Gift, and therefore *he* thought this Caſe conſiſted of but two Points; Firſt, *Whether there be ſufficient Evidence to prove that the Tally was in the Trunk at the Time of the Gift?* Secondly, *Whether this Will was not a Revocation of it?* As to the *firſt*, his *Lordſhip* premiſed, that theſe Sort of Donations, eſpecially where they were of the ſame Kind with what was given by the Will, ought to be fully proved in all their Circumſtances, otherwiſe they were not to be countenanced, becauſe it would open a Way to Perjury greater than the Statute had provided againſt: That here the Plaintiff had not proved by any one Witneſs, that this Tally was in the Trunk at the Time of the Gift; that if it had been ſo, ſurely the Teſtator would then, or when he had Occaſion ſo often after, have told the Witneſſes of it: That it was ſtrange he ſhould bid them take Notice of the Trunk, and not mention the Tally, which was the principal Thing in it: That all the Plaintiff proved, was, it's being there when the Trunk was opened, which was *three Years after the Gift*, and *four Days after the Teſtator's Death*; and ſaid, *that he ſat there to condemn Frauds, and therefore might preſume them, unleſs they proved the contrary*. As to the *ſecond* Point, his *Lordſhip* ſaid, it could not be properly called a Revocation, but the 1000 *l.* therein given ſhould be looked upon as a Satisfaction of the 500 *l.* given her by the *firſt* Will, and the 500 *l.* Tally after that. One cannot be ſaid to revoke a Debt by his Will, but yet he may ſatisfy it, by giving a Legacy of equal Value; and ſince he has revoked all *former* Wills, this 1000 *l.* was a Satisfaction equivalent to a Revocation, and muſt go in Recompence of the 1000 *l.* he had before intended her, ſince ſhe could not prove he intended it otherwiſe; for if ſhe had, then the *Donatio Cauſâ Mortis* muſt have ſtood. And therefore reverſed the Decree made by his *Honour*. *Trin.* 1710. *Jones* and *Selby*, *Prec. in Chan.* 300.

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3. *A.* by Will diſpoſes of his perſonal Eſtate, and afterwards by *Parol* gives 100 *l.* Bill to *B.* in Caſe *A.* ſhould die of *that* Sickneſs, which happened accordingly. And Lord Chan. *Cowper* decreed *B.* this 100 *l.* Bill, with Coſts. *Hil.* 1717. *Drury* and *Smith*, 1 *Will. Rep.* 404.

This is a Gift in the Teſtator's Life-time, *Donatio Cauſâ Mortis*, and the Poſſeſſion *tranſmuted*, and notwithſtanding the Will the Teſtator had a Power to give away any Part of his Eſtate *abſolutely*, and by the ſame Reaſon might, notwithſtanding the Will, give away any Part thereof *conditionally*, and *this Gift being fully proved*, his *Lordſhip* decreed *ut ſupra*. *Ibid.* 405.

4. Teſtator upon his Death-bed delivers to his Wife a Purſe of one hundred Guineas, and bids *her apply it to no other Uſe but her own*. This is *Donatio Cauſâ Mortis*, and a good Legacy to the Wife. Decreed *per* his *Honour*, *Hil. Vac.* 1718. *Lawſon* and *Lawſon*, 1 *Will. Rep.* 441.

His *Honour* obſerved that this being *Donatio Cauſâ Mortis*, need not be proved with the Teſtator's Will, neither need ſuch Gift, tho' in Nature of a Legacy, be ſo proved, for they operate as a Declaration of Truſt upon the Executor. *Ibid.*

5. So if the Teſtator, being ill, draws a Bill on his Goldſmith to pay his Wife 100 *l.* *to buy her Mourning*, this is good, and operates as an Appointment. *Ibid.*

6. In every *Donatio Cauſâ Mortis*, Delivery muſt be made by the Party in his *laſt* Sickneſs, and it may be to a Wife, being in Nature of a Legacy, but need not be proved (*a*) in the Spiritual Court as Part of the Teſtator's Will. *Per* Sir *Joſeph Jekyll* Maſter of the Rolls, *Trin.* 1735. in the Caſe of *Miller* and *Miller* (*b*), 3 *Will. Rep.* 357.

(*a*) For it operates as a Declaration of Truſt on the Executor. *Vide Ca.* 4. *ſupra.*

7. There cannot be a Gift of a *Bond*, *Note*, or other *Choſe en Action*, by way of *Donatio Cauſâ Mortis*, neither can any Thing operate as ſuch, without having been delivered in the Teſtator's Life-time by him or his Order. *Ibid.* 358.

(*b*) *Vide P. Ca.*

CAP. LIX.

Length of Time.

1. *J. S.* had been in Poſſeſſion of a Water-Courſe upwards of ſixty Years; *B.* claimed the Land thro' which the Water-Courſe ran, by Virtue of a forfeited Mortgage for one hundred Years, and which he had obtained a Decree to foreſcloſe; *J. S.*'s Title was fully proved, and this Bill was for a perpetual Injunction to be quieted in the Poſſeſſion, which *B.* had interrupted, by making a Channel thro' his own Lands, and ſetting up a Sluice at the Mouth thereof, whereby the Water that ſhould have ran to *J. S.*'s Water-Courſe was totally diverted and prevented. It was objected, That if *J. S.* had any Damages, his Remedy was purely at Law, and that he ought not to come here 'till he had eſtabliſhed his Title at Law; and that if he could, yet he ought to have brought thoſe who had the Inheritance of the Lands thro' which the Water-Courſe ran before the Court, and that it was not ſufficient to have only the Mortgagee. But decreed for

Prec. in Chan. 530. *Trin.* 1720. *Buſh* and *Weſtern*, S. C. *in totidem verbis.*

J. S.

J. S. and agreed it was *uſual* to have ſuch Bills in the *firſt* Inſtance in this Court, and cited Lord *Aylesford*'s Caſe lately, and ſome others; and if *B.* would have had the Remainder Man a Party, he ought in his Anſwer to have ſhewn who he was, and ſet forth that he himſelf had only a Term for Years, and prayed that the Remainder Man might have been made a Party; but this he had not done, but inſiſted on his own Title under the foreclоſed Mortgage; and therefore that Objection was over-ruled. *Trin.* 1720. *Anon. MS. Rep.*

If this had been an Adminiſtration granted by the *Archdeacon* or *Ordinary* where there were *Bona Notabilia* in divers Dioceſes, the *Adminiſtration had been* merely *void*, for the Adminiſtrator receives his Right entirely from the Adminiſtration, but the Right of the Executor is derived from the Will, and not from the Probate, as appears from an Executor's having Power to releaſe or aſſign any Part of the *perſonal* Eſtate before Probate; and a Defendant at Law *cannot plead to any Action brought by an Executor*, that the *Executor has not proved the Will*, tho' *he may demur*, if *the Plaintiff does not, in his Declaration, ſhew the Probate. Per Lord Chancellor, ibid.* 767, 768.

2. Plaintiff brought a *Scire Facias* to revive an old Decree obtained againſt the Defendant by Plaintiff's Teſtator about twenty-three Years ſince. Defendant pleaded in Bar to the *Scire Facias*, that the Plaintiff's Teſtator, after he had obtained this Decree, lived fifteen Years in the ſame Town with the Defendant, and never aſked him for this Money; but on the contrary told him, that he ſhould never be troubled for it, and that he acquitted him thereof, (without ſuggeſting any Deed or Writing for that Purpoſe.) Alſo pleaded, that the Plaintiff in the original Cauſe (who appeared by the *Scire Facias* to be ſince dead) died poſſeſſed of *Bona Notabilia* in two Dioceſes within the Province of *Canterbury*, *viz.* in thoſe of *Chicheſter* and *London*, and that the Executor having proved this Will only in the Archdeaconry of *Surry*, ſuch Probate was void, and that therefore he ought not to be admitted to ſue. Lord Chan. *Macclesfield* ordered that the Plaintiff ſhould not proceed any farther without *ſhewing a ſufficient Probate of the Will*, and without farther Leave of the Court, in reſpect of the *Staleneſs* of the Demand. *Mich.* 1721. *Comb's Caſe*, 1 *Will. Rep.* 766.

3. Poſſeſſion for *more than twenty Years under a legal Title* ſhall never be diſturbed in Equity. 28 *Jan.* 1722. *Stone* and *Burn*, *Vin. Abr.* Tit. *Length of Time*, (A) *Ca.* 37.

4. The Court refuſed to ſet aſide an Account ſtated in a *fraudulent* Manner, after the Death of the Parties to the Account, and near twenty Years after the ſtating it. *Trin.* 1725. *Weſtern* and *Cartwright*, *Select Caſes in Chan.* 34.

5. If *A.* takes a Conveyance of an Eſtate as a Mortgage, without any Defeazance, he is guilty of a Fraud, and no Length of Time will bar a Fraud. *Per* Lord Chan. *Talbot*, *Hil.* 1734. *in Caſu Cotterell* and *Purchaſe*, *Caſes in Eq. Temp. Lord Talbot* 63.

6. Where a Bill to redeem was brought in about ſixteen Years after the Entry of the Mortgagee, but the Cauſe lay dormant 'till about twenty Years, this is not like making an Entry, and then lying ſtill; for the Defendant might have diſmiſſed the Bill for want of Proſecution, or they themſelves might have ſet down the Plea to be argued. *Per* Lord Chan. *Talbot*, *ibid.*

CAP. LX.

Lien.

(A) What is a Lien on Lands.

1. *A. Ceſtui que Truſt* of a Farm, (whereof eight Acres were Copyhold, and which were agreed to be ſettled on *A.* and a Covenant to ſurrender them accordingly), mortgaged the Farm, whereof the eight Acres were Parcel, to *B.* by the Name of ſuch a Farm, with the general Words, "All and ſingular the Lands "and Tenements, Parcel thereof or uſually occupied therewith, *&c.*" but does not mention the eight Acres of Copyhold, nor does he covenant in the Mortgage Deed to ſurrender them. *A.* died, the Surrender of the eight Acres not being made. *B.* got a Decree of Foreclоſure againſt *C.* the Heir of *A.* And afterwards the Covenantor (*A.*'s Father) being indebted by Judgment to *J. S.* at *C.*'s Requeſt ſurrendered the eight Acres to *J. S.* *J. S.* brought an Ejectment, and got Judgment; whereupon *B.* brought his Bill for Relief. And the Queſtion was between *B.* the Mortgagee and *J. S.* Whether the Mortgage was a Lien on the Copyhold? And *Lord Chancellor* held that the Copyhold was never by the Mortgage under any ſpecifick Lien, and that it would be the ſame were there no Creditor in the Caſe (*a*). And ſo diſmiſſed the Mortgagee's Bill, and affirmed a Decree made by the *Maſter of the Rolls. Hil. 7 Ann. Oxwith* and *Plummer, Gilb. Rep. in Eq.* 13.

(*a*) His *Lordſhip* took a *Difference* where a Man originally lends Money upon a Security, and where a Man having Money due to him on Bond, tells the Debtor he will truſt him no longer upon perſonal Security only, and thereupon he mortgages Lands to him; and where a Man already truſted with Money, ſeems to grow inſolvent, and thereupon his Creditors, endeavouring to boulſter up their Security as well as they can, find out Copyhold Lands, and get a Surrender of them; for, in the *firſt* Caſe he truſts his Money on the real Security, but in the *latter* he does not. *Ibid.* 15.

2. A Decree for a Debt does not bind the *real* Eſtate, acting only *in perſonam*, not *in rem*, and the Remedy upon a Decree to affect the Land is only for a Contempt; whereupon the Party proceeds to a Sequeſtration, which is but a *perſonal* Proceſs, as appears by its *falling* and *abating* by the Death of the Party (*b*). *Per* his *Honour*, *Trin.* 1731. in the Caſe of *Bligh* and *Lord Darnley*, 2 *Will. Rep.* 621, 622.

(*b*) But an *Extent* upon a Judgment does not ſo abate. *Per* his *Honour*, *ibid.* 622.

CAP. LXI.

Limitations, (Statute of).

(A) What Demands, &c. are in Equity deemed within and what out of the Statute of Limitations;—And where a Demand, tho' once barred, may be revived or ſet up again.

1. LANDS were ſettled upon Marriage on Truſtees, *&c.* Proviſo, "That if the Wife ſhould ſurvive, then *In Truſt* to permit "her to receive the Rents and Profits during her Life as the ſame were at that Time lett." Her Huſband made Leaſes, and advanced the Rent, and died; and the Wife received the advanced Rent for ſeveral Years, and then died. To a Bill by *A.* as Heir at Law of the Huſband, againſt the Defendant, the Wife's Executor, to have an Account of the Overplus received by the Wife, and by her Executor ſince her Death, and that it might be paid to him as Heir at Law, *&c.*———Defendant anſwered, That if his Teſtatrix received more than ſhe ought, it was above fourteen Years ſince; and ſo pleaded the Statute of Limitations (*a*). But the Plea was diſallowed, *becauſe the Eſtate in Law was in Truſtees.* And Defendant was ordered to pay Coſts. *Trin.* 9 *Geo. in Canc'*, *Lawly* and *Lawly*, 2 *Mod. Caſes in Law and Eq.* 32.

(*b*) And if that Plea ſhould not be allowed, then he ſaid, that he had not Aſſets but what was ſufficient to pay Debts of an higher Nature affecting the ſame. But he was decreed to account; and that what ſhould appear to have been received by the Wife more than ſhe ought to receive, (being the improved Rent) ſhould be paid to Plaintiff out of her Aſſets, and what had been received by Defendant ſince her Death, ſhould be paid out of his Aſſets. *Ibid.* 33.

2. A Defendant inſiſting upon the Benefit of the Statute by way of *Anſwer*, ſhall, at the Hearing, have the like Benefit thereof as if he had *pleaded* it. Said *arg'*, and agreed to by the *Maſter of the Rolls*, *Trin.* 1723. in the Caſe of *Norton* and *Turvill*, 2 *Will. Rep.* 144.

Vide P. Ca. 3. A *Truſt Eſtate* is *not* within the Statute of Limitations. *Per* his *Honour*, *Trin.* 1723. *in Caſu Norton* and *Turvill*, *ibid.* 145.

4. The Court of *Exchequer* would not allow a Plea of the Statute of Limitations to be a good Bar to a Bill for Tithes, ſaid *arg'* to have been ſo held in *Hil.* 12 *Geo.* 1. and admitted by the other Side, that that Statute could not be extended to a Demand for Tithes. And *per Gilbert* C. B. the Reaſon is, that Tithes are not of the Nature of thoſe Demands intended to be barred by that Statute. *Gilb. Rep. in Eq.* 228, 229.

5. Forbearance of Suit for *twenty Years* will be a good Bar in Equity, tho' in a Demand by one *Merchant* upon *another*, and tho' the Statute has always been conſtrued to except Accounts between Merchant and Merchant, yet that is to be underſtood with this Diſtinction, that if *open* Accounts are by *ſubſequent* Acts continued, they are not barred by the *Intervention* of ſuch Length of Time from the

original Tranſaction, but if ſuch Account is deſerted by the Complainant, then in ſuch Caſe it is barred, and the Defendant's Plea of Acquieſcence without Suit, and alſo of the Statute of Limitations, was allowed. *Hil.* 12 *Geo.* 1. *Bridges* and *Mitchell* (a Merchant), *Gilb. Rep. in Eq.* 224.

6. If a Debtor by *Will directs the Payment of all his Debts* out of his perſonal Eſtate and by Sale of Part of his real, this revives a Debt barred by the Statute, ſo that his Executors muſt pay it, tho' it was inſiſted that Defendant's Plea of the Statute was good, and that the Law extinguiſhes the Debt; for that a *Right, without Remedy, is an Abſurdity.* But *Lord Chancellor* ſaid, that the Statute is *not* an Extinguiſhment of the Debt, but the ſame is ſubſiſting in Conſcience, and that a Promiſe in ſuch Caſe is not to be conſidered as a *new* one, but a Recontinuance of the *old. Trin.* 11 *Geo.* 1. *Blackway* and *Earl of Strafford, Select Caſes in Chan.* 57.

2 *Will. Rep.* 373. *Trin.* 1726. *Blakeway* and *Earl of Strafford*, S. C. ſays, his *Lordſhip* having been attended with the Caſe of *Staggers* and *Welby*, overruled the Plea of the Statute of Limitations, but the *Lords* reverſed this Decree, and ordered the Plea to ſtand for an Anſwer. *Ibid.* 375.

7. *Per* Lord Chan. *Macclesfield, Mich.* 1721. the Statute of Limitations ſpeaks nothing of Bills in Equity, yet theſe are conſtrued to be within it. The Caſe of not reviving a Decree which is only to account, is within all the Miſchief deſigned to be prevented, *viz.* to ſue a Man after his Vouchers have been loſt, or his Witneſſes dead; for if the Party may delay ſix Years before he revives his Bill, he may for the ſame Reaſon forbear 26, 36 or 46 Years. There can be no Doubt, if there be only a Bill and Anſwer, and the Suit abated, the Executor muſt bring his Bill of Revivor within ſix Years, elſe the Suit would be barred. And the Reaſon holds ſtill as ſtrong in the Caſe of a *Decree to account*, which is *in Nature of a Judgment* quod computet; where, if the Plaintiff had died, his Executor or Adminiſtrator could not formerly carry it on, as now by the late Statute he may; and tho' it may ſeem a material Objection, that when there is a Decree to account, the Defendant as Plaintiff may revive, his *Lordſhip* ſaid, it would, however, be very bad for Equity to force a Man to revive a Suit againſt himſelf, at the ſame Time that he ſwears he owes nothing; and therefore his *Lordſhip* ordered the Plaintiff to amend his Bill, and the Defendant his Anſwer, to bring the Matter more fully before the Court. After which the Defendant died, and *B.* adminiſtering to him, the Plaintiff brought another Bill of Revivor, to which *B.* pleaded the Statute of Limitations; and it coming to be argued before Lord Chan. *King, Mich.* 1727, he *diſallowed* the Plea, ſaying, that a Bill of Revivor, after a Decree to account, was in the Nature of a *Scire Facias*, and *not within* or *barrable* by the Statute of Limitations, tho' the Demand ſeemed to be a very ſtale one, and not to be countenanced. *Hollingſhead's Caſe*, 1 *Will. Rep.* 742, 745.

8. The Rule in this Court, that the Statute of Limitations does not bar a *Truſt Eſtate*, holds *only* as between *Ceſtui que Truſt* and *Truſtees*, not *between Ceſtui que Truſt* and *Truſtee on one Side* and *Strangers on the other*, for that would be to make the Statute of no Force at all, becauſe there is hardly any Eſtate of Conſequence without ſuch Truſt, and ſo the Act would never take Place; therefore, where a *Ceſtui que Truſt* and his Truſtee are both out of Poſſeſſion for the Time limited, the Party in Poſſeſſion has a good Bar againſt them both. *Per* Lord Chan. *Hardwicke* 7 *July* 1740, in the Caſe of *Lewellin* and *Mackworth, in Chan. Vin. Abr.* Tit. *Limitation*, (T) in a Note to *Ca.* 1.

9. There may be a Caſe where the Circumſtance of concealing of a Deed ſhall prevent the Statute's barring, but then it muſt be a

voluntary

voluntary and *fraudulent* detaining; for to ſay, that *newly having* an old Deed in one's Poſſeſſion ſhall deprive a Man of the Benefit of the Act, is going too far, and would be a hard Conſtruction of a Statute made for the quieting Poſſeſſions. *Per* Lord Chan. *Hardwicke* 7 *July* 1740, in the Caſe of *Lewellin* and *Mackworth*, *ibid.*

CAP. LXII.

Lunatick and Idiot (a).

(a) Stat. *Prærog. Reg.* 17 *Edw.* 2. *cap.* 9. the King ſhall have Ward of natural Fools, taking the Profits without Waſte or Deſtruction, and find them Neceſſaries; and after the Death of ſuch Ideots, he ſhall render it to the right Heirs, ſo that ſuch Ideots ſhall not alien, nor their Heirs be diſinherited.——Stat. *Prærog. Reg.* 17 *Edw.* 2. *cap.* 10. the King ſhall provide when any (that before Time hath had his Wit and Memory) happen to fail of his Wit *per lucida intervalla*, that their Lands ſhall be kept without Waſte or Deſtruction, and that they and their Houſhold be conveniently maintained with the Profits, and the Reſidue, beſides their Suſtentation, ſhall be kept to their Uſe, to be delivered to them when they come to right Mind, ſo that ſuch Lands ſhall in no wiſe be aliened; and the King ſhall have nothing to his own Uſe; and if the Party die in ſuch Eſtate, the Reſidue ſhall be diſtributed.

(A) What is not a good Return to a Commiſſion of Lunacy.

(B) Concerning the Cuſtody of the Perſon and Eſtate of a Lunatick.

(C) The Power of Ideots, Lunaticks, or non Compos Mentis, or their Committees, as to the transferring of a Truſt Eſtate whereof ſuch Ideot, &c. is ſeiſed or poſſeſſed.

(D) How Offences in reſpect of a Lunatick and Ideot are puniſhed.

(A) What is not a good Return to a Commiſſion of Lunacy.

1. ON arguing the Caſe of *Barnſley* before Lord Chan. *Hardwicke* 30 *July* 1745, where the *Commiſſioners* and *Jury had found and returned that Mr.* Barnſley *from the Weakneſs of his Mind was incapable*, &c. it was prayed by the Petitioner *Barnſley* (againſt whom the Return was made) That this Inquiſition might be quaſhed, which was done. Petitioner's Counſel ſaid, that there were but *two Diſtinctions in Law*, viz. *Idiocy* and *Lunacy*, and tho' the latter has been ſince deſcribed by other Words, *i.e. non Compos Mentis*, *Inſanæ Memoriæ*, and of *unſound Mind and Memory*, yet the Law is not *changed*, but the *Words*. *Lord Chancellor* ſaid, 'tis ſo, and nothing can change the Law herein but an Act of Parliament; and God forbid that a Weakneſs of Mind only ſhould be a ſufficient Reaſon for granting any Cuſtody of ſuch Perſons and their Eſtates, for then *violent People*, *Drunkards*, *careleſs* and *ſilly*, would be all taken in; and the material Part of the Traverſe is, not to the Incapacity of Judgment, but to the more *material* Words of *unſound Mind* or *Inſanæ Memoriæ*, which all Perſons muſt underſtand to be a *Depravity of*

Reaſon, or *want of it*. It was obſerved by the Counſel againſt Mr. *Barnſley*, that People of *unſound Mind* (ſuch of ſuch Underſtanding as he) always grow worſe by Time, becauſe incapable of Improvement; but allowed that Men who may be improved by Time or Inſtruction, are only ignorant or *weak* Men, and are not within the Meaning of theſe Words *non Compos Mentis* or *Inſanæ Memoriæ*.—— If a Man who is ſo weak as to be impoſed on in the Execution of a Deed by the Artifice of another, or has ſpent his Money fooliſhly or weakly, ſuch Men do not come within the Meaning of the Law in Caſes of this Sort; but if ſuch Men or Women by Means of the Weakneſs of their Minds are drawn in to execute by any fraudulent Means, they are relievable in this Court; and Bills are frequently brought by weak and ignorant Perſons to ſet aſide thoſe Acts of their Folly, and of their Adverſary's Fraud. But Commiſſions of Lunacy are not intended for ſuch Men, but Decrees for their Relief. *MS. Rep.*

2. A ſpecial Return was made to a Commiſſion of Lunacy, which was *filed*; and *per* Lord Chan. *King*, he muſt be found either *mad* or *not mad*; and *if the Return had not been filed*, it had been *no Return*; but ſince *it is filed*, it muſt be *quaſhed*, and an *alias* Commiſſion go. *Trin.* 11 *Geo.* 1. *Freak's Caſe*, *Select Caſes in Chan.* 47.

(B) Concerning the Cuſtody of the perſonal Eſtate of a Lunatick.

1. LORD *Wenman* being found by Inquiſition to be a Lunatick, the Cuſtody of his perſonal Eſtate was granted to his Wife, ſhe being diſcharged from her Commitment for not producing him (*a*). *Trin.* 1721. *Lord Wenman's Caſe*, *cor'* Lord Chan. *Parker*, 1 *Will. Rep.* 701, 702.

(*a*) *Vide* (D) *P.* 583. *Ca.* 2.

2. *J. S. Nephew* of *B.* was found a Lunatick in *March* 1693, whereupon King *William* and Queen *Mary* granted the Cuſtody of his Eſtate to the ſaid *B.* who is the *next Remainder Man in Tail of the principal Part of the Family Eſtate*, but the *Perſon* of the Lunatick was granted to *C.* Afterwards theſe Grants were upon the Demiſes of the Crown frequently renewed, the Cuſtody of the Eſtate being always granted to the ſaid *B.* and that of the Perſon of the Lunatick to *C.* But it appeared that *C.* was only *nominal* and *In Truſt* for *B.* who all along had the Lunatick in his Cuſtody, and lived with his whole Family, in the Lunatick's Houſe; and it was in Proof that *C.* declared he knew nothing of the Matter, or how the Lunatick was managed, but that the Lunatick was under the Conduct and in the Cuſtody of *B.* Whereupon *D.* who was the Lunatick's deceaſed's Siſter's Son petitioned, that the Cuſtody of the Eſtate might be taken from *B.* and that the Cuſtody of the Perſon might be removed, the ſame being now in Effect in *B.* tho' in *C.*'s Name. And it having been ordered that 200 *l. per Annum*, Part of the Income of the Lunatick's Eſtate in *G.* which was ſubject to a Mortgage of 850 *l.* ſhould be ſet apart to pay off the Mortgage, and that the Reſidue of the Profits ſhould be applied towards the Maintenance of the Lunatick and the Management of

His *Lordſhip* ſaid, It is very ſhocking to think that any Brother or *Uncle* would commit Murder upon his own Brother or *Nephew* to get his Eſtate; but in the preſent Caſe here has been the ſtrongeſt Proof that there is not any Ground for that *cruel* and *barbarous* Preſumption in *B.* who for thirty two Years laſt paſt has maintained his Nephew in the moſt *tender* and *careful* Manner, and who, if he could have been ſuppoſed to have any ill Deſigns upon the Lunatick, might have executed them long ſince. This Experience of *B.*'s Tenderneſs towards his Nephew is the ſtrongeſt Argument of his being the proper Guardian for him. And as to *D.*'s Complaint that

of his Eſtate; *D.* the Lunatick's Nephew, complained in his Petition, that this Maintenance was *exceſſive*, and *to the Prejudice of the next of Kin*, to whom would belong what the Lunatick ſhould leave at his Death. But Lord Chan. *Macclesfield* would not leſſen the *Allowance* nor *alter the Committee* of the *Perſon*, ſaying, nobody can tell who will be the Lunatick's next of Kin at his Death, for he may live to bury all the next of Kin that are ſo now. *Mich.* 1724. *Mr. Juſtice Dormer's Caſe*, 2 *Will. Rep.* 262.

that the Maintenance is too much, his *Lordſhip* ſaid, that *D.* ſeems more careful of himſelf than of the Lunatick. His *Lordſhip* ſaid,

he thought the *Improvements* made in the Lunatick's *real* Eſtate very *commendable*; the Lunatick may recover, and then to ſee his Eſtate in good Condition may be greatly to his Comfort; and tho' he has been ſo long in this unhappy Condition, yet a Lunatick in the Eye of the Law is never to be looked upon as *deſperate*, but always at leaſt in a Poſſibility of recovering. That it was *his Benefit and Comfort*, his *Lordſhip* ſaid, he was to take Care of *where no Creditor complains*, and not to heap up Wealth for the Benefit of his Adminiſtrators or next of Kin. *Ibid.* 264, 265.

3. Two Siſters of a Lunatick petitioned for the Cuſtody of her Perſon. The Petitioners were *not* the Heirs at Law, but a deceaſed Brother's Son was. The Lunatick's Eſtate conſiſted of 700 *l.* in Money, and a Freehold Eſtate of 50 *l. per Annum* for her Life only. And a *Niece*, a deceaſed Siſter's Daughter, put in a Croſs Petition, recommending a third Perſon to be the Committee. And it being inſiſted, that there is not the ſame Objection againſt the next of Kin of the Lunatick *on account of the perſonal Eſtate*, as there is againſt the Heir (*a*) with regard to the *real* Eſtate, for the *perſonal* Eſtate may increaſe, and probably will by good Manànagement during the Life of the Lunatick, ſo that the longer the Lunatick lives, the better it will be for the next of Kin, and conſequently it is for their Intereſt to preſerve and prolong the Lunatick's Life (*b*), whereas the real Eſtate cannot be increaſed. And it appearing that the *Niece* did recommend a neceſſitous Man to be the Committee of the Perſon, who was a Day Labourer and a Mole Catcher, and had but a very mean Cottage, with only one Fire Place in the whole Houſe, (which was an Argument the Niece did not care what became of her Lunatick Aunt) Lord Chan. *King* granted the Commitment of the Perſon of the Lunatick to her two Siſters, and both Parties agreed that the Commitment of the *Freehold* Eſtate ſhould go to *B.* a neighbouring Gentleman of a fair Character, who was likely to manage it to the beſt Advantage. *Trin.* 1729. *Neal's Caſe*, 2 *Will. Rep.* 544.

(*a*) *Vide* Judge *Dormer*'s Caſe, *Ca.* 2. *P.* 481.

(*b*) The ſame Diſtinction was taken by Lord Chan. *King* in a Petition *ex parte Ludlow. Mich.* 1731. *Vide P.* 579. *Ca.* 4.

4. *J. S.* having a Daughter who was found a Lunatick, and being ſeiſed of a *real* Eſtate of near 500 *l. per Annum*, and poſſeſſed of 600 *l.* perſonal Eſtate, by Will made *B. Executrix* and *reſiduary Legatee*, in Caſe his Daughter ſhould not recover from her Lunacy, but if ſhe did, then the *Daughter* to be *Executrix* and *reſiduary Legatee*, and to remain under the Care of *B.* during the Continuance of her *Inſanity* of *Mind*. Afterwards *B.* by Will appointed *D.* her *Executor* and *reſiduary Legatee*, and deviſed, as far as in her lay, the Cuſtody of the Lunatick to ſaid *D.* who having proved the Will, and under Colour thereof got the Lunatick under his Care, petitioned for the Cuſtody of the Perſon; and Mr. *S.* the Lunatick's Couſin, *viz.* the Lunatick's Grandfather's Siſter's ſecond Grandſon, petitioned for the Cuſtody of the Perſon, as did Mrs. *M.* who was another ſecond Couſin of the Lunatick, *viz.* the Lunatick's Grandfather's youngeſt Siſter's Grand-daughter. Lord Chan. *King* (*c*) ſaid, that when the Party

(*c*) As to the Will of *B.* deviſing the Cuſtody of her Niece to *D.* it is abſolutely void; the Father himſelf could not make ſuch a Will, tho' he might diſpoſe of the Guardianſhip of his Child 'till twenty one; yet after that Age (which is the preſent Caſe) he had no

Party ſeeking the Cuſtody of the Lunatick's Perſon has been *Heir at Law* or *next intitled to the Lunatick's real Eſtate after his Death*, this has prevailed as an Objection, tho' much more conſiderably *formerly* than of *late* (*a*); but the being next of Kin, ſo as to be intitled to Share of the *perſonal* Eſtate of the Lunatick is no Objection (*b*), nor did his *Lordſhip* remember it ever to have prevailed, for the perſonal Eſtate in all Probability will increaſe by the Continuance of the Lunatick's Life, conſequently it muſt be for the Advantage of the Committee to preſerve ſuch Life, and to be more careful and tender of it: That in the preſent Caſe, the Degree of Relation is equal, which may ſeem to intitle both the Competitors: But his *Lordſhip* ſaid, he had found by Experience that Granting the Commitment to *two* had been attended with Inconveniencies, by occaſioning Suits, and putting the Eſtate to great Expence; and ſince *M.* being of the ſame Sex, may probably better know how to take Care of the Lunatick, and in this Reſpect be more tender of her, his *Lordſhip* ordered the Cuſtody of the Lunatick's Perſon to be granted to *M. Mich.* 1731. *Ex parte Ludlow*, 2 *Will. Rep.* 635.

5. The Cuſtody of a Lunatick's Eſtate was granted to the *Huſband* and *Wife*, the *Wife being next of Kin to the Lunatick.* The Wife died; and Lord Chan. *Talbot* held, that the Huſband's Right to the Cuſtody of the Lunatick's Eſtate was *determined*, it being a *joint Grant*, and a *mere Authority without any Intereſt* (*c*). *Mich.* 1735. *Ex parte Lyne*, a Lunatick, *Caſes in Eq. Temp. Lord Talbot* 143.

(*a*) *Vide* Mr. Juſtice *Dormer*'s Caſe, *P.* 581. *Ca.* 2.

(*b*) *Vide Neal*'s Caſe, *P.* 582. *Ca.* 3.

(*c*) And his *Lordſhip* ſaid, it had been ſo determined in Lord *King*'s Time.

(C) The Power of Ideots, Lunaticks, or non Compos Mentis, or their Committees, as to the transferring of a Truſt Eſtate whereof ſuch Ideot, &c. is ſeiſed or poſſeſſed.

1. BY Stat. 4 *Geo.* 2. *cap.* 10. *ſect.* 1. it ſhall be lawful for Perſons being *Ideot*, *Lunatick*, or *non Compos Mentis*, or for the Committees of ſuch in their Name, by the Direction of the *Lord Chancellor*, by an Order made upon hearing all Parties on the Petition of the Perſons for whom ſuch *Ideots*, &c. ſhall be ſeiſed or poſſeſſed In Truſt, or of the Mortgagors, or the Perſons intitled to the Monies ſecured upon any Lands whereof ſuch Perſon being Ideot, *&c.* ſhall be ſeiſed or poſſeſſed by way of Mortgage, or of the Perſons intitled to the Redemption thereof, to convey ſuch Lands as the *Lord Chancellor* ſhall by ſuch Order direct; and ſuch Conveyance ſhall be good.

2. *Sect.* 2. Such Perſons being Ideot, *&c.* and only Truſtees or Mortgagees, or the Committees of ſuch, may be *impowered* and *compelled* by ſuch Order to make ſuch Conveyances in like Manner as Truſtees or Mortgagees of *ſane* Memory.

(D) How Offences in reſpect of a Lunatick and Ideot are puniſhed.

1. ON a Commiſſion of Lunacy iſſued out againſt *A.* the Cuſtody of her Perſon and Eſtate (being perſonal Eſtate only) was committed to *B.* Afterwards *C.* by ſome Contrivance got the Lunatick and married her, without making any Settlement on her. For

this

no ſuch Power; and then taking the Will out of the Caſe, *D.* being no Relation, is a mere Stranger, and conſequently againſt the near Relations of the Lunatick he can have no Pretence of Claim to the Cuſtody of the Perſon. *Per Lord Chancellor*, in S. C. *ibid.* 638.

this Contempt the Huſband and others concerned in procuring the Marriage were committed by *Lord Chancellor* to the *Fleet*, and all Deeds and Securities relating to *A.*'s Fortune, and alſo her Jewels, were ordered to be lodged with a *Maſter* in order to ſecure ſome Proviſion for the Wife, in Caſe ſhe ſhould ſurvive, and alſo for the Children of that Marriage, if there ſhould be any. *Mich.* 1715. *Vide* the Caſe of *Packer* and *Wyndham*, *Prec. in Chan.* 412.

2 Will. Rep. 111. S. C. cited *per* Sir *Joſeph Jekyll* Maſter of the Rolls, and ſays, the Court committed the *Huſband*, the *Parſon*, and others that were their *Agents*, and that the Huſband continued in Cuſtody for a conſiderable Time.

2. A Commiſſion was granted to enquire of the *Ideocy* or *Lunacy* of the Lord *Wenman* (*a*), and they who had him in their Cuſtody refuſing to produce him before the Commiſſioners, Lord Chan. *Macclesfield* ordered him to be produced; whereupon, after great Delays, and after Lord *Wenman*'s Lady had been ordered to attend, and it alſo appearing by Affidavits, that ſhe had been with her Huſband, and been inſtrumental in removing him from Place to Place, in order to evade his being produced, his *Lordſhip* ordered the Lady (*b*) to be committed to the *Fleet*, ſaying, It was great *Impudence* as well as Obſtinacy in her not to do what ſhe could for the producing her Huſband, who, upon the Affidavits that had been made, could not but be thought a Lunatick; for if he were found ſo, his *Wife muſt have the Commitment of his Perſon* (*c*), and *alſo an Allowance ſuitable to his Eſtate and Quality*; and it not being pretended that Lord *Wenman* was an Ideot *a Nativitate*, his Eſtate muſt be all accounted for, and the *perſonal* Eſtate will, upon his Death *without* Children, go one Moiety thereof, to his Wife. That the taking of this Account would ſave the Eſtate from Imbezilment, to the Benefit of his Family; and where there was ſuch a *Preſumption* of Lunacy, the Wife, tho' otherwiſe under the Power of the Huſband, might well be ſuppoſed to have him under her Power (*d*). *Trin.* 1721. *Lord Wenman's Caſe*, 1 *Will. Rep.* 701.

(*a*) An *Iriſh* Lord.

(*b*) Tho' an *Iriſh* Peereſs.

(*c*) *Vide P.* 581. *Ca.* 1.

(*d*) His *Lordſhip* obſerved, that it would be a Scandal to the Court, if the *Contempt* of not producing the Lord *Wenman* were not puniſhed, after ſo long Time given for that Purpoſe; and alſo an *intolerable Hardſhip*, if the *Proſecutor* of this Commiſſion, after ſo many Delays and ſo long an Expectation, ſhould be without Remedy; not to mention the Reflection it would bring on the *Juſtice* of the Court, which, his *Lordſhip* ſaid, ſhould not *die* in his Hands; and tho' he did this with great Reluctance, in reſpect of the Quality of the Perſon whom he committed, yet ſince the *Juſtice* and *Honour* of the Court were ſo immediately concerned in this Matter, it was abſolute Neceſſity. *Ibid.* 702. *MS. Rep.* S. C. *accord*.

3. *A.* and *B.* being acceſſary to the Marriage of *C.* to *D.* an Ideot, and who had 45*l. per Annum* Lands of Inheritance, and being ordered to attend the Court, ſtood in Contempt and refuſed to appear; and being committed, they now petitioned to be diſcharged; but *E.* being the *principal* Contriver of this Marriage, and the Friends of the Ideot having no Evidence to impeach it in *Doctor's Commons*, nor any Evidence againſt *E.* but the Petitioners, it was inſiſted, that they ſhould *not* be diſcharged without good Security to give Evidence of this Contrivance; which *Cur'* thought reaſonable, and therefore they were ordered to be kept in Cuſtody until they give ſuch Evidence *or* good Security for that Purpoſe; and it was directed that the Attorney ſhould cauſe an Information to be filed againſt *E.* and that the Priſoners ſhould remain in Cuſtody 'till they gave Evidence againſt him in like Manner. *Mich.* 2 *Geo.* 1. *Smart* and *Taylor*, *MS. Rep.*

2 Mod. Caſes in Law and Eq. 98. S. C. *in totidem verbis.*

CAP. LXIII.

Marriage (a).

(a) The *Legality* of a Marriage ſhall never be agitated in Equity, eſpecially *after Sentence in the Spiritual Court*, in a Cauſe of *Jactitation* of Marriage, *altho' the Proceedings in the Spiritual Court* were only feint and colluſive. 1 *April* 1725. *Hatfield* and *Hatfield*, *Vin. Abr.* Tit. *Marriage*, (G) *Ca.* 8.——The giving a Perſon away is not a Thing *eſſential* to a Marriage, but it is a Cuſtom that is uſually practiſed. *Per* Lord Chan. *Hardwicke*, *Hil.* 1741. in the Caſe of *Moor* and *Moor*, *Barnard. Rep. in Chan.* 407.——Maxim, *Marriage is the very higheſt Conſideration in Law. Vide* 2 *Mod. Ca.* 17.——There are many Caſes in the Books to ſhew that Agreements made *in Derogation* of the Marriage Contract are to be ſet aſide, whether by way of *Marriage Brocage* or *ſecret Truſt or Conveyance*, in Fraud of the Marriage or Agreement, *&c.* And alſo that Agreements of a third Perſon have been inforced, where it has been the Conſideration of, and real Occaſion of the Marriage.

1. A LEASE was made by *Tenant for Life* (purſuant to his Power, *&c.*) to *B.* It was ſaid, that tho' this Leaſe imported to be made for 3600 *l.* yet no Money was really paid; and that it was made upon a Marriage Brocage for *B.*'s procuring Marriage between the *Leſſor* and Lady *Ogle*. And *per Lord Keeper*, If it be a Leaſe for Marriage Brocage, it muſt be ſet aſide, being *ex turpi cauſa*, and no Difference between a Bond or Leaſe, and an Inheritance; but his *Lordſhip* not thinking the Proof ſufficient to found a Decree upon, he ordered it to be tried at Law, whether the procuring the Marriage were the Conſideration of this Leaſe. Afterwards it was twice tried, Verdicts both Times for the *Leſſee*; and thereupon the Bill was diſmiſſed. But the Lords reverſed the Decree, and ſet aſide the Leaſe, without Regard to the Verdicts. *Trin.* 1701. *Stribblehill* and *Brett*, *Prec. in Chan.* 165.

2 Vern. Rep. 445. *Mich.* 1703. S. C. ſays, the Leaſe was by Tenant in Tail, in Conſideration of procuring a Match between the *Leſſor* and Lady *Ogle*, and that the Leaſe was ſet aſide at the Suit of the *Remainder Man.*

2. Marriage Contracts made in all Countries are to be obſerved in all, and therefore a Contract made in *France* was inforced here. *Prec. in Chan.* 208.

Vide P. 475. *Ca.* 1. this Caſe fully abridged.

3. Entry of a Marriage in a Church Book, no Evidence of that Marriage, unleſs the Idenity of the Perſons be ſufficiently proved, or the ſame be ſtrengthened by Proof of Cohabitation, or Allowance or Confeſſion of the Parties. See the Caſe of *Draycot* and *Talbot*, before the Lords, 28 *Jan.* 1718. *Grounds and Rudim. of Law and Eq. Ca.* 15. *P.* 206.

4. A Power was given to a Feme ſole to diſpoſe by Will; and ſhe afterwards married. Decreed that the Marriage is a Suſpenſion of her Power, but if ſhe ſurvives her Huſband, the Power revives. See the Caſe of *Rich* and before the Lords, 9 *Feb.* 1727. *Grounds and Rudim. of Law and Eq. Ca.* 13. *P.* 206.

5. A Bond was given by the Defendant to a young Woman in the Penalty of 1000 *l.* reciting, that ſhe had agreed to marry him, and conditioned, *that he would marry her* according to the Rites and Ceremonies of the Church of *England within a Twelvemonth*, or *elſe pay the Sum of* 500 l. The Defendant *not having married her*, and *having got the Bond out of her Poſſeſſion, and deſtroyed it*, ſhe brought her Bill (which after her Death was revived by her Repreſentative) praying a Satisfaction for the 500 *l.* At the Hearing the chief Matter inſiſted upon for the Defendant, was, that the Plaintiff in her Bill had *not averred that ſhe herſelf was ready and willing to have married the Defendant*; that *the Marriage was not in his Power alone*, but *her*

Conſent was neceſſary; and that wherever the *Act* of the *Obligee* is *neceſſary* to the Performance of the Condition, a Readineſs on his Side muſt be ſhewn. But *Cur'* held the Bill was ſufficient without ſuch Averment; and that the Caſe muſt be conſidered as if an Action at Law had been brought upon this Bond. Now at *Law* the Plaintiff *need not have averred that ſhe was ready and willing*, but it would be *incumbent on the Defendant to ſhew the contrary*, as an *Excuſe for his Nonperformance*, viz. *that he was ready, and offered and requeſted her, but ſhe refuſed*; for he muſt not only have ſhewn a *Readineſs on his Part*, but *a Refuſal on hers*; beſides, in *all Caſes of Contract, the Nature of the Thing is to be conſidered*, and from the *Modeſty* of the Woman's Sex, the Law preſumes that the *Requeſt is to ariſe on the Part of the Man*, unleſs *the Agreement is to the contrary*. Accordingly decreed the 500 *l.* to the Repreſentative, with *Coſts*, and *Intereſt from the Time of filing the original Bill. Hil.* 1738. *Atkins* and *Farr*, *Vin. Abr.* Tit. *Marriage*, (G. a.) *Ca.* 3. *P.* 296.

Vide Tit. **Agreements**, *P.* 15. **Baron and Feme**, *P.* 129. **Bonds**, *P.* 181. **Settlements**, *P.*

Maſter of a Ship, *vide* Tit. **Ship**, *P.*

CAP. LXIV.

Maſter and Servant.

Prec. in Chan. 221. S. C.

1. PLAINTIFF's Teſtator (in 1676) being Commander of the Ship *H.* ſent by the King (at the *Inſtance* and *Charge* of the *African* Company, to whom his Majeſty had granted the ſole Trade on the Coaſts of *Guinea*, excluſive of others) to ſeize all Interlopers in *Africa*, in 1677 the Teſtator ſeized a Ship (whereof Defendant *D.* was Freighter) trading in *Africa*, and her Cargo was accounted for to the *African* Company. In 1696 *D.* brought Trover againſt Plaintiff, and recovered 2500 *l.* Damages for the Ship and Cargo. The Bill was brought againſt *D.* and the Company to be relieved, but was diſmiſſed as to *D.* But the Company was decreed to indemnify the Plaintiff, and that *D.* might proſecute the Decree in the Plaintiff's Name; and tho' Plaintiff's Teſtator had received 700 *l.* from the Company for his Service out of the Cargo, yet Plaintiff was not to refund or abate, that being a Gratuity to the Teſtator, he acting only as Servant or Agent to the Company; and as to the *Quantum* of the Damage, *they* (the Company) were bound by the Recovery at Law againſt Plaintiff the Executor, becauſe *they* might have defended the Trial. *Trin.* 1703. *Langdon, Executor of Dickenſon*, and *African Company et al'*, *MS. Rep.*

2. *A.* in 1712 binding his Son to *B.* a Merchant, was bound in a Bond of 1000 *l.* Penalty for his Son's Fidelity. The Son in 1715 imbezilled 203 *l.* of his Maſter's Caſh, which *A.* paid, but at the ſame Time by Letter deſired *B.* to truſt his Son no more with Caſh,

or

or at leaſt but very ſparingly; however, *B.* does truſt the Son again with Caſh, and about a Year after the Apprentice, on ſtating the Account, appeared to be indebted 300 *l.* but *B.* did not make up the Account until near two Years after the Expiration of the Apprenticeſhip, and during that Time got the Apprentice to ſign a *Memorandum*, whereby he acknowledged he had imbezilled 2750 *l.* of *B.*'s Caſh. The Apprenticeſhip expired 12 *Feb.* 1719, and the *Memorandum* was dated 24 *Feb.* 1719, but the Appretice ſtill continued with *B.* and *B.* gave no Notice of this Imbezilment 'till *July* 1721, and then putting this 1000 *l.* in Suit, *A.* the Father brought his Bill to be relieved; and Lord Chan. *King* decreed the Father to pay to *B.* what he ſhould prove to have been imbezilled by the Son during the Apprenticeſhip, not exceeding the 1000 *l.* Penalty of the Bond, but the 203 *l.* already paid to be taken as Part thereof; and this being on a *Rehearing* from a Decree by his *Honour* 28 *July* 1724. The 10 *l.* Depoſit was to be divided, the Plaintiff having prevailed but in Part upon the Rehearing. *Trin.* 1725. *Shepherd* and *Beecher*, 2 *Will. Rep.* 288.

His *Honour* had ordered that the Father ſhould pay the whole 1000 *l.* if ſo much ſhould prove to be imbezilled, without any Abatement for the 203 *l.* paid on account of the former Imbezilment; but Lord Chan. *King* obſerved that the Father ſeems to have intended not to make himſelf liable beyond the 1000 *l.* and that conſidering the groſs Neglect of *B.* in this Caſe, and that he thereby was Party to the Occaſion of this Loſs, it was reaſonable that the 203 *l.* ſhould be taken as Part of the 1000 *l.* Penalty. But that the Father having given this Bond, tho' there was an Imbezilment, and tho' the Father ſent the ſaid Letter to *B.* yet he continued bound, and ought not to have ſatisfied himſelf with ſending the Letter, and taking no farther Care of the Matter, but ſhould have endeavoured to have made ſome End with *B.* and to have got up the Bond; wherefore he muſt continue liable to anſwer ſome Imbezilment, unleſs there ſhould appear *Fraud* in the Maſter. *Ibid.* 289, 290, 291. and for theſe Reaſons decreed *ut ſupra.*——*Select Caſes in Chan.* 43. S. C.

CAP. LXV.

Merger.

(A) In what Caſes (*a*).

(*a*) Maxim, *Equal Things cannot drown one another.*

1. *J. S.* was ſeiſed in Fee of a Manor, out of which a Fee-Farm Rent was iſſuing. *J. S.* purchaſed in the Rent, and took the Conveyance to himſelf in Fee. By this the Rent is *merged* in the Inheritance. Said *arg'* 10 *Geo.* 1. in the Caſe of *Atcherley* and *Vernon et al'* (*b*), *Lucas's Rep.* 525.

(*b*) 2 *Mod. Caſes in Law and Eq.* 68. *Acherley* and *Vernon*, S. C.

2. Where 100 *l.* is charged upon Lands, payable to *A.* and veſted in Truſtees and their Heirs 'till Payment thereof and Intereſt, and the ſame legal Eſtate ſtill continuing in them, there can be *no* Merger by an *Eſtate-tail* in the *ſame* Lands coming to *A.* who was intitled to the Money. *Per* Lord Chan. *King*, who ſaid, that had this been a *mere* equitable Charge upon the Land, and a *Fee-ſimple*, not an *Eſtate-tail* only, had come to *A.* it might then have been a Merger. *Trin.* 1731. *Duke of Chandos* and *Talbot*, 2 *Will. Rep.* 605.

CAP. LXVI.

Meſne Profits.

(A) From what Time to be accounted for.

1. LORD Keeper *Wright* was of Opinion, That when one has a Title to the Poſſeſſion of Lands, and makes an Entry, whereby he becomes intitled to recover Damages at Law, for the Time the Poſſeſſion was detained from him after ſuch Entry; he ſhall not turn that Action at Law into a Suit in Equity, and bring a Bill for an Account of the Profits, except in Caſe of an *Infant*, or ſome other very particular Circumſtances. *Eaſt.* 1705. *Tilly* and *Bridges*, *Prec. in Chan.* 252.

2. A Leaſe was made by ſome of Plaintiff's Anceſtors (under whom he claimed) to *J. S.* for his Life, and the Lives of *A.* and *E.* his two Daughters. Upon *J. S.*'s Marriage with Defendant his ſecond Wife, theſe Lands were ſettled on her for her Life, and they had Iſſue a Daughter alſo named *E.* Then *J. S.* died, and then his two Daughters named in the Leaſe died, whereby the Leaſe was at an End; but there being ſtill a Daughter named *E.* Plaintiff's Anceſtors or Plaintiff made no Entry, but concluded the Leaſe was ſtill ſubſiſting; and the Defendant the ſecond Wife had held theſe Lands under this miſtaken Title for ſeveral Years; but now the Miſtake being diſcovered, the Defendant acquainted Plaintiff with it, who had Poſſeſſion delivered to him; and now brought his Bill for an Account of the Rents, *&c.* from the Time of the Determination of the Leaſe. And Lord Chan. *Macclesfield* was clear of Opinion, that where one has a Title of Entry, and neglects to enter, or to bring his Ejectment, but ſleeps upon it ſeveral Years, as he has no Remedy at Law for the Meſne Profits, ſo neither has he in Equity; for it was his own Fault he did not enter, and he ſhall never come into this Court for Relief againſt his own Negligence, or to make the Tenant in Poſſeſſion, who held over his Leaſe, to be but his Bailiff or Steward, whether he will or no; but in the *principal* Caſe, by reaſon of this Circumſtance of *both Daughters being of the ſame Name*, and the *Miſtake conſequent thereupon*, the Defendant was decreed to account for the Meſne Profits from the Time of the Expiration of the Leaſe; and ſo it would be *where any Fraud had been uſed to conceal the Title from the Leſſor*, or *in Caſe of an Infant*; but otherwiſe generally, *where the Party has no Remedy at Law, he ſhall have no Relief in Equity for the Meſne Profits* but *from the Time of an Entry made*, which he at his *Peril* ought to have taken Care of ſo ſoon as his Title began. *Eaſt.* 1719. *Duke of Bolton* and *Deane*, *Prec. in Chan.* 516. *MS. Rep. accord'.*

3. *J. S.* granted a Leaſe of Lands for twenty-one Years to *B.* *B.* deviſed the ſame Lands to *C.* his younger Son, and made *D.* his Executor, and died. *C.* brought his Bill againſt the Defendant for the Meſne Profits of *Part* of the Premiſſes, having himſelf been in Poſſeſſion of the *other* Part from *B.*'s Death; and it appearing that a

Counterpart of a Leaſe was delivered by *E.* who had been the Defendant's Agent, to *C.* by which the Lands in Queſtion were formerly leaſed by *J. S.* to Defendant, which Counterpart was executed by Defendant, and now produced, and the Lands therein mentioned being the ſame as were granted by the *latter* Leaſe to *B.* this ſatisfied the Court of *C.*'s Right; wherefore Defendant (who pretended Title to the Inheritance) was decreed by Lord Chan. *King* to account for the Profits from *B.*'s Death, at which Time *C.*'s Title thereto accrued by Virtue of *B.*'s Will. *Mich.* 1731. *Bennet* and *Whitehead*, 2 *Will. Rep.* 644.

4. If a third Perſon enters on the Lands of an *Infant*, the *Infant* when he comes of Age, ſhall, by a Bill in Equity, recover the Profits from the Time of the *firſt* Entry; becauſe, when one enters on an *Infant*, he is chargeable as *Bailiff* or *Guardian*, and *no Laches ſhall be imputed to the Infant*; wherefore it will be conſtrued as if he had entered as ſoon as his Right accrued. Admitted *arg'*, *Mich.* 1731. in the Caſe of *Bennet* and *Whitehead*, 2 *Will. Rep.* 645.

CAP. LXVII.

Mines.

1. *J. S.* ſeiſed in Fee of Lands, in which were Mines, all of them *unopened*, by Deed conveyed the *Lands* and *all Mines, Waters, Trees*, &c. *to Truſtees and their Heirs*, to the *Uſe of himſelf for Life*, (who ſoon after died), Remainder *to the Uſe of* A. *for Life*, Remainder *to his firſt*, &c. *Son in Tail Male ſucceſſively*, Remainder to *B.* in like Manner, Remainder to his two Siſters *C.* and *D. and the Heirs of their Bodies*, Remainder to himſelf in Fee. *A.* and *B.* had no Sons, and *C.* died without Iſſue, by which the Heir of *J. S.* as to one Moiety of the Premiſſes, had the firſt Eſtate of Inheritance. Upon a Bill brought after *J. S.*'s Death by his Heir, to ſtay *A.*'s opening any Mine, it was urged, that the Mines being expreſsly granted by this Settlement with the Lands, it was as ſtrong a Caſe as if the Mines themſelves were limited to *A.* for Life, and like *Sanders*'s Caſe 5 *Co.* 12. But Lord Chan. *Macclesfield econtra*; *A.* having only an Eſtate for Life, ſubject to Waſte, he ſhall no more open a *Mine* than he ſhall cut down the *Timber* Trees, for both are equally granted by this Deed; and the Meaning of inſerting *Mines, Trees and Water*, was, that all ſhould paſs; but as the *Timber* and *Mines* were Part of the Inheritance, no one ſhould have Power over them but ſuch as had an Eſtate of Inheritance limited to him. *Mich.* 1724. *Whitfield* and *Bewit*, 2 *Will. Rep.* 240.——Of which Opinion was Lord Chan. *King* on a *Rehearing*, *ibid.* 242.

2. *A.* (the Defendant) was *Tenant for Life*, but *not without Impeachment of Waſte*; *B.* the Plaintiff was the *Remainder Man*, and in theſe Lands there were ſeveral *Mines* of Coals which were opened before *A.* came to the Eſtate, and *A.* opened the Earth in ſeveral Places to pur-

ſue the old Vein of Coals. *B.* moved for an Injunction *to ſtay* A. *from opening the Earth in any new Place.* And Lord Chan. *King* ſaid, this was determined in the great Cauſe of *Hellier* v. *Twiford* at the Aſſizes for *Devon* before *Powel* J. and that there it was proved to be the Courſe of the Country, and a Practice well-known in thoſe Parts among the *Miners*, that any Perſon, having a *Right to dig in Mines, may purſue the Mine*, and *open new Shifts* or *Pits to follow the ſame Vein*; and that otherwiſe the working in the *ſame* Mines would be *impracticable, becauſe the Mines would be choaked for want of Air*, if *new Holes ſhould not be continually opened to let the Air in*; and the ſame Vein of Coals frequently runs a great Way; and (as his *Lordſhip* expreſſed it) the *ſame* Mine of Coals was very *knowable* and *eaſy to be diſcerned*; beſides, to ſtop the Working might be the Ruin of the Colliery for ever; and in the preſent Caſe it appeared, that there was a Fire Engine kept by the Tenant for Life of theſe Mines, which carried off the Water, without which the Mines would be loſt, and the Working of this Engine coſt 40 *l.* or 50 *l.* a Week. Then it was objected, That theſe Mines were not opened when the Settlement was made, but having been opened by the Perſon who by that Settlement claimed an *Eſtate-tail*, and *was ſince dead without Iſſue*; whereas the Settlement gave only the Benefit of the Mines then opened to the Tenant for Life. But his *Lordſhip* ſaid, it ſeems as if the Tenant for Life may work all Mines which were *lawfully* opened by the *precedent* Tenant in Tail, tho' ſubſequent to the Settlement; and ſo denied the Injunction. *Mich.* 1726. *Clavering* and *Clavering*, 2 *Will. Rep.* 388.

1 *Vol. Abr. Ca.* 24. *Ca.* 6. *Clavering* and *Clavering*, is *not* S. C.—*Vide P. Ca.* this Work.

3. There is a great Difference between *Pits* and *Mines*, for if a Mine be opened, he that may work the Mine is not obliged to purſue the Vein of one under Ground, but he may ſink Pits in Purſuit of it as many as he thinks proper, which are neceſſary to come at the Ore. *Per* the *Solicitor General.*—And Lord Chan. *King* ſaid, it had been ſo reſolved by *Powel* J. on great Conſideration, and conſulting and examining the moſt able Miners. *Nov.* 10, 1729. *Clavering* and *Clavering*, *Select Caſes in Chan.* 79.

4. If *J. S.* either *breaks* up Mines, which he ought not to do, or *even attempts* or *threatens* to break them up, that is a Reaſon for coming into *this* Court to have an Injunction. *Per* Lord Chan. *Hardwicke*, *Eaſt.* 1741. *in Caſu Gibſon* and *Smith*, *Barnard. Rep. in Chan.* 407.

CAP.

CAP. LXVIII.

Mortgage.

(A) What is a Mortgage, &c.——Of a Mortgage in Fee;——And here in what Case a Mortgage shall have the Preference of a Judgment (a).

(B) Redemption in what Cases decreed,——And at what Time, &c.——And who shall be admitted to redeem (b).

(C) Of Foreclosure;——And here of opening a Foreclosure.

(D) In what Case the Act of the Mortgagee will bind the Mortgagor, et cont'.

(E) In what Case the Court of Chancery refused to relieve (c) a Mortgagee.

(F) Concerning of Interest due on a Mortgage, and of such being made Principal.

(G) Of Preference, Disputes, &c. amongst Mortgagees;—— Of Puisne Mortgagees, &c.——Buying in Prior Mortgages, &c.——And where a Prior Mortgagee shall retain against a Mesne Mortgagee.

(H) Mortgage Money, to whom to be paid;——And what Act will discharge a Mortgage.

(I) In what Case the Profits, &c. received by the Mortgagee, shall be set against the Interest;——And in what Cases a Mortgagee may not commit Waste in Equity, et cont'.

(K) Cases relating to Tenant for Life, and the Remainder Man of a mortgaged Estate.

(L) In what Case a Mortgagee shall not be relieved (d) against a Forfeiture.

(a) *Vide Ca.* 8. *P.* 592.

(b) *Vide* (A) *P. Ca.* and (G) *P. Ca.*

(c) *Vide* (L) *P.*

Vide (B) *P.*

(d) *Vide* (E) *P.*

(A) What is a Mortgage, &c. (e).—Of a Mortgage in Fee;——And here in what Case a Mortgage shall have the Preference of a Judgment (f).

(e) The personal Estate, tho' devised, shall pay off a Mortgage, tho' there is no Covenant for Payment in the Mortgage. *Trin.* 1696. *Meynel* and *Howard*, *Prec. in Chan.* 61. unless there are Words of Exemption. *Per* Lord *Cowper*, *Mich.* 1717. *Prec. in Chan.* 477.

(f) *Vide Ca.* 8. *P.* 592.

1. A MORTGAGE is looked upon as a *personal* Contract, and the Mortgagee has *no* Interest beyond his Money. *Per* Lord Chan. *Somers*, *Mich.* 1699. in the Case of *Brown* and *Gibbs*, *Prec. in Chan.* 99.

2. If a Mortgagee afterwards gets an absolute Deed, but suffers Possession to go sometime contrary to it, it will again make it but a Mortgage. *Mich.* 7 *Ann. in Casu Harris* and *Howell*, *Gilb. Rep. in Eq.* 11.

3. Sir

3. Sir *John Trevor* Maſter of the Rolls ſaid, If a Mortgage in Fee is made, the Eſtate will deſcend to the Heir of the Mortgagee, but he hath it only In Truſt for the Executors, and there is no Difference between a Mortgage in Fee of Lands at the Common Law and of Copyhold. *Eaſt. 7 Ann. MS. Notes.*

4. There is no Difference between a Mortgage in Fee of Lands at the Common Law and of Copyhold. Said *per* Sir *John Trevor* Maſter of the Rolls, *Trin. 7 Ann. MS. Notes.*

5. A Mortgage is an Intereſt in Land, and on Nonpayment the Eſtate is abſolute in Law, and the Mortgagee's Intereſt is good in Equity to intitle him to receive and enjoy the Profits 'till Redemption or Satisfaction, and on a *Foreclоſure* has the *abſolute* Eſtate both in Law and Equity. *Per Pratt* C. J. in the Caſe of *Roper* and *Ratcliffe*, 2 *Mod. Caſes in Law and Eq.* 196.

6. Where a Man treated to lend Money on a Mortgage, and the Conveyance propoſed was an abſolute Deed from the *Mortgagor* and a Deed of *Defeazance* from the *Mortgagee*, and after the *Mortgagee* had got the Conveyance he refuſed to execute the *Defeazance*, yet Lord *Nottingham* decreed it againſt him on the Fraud *after* the Statute cited *per Cur'*, *Mich.* 1719. in the Caſe of *Maxwell* and *Lady Mountacute his Wife*, *Prec. in Chan.* 526.

7. So where an *abſolute* Conveyance is made for 100 *l.* to *A.* and inſtead of entering and receiving the Profits, *A.* demands Intereſt for the Money, and has it paid him, this will be admitted to explain the Nature of the Conveyance. *Per Cur'*, *ibid.*

8. A Judgment was ſigned in *June* 1725. A Mortgage was made to Plaintiff in 1728. In *January* 1730 the Judgment was docketted, as appears by Entry in the Margin of the Docket. The *Maſter of the Rolls* held that the Docket was not good, being made after the Time limited by 4 & 5 *W. & M. cap.* 20. and that the Officer had no Authority for it; and ſaid, he would complain to the Judges of the Attorney's keeping back the Rolls; that the Mortgage had got the Preference of the Judgment by Defect of the Docket; and as to the Notice that the Statute being expreſs that Judgments not docketted ſhould loſe their Preference as to Purchaſer and Mortgagees, Notice or not Notice was not material, tho' urged that the Docket was purely to give Notice, and to make the finding of Judgments more eaſy. Decreed for Plaintiff; but the Cauſe turned upon the Foot of an Agreement between Plaintiff and Defendant touching Defendant's delivering up the Bond and Judgment. *Mich.* 1733. *Forſhall* and *Coles*, *Vin. Abr.* Tit. *Creditor and Debtor*, (E) *Ca.* 6.

9. *A.* a Jointenant with *B.* her Siſter, made an abſolute Conveyance to *C.* in Fee for 104 *l.* which was intended only as a Mortgage. In 1708 thoſe Deeds were cancelled; and then *A.* in Conſideration of 184 *l.* (including the 104 *l.*) paid by *C.* conveyed the Eſtate *ut ſupra*, but with a further Covenant not to agree to any Partition without *C.*'s Conſent. *B.* was in Poſſeſſion 'till 1710, when *C.* ejecting her out of the Moiety, enjoyed it quietly 'till 1726, when *A. brought her Bill for Redemption*, to which *C. pleaded himſelf an abſolute Purchaſer.* The Receipts given for the Money mentioned it to be *Purchaſe Money.* In 1710 there was an Agreement that *A.* might have the Eſtate again, *if deſired*, on *Payment of Principal, Intereſt and Charges.* The Cauſe was *firſt* heard before his *Honour*, who diſmiſſed the Bill. And afterwards coming on before Lord Chan. *Talbot*, his *Lordſhip* took Notice that the Caſe was very dark, but that the ſaid Agreement ſhewed it was *not* redeemable at firſt, and that upon conſidering

what, upon Proof, he took to be the annual Value of the Eſtate; and as to the other Matters, his *Lordſhip* was inclined upon the whole to think it was at firſt an abſolute Conveyance; and, upon the Circumſtances of the Caſe, affirmed his *Honour*'s Decree. Had *A.* continued in Poſſeſſion any Time after executing the Deeds, he ſhould have been *clear* that it was a Mortgage; and the Acquieſcence of ſixteen Years under *C.*'s Poſſeſſion was a ſtrong Evidence of it's being an abſolute Conveyance, for otherwiſe the Length of Time would not have ſignified, becauſe *they who take a Conveyance of an Eſtate as a Mortgage without any Defeazance are guilty of Fraud*; and *no Length of Time will bar a Fraud* (*a*). And his *Lordſhip* diſapproved of the Practice in the *North*, of *making Mortgages abſolute*, and *the Defeazance by a ſeparate Deed*, as carrying a Face of Fraud. *Hil.* 8 *Geo.* 2. *Cotterel* and *Purchaſe*, *Caſes in Eq. Temp. Lord Talbot* 61.

(*a*) Maxim.

10. *J. S.* being indebted to *A.* in 300 *l.* *A.* threatened to arreſt him, but to prevent this, *J. S.* propoſed to aſſign to him a Leaſe; *A.* agrees; but it was not fully ſettled whether the Aſſignment was to be an abſolute one in Diſcharge of the Debt, or whether it was to be redeemable on Payment of the 300 *l.* with Intereſt; however, *A.* got an abſolute Aſſignment drawn, which *J. S.* objected to, inſiſting, that it ſhould be made redeemable on Payment *ut ſupra*. The Parties diſagreeing, *B.* the Brother of *J. S.* interpoſed, and at laſt the Agreement was, that *B.* ſhould become bound to *A.* for the Payment of the 300 *l.* and that the Name of *A.* ſhould be ſtruck out of the Aſſignment, and *B.*'s inſerted; that *J. S.* ſhould execute the Deed with this Alteration only, but that there be an Indorſement, purporting, that the Deed was made to indemnify *B.* againſt the ſaid Bond; all which was accordingly done. Two Days afterwards *J. S.* directed the Tenants to attorn to *B.* which they did, and it was ſworn by *B.* in his Anſwer, that on the ſame Day it was agreed between *J. S.* and *B.* that the Aſſignment which had been made ſhould be abſolute to him without Redemption. But this Part of his Anſwer was falſified by a Witneſs, who ſwore that *B.* afterwards *declared that* J. S. *was a Fool for not making the Aſſignment abſolute to him.* *J. S.* became afterwards a Bankrupt, and a Bill being brought for a Redemption, Mr. Juſtice *Parker*, who ſat for *Lord Chancellor*, ſaid, his Opinion was, that the Plaintiffs were intitled to Relief; that it could not be doubted but that when this Aſſignment was made, it was then intended only as a Mortgage; for tho' the Aſſignment was, on the Face of it, abſolute, and that under Hand and Seal, yet the Indorſement, tho' under the Party's Hand only, was ſufficient to ſhew, at leaſt in Equity, it was only a Mortgage; and that what was done two Days after the Execution of the Aſſignment did not alter the Nature of it, being no more than a Direction to the Tenants to attorn to the Mortgagee. And it being contended for the Plaintiffs, that *B.* not only forfeited his Coſts, by inſiſting upon this Aſſignment as an abſolute Purchaſe, but that he ought to pay Plaintiffs the Coſts of this Suit, the *Judge* ſaid, he thought it would be going too far to make *B.* pay the Coſts of this Suit; but was of Opinion, that he had forfeited his Coſts. Here is an Indorſement under his own Hand, whereby he has admitted the Aſſignment to be a Mortgage, and then here is a Witneſs falſifying his Anſwer. Decreed that the Aſſignees under the Commiſſion in the firſt Place ſhall have Liberty to redeem, and in Default thereof that the Plaintiffs ſhall have the Redemption. *Eaſt.* 1740. *Franklyn* and *Fern*, *Barnard. Rep. in Chan.*

(B) Redemption in What Caſes decreed,—And at What Time, &c.—And Who ſhall be admitted to redeem (*a*).

(*a*) *Vide* (A) *P.* . *Ca.* and (G) *P.* *Ca.* If a Mortgagor has been abſent thirty Years, his Heir apparent may redeem, for it may be preſumed when the Mortgagor has not been heard of ſo long, that he is dead. (*b*) *MS. Notes.*—— If Lands are limited in a Settlement to Daughters, with a Proviſo, that if the Heir, Executor or Adminiſtrator of the Seller, pays 400 *l.* at a Day certain to Truſtees, that the Limitation ſhall ceaſe, this Limitation is only a Collateral Sort of Security for the Money, which the Creditors of the Seller, or he in Reverſion, may redeem. *Frederick* and *Aynſcombe*, (*c*) *MS. Notes.*——An Equity of Redemption has always been conſidered, in Equity, as an Eſtate in the Land; it is ſuch an Intereſt in the Land as will deſcend from Anceſtor to Heir, and may be granted, intailed, deviſed or mortgaged; and that equitable Intereſt may be barred by a Common Recovery. The Perſon who is intitled to the Equity of Redemption, is conſidered in Equity as Owner of the Land, and the Mortgagee to retain the Land as a Pledge or Depoſit; and for this Reaſon it is, that a Mortgage in Fee is conſidered as a perſonal Eſtate, notwithſtanding in Point of Law the legal Eſtate veſts in the Heir. (*d*) *MS. Notes.* (*b*) *Quære* Term and Year. (*c*) *Quære* Term and Year. (*d*) *Quære* Term and Year.

1. A Mortgagee in Fee lends Money to the Mortgagor upon Bond, and the Mortgagor dies, and his Heir ſells the Equity of Redemption. And *per Lord Chancellor*, the Vendee of the Heir of the Mortgagor ſhall redeem the Land, without paying the Money lent on the Bond. *Hil.* 1678. *Bayly* and *Robſon*, *Prec. in Chan.* 89.

2. If *A.* mortgage Lands to *B.* for 100 *l.* and *A.* owes *B.* alſo 100 *l.* by *Contract* or *Bond*, *A.* ſhall not be admitted to redeem the Mortgage without paying the 100 *l.* by the *Contract* or *Bond*, but is left to his Remedy on his *Contract* or *Bond* (*e*). *Mich.* 1701. ſo held in the Caſe of *Monger* and *Kett*, *in Canc'*, *Caſes in B. R. Temp. W.* 3. 559.

(*e*) Hereupon *Pooly* at the Bar ſaid, that if I have ſeveral Mortgages upon ſeveral Lands for 100 *l.* each from the *ſame* Perſon, and one of the Mortgages proves a bad Title, and the other good, the Mortgagor ſhall redeem the good one, without paying of the Money upon the bad one. *Ibid.*

3. If Mortgagee aſſigned over his Mortgage, yet he muſt be made a Party in a Bill of Redemption, that he may account for what Profits he did receive in his Time. This was held by the Court, to be the daily Practice. *Anne*, *in the Dutchy.*

4. *A.* had a Mortgage of certain Lands, whereof *B.* had a *prior* Mortgage, and afterwards *B.* lent a further Sum to the Mortgagor on a Statute; but as *A.* alledged *B.* had Notice of *A.*'s Mortgage before he lent the laſt Money, *B.* by Anſwer did not *deny Notice poſitively* but *evaſively*, and *A.* could not prove Notice 'till after *B.*'s lending the laſt Money; yet becauſe *B.* had not denied Notice *poſitively*, Lord Keep. *Wright* and his *Honour* decreed a Redemption on Payment of the *firſt* Money only. *Trin.* 1703. *Caſon* and *Round*, *Prec. in Chan.* 226.

In this Caſe it was ſaid, that tho' the Heir on Payment of what is due on the Mortgage will have back the Copyhold from the Wife, yet that ſhe ſhall hold the Freehold 'till the Bond is ſatisfied. *Ibid.* 238.

5. Plaintiff's Huſband before Marriage gives her a Bond to leave her 1000 *l.* if ſhe ſurvived him, and the ſame Day marries her. The Huſband dies inteſtate, leaving a *Freehold* and *Copyhold* Eſtate, all in Mortgage to *B.* The Wife adminiſters, but the perſonal Eſtate not being near ſufficient to ſatisfy this Bond, ſhe brings a Bill againſt the *Heir* and *Mortgagee* to *redeem*, and be let in to have Satisfaction of the Bond. And *per* Lord Keep. *Wright*, if the Bond were executed, (which being doubtful, was ordered to be tried) the Court would ſupport it as a Bond, and that the *Freehold* and *Copyhold* being mortgaged together, the Plaintiff ſhould redeem both. *Hil.* 1704. *Acton* and *Acton*, *Prec. in Chan.* 237.

6. A Note was given *at the Time of the Releaſe of an Equity of Redemption*, that the *Releaſor* ſhould have the Lands conveyed to him, *upon Payment of what was given for the Lands, within a Year*; ſuch Payment having been neglected for ſeveral Years, there ſhall be no Redemption. 10 *Feb.* 1706. *Endſworth* and *Griffith*, *Vin. Abr.* Tit. *Mortgage*, (U) *Ca.* 8.

7. *A.* mortgages a Tenement to *B.* and *C.* and *D.* were Sureties for Payment of Principal and Intereſt; afterwards 11 *l.* Intereſt being behind, *C.* paid it to prevent a Suit; after this *D.* lends Money to *A.* and it was propoſed that the Equity of Redemption ſhould be his Security; upon which *C.* deſired *D.* that the 11 *l.* might be included in his Security; *D.* promiſed it ſhould, and accordingly adds the 11 *l.* to the Conſideration of the Mortgage, and gave *C.* a Note to aſſure him a Satisfaction out of this Security. *D.* being a conſiderable Creditor to *A.* inſiſted, that *C.* ſhould have no Satisfaction until his own Money was firſt reimburſed; *C.* dies; his Widow being his Executrix, exhibits her Bill againſt *D.* and inſiſts upon having Satisfaction before him. The Money being due to her precedent to his Demand, the Defendant alledged that the Acceptance of the Note was a Waiver of the firſt Equity. *Lord Chancellor: C.* having paid 11 *l.* for Intereſt, he ſtands in the Place of *B.* the Mortgagee, and ſhall have the Benefit of that Security; and as to the Note it is not any Waiver, but an additional Security. *Trin.* 7 *Ann. Beckett* and *Booth.*

His *Lordſhip* in this Caſe ſaid, no valuable Purchaſer, with Notice of a Debt, ſhall be aſſiſted againſt it in Equity.

8. *A.* ſeiſed of a Copyhold in Fee, upon his Marriage ſurrendered it to the *Uſe of himſelf* and *his Wife in ſpecial Tail*, Remainder *to the Wife in Fee*, upon *Condition that if he pay* 50 l. *at ſuch a Day to a Daughter that the Wife had, then the whole Surrender to be void*; the Day elapſed and the 50 *l.* not paid; the Huſband died *without* Iſſue. The Plaintiff being his Heir, brought his Bill againſt the Defendant, who purchaſed from the Wife to *redeem.* Defendant pleads *that he is a Purchaſer for a valuable Conſideration without Notice. Lord Chancellor:* The Court may ſometimes *carry an Intereſt which is redeemable even to an Oppoſition.* This originally was not deſigned for a Mortgage, but the Party by ſettling it thus has left it in his Election either to perform the Condition, by paying the Money, or to let the Settlement ſtand, and he choſe the latter; therefore he allowed the Plea, but ſaid nothing of the Notice. *Mich.* 8 *Ann. King* and *Bromley*, *MS. Rep.*

9. *A.* being ſeiſed of ſeveral Copyholds in Fee, mortgages them; and afterwards mortgages Part of them to another, and mortgages Part of them to a third Perſon; but there was no Admittance, or if there was, it was entered in a wrong Book, contrary to the Cuſtom of the Manor. But the Mortgagee relied upon the Mortgagor, who was Deputy Steward of the Manor, to do every Thing that was needful, but inſtead of that he entered the Surrender in a wrong Book, contrary to the Cuſtom. And after mortgages the Lands a fourth Time, then the Mortgagor becomes a Bankrupt. Inſiſted, That the Lands in the ſecond Mortgage being Part of thoſe that were in the firſt, the ſecond Mortgagee ſhall be admitted to redeem all the Lands contained in the firſt Mortgage, paying the firſt Mortgagee all that is due upon his Mortgage. And by *Lord Chancellor*, Where there is a ſecond Mortgagee of Part of the Lands that were before in Mortgage, he ſhall not redeem Part of the firſt Mortgage, and ſo put the firſt Mortgagee to ſeek what is due to him out of the Reſidue of the Lands, when he hath a precedent Title to the whole, but paying all that is due, he ſhall redeem the whole. But it was ordered that the ſecond

Mortgagee

Mortgagee ſhould redeem ſo much as was contained in his own Mortgage, the *Maſter* ſettling the Proportion the ſecond Mortgagee ſhall pay to the firſt. And it was alſo decreed, that the fourth Mortgage being without Notice of the third, and the third being entered in a wrong Book, the third ſhall be poſtponed, and the fourth ſtand in the Room of it; and that after the fourth Mortgage is ſatisfied, the third ſhall be let in. It was objected, That the Aſſignees of the Commiſſioners of Bankrupt have the legal Eſtate, and being Creditors have an equitable Right, which will prevail againſt Equity only. *Lord Chancellor:* They ſtand but in the Place of the Bankrupt, and this third Mortgage would have been good againſt the Bankrupt himſelf, and therefore ſhall be good againſt the Creditors; and the third Mortgagee ſhall come in as a Creditor, to have his Dividend of the Bankrupt's perſonal Eſtate, for ſo much as the third mortgaged Lands fall ſhort of ſatisfying what is due upon that Mortgage. *Welman* and *Warren*, *Mich.* 8 *Ann.*

10. No Redemption *after forty Years Poſſeſſion*, but *on a ſtated Account for turning Intereſt into Principal.* 15 *Jan.* 1710. *Conway* and *Shrimpton*, *Vin. Abr.* Tit. *Mortgage*, (U) *Ca.* 9.

11. A Feme ſole ſeiſed of Lands in Fee, ſubject to a Mortgage, marries *A.* who about ten Years after pays off the Mortgage, and has it aſſigned over to *B.* In Truſt for himſelf, and lays out a conſiderable Sum in Improvements upon the Eſtate; and having Iſſue two Daughters by his Wife, makes his Will, and deviſes theſe Lands to his youngeſt Daughter, and dies; the Wife ſurvives, and holds the Lands for her Life; and after her Death, the eldeſt Daughter and her Huſband bring a Bill againſt her Siſter and Coheir, to redeem a Moiety of theſe Lands. The great Queſtion was, Upon what Terms and in what Manner Plaintiff ſhould redeem, for if the Account was to be taken as between Mortgagor and Mortgagee in Poſſeſſion, then the Deviſee muſt account for the Profits received by the Deviſor, and be allowed for Repairs and laſting Improvements; but if in this Caſe the Deviſor ſhould be judged in Poſſeſſion by Right of his Wife, and not by Virtue of the Mortgage, then the Deviſee was not to account for the Profits, nor have an Allowance for Repairs and Improvements, but only to have Intereſt allowed from the Father's Death, for then it would be the common Caſe of Tenant for Life of Lands in Mortgage, who is obliged to keep down the growing Intereſt during the Continuance of his Eſtate, and ſhall not have any Allowance for the Improvements? *Cowper* C. decreed that there ſhould be no Allowance for Improvements by the Huſband before he took an Aſſignment of the Mortgage; but from that Time the Deviſee ſhould have an Allowance of the two Thirds of the laſting Improvements, but nothing for the other Third, becauſe he received the Benefit of the Improvements during his Life, according to the uſual Proportion between an Eſtate for Life and the Reverſion in Fee; and that no Intereſt ſhould be allowed during the Deviſor's Life, for Tenant for Life is bound to keep down the Intereſt during his Eſtate. *Per Cur'*, *Newling* and *Abbot*, *Eaſt.* 1 *Geo. Vin. Abr.* 185. *Ca.* 8. Letter *A.*

12. *J. S.* grants a *Rent-charge* in Fee of 48 *l. per Annum* to *B.* upon Condition, that if *J. S.* ſhould at any Time give Notice to pay in the Conſideration Money (being 800 *l.*) by Inſtalments, *viz.* 100 *l.* at the End of every ſix Months, and ſhould, purſuant to ſuch Notice, pay the ſaid Money and Intereſt *at any Time during his Life-time*, then the Grant to be void; but there is no Covenant for *J. S.* to pay the Money, and the Rent-charge was much leſs than what the

Intereſt of the Money came to, (legal Intereſt being then, *viz.* about ſixty Years ago, at 8 *l. per Cent.*); and *B.* had conveyed it over after *J. S.*'s Death (*a*) to a Purchaſer, to whom he had given collateral Security for quiet Enjoyment; and the Purchaſer had afterwards made a Marriage Settlement of it. And upon a Bill brought by the Heir of *J. S.* to redeem this Rent-charge, the only Queſtion was, Whether it was redeemable? And Lord Chan. *Cowper* conceived the Rent-charge was not redeemable *at ſo great a Diſtance of Time* (*b*), *viz.* about ſixty Years; and that this Court had gone too far in permitting Redemptions. And decreed the Bill to be *diſmiſſed* with the *uſual Coſts*, it being only upon Bill and Anſwer. *Mich.* 1714. *Floyer* and *Lavington*, 1 *Will. Rep.* 268.

(*a*) *Quære* when the Mortgagor died.

His *Lordſhip* obſerved, that it was *material*, that at the Time of making the Mortgage Intereſt was at 8 *l. per Cent.* and therefore the Rent-charge of 48 *l.* a Year being ſo much leſs than the yearly Intereſt of 800 *l.* which at 8 *l. per Cent.* came to 64 *l.* a Year, the Payment of the Rent-charge could not be taken to be the Payment of the Intereſt. That here ſeveral Circumſtances concurred, which, tho' each of them ſingly might not be of Force to bar the Redemption, yet all joined together were ſtrong enough to prevail over it. That the *Mortgagee* ſeemed to have allowed a Conſideration for the purchaſing the Equity of Redemption after the Death of the Mortgagor. Firſt, By taking the Rent-charge at 48 *l. per Annum*. Secondly, By agreeing to have his Principal Money by *Inſtalments*. Thirdly, By leaving it at the Election only of the Mortgagor, whether he would redeem or not. And that there could be no Reaſon given why ſuch a contingent Right of Redemption might not, upon fair and reaſonable Terms, be purchaſed. That the *Length of Time*, where ſo great as in the *preſent* Caſe, was a good Bar of Redemption of a *Rent charge* as well *as of Land*. That the *Alienation*, *Purchaſe* and *Settlement* of this Rent-charge, after the Death of the Mortgagor, being all *without* any *Fraud*, were of Right; as alſo that the *Mortgagor* was not bound to pay the Money by any Covenant. That the Purchaſe of this Rent-charge did no ways either create or admit of a Right of Redemption, by taking a Security againſt a Redemption, that being only a *prudent Caution* made uſe of by the Purchaſer, which the Seller, being ſatisfied it would not hurt himſelf, might adviſe him to. *Per Lord Chancellor*, *ibid.* 271 to 273. But the *Reporter* ſays, it was thought that the *Length of Time* was the chief Objection to the Redemption. *Ibid.* 273.

(*b*) Sir *Joſeph Jekyll*, for the Plaintiff, cited the Caſe of *Lord Widdrington* and *Jennings* in Lord *Harcourt*'s Time, where the Court took a Difference between a Mortgage of a Rent-charge and of Land, and that a Redemption was allowed in the *former* Caſe after a very long Time, *viz.* eighty Years, as he thought. *Ibid.* 270.

13. Bill *by a Conuſee of a Statute of the Mortgagor to redeem after a Decree of Foreclоſure*, &c. The Defendant *pleads a Decree* of Foreclоſure, and that the Statute was acknowledged after the Mortgagee's Bill filed, *that the Mortgagee had no Notice*, and made proper Parties at the filing of the Bill, and that the preſent Plaintiff took the Security *pendente lite*. *Per Harcourt* C. This is a *recent* Foreclоſure; let the Plaintiff redeem upon Payment of what is due, with Coſts. 9 *July* 13 *Ann. Criſp* and *Heath*, *Vin. Abr.* Tit. *Creditor and Debtor*, (E) *Ca.* 2. *P.* 52.

14. There is a Difference between Mortgages of Exchequer Annuities and Common Stock, the Value of which depends upon Imagination, rather than real Value; but Annuities are a certain Security, and carry a conſtant Intereſt, and are to be conſidered as Mortgages of Lands, and cannot be ſold after Forfeiture without Foreclоſure; but the Decree was reverſed. 1714. *Wilſon* and *Tooker*, *Vin. Abr.* Tit. *Mortgage*, (Y) *Ca.* 7. *P.* 476.

But according to *Manning* and *Scott*, 14 *Nov.* 1714, Annuities mortgaged are redeemable after Forfeiture, unleſs there be an expreſs Agreement that the Mortgagee may ſell after Forfeiture. *Ibid.*

15. A Mortgage was in *Wales* by Leaſe and Releaſe for 300 *l.* Proviſo, to be redeemed on Payment of 300 *l.* on *any Michaelmas-Day*; but there was *no Covenant to pay the Money*. Lord Chan. *Cowper* thought this in Nature of a *conditional Purchaſe*, and *redeemable* even at Law *to the End of the World*. *Mich.* 1715. *Howell* and *Price*, *Prec. in Chan.* 423, 424.

Here being *no Covenant for Payment of the Money*, there is *no Contract at all* between the Parties, either *expreſſed* or *implied*, nor would any Action lie againſt the Mortgagor, to ſubject his Perſon, or compel him to pay this Money; but this being in Nature of a conditional Purchaſe, is ſubject to be defeated on Payment by the Mortgagee or his Heirs, of the Money on *any Michaelmas-Day*, at the Election of the *Mortgagor* or his Heirs; ſo that here was an everlaſting ſubſiſting Right of Redemption deſcendible, and which cannot be forfeited at Law like other Mortgages, and therefore there can be no Equity of Redemption or any Aſſiſtance of this Court, but the Mortgage may be defeated, even at Law, by a Performance of the Terms and Conditions of it. *Per Lord Chancellor*, *ibid.* 423, 424.——2 *Vern.* 701. S. C.

16. *A.* mortgages to *B.* for a Term of Years, to ſecure a Sum of Money already lent to *A.* as alſo ſuch other Sums as ſhould hereafter be lent or advanced to him. *A.* makes a ſecond Mortgage to *C.* for a certain Sum, with Notice of the firſt Mortgage; and then the firſt Mortgagee, having Notice of the ſecond Mortgage, lends a further Sum, *&c.* *Per Cowper* Lord C. The ſecond Mortgagee ſhall not redeem the firſt Mortgage, without paying as well the Money lent after, as that lent before the ſecond Mortgage was made; for it was the Folly of the ſecond Mortgagee, with Notice, to take ſuch Security. But upon the Importunity of the Counſel, it was ordered, that the *Maſter* ſhould report what Money was lent by the firſt Mortgagee after he had Notice of the ſecond Mortgage. *Eaſt.* 2 *Geo.* *Gordon* and *Graham*, *Vin. Abr.* Tit. *Creditor and Debtor*, (E) *Ca.* 3. *P.* 52.

17. It is a Rule in Equity, that a *Mortgagee in Poſſeſſion*, who is *ſued for a Redemption, ſhall never be ſtripped of his Poſſeſſion before Payment.* 17 *Feb.* 1717. *Brine* and *Hartpole*, *Vin. Abr.* Tit. *Mortgage*, (T) *Ca.* 15. *P.* 467.

18. Where by a *ſpecial* Agreement Profits are to be ſet againſt Intereſt, whether *Length of Time* be a Bar to Foreclоſure. 17 *Feb.* 1717. *Brine* and *Hartpole*, *Vin. Abr.* Tit. *Mortgage*, (U) *Ca.* 12. *P.* 469.

(*a*) 1 *Will. Rep.* 775. S. C.

19. The (*a*) principal Queſtion was, Whether on a Bill brought by the Purchaſer of Lands (from the Heir at Law of the Mortgagor) to redeem, the Mortgagee could retain a Bond Debt of the Mortgagor to the Mortgagee, ſo as to oblige the Purchaſer to pay both before he redeemed, as without Queſtion he might have done upon ſuch a Bill brought by the Heir at Law of the Mortgagor before any Sale made. Decreed *per* Lord Chan. *Macclesfield*, that the Alienee of the Heir might redeem the Mortgage without paying the Bond Debt; for tho' it is true, that the Heir muſt have paid both in ſuch a Caſe, yet the Reaſon of that is, becauſe the Heir is expreſsly bound, and it is his own Debt, ſo that the Action upon the Bond is brought againſt him in the *Debet* and *Detinet*; and tho' by the *Civil* Law he may ſubſtitute the Lands which he had by Deſcent in Diſcharge of his Perſon, yet he may, if he thinks fit, diſpoſe of thoſe Lands, and make his perſonal Eſtate liable. But by *our Law*, before the Statutes of *Riens per Deſcent* were pleaded, the Plaintiff could only reply that he had Aſſets by Deſcent at the Time of the Writ purchaſed, for if he had diſpoſed of them before, the Plaintiff had no Remedy; but now by the Statute the Plaintiff may reply that he had Aſſets by Deſcent before the Writ purchaſed at ſuch a Time, and if found for him, he ſhall have Execution in Value againſt the Heir, which before he could not have; but he can no more follow the Lands in the Hands of the Alienee than he can the Goods in the Hands of the Vendee of the Executor; for the Perſon of the Heir is Debtor, and not the Lands, and conſequently the Lands in the Hands of the Alienee can be charged with nothing but what is an immediate Lien thereon, which the Bond is not, tho' the Lands in the Hands of the Heir himſelf muſt be liable, in this Caſe, to pay both the Bond and the Mortgage, on a Bill brought by the Heir for a Redemption (*b*). *Hil.* 1718. *Coleman* and *Wince*, *Prec. in Chan.* 511.

(*b*) So if a Man poſſeſſed of a Term for Years, mortgages it, and dies indebted to a Mortgagee in a Bond Debt, if the Executor brings a Bill to redeem, he muſt pay both before the Equity of Redemption of the Term is Aſſets in his Hands; but if he alien the Equity of Redemption, as it is ſo far a *Devaſtavit*, yet the Purchaſer ſhall be charged with no more than was immediately borrowed upon it; and it was alſo held in this Caſe that the Bond Creditor of the Heir himſelf ſhould be preferred before a Bond Creditor of his Anceſtor, after ſuch Alienation, whether it were voluntary or for a valuable Conſideration. *Ibid.* 512, 513.

20. Where Poſſeſſion is got againſt a Mortgagee *by Fraud* pending a Suit, it muſt be reſtored before there can be any Redemption. 18 *Jan.* 1719. *Lant* and *Criſp, Vin. Abr.* Tit. *Mortgage*, (T) *Ca.* 16. *P.* 467.

21. Equity will not enlarge the Time for *Mortgagor* to redeem *after ſix Years Acquieſcence under a Forfeiture by his own Conſent*, eſpecially *if there have been any Improvements on the Eſtate.* 18 *Jan.* 1719. *Lant* and *Criſp, Vin. Abr.* Tit. *Mortgage*, (U) *Ca.* 13. *P.* 469.

22. There ſhall be *no* Redemption *after long Poſſeſſion, Settlements made*, and *Eſtate improved.* 8 *April* 1720. *Courtney* and *Langford, Vin. Abr.* Tit. *Mortgage*, (U) *Ca.* 14. *P.* 469.

23. If a Teſtator, being poſſeſſed of a Term, mortgages it to *A.* and becomes alſo indebted to *A.* by ſimple Contract, and dies, his Executor bringing a Bill to redeem, ſhall pay both the Mortgage and Debt by *ſimple Contract*, becauſe the very *Equity of Redemption is Aſſets to pay ſimple Contract Debts*; but if any Creditor of the Teſtator brings a Bill to redeem this Mortgage, he ſhall only pay the Mortgage. *Hil.* 1721. *Per* Lord Chan. *Macclesfield*, in the Caſe of *Coleman* and *Winch*, 1 *Will. Rep.* 777.

24. *A.* Plaintiff's Brother, mortgaged the Lands to *B.* and died. In the Mortgage Deed there was a *Covenant to reconvey upon ſix Months Notice of the Payment of the Principal and Intereſt*; and another *Covenant, that in Caſe the Eſtate was to be ſold, that* B. *ſhould have the Pre-emption*; but *B.* getting the Counterpart of the Mortgage into his Hands after *A.*'s Death, and Plaintiff having given *B. ſix Months Notice that he would pay the Principal and Intereſt*, and Defendant refuſing to accept it, whereupon Plaintiff exhibited his Bill for a Reconveyance of the Eſtate, having entered into Articles for the Sale thereof, *B.* by his Anſwer, inſiſted on the Covenant in the Deed to have the *Pre-emption*; but it appearing that neither the Plaintiff nor the Purchaſer knew any Thing of this Covenant, the Counterpart of the Mortgage having been in *B.*'s Cuſtody, *&c.* and that Plaintiff had often made Application for a Counterpart thereof, which was denied, *he inſiſting only to have the Principal and Intereſt paid*, for that the Security was too narrow for the Money he had lent; and that if it was not paid by ſuch a Time he would foreclose the Equity of Redemption; but never mentioned that he was to have the Benefit of *Pre-emption* 'till after the Eſtate was ſold; therefore he ought not now to claim it to the Prejudice of the Purchaſer, Plaintiff having had Time for to claim it (if he had pleaſed) before the Eſtate was ſold. Decreed accordingly; and the Mortgagee to reconvey upon Payment of Principal and Intereſt, *&c.* *Eaſt.* 1722. *Orby* and *Trigg*, *MS. Rep.* *2 Mod. Caſes in Law and Eq.* 2. S. C. *in totidem verbis.*

25. Bill to have a Satisfaction of a Judgment, againſt a Purchaſer of the Equity of Redemption of the Land, or to redeem Incumbrances, *&c.* The Defendants inſiſt on the Stat. 4 *&* 5 *W. & M. cap.* 20. that no Judgment ſhall affect a Purchaſer or Mortgage, unleſs docketed. This Judgment was not docketed 'till 1721, and the Purchaſe was made in 1718. *Macclesfield* C. It is plain Defendant had Notice of the Judgment, and did not pay the Value of the Eſtate; and that is a ſtrong Preſumption of an Agreement to pay off the Judgment; and ſince Plaintiff cannot proceed at Law againſt Defendant upon the Judgment for want of docketing in due Time, he ought to be relieved here. Decreed that Defendant pay Plaintiff the Money *bona fide* due upon the Judgment. *Mich.* 9 *Geo. Thomas* and *Pledwell, Vin. Abr.* Tit. *Creditor and Debtor*, (C) *Ca.* 5. *P.* 53.

26. A Bill was exhibited by the Creditors of a Mortgagor, to have the Eſtate ſold for Payment of their Debts; pending which Suit the Mortgagee obtained a Decree to *foreclose* the Mortgagor. The Court decreed that the Creditors ſhould redeem upon Payment of *Principal, Intereſt* and *Coſts*, to the Mortgagee; and referred it to a *Maſter* to take an Account thereof; and that the Lands ſhould be ſold to the Creditors. *Trin.* 11 *Geo.* 1. *Soley* and *Saliſbury*, 2 *Mod. Caſes in Law and Eq.* 153.

27. *J. S.* in 1679, mortgaged Lands to *A.* for a *ſmall* Sum of Money, by an abſolute Coveyance and Defeazance, but the *Redemption was expreſſed to be made with* J. S.*'s own Money* and *in his Life-time.* Soon after *J. S.*'s Neceſſities forced him to go abroad, where he died about twenty-ſeven Years ſince, and his Heirs knew nothing of the Mortgage. In 1702 *A. deviſed that if the Mortgage ſhould be redeemed*, the Money ſhould go ſo and ſo. About ſixteen Years after the Will, a Bill was filed for Redemption, to which was objected the *great Length of Time*, and that by the ſettled Rules of the Court a Mortgage ſhall not be redeemed after twenty Years. But his *Honour* held, that decreeing a Redemption would be no Wrong or Hardſhip to the Party, for he will have greater Intereſt than the Law now allows; and that the not decreeing a Redemption, would be eſtabliſhing a very great Impoſition; and tho' *abſolute Conveyances* and *Defeazances* were formerly much uſed in Mortgages, yet the ſame is left off, as dangerous, by loſing the Defeazance, which is avoided by being in the ſame Deed; that the Words in the Defeazance, however fettered, ſignify nothing where the Money is to be repaid; for the Borrower, being neceſſitated, and ſo under the Lender's Power, the Law makes a benign Conſtruction in his Favour; but this was a *Fraud* in its Creation, and in ſuch Caſe *is redeemable after any Length of Time*; for the Words *to be paid with his own Money*, were thrown in to no other Purpoſe but to make *J. S.* imagine it could not be done otherwiſe; whereas any other Perſon's Money was of equal Value. But if rightly conſidered diſtinct from the Fraud, there is ſufficient for Redemption by the Declaration in the Will, where he calls it a Mortgage; and as *J. S.* by thoſe fettering Clauſes would have a Right to redeem, ſo will his Heir, who would be equally deceived by them; but here it appears that the Heir knew nothing of this Deed, which is ſtill ſtronger; and had he known of it, it would have deceived him, and led him into an Imagination that he could not redeem. And Lord Commiſſioner *Gilbert* was of the ſame Opinion, and thought this Caſe out of the general Rule of *Dereliction*, which *even ſuppoſes previous Knowledge of the Right*, it being abſurd to ſay a Man relinquiſhes a Right which he knows not of, nor can it be ſuppoſed a *Dereliction* or a *Right neglected* or *diſregarded*, by reaſon of the great Over-value. And a Redemption was decreed. *Eaſt.* 1725. *Ord* and *Smith, Select Caſes in Chan.* 9.

In this Caſe the *Maſter of the Rolls* ſaid, he remembered a Caſe about twenty Years ago, where a Redemption was decreed on a Mortgage made in 1642, and where there was neither *Infancy* nor *ouſter le Mere*; but only the *Mortgagee* having brought a Bill to foreclose, it was an Admiſſion that he conſidered it as a Mortgage, and ſo the *Mortgagor* was let in to redeem. *Ibid.* 10.

28. The Rule for Redemption *within twenty Years* ſhould be inviolably abided by, for it is for the quieting of Mens Eſtate; and neglecting for ſo long a Space of Time to purſue their Rights, is a *Dereliction* of the Pledge, and ſhould not be broken into; for it is a natural Reaſon to think, that Perſons having a Right would purſue it in ſuch a Space of Time, if it were worth while; and by its not being

done, as it was their Intereſt to do ſo, (about which Men are very ſedulous) the natural *Deduction* is, that they thought it not worth while. But a Caſe may be out of the general Rule; as where the Suppoſal of a *Dereliction* may be anſwered, as where the Right of Redemption is induſtriouſly obſcured by particular Clauſes, *viz. That the Redemption muſt be with his own Money* and *in his own Life-time*, &c. which would be uſeleſs for any other Purpoſes but to create an Imagination, that he could not do it unleſs with his own Money and in his Life-time. *Per* Lord Commiſſioner *Gilbert*, *Eaſt.* 1725. *Ord* and *Smith*, *Select Caſes in Chan.* 9.

29. The Plaintiffs brought a Bill to redeem a Lottery Annuity they had mortgaged to the Defendant, and prayed to have the ſame reſtored upon Payment of the Mortgage Money and Intereſt. The Defendant in his Anſwer ſaid, that he had ſubſcribed the ſaid Annuity into the *South-Sea* Company, and he inſiſted upon the Benefit of the Stat. 6 *Geo. cap.* 4. *ſect.* 23. by which Act all Executors, Adminiſtrators, Guardians and Truſtees, have Liberty to ſubſcribe for and on the Behalf of their reſpective Teſtators, Inteſtates, or of Infant Minors, Feme Coverts or others, for whom they are reſpectively intruſted, and by Virtue of the ſaid Act are indemnified for ſo doing; and that by the ſaid Statute the Share or Intereſt of ſuch Executor, Adminiſtrator, Guardian or Truſtee, in the Capital Stock of the *South-Sea* Company, ſhall be ſubject to the like Uſes, Truſts and Purpoſes, as the ſaid Annuities ſo ſubſcribed were ſubject; therefore the Defendant inſiſted that he was indemnified by this Statute, and that he was only anſwerable to the Plaintiffs for the Produce or Share of the ſaid Annuity in Stock, and that he was not obliged to anſwer ſpecifically in Value. It appeared, that the Annuity was ſubſcribed after the Condition of the Mortgage was forfeited, and that the Defendant had ſubſcribed it without the Conſent or Privity of the Owners. *Lutwyche* for the Defendant inſiſted, that he ought to be charged only with the Produce, and cited ſeveral Caſes in this Court, where the Party, ſo ſubſcribing, had been decreed to pay only the Produce, as being indemnified from any Thing farther by Virtue of the ſaid Statute; and this, he ſaid, had been done in the Caſe of a Goldſmith, in whoſe Hands ſuch Annuities being left, and they having ſubſcribed them without the Privity or Conſent of the Owners, yet they were decreed to anſwer only the Produce; and to this Purpoſe he cited the Caſes of *Black* and *Fowler*, *cor'* Lord Chan. *Macclesfield*, and *Weaver* and *Nichols*, and *Marſhall* and *Fowler*, in which laſt Caſe an Action of Trover was brought for the Annuities againſt the Goldſmith in whoſe Hands they were depoſited, and the Plaintiff recovered in Damages the whole Value of the Annuities; and the Bill being brought by the Goldſmith who was the Defendant at Law, to be relieved againſt the Verdict, the *Maſter of the Rolls* granted a perpetual Injunction upon Payment of the Produce. And this Decree was afterwards affirmed by *Macclesfield* Lord Chan. upon an Appeal. Lord Chan. *King* ſaid, the preſent Caſe differed from thoſe which were cited, and decreed a Redemption of the Plaintiff's Annuity upon the common Terms of Payment of the Principal Money and Intereſt. *Mich.* 12 *Geo.* 1. *Thomas et al'* and *Pendlebury*, *MS. Rep.*

30. *J. S.* having Chambers in *Gray's Inn*, mortgaged them to *A.* *Vide P.* 602. *J. S.* died, leaving *B.* a Son, who was his Adminiſtrator, but no *Ca.* 32. Member of the Society. *B.* brought a Bill to redeem. It was objected, That *B.* was utterly incapable of having the Chambers by the Rules of the Society, which are, that none can have Chambers but

ſuch as are Members of the Inn. But Lord Chan. *King* ſaid, tho' *B.* by the Rules of the Houſe, is not capable of Chambers, yet they ſhall be to him or his Appointee. *Trin.* 1726. *Rakeſtraw* and *Brewer* (*a*), *Select Caſes in Chan.* 55.

(*a*) *Vide this Page, Ca.* 32.

31. A Decree of Foreclosure is *not to be ſet aſide after twenty Years for Matter of Form only*; upon a Demurrer to a Bill of Review. 12 *Feb.* 1727. *Jones* and *Kendrick*, *Vin. Abr.* Tit. *Mortgage*, (U) *Ca.* 18.

32. *J. S.* Repreſentative of *H.* brought his Bill againſt *C.* to redeem a Mortgage of Chambers in *Gray's Inn* made by *H.* in 1687, and by Aſſignment transferred to *C.* whoſe Executor *B.* was. The Term mortgaged by *H.* was for fifty-ſeven Years, which would expire at *Lady-Day* 1731, and the Bench gave a new Term for eleven Years to *C.* to commence from the End of the former; and he was the firſt Perſon who was in Poſſeſſion of the Chambers under the Mortgage, but had not been in Poſſeſſion for twenty Years; ſo that *J. S.* came within Time. *J. S.* firſt petitioned the Bench to be admitted to redeem, and 21 *May* 1726 an Order of *Penſion* was made, reciting, "That "the Matter in Diſpute between the Parties was Matter of Account, "which the Bench was not capable of taking, and the Mortgage of "ſo long ſtanding; but that *J. S.* was at Liberty to ſeek his Re-"medy in a Court of Equity, as he ſhould be adviſed." Upon which *J. S.* brought this Bill. And his *Honour* ſaid, he could not meddle with this Title to Chambers, which is *no legal* one, but the Benchers themſelves having recommended it to *J. S.* to come hither, and left him at Liberty to make his Application, he ſaid the Bill was proper; and it being urged, that if *J. S.* could redeem the old Term, yet he could have no Title to the additional (*b*) Term of eleven Years. But *per Cur'*, This additional Term comes from the old Root, and is of the ſame Nature, ſubject to the ſame Equity of Redemption, elſe Hardſhips might be brought upon Mortgagors by the Mortgagees getting ſuch additional Terms more eaſily, as being poſſeſſed of one not expired, and by that Means *worming* out and oppreſſing a poor Mortgagor. A Redemption was decreed *per* his *Honour*, *Hil.* 1728. *Rakeſtraw et al'* and *Brewer* (*c*), 2 *Will. Rep.* 511. Affirmed by Lord Chan. *King*, 12 *July* 1729.

(*b*) Such *renewed* Term has always been ruled to be *redeemable* with the principal Term, as an *Excreſcence* out of it, and to go with it. *Per Lord Chancellor* in S. C. *Trin.* 11 *Geo.* 2. *Select Caſes in Chan.* 56.

(*c*) *Select Caſes in Chan.* 55. *Trin.* 11 *Geo.* 1. S. C. and ſtates it thus: *A.* mortgaged his Chambers in *Gray's Inn* to *B.* in 1687, but continued in Poſſeſſion 'till 1700, at which Time an Order of the Bench was made to deliver Poſſeſſion to *B.*—*B.* entered into Part, but *A.* continued in Poſſeſſion of the reſt 'till 1708. *A.* died, leaving the Plaintiff an Infant, and *B.* then being in Poſſeſſion of the whole, the Infant came of Age in 1714. In 1726 Plaintiff brought his Bill to redeem, and a Decree was made at the Rolls to redeem, and alſo to have the renewed Term of eleven Years conveyed on Payment of the *Conſideration* Money, with Intereſt. In arguing this Caſe before Lord Chan. *King*, it was admitted that *where a Mortgagee is in Poſſeſſion for twenty Years*, and *no Intereſt paid*, the *Mortgagor ſhall not redeem*, but *where he is in Poſſeſſion of any Part*, the *Computation of that Time ſhall never affect him*, but *only from the Time the Mortgagee was in Poſſeſſion of the whole*, and *ſhall be admitted to redeem.* And *Lord Chancellor* affirmed the Decree, and added, that for Part the Mortgagor may redeem as being in Poſſeſſion, and as he *cannot* do that *ſeparately*, he ſhall redeem the whole. That in this Caſe *A.* was in Poſſeſſion 'till 1708, and that from 1708 to 1714 the Plaintiff was an Infant, and ſo that Time is accounted for; and that from 1714 to this Time, (*viz.* 1726) it does not amount to twenty Years.

33. Land mortgaged for two ſeveral Terms of one thouſand Years each, was afterwards ſettled to *A.* in Tail, Remainder to *B.* in Tail, Remainder to *A.* in Fee, by which *A.* firſt and *B.* afterwards had an Equity of Redemption incident to their Eſtates. *A.* by Will appoints the Mortgage to be paid off, and then the Mortgage Term to be aſſigned to *M.* and by the ſame Will deviſed all his Lands (being alſo ſeiſed in Fee of other Lands) to *C.* and his Heirs. By this the Reverſion paſſes of the mortgaged Premiſſes and the Eſtate Tail; and the Remainders in Tail being ſpent by the Death of *A.* and *B.* without

Iſſue, the Queſtion was, If the Equity of Redemption that was incident to the Reverſion in Fee of *A.* paſſed to *M.* by the Will, and was thereby ſevered from the Reverſion? And decreed it was not. *Per King* C. *Raymond* C. J. and *Denton* J. and that ſhe was only in the Place of the Mortgagees, and that *C.* ſhould be let in to redeem. *Mich.* 3 *Geo.* 2. *Armhurſt* and *Litton*, *Fitz-Gibb.* 99.

34. *Blake* was ſeiſed in Fee of a Copyhold Eſtate held of the Manor of and upon the 5th of *October* 1725, made a conditional Surrender of it to the Plaintiff to ſecure 400 *l.* and Intereſt, and afterwards borrowed of the Plaintiff 50 *l.* upon Bond, and afterwards by two Surrenders, the firſt dated 26 *May* 1733, the other 27 *May* 1734, *Blake* mortgages his Eſtate to the Defendant *Trott* for 650 *l.* The 29 *Auguſt* 1734, *Blake* became a Bankrupt. Some time in *October* 1734, the Plaintiff delivered Ejectment againſt the Tenants to get Poſſeſſion of this Eſtate. Upon 30 *October* 1734, the Defendants *Trott* and *Hutchins*, as Aſſignees, gave the Plaintiff Notice that they would pay him his Money due upon the Mortgage the 11 *November* following, at the Exchequer in the Caſtle of where it is made payable by the Surrender, and which, as appeared by full Proof, was the uſual Place for the Receipt for the Money due upon Mortgages. Upon 6 *Nov.* 1734, the Plaintiff filed his Bill in this Court for a Foreclоſure, not having attended at the Time and Place appointed to receive the Money. The Defendant *Trott* brought a Croſs Bill to redeem the Plaintiff's Mortgage, upon Payment of Principal and Intereſt due to the 11 *Nov.* 1734. *Shrapnell* the Defendant in the Croſs Cauſe inſiſts upon being paid the Bond Debt of 50 *l.* as lent upon Security of the Mortgage, and that at the Time of lending it it was agreed that the Mortgage ſhould ſtand as a Security for it, and inſiſts upon *Trott's* Mortgages being only colourable and fraudulent, to cover the Eſtate from his Debts. *Note*; *Trott* was *Blake's* Son-in-Law, and *Trott* had made no Proof in the Cauſe of the Payment of the pretended Coſideration Money for the two Mortgages. *Lord Chancellor:* This Bond Debt cannot poſſibly be tacked to the Mortgage; an Heir ſhall never redeem without paying both, becauſe the Equity of the Redemption is chargeable as Aſſets in the Hands of the Heir to pay off the Bond Debts; and therefore, to avoid Circuity, the Heir muſt pay them both before he can be intitled to a Redemption. By all the late Caſes, a Mortgagee can inſiſt upon being paid a Bond Debt, even againſt the Mortgagor himſelf, and it is ſtill ſtronger againſt a ſecond Mortgagee, or Aſſignees of a Commiſſion of Bankruptcy; and in the latter Caſe the Creditor is not intitled to the whole Debt, but rateably and proportionably with the reſt of the Creditors. As to the Intereſt, ſince the Tender, it is a very peculiar Caſe; in common Caſes ſix Months Notice is neceſſary to raiſe the Intereſt, and, except a particular Place is agreed upon, there muſt be a perſonal Tender. In the preſent Caſe, the Exchequer at the Caſtle is fixed upon by the Mortgagee for the Payment of the Money, but in Strictneſs that relates to the Payment of it upon the Day mentioned in the Mortgage; tho' as it appears by Proof that it has been the uſual Method to pay off Mortgages there, I think the Notice is in that Reſpect ſufficient. A Tender after a Bill or Ejectment brought, is quite different from one made before, becauſe a Demand is thereby made of the Mortgage Money; and therefore he is obliged to take it at leſs Notice than ſix Months, and within a reaſonable Time according to the Circumſtance of the Caſe. But in the preſent Caſe, there was a Controverſy to whom the Equity of Redemption

demption belonged; the Aſſignees, indeed, gave the Notice, but one of the Aſſignees, *Trott*, now inſiſts upon a Right to redeem in his own private Right; and it was impoſſible any Aſſignment could be made 'till that Point was ſettled; and it is a Point very properly controvertible by the Plaintiff; for, if the Mortgages were ſubſtantiated, they will exhauſt ſo much of the Eſtate as would otherwiſe be liable to pay off this Bond Debt in Proportion of the reſt of the Creditors, and there muſt be an Enquiry before the *Maſter*, or by directing an Iſſue whether any Money was really lent upon theſe Mortgages; and muſt the Plaintiff's Intereſt ceaſe 'till the Point be ſettled? Suppoſe no Bill or Ejectment had been brought, and there had been regular ſix Months Notice, and it had been controvertible to whom the Aſſignment ſhould be made, the Intereſt of the Mortgage would certainly not ceaſe from that Time, becauſe he refuſed to receive the Money. The Plaintiff muſt have his Intereſt 'till the Time fixed by the *Maſter* for his receiving it, after it has been ſettled whether the Mortgages were made upon a good Conſideration or not. *Mich.* 11 *Geo.* 2. *Sharpnell* v. *Blake, a Bankrupt, and Trott and Hutchins his Aſſignees, MS. Rep.*

35. *A.* mortgages two Eſtates, *viz. Blackacre* and *Whiteacre*, to *B.* and afterwards mortgages *Blackacre* to *C.* and after that *Whiteacre* to *D.* The Queſtion was, Whether the Court can decree a *Redemption of* B.*'s Mortgage, who was the* original *Mortgagee, by proportionable Contributions of* C. *and* D. *the two* puiſne *Mortgagees?* And *Lord Chancellor*, after Conſideration, was of Opinion that the Court could not decree ſuch a Redemption; that the *original* Mortgagee ought not to be intangled with any (*a*) Queſtions that may ariſe among ſubſequent Mortgagees; that he *has a Right to be redeemed intire* and *not by Parcels*; and his Right undoubtedly ſtood ſo with regard to the Mortgagor, and conſequently with regard to the ſubſequent Mortgagees; for the Mortgagor could not hurt him by playing his Right into another's Hands, nor is there any Precedent where ſuch a Redemption was ever allowed. 12 *Dec.* 1739. *Titley* and *Davis*, *Vin. Abr.* Tit. *Mortgage*, (F) *Ca.* 19. *P.* 447.

(*a*) If a Man mortgages all his Eſtate to one Perſon, he may notwithſtanding ſlip it into ten *puiſne* Mortgages more; now if all theſe ſubſequent Mortgagees ſhould have a Right to redeem on Payment of proportionable Contributions, it would be impoſſible for the firſt Mortgagee to come at his Right 'till all thoſe Proportions are ſettled, which may and generally does take up a great deal of Time, and often produces Trials at Law, and after all there muſt be ſo many different Redemptions, and Times given for them, (either half Years or Quarters) before he can come at his Money or a Foreclоſure, which appears, at firſt Sight, to be very inconvenient, and would much invalidate the Credit of this Kind of Securities. *Per Lord Chancellor, ibid.*

36. So if thoſe two Eſtates, *Blackacre* and *Whiteacre*, are mortgaged to *B.* and then *Blackacre* is mortgaged to *C.* and after that *Whiteacre* to *D.* and *C.* redeems *B.*'s whole Mortgage, he ſhall hold (*b*) both Eſtates, (tho' *Blackacre* only was compriſed in his own Mortgage) *'till he is repaid all that he has diſburſed in Diſcharge of* B.*'s Mortgage*, and *likewiſe all that is due upon his own Mortgage*, and *D.* ſhall not be admitted to redeem him but upon thoſe Terms, for *C.* could not have redeemed *B.* but by an intire Redemption of all that was in Mortgage to *B.* and having ſo done, he ſtands in *B.*'s Place, and has the ſame Right as he had, *viz.* to be redeemed intire both as againſt the Mortgagor and againſt *D.* a ſubſequent Mortgagee. *Per* Lord Chan. *Hardwicke*, who accordingly was for affirming an Order of the 22 *Feb.* 1736, made agreeable to this Opinion by his *Honour*, but made no Decree, the proper Parties not being before the Court. 12 *Dec.*

(*b*) The chief Objection in this Caſe was, that by this Order *Whiteacre*, which was not compriſed in *C.*'s Mortgage, is notwithſtanding charged with his Debt; but the *Lord Chancellor* ſaid, it was no new Thing for a Man by a ſubſequent Accident (as by Payment of Money) to gain Lands as a Security for his Debt more than he contracted for, and which otherwiſe would not be liable to it; and mentioned the Caſe of *Bovey* v. *Smith*, 1 *Chan. Ca.* 201. and *Aſton* and *Peirce*, 2 *Vern.* 480. *Ibid.*

12 *Dec.* 1739. *Titley* and *Davis.*——The Cauſe was afterwards revived, and (as Mr. *Viner* ſays he heard) a Decree made according to this Opinion. *Ibid. Ca.* 20.

37. A Decree of Foreclosure was made, and *ſix Months Time was given according to the uſual Form of thoſe Decrees*; the ſix Months were near *expiring*, and then the *Mortgagor* got an Order for inlarging the Time for ſix Months more; after this he obtained another Order for inlarging the Time ſix Months more, but *Part of that Order was that he ſign the Regiſter's Book not to aſk any further Inlargement.* He ſigned the Regiſter's Book, but notwithſtanding that, he had now moved that the Time might be inlarged ſix Months more, and chiefly upon this Circumſtance, *that the Eſtate was of greater Value. than the Incumbrance upon it amounted to.* Lord Chan. *Hardwicke* was of Opinion, that upon that Circumſtance the Motion was reaſonable; but made it Part of his Order, that this *laſt* Time ſhould be peremptory. *Jan.* 12, 1740. *Barnard. Rep. in Chan.* 221. *Anon.*

38. A Decree of Foreclosure had been made againſt the Defendant, and the Time for redeeming was expired according to the Computation of *Lunary* Months. It was moved, that the Defendant might ſtand abſolutely foreclosed. But Lord Chan. *Hardwicke* was of Opinion, that the Computation, in this Caſe, ought to be according to the *Kalendar* Months, and *not* according to *Lunary* Months; and accordingly appointed a further Time for the Payment of the Money. *Feb.* 5, 1740. *Anon. ibid.* 324.

39. The Rules laid down in the Caſes of *Bickley* and *Dorrington*, and *Monk* and *Pomfret*, are very right, namely, that in general *no Perſons ſhall be allowed to come into Equity for a Redemption*, but *he that has the legal Eſtate.* So, if an Executor is willing to get in the Debts of the Teſtator, there is no Foundation for a Creditor to bring a Bill for that Purpoſe; and therefore in general, where there are proper Perſons to get in the Eſtate of another, a Court of Equity will not ſuffer either the Creditors of the Teſtator, or of a Bankrupt, to bring a Bill in Equity in order to get in that Eſtate. But if a Creditor or Aſſignee under a Commiſſion, will *collude* with a Debtor, there is no Doubt but a Creditor may bring his Bill in order to take Care of that Eſtate, and charge the Aſſignees or Executors with ſuch Colluſion. That in the principal Caſe, the Creditors of the Bankrupt met to conſider whether it was proper that the Aſſignees ſhould bring a Bill to redeem a Mortgage, which the Majority of the Creditors thought it was not. The Aſſignees thereupon could not by Stat. 5 *Geo.* 2. bring a Bill, whereupon the *minor* Part of the Creditors of the Bankrupt brought a Bill to redeem againſt the Mortgagor and the Aſſignees. And the Bill was held to be well brought; and that if the Aſſignees refuſe to bring a Bill, which is for the Benefit of the Bankrupt's Eſtate, any Creditor has a Right to bring ſuch Bill, under Peril of Coſts. And decreed that the Aſſignees ſhould have Liberty to redeem in the firſt Place, and in their Default the Plaintiff to do it. *Per* Mr. Juſtice *Parker*, who ſat for Lord Chan. *Hardwicke. Eaſt.* 1740. *Franklyn* and *Fern*, *Barnard. Rep. in Chan.* 30, 32.

40. In 1692 *J. S.* and *M.* his Wife mortgaged an Eſtate, whereof *J. S.* was ſeiſed in Right of *M.* for 785 *l.* And *J. S. covenanted* for himſelf and *M. to levy a Fine on or before* Eaſter *Term then next enſuing, for ſecuring the Title of* B. *the Mortgagee. In the* Trinity *Term following, and not before, the Fine was levied.* This Mortgage was ſoon after aſſigned to *T.* for a valuable Conſideration. Afterwards in *Auguſt* 1695 *J. S.* and *M.* executed a Deed, whereby in Conſide-

ration of about 10 *l.* *they relinquiſhed to* T. *their Equity of Redemption*, the Eſtate being at that Time about 40 *l.* *per Annum*, and in the ſame Deed covenanted, *that the ſaid Fine ſhould be for ſtrengthening this Deed.* *T.* entered, and laid out upon the Eſtate large Sums of Money in Improvements, ſo that it was now of the Value of 65 *l.* *per Annum.* In 1718 *J. S.* died. In 1727 *M.* the Wife died. Then *D.* her Heir, for 81 *l.* conveyed to *F.* all his Intereſt in this Eſtate. One of the ſubſcribing Witneſſes to this Conveyance ſwore, that at the Time of the Execution of it he ſaw Gold paid down, and that afterwards he heard *D.* acknowledge that he received 81 *l.* In 1737 *F.* brings a Bill in order to redeem the Eſtate. Lord Chan. *Hardwicke* ſaid, his Opinion was, that there was no Ground for Relief; that the Purchaſe was *after great Length of Time* from making the Mortgage, and that from one who had never been in Poſſeſſion himſelf, and whoſe Anceſtor had not for a great Number of Years; that he was inclined to think in Point of Law, that as the Fine was *not* levied by the Time covenanted to be levied, the Fine ſhould not operate to ſtrengthen the Deed of Mortgage; but that to ſtrengthen the Deed of 1695, it well might; and that the *ſubſequent* Deed well might declare the Uſes of that Fine. That the Caſe of *Jones* and *Morley in B. R.* the Beginning of King *William*'s Time, as his *Lordſhip* believed, was to that Purpoſe; and if this was ſo, it makes an End of the preſent Queſtion, by ſhewing that the *Anceſtor* of the Defendant was a Purchaſer of the Inheritance; but ſaid, he would not determine the preſent Queſtion merely on this Point of Law, but upon the whole Circumſtances of the Caſe. Suppoſe the Defendant was only the Repreſentative of a Mortgagee, there were ſtrong Objections againſt the Plaintiff's being allowed to *redeem him after ſo great a Length of Time.* That the Plaintiff has by no Means given ſuch a clear and ſufficient Proof even of his paying the Conſideration of the Purchaſe as might have been expected. Bill diſmiſſed with Coſts. 1 *Nov.* 1740. *Fleetwood* and *Templeman*, *Barnard. Rep. in Chan.* 187.

41. *Job Smith* and *Samuel* his Son in 1654 by Feoffment mortgaged the *Swan* Inn in *Chelſea* to *Winter* for 200 *l.* *Samuel* afterwards died, and *Elizabeth Smith* became Heir to him, and afterwards married *Thomas Broomwich.* In 1684 *Thomas* took an Aſſignment of this Mortgage in the Name of *Anthony Broomwich*, in Truſt for himſelf. Afterwards *Thomas* mortgaged the Premiſſes for 400 *l.* Conſideration to *Elizabeth* his Siſter for five hundred Years, for ſecuring to her the Payment of 30 *l.* *per Annum* for Life, and afterwards for ſecuring the Payment of 400 *l.* to ſuch of the Children or Grandchildren of *Thomas* as ſhe by her Will or otherwiſe ſhould direct and appoint. In 1707 *Thomas* deviſed to his Grandſon *Anthony Broomwich Abbot*, and his Heirs, all his *Freehold Meſſuages and Garden Grounds in* Chelſea. At the Time of making the Will *Thomas* had two Daughters, *Ann* (married to *Robert Abbot*) and *Elizabeth*, and had no other Lands in *Chelſea* beſides theſe Premiſſes. *Thomas* died, and *Elizabeth* his Wife ſurvived him, and afterwards ſhe died, and *Elizabeth* the Daughter married *Peter Newly.* In 1713 a Bill was brought by *Peter* and *Elizabeth* his Wife againſt *Robert Abbot* and *Ann* his Wife, *Anthony Broomwich Abbot* and *Robert* the Son of *Robert*, who was an Infant, praying that the Plaintiffs might be let into a Redemption of a Moiety of the Premiſſes, inſiſting that *Thomas* had only a redeemable Intereſt in the ſame, and no Power to diſpoſe of the Inheritance, as he had done by his Will. 11 *May* 1715 the Cauſe was heard, and the Court declared, that the Plaintiffs had a Right to redeem a Moiety of the Premiſſes; and declared,

red, that *Thomas* ought to be looked upon to have firſt entered on the Premiſſes in Right of his Wife, who had the Equity of Redemption, and that he ſo continued the Poſſeſſion 'till he took an Aſſignment of *Winter*'s Mortgage in the Name of *Anthony Broomwich*, in Truſt for himſelf, and therefore during that Time that the Rents and Profits were no otherwiſe to be accounted for, than to keep down the Intereſt of that Mortgage; but that nothing was to be allowed for Repairs or laſting Improvements during that Time; and the *Maſter* was to take an Account of the Money laid out in Repairs, *&c.* after the Aſſignment of the Mortgage, and *one Third thereof was to be paid by* Thomas *as he had the Benefit of the Eſtate for Life*; and in regard to the other two Thirds, the *Maſter* was to compute Intereſt for the ſame at the Rate of 6 *l. per Cent. per Annum* from the Time the Money was laid out in ſuch Repairs, *&c.* And from *Thomas*'s Death the *Maſter* was to compute Intereſt for the Principal Money due upon that Mortgage, and was to take an Account of the whole Profits of the Premiſſes; and if it ſhould appear that the Money laid out upon the Improvements, together with the Intereſt of the Money, were unpaid, and that the Mortgage Money and Intereſt were alſo unpaid, it was decreed that *Robert* the Elder and *Anthony Broomwich Abbot* ſhould refund a Moiety of the Overplus to the Plaintiffs, and that a Moiety of the Premiſſes ſhould be aſſigned the Plaintiffs. On a Rehearing it was directed that it ſhould be added to the Decree, that if *Anthony Broomwich Abbot* was overpaid a Moiety of what was due for Principal and Intereſt on the Mortgage, he ſhould refund the Overplus, and that the Allowance of Repairs ſhould be ſtruck out of the Order; and confirmed the reſt of the Decree. This Decree was never carried into Execution, and *Anthony Broomwich Abbot* was permitted to continue in Poſſeſſion 'till his Death. In 1720 ſaid *Anthony* the Grandſon mortgaged the Premiſſes for 400 *l.* to Mrs. *Taylor*, and this Mortgage was made by raiſing a Term for one thouſand Years. In 1724 the Premiſſes were mortgaged by ſaid *Anthony* to *Nicholas* for 400 *l.* more. In 1726 he mortgaged the Premiſſes to ſaid *Nicholas* for 200 *l.* and afterwards in the ſame Year mortgaged them to him for 140 *l.* In 1728 the Grandſon died, leaving *Anthony* his Heir at Law. Then *Peter Newly* and *Elizabeth* his Wife, and *Ann Abbot*, who was the Widow of *Robert*, for 10 *l.* Conſideration paid by *Robert* the Son of *Ann* to *Peter Newly*, and alſo of an Annuity of 10 *l. per Annum* to be paid him during his Life, and of natural Love, *&c.* which *Ann* bore to *Robert*, conveyed to ſaid *Robert* and his Heirs, the ſaid Premiſſes. In 1729 *Robert* took an Aſſignment of the Mortgage, which was made to *Taylor*. In the ſame Year *Nicholas* aſſigned his Mortgages to *Clarke*. In 1732 *Elizabeth* the Siſter of *Thomas* died, and at her Death there was 367 *l.* due to her for the Arrears of her Annuity. Some Time before her Death ſhe made her Will, and thereof *Peter Newly* Executor, but did not make any Diſpoſition of the 400 *l.* which ſhe had a Power to diſpoſe of. In 1736 *Peter Newly* made his Will, and thereof *Thomas Newly* Executor. Then *Thomas Newly* aſſigned to *Clarke* the Benefit of the 367 *l.* and the whole Intereſt in the Mortgage, which had been made to *Elizabeth* the Siſter. Then *Clarke* brings his Bill againſt *Robert Abbot*, *Anthony Abbot*, and *Elizabeth Abbot*, praying (*inter al'*) that an Account might be taken of what Money was due to *Robert* on the Aſſignment of the Mortgage which was made to him by *Taylor*, and that the Plaintiff might redeem him, and that *Anthony* and *Elizabeth* might come to an Account as to the Mortgages, which were aſſigned to him; that they might be decreed to pay thoſe Sums to the Plaintiff,

tiff, together with the Money which he ſhould pay to *Robert*; and in Default, that *Anthony* may be foreclоſed. This Bill was afterwards amended, and *Young* and *Thomas Newly* were added Plaintiffs. *Lord Chancellor* ſaid, his Opinion was, that the Plaintiff was intitled to Relief as far as he can take that Relief within the Compaſs of the former Decree; that if the Plaintiff had got the legal Eſtate either himſelf or a Truſtee for him, ſo that he could have brought an Ejectment, and put the Defendants to have been Plaintiffs here, it might have deſerved Conſideration, whether theſe Defendants would have been intitled to have redeemed the preſent Plaintiff; but as the Plaintiff has not the *legal Eſtate*, and is forced to come into Equity, he muſt ſubmit to be redeemed by *Anthony Abbot*, and can put no other Terms upon his redeeming him than ſuch as fall within the Compaſs of the former Decree. *Qui prior eſt tempore, potior eſt Jure*, is a Rule that holds in *equitable* as well as in *legal* Rights. In this Caſe *Robert* had the firſt *equitable* Right, and therefore his Mortgage muſt be paid off in Preference to that of the Plaintiff. It is true, that the Plaintiff has taken in the Mortgage which was paid to *Elizabeth* the Siſter of *Thomas*, which was prior to Mrs. *Taylor*'s Mortgage, under which Plaintiff claims; but he has no *legal* Eſtate for want of taking an Aſſignment from *Anthony Broomwich*, or at leaſt for want of having him before the Court, in order to have a Conveyance; and therefore *Robert*, who had the Aſſignment of the Mortgage, which was made to Mrs. *Taylor previous* to any Aſſignment of the Mortgage which *Clarke* took, muſt be preferred to him, and it was never determined that a *puiſne* Mortgagee could protect himſelf againſt a *prior* Mortgagee by purchaſing a Mortgage previous to that, where there is no legal Eſtate in that Mortgagee from whom he takes his ſecond Aſſignment, eſpecially without bringing the Truſtee of that Mortgagee before the Court. And decreed *accord'*, *Eaſt.* 1741. *Clarke* and *Abbot*, *MS. Rep.*

Maxim.

(C) Of Foreclоſure; — And here of opening a Foreclоſure.

1. A Decree of Foreclоſure is *not to be opened after ſeveral Years*, where there has been *building upon the Eſtate and Settlements*, nor ſhall the *Mortgagee's calling it a Debt* in his Will, alter the Nature of it. *Jan.* 9, 1705. *Took* and *Biſhop of Ely*, *Vin. Abr.* Tit. *Mortgage*, (Z) Note to *Ca.* 1.

2. *Poſſeſſion*, under a Decree of *Foreclоſure inrolled*, is a good Plea. 1713. *Nichols* and *Short*, *Vin. Abr.* Tit. *Mortgage*, (C. a.) *Ca.* 2.

3. There is a Difference between Mortgages of Exchequer Annuities and Common Stock, the Value of which depends upon Imagination, rather than real Value; but Annuities are a certain Security, and carry a conſtant Intereſt, and are to be conſidered as Mortgages of Lands, and cannot be ſold after Forfeiture without Foreclоſure; but the Decree was reverſed. 1714. *Wilſon* and *Tooker*, *Vin. Abr.* Tit. *Mortgage*, (Y) *Ca.* 7. *P.* 476.

But according to the Caſe of *Manning* and *Scott*, 14 *Nov.* 1714, Annuities mortgaged are *irredeemable* after Forfeiture, unleſs there be an expreſs Agreement that the Mortgagee may ſell after Forfeiture. *Ibid.*

4. After a Foreclоſure, the *Mortgagee* by Will diſpoſes of the Money due on the Mortgage; upon this *Admiſſion* in the Will, a Bill was brought to open the Foreclоſure. The Court took Time to conſider of it, and after the Parties agreed. Cited *per* his *Honour*, as the Caſe of *Stuckville* and *Dolben*, *Select Caſes in Chan.* 10.

5. A

5. A *Decree of Foreclosure was opened after ſixteen Years*, the *Equity of Redemption being worth much more than was due upon the Account*; and the *Mortgagor having been diſtreſſed*, an Account was ordered to be taken of what was due for *Principal, Intereſt and Coſts*, and Liberty given to redeem. 17 *April* 1724. *Burgh* and *Langton*, *Vin. Abr.* Tit. *Mortgage*, (Z) *Ca.* 2. *P.* 476.

6. *J. S.* the Mortgagee brought a Bill to foreclose, and *A.* the Mortgagor brought a Croſs Bill to redeem; and Principal, Intereſt and Coſts, were decreed to be paid, or elſe to be foreclosed, and on Payment to be let in. *A.* died, and the Account being taken, the Plaintiff finding the Eſtate inſufficient, brings a new Bill of Revivor, and partly a ſupplemental Bill both to review the former Decree and Proceedings, and likewiſe to have an Account of the Aſſets of *A.* the Mortgagor, and thereout to have Satisfaction for a Bond which was given as a *collateral* Security with the Mortgage. To this Bill *A.*'s Executor pleads the former Decree in Bar that the Plaintiff elected his Satisfaction, and had not ſo much as ſuggeſted that that Satisfaction was deficient; ſo that it does not appear but that he may receive a double Satisfaction for his Debt, and that it was plain that he had not waived the Mortgage by his Bill of Revivor. *J. S.* inſiſted, that it was the Practice of the Court that taking out of Proceſs or making Uſe of any *counter* Security, was in itſelf a *Waiver* of the Foreclosure, and that a Mortgagee had always his Election to *waive* and open the Foreclosure, and have Recourſe to his Bond or Covenant, if he thought proper. But *per Cur'*, The Plaintiff by his Revivor has not waived the Mortgage, or ſo much as ſuggeſted a Deficiency; ſo that the Plea muſt ſtand for an Anſwer, *without* Liberty to except. *Hil.* 12 *Geo.* 1. *Birch's Caſe*, *Gilb. Rep. in Eq.* 186.

7. *Wrightſon* advanced 800 *l.* on a Mortgage in *Yorkſhire*, and regiſtered his Mortgage, and afterwards *Hudſon* lent a Sum of Money, and took a Judgment for it, which was regiſtered; and then *Wrightſon* advanced 270 *l.* more, but without any expreſs Notice of *Hudſon*'s Judgment; tho' it was argued on a Bill brought by *Wrightſon* to foreclose, that *Hudſon* ought to redeem on paying the firſt Mortgage; for that where ſuch Regiſters prevail, every Incumbrancer ſhould be ſatisfied according to the Priority of his Regiſtry, and that the Regiſtring *Hudſon*'s Judgment was conſtructive Notice to *Wrightſon*, ſufficient to deprive him of the common Benefit of a Court of Equity, whereby a firſt Mortgagee, without Notice, is to hold 'till all ſubſequent Incumbrances are diſcharged. Yet it was reſolved, that theſe Statutes avoid only prior Charges not regiſtered, but did not give ſubſequent Conveyances any further Force againſt prior ones regiſtered than they had before; that to have affected Mr. *Wrightſon*, *Hudſon* ought to have given him Notice when he advanced his Money; and that tho' *Wrightſon* might have ſearched the Regiſter, yet he was not bound to do it. And therefore it was decreed that *Hudſon* and the Mortgagor ſhould be foreclosed, unleſs they paid off both Plaintiff's Securities. *Wrightſon et al'* and *Hudſon et al'*, 16 *Feb.* 1737. at the Rolls, before Sir *Joſeph Jekyll*, *MS. Rep.*

(D) In what Caſe the Act of the Mortgagee will bind the Mortgagor, et cont'.

1. *J. S.* having mortgaged an Houſe to *A.* tendered *A.* the Principal and Intereſt, which he refuſing, *J. S.* exhibited his Bill to have a Reconveyance upon Payment of Principal and Intereſt. *A.* in his Anſwer ſet forth, that he had made a Leaſe of this Houſe for five Years, reſerving ſo much yearly Rent, and that after the Expiration of the five Years *he had covenanted that the Leſſee ſhould hold it for four Years longer, if the Leſſee was willing*; that the five Years were now expired, and that the Leſſee was willing to hold the Houſe four Years longer; and that if *J. S.* would grant ſuch Leaſe, then he would reconvey upon Payment of Principal and Intereſt. At the *Rolls A.* had a Decree in his Favour, but on Appeal *Lord Chancellor* was of Opinion, that the Mortgagee *before* Foreclоſure *cannot make a Leaſe for Years* of an Houſe in Mortgage *to bind the Mortgagor*, unleſs *to avoid an apparent Loſs*, and *merely in Neceſſity*. So the Decree at the *Rolls* was *reverſed*. *Eaſt.* 1722. *Hungerford* and *Clay*, 2 *Mod. Caſes in Law and Eq.* 1.

(E) In what Caſe the Court of Chancery refuſed to relieve (*a*) a Mortgagee.

(*a*) *Vide* (L) *P.*

1. ON a Treaty of Marriage between *G. B.* and *M.* his Wife, *T. B. G. B.*'s Father, and ——— the Father of *M.* had a Meeting, at which *J. S.* who had a Mortgage upon *T. B.*'s Eſtate, was accidentally preſent, when the two Fathers talking of making a Settlement of the mortgaged Eſtate, *J. S.* never mentioned to *M.*'s Father that he had ſuch a Mortgage, but called *T. B.* out, and reminded him of the Mortgage. Upon this, as *T. B.* ſwore, and which certainly (as *Lord Chancellor* ſaid) was the Fact, *J. S. privately* conſented to *T. B.*'s ſelling the Eſtate, and to take his perſonal Security for Payment of the Mortgage Money; and then an Agreement was entered into in the Preſence of *J. S.* between the two Fathers, that this Eſtate ſhould be ſettled upon *G. B. for Life*, Remainder *to* M. *for Life*, Remainder *to the firſt*, &c. *Sons of that Marriage in Tail*, Remainder *to any other Son* G. B. *ſhould have of any other Wife*, Remainder *to* T. B. *in Fee*. The Marriage took Effect, and about twelve Years after *J. S.* brought an Ejectment as Mortgagee to recover Poſſeſſion of this Eſtate. Whereupon *G. B.* and *M.* exhibited their Bill againſt *J. S.* and *T. B.* praying a perpetual Injunction. And Lord Chan. *Hardwicke* ſaid his Opinion was, that the Plaintiffs were well intitled to a perpetual (*b*) Injunction, and ought to be relieved under the Head of *Fraud*. And his *Lordſhip* declared, that *J. S.* having voluntarily concealed his Mortgage at the Time of the Treaty of Marriage, was not intitled to have any Benefit from it againſt the Plaintiffs, nor would he make any Decree over for *J. S.* againſt *T. B.* by reaſon that both Parties had examined him as a Witneſs in that Cauſe. Decreed *J. S.* to aſſign the Mortgage *In Truſt* for the Benefit of the Plaintiffs and the Iſſue of that Marriage, but would not determine

(*b*) His *Lordſhip* ſaid, the Caſe is well known which was in this Court, where a perpetual Injunction of this Kind was granted by reaſon of a *Mortgagee's ingroſſing a Settlement*, and *not diſcovering that he had ſuch a Mortgage upon the Eſtate*, and yet the *Mortgagee*, in that Caſe, *was an Infant at the Time he ingroſſed the Deed*. *Ibid.* 102.

mine whether it was to be conſidered as fraudulent or not againſt the Iſſue which *G. B.* might have by any other Wife, and would reſerve the Conſideration of that Matter. He alſo decreed *J. S.* to pay the Coſts both at Law and in Equity, and alſo the Coſts of the Aſſignment, but without Prejudice to *J. S.*'s bringing any Bill againſt *T. B. Eaſt.* 1740. *Berrysford* and *Millward*, *Barnard. Rep. in Chan.* 101.

(F) Concerning Intereſt due on a Mortgage, and of ſuch being made Principal.

1. DECREED that a Mortgagee having received 8 *l. per Cent.* ſince the Year 1660, ſhould account for the 2 *l.* Over-value to ſink the principal Mortgage Money; but if the Principal and Intereſt were overpaid, there ſhall be no refunding. *Mich.* 1692. *Walker* and *Pourin*, *Prec. in Chan.* 50. *Vide* 1 *Vol. Abr. Eq.* 288. (D) *Ca.* 1.

2. Mortgagee enters before the Act 12 *Car.* 2. Mortgagor ſhall pay 8 *l. per Cent.* only to the Time of the Act, and tho' the Profits were not ſufficient to anſwer the Intereſt, yet the *Arrears* ſhall *not* carry Intereſt, but the *Coſts* and *Charges* muſt. Decreed *per* his *Honour*, *Trin.* 1700. *Proctor* and *Cooper*, *Prec. in Chan.* 116. 1 *Vol. Abr. Eq.* 314. *Ca.* 3. S. C. but *not* S. P.

3. A Mortgagee lends Money at 6 *l. per Cent.* but agrees in the Deed to take 5 *l. per Cent.* if the Money be paid within three Months after it became due. The Mortgagor fails to pay the Money within that Time. And *Lord Keeper* (having taken Time to conſider of the Caſe) delivered his Opinion that Intereſt muſt be paid at 6 *l. per Cent.* for tho' this Court relieves againſt *unreaſonable* Penalties, yet this is not ſo, for the Mortgagee might have refuſed to lend his Money under 6 *l. per Cent.* If he had accepted 5 *l. per Cent.* that might have altered the Caſe, and if it were ſo that he muſt take 5 *l. per Cent.* yet he ought to have Intereſt for the Intereſt from the Time it ought to have been paid, for elſe his *Lordſhip* ſaid, he took from him his *legal* Advantage without making him the Recompence which in Conſcience he ought to have; and ſo there is ſome Difference between reſerving *ſimply* 5 *l. per Cent.* and reſerving it as in this Caſe. *Eaſt.* 1701. *MS. Rep. Anon.* *Prec. in Chan.* 160. *Jory* and *Cox*, S. C. *accord*, and adds, that his *Lordſhip* ſaid, he could not ſet aſide a Man's Agreement; he muſt have 6 *l. per Cent.* In this Caſe was cited a Caſe between Lord *Hallifax* and *Higgins*, where in ſuch Caſe 5 *l. per Cent.* only was allowed, but *Ibid.* 161.

there the Agreement to take 5 *l. per Cent.* was by a diſtinct Deed. *Quære* How that varies it?

4. Altho' Equity cannot carry Intereſt higher than the Penalty of a Bond, yet when it is tacked to another Security, as where there is a Mortgage from the Obligor to the Obligee for ſecuring other Sums of Money, Equity will not ſuffer the Mortgagor to redeem, unleſs he will pay the Intereſt which is over and above the Penalty of the Bond (*a*). *Mich.* 8 *Ann. Peers* and *Baldwyn*, *MS. Rep.*

(*a*) This is very equitable, for certainly it is agreeable both to Reaſon and Conſcience that the Intereſt ſhould be paid when the Obligor has ſo long neglected Payment. *MS. Notes.*

5. Where by a *general* and *national* Calamity nothing is paid out of Lands aſſigned for Payment of Intereſt, it ought not to run on during the Time of ſuch Calamity. 25 *June* 1715. *Baſil* and *Acheſon*, *Vin. Abr.* Tit. *Mortgage*, (X. 3.) Note to *Ca.* 1. *P.* 474.

6. *J. S.* made a Mortgage at 6 *l. per Cent.* Intereſt, with a Proviſo to accept 5 *l. per Cent.* if paid within three Months after due. There being a great Arrear of Intereſt, the Mortgagee ſends an Account thereof computing at 6 *l. per Cent.* and the Mortgagor returns an Anſwer, allowing

lowing the Account, deſiring Forbearance, and promiſing to make Satisfaction for the ſame. Lord Chan. *Parker* queſtioned whether a Mortgagor ſigning an Account, whereby he owns ſo much Money due for Intereſt, would make the Intereſt Principal; becauſe of itſelf it does not ſhew any Agreement or Intent to alter the Intereſt or the Nature of that Part of the Debt, or to turn it into Principal; neither does it appear to have been ever ſo determined. And his *Lordſhip* conceived that to make Intereſt on a Mortgage Principal, it is requiſite there ſhould be a Writing ſigned by the Parties, foraſmuch as the Eſtate in the Land is to be charged therewith; but in the principal Caſe the Mortgagor does fulfil his Promiſe by making Satisfaction to the Mortgagee for his Forbearance, ſince this Proviſo obliging the Party to pay 6 *l. per Cent.* on Default, *&c.* is generally looked upon as a Penalty and *in terrorem*, and to be *relieved* againſt, if only a very ſhort Time has happened, tho' it may not in Caſe of a long Arrear of Intereſt. However, this 1 *l. per Cent.* is a Satisfaction, and a conſiderable one too. But the Court at the ſame Time declared, that if there had not been ſuch a Penalty of 6 *l. per Cent.* inſtead of 5 *l.* and a great Arrear of Intereſt incurred, it would, on ſuch a Promiſe in Writing to make a Satisfaction for Forbearance, have given the Mortgagee ſome Allowance in this Reſpect. *Trin.* 1720. *Brown* and *Barkham*, 1 *Will. Rep.* 652.

(G) Of Preference, Diſputes, &c. amongſt Mortgagees; — Of Puiſne Mortgagees, &c. — Buying in Prior Mortgages, &c. — And where a Prior Mortgagee ſhall retain againſt a Meſne Mortgagee.

1. IF a *third* Mortgagee takes only an Agreement of the *firſt* Mortgagee to convey to him, the *ſecond* Mortgagee cannot in ſuch Caſe compel the firſt to aſſign to him, becauſe ſuch Agreement was no more than what they might have done without any Agreement. *Eaſt.* 1701. in the Caſe of *Blake* and *Hungerford*, *Prec. in Chan.* 160.

2. *A.* an Owner of a Ship, mortgages her to *B.* with whom he leaves the original Bill of Sale, and this Mortgage is made by Deed of Mortgage only, without any Indorſement or Notice of the Mortgage on the Bill of Sale, as is uſual. Afterwards at *A.*'s Requeſt *B.* lets him have the original Bill of Sale, and thereupon *A.* made ſeveral ſubſequent Mortgages of ſeveral Parts of the Ship, which were indorſed upon the original Bill of Sale; and ſome Time afterwards *A.* delivered the Bill of Sale to *B.* who made no Objection as to the Indorſements. It appeared alſo in the Caſe, that *A.* had made a *prior* Mortgage of the Ship to this of *B.*'s by a Deed, bearing Date the Day before, but that the *prior Mortgagee was a Witneſs to* B.*'s Mortgage Deed.* Alſo *B.* ſome Time afterwards took a Releaſe from *A.* of his Equity of Redemption. And Lord Chan. *Cowper* decreed, *Firſt*, That the firſt Mortgagee of the Ship being a Witneſs to *B.*'s Mortgage, tho' it did not appear that he actually knew the Contents of this ſecond Mortgage, yet ſince it did not appear but that he might know them, it would be preſumed that very Witneſs that could write or read was acquainted with the Subſtance of the Deed or Inſtrument, which, he having atteſted it, undertook to ſupport by his Evidence; and that

therefore the firſt Mortgagee's being a Witneſs to *B.*'s Mortgage, and not acquainting *B.* with his *former* Mortgage, this ſhould give a (*a*) Preference to *B.*'s Mortgage. *Secondly*, That when *B.* was ſo careleſs as to intruſt *A.* with the original Bill of Sale, and accepted of the Bill of Sale again, and made no Objection to the Indorſements of the *ſubſequent* Mortgages made thereon, this, *together* with the *long Acquieſcence afterwards*, amounted to an *implied* Conſent in *B.* to the *ſubſequent* Mortgages, and ſhould give a *Preference* to *ſuch* Mortgagees. *Thirdly*, That tho' *B.* when there were *ſubſequent* Mortgages, took afterwards a Releaſe of the *ultimate* Equity of Redemption, yet this did not oblige him to pay the *intermediate* Mortgages, provided he would ſtill waive the Releaſe made to him of the Equity. *Fourthly*, *B.* was ordered to pay Coſts to the Plaintiffs, the Indorſers of the ſubſequent Mortgages on the Bill of Sale, but *B.* was not to have his Coſts over againſt *A.* in regard, as *Lord Chancellor* ſaid, it was not reaſonable that *B.* ſhould *onerate* his Pledge with Coſts, occaſioned by his unjuſt Defence. *Hil.* 1717. *Mocatta et al'* and *Murgatroyd*, 1 *Will. Rep.* 393 to 395.

(*a*) The Editor in a Note, *ibid.* 394. ſays, *Quære* Whether the bare Atteſting of a *ſubſequent* Incumbrance, without other Circumſtances of *preſumptive* Notice will *poſtpone* a *prior* Incumbrancer, ſince at that Rate a *prior* Mortgagee or Incumbrancer may, without any Fraud or ill Intention on his Side, be liable to be cheated of his Security. And the *Editor* ſays he found it to have been ſo ſaid by Lord *King* in Mr. *P. Williams*'s Report of an *Anonymous* Caſe, in *Mich.* 1732.

3. A Difference has always been taken between a general Incumbrancer by Statute or Judgment and a Purchaſor or Mortgagee; that the one is no Lien on any particular Part of the Eſtate, but affects it only at large. But in Caſe of Mortgage or Purchaſe, the Party contracts for that particular Part. That if a Man had confeſſed twenty Judgments or Statutes, the laſt could not, by buying in the firſt, hold out all the *intervening* Judgments. Said *arg'* by Mr. *Vernon*, and agreed to *per Cur'*, becauſe when the Debt on the firſt Judgment was paid, that Security determined and expired of itſelf. *Trin.* 1718. in the Caſe of *Wright* and *Pilling*, *Prec. in Chan.* 494.

And Lord Chan. *Cowper* and ſeveral at the Bar thought that a Judgment Creditor might as well ſecure himſelf by taking in a *prior* Mortgage as the *third* Mortgagee, for that his Judgment was a Lien upon the Land, and when he gets in a *prior* Mortgage, that ought not to be taken from him 'till Payment of his whole Debt. *Ibid.* 496.

4. The ſubſequent Mortgagee prays to redeem the firſt Mortgagee upon Payment of what was due thereon, and the rather becauſe the firſt Mortgagee had all the Title Deeds which were left in his Poſſeſſion by the Mortgagor, ſo that Plaintiff, the ſubſequent Mortgagee, might be eaſily deceived. Pending the Suit the firſt Mortgagee ſets up another Mortgage to himſelf *prior* to them all, and it was decreed at the *Rolls*, that it ſhould be tried at Law, Whether this *prior* Mortgage Deed was executed? From which Decree Plaintiff *appeals*, for that it was too ſhort; for if upon the Trial it ſhould appear that ſuch Deed was executed, yet the Money therein mentioned might be paid in Part or in the Whole. And *Lord Chancellor* decreed that it ſhould be tried at Law, Whether this Deed was executed? And if it was, then, Whether the whole, or any Part, or how much of the Money was paid? *Trin.* 9 *Geo.* 1. *Dowſe* and *Rue*, 2 *Mod. Caſes in Law and Eq.* 38.

5. If a *third* Mortgagee buys in the *firſt* Mortgage, tho' it be *pendente lite*, pending a Bill brought by the *ſecond* Mortgagee to redeem the *firſt*, yet the *third* Mortgagee having obtained the *firſt* Mortgage, and got the Law on his Side, and equal Equity, he ſhall thereby ſqueeze out the *ſecond* Mortgage; and this the Lord Chief Juſtice *Hale* called a *Plank* gained by the *third* Mortgagee, or *Tabula in Naufragio*,

which Conſtruction is in Favour of a *Purchaſer*, every *Mortgagee* being ſuch *pro tanto*. *Per* his *Honour*, *Mich.* 1728. in the Caſe of *Brace* and *Dutcheſs of Marlborough*, 2 *Will. Rep.* 491.

6. If a Judgment Creditor, or Creditor by Statute or Recognizance, buys in the firſt Mortgage, he ſhall not tack or unite this to his Judgment, *&c.* and thereby gain a Preference, becauſe ſuch Creditor cannot be called a *Purchaſer*, nor has he any Right to the Land; he has neither *jus in re* nor *ad rem*, and therefore tho' he releaſe all his Right *to the Land*, he may extend it afterwards. All that he has by the Judgment is a Lien upon the Land, but *non conſtat* whether he ever will make Uſe thereof; for he may recover the Debt out of the Goods of the Cognizor by *Fieri Facias*, or may take the Body, and then during the Defendant's Life he can have no other Execution; beſides the Judgment Creditor does not lend his Money upon the immediate View or Contemplation of the Cognizor's real Eſtate, for the Lands afterwards purchaſed may be extended on the Judgment; nor is he deceived or defrauded, tho' the Cognizor of the Judgment had before made twenty Mortgages of all his real Eſtate; whereas a Mortgagee is defrauded or deceived, if the Mortgagor before that Time mortgaged his Lands to another; and 'tis ſuch a Fraud as the Stat. of 4 & 5 *W. & M. c.* 16. takes Notice of, and puniſhes by foreclоſing ſuch Mortgagor, who mortgages his Lands a ſecond Time without giving Notice of the firſt Mortgage; and in that Reſpect the principal Caſe, which was of a *Puiſne* Judgment Creditor's buying in the firſt Mortgage without Notice of the ſecond Mortgage when he lent his Money on the Judgment, differs from a *Puiſne* Mortgagee's buying in the firſt Mortgage (*a*). *Mich.* 1728. *Brace* and *Dutcheſs of Marlborough*, 2 *Will. Rep.* 491.

(*a*) His *Honour* ſaid, tho' the Rule of Equity has been ſo ſettled, it is not, however, without *great Appearance of Hardſhip*; and that ſtill it ſeems *reaſonable* that *each* Mortgagee ſhould be paid according to his Priority, and it's hard to leave a *ſecond* Mortgagee without Remedy who might know when he lent his Money, that the Land was of ſufficient Value to pay the firſt Mortgage, and alſo his own; and that to be defeated of a juſt Debt by a Matter *inter alios acta*, is a great Severity, being only a Contrivance betwixt the *firſt* Mortgagee and the *third*; but that this had been ſettled upon ſolemn Debate in the Caſe of *Marſh* and *Lee*, 2 *Vent.* 337. wherein that great Man Lord Chief Baron *Hale* was called by *Lord Chancellor* to his Aſſiſtance; and that tho' this be ſettled, there can be no Reaſon to carry it further. *Ibid.* 492, 493.

7. If a *firſt* Mortgagee lends a further Sum to the Mortgagor upon a Statute or Judgment, he ſhall retain againſt a *Meſne* Mortgagee 'till both the Mortgage and Statute or Judgment be paid, becauſe it is to be preſumed that he lent his Money upon the Statute or Judgment, as knowing he had hold of the Land by the Mortgage, and in Confidence ventured a farther Sum on a Security, which, tho' it paſſed no preſent Intereſt in the Land, yet muſt be admitted to be a Lien thereon. *Per* his *Honour*, *ibid.*

8. If a *Puiſne* Mortgagee, *without* Notice, buys in a *Prior* Judgment or Statute, and that Judgment, *&c.* be extended upon an *Elegit* at a Value much under the real, the *Meſne* Mortgagee ſhall not make the *Puiſne* Mortgagee, who has got in his Judgment, account otherwiſe or for more than the extended Value; nor will this Court give any Relief againſt the Judgment or Statute, but leave the *Meſne* Mortgagee to get rid of them as well as he can at Law. *Per* the *Maſter of the Rolls*, *Mich.* 1728. *Brace* and *Dutcheſs of Marlborough*, 2 *Will. Rep.* 491, 494.

9. In all theſe Caſes it muſt be intended that the *Puiſne* Mortgagee, when he lent his Money, had no Notice of the *ſecond Mortgage*, *Statute* or *Judgment*, for that is the ſole Equity; and where a Creditor by Recognizance who bought in a firſt Mortgage did not deny Notice

Notice in his Anſwer, tho' ſuch Notice was not charged in the Bill which was brought by ſome *Puiſne* Incumbrancers for a Sale, and upon Bill and Anſwers there was firſt a Decree to ſtate the ſeveral Incumbrances, then a Report, and thereupon a farther Decree was obtained for the *Maſter* to ſtate the Value of the Land mortgaged to each of the Mortgagees, yet after all theſe Proceedings, for a *Puiſne* Judgment, *&c.* Creditor to inſiſt upon his having had no Notice, and offering to be examined upon Interrogatories, is not ſufficient; but this denying of Notice ought to appear on the Pleadings, whereupon the Parties might go to Iſſue, and have an Opportunity of proving Notice. *Per* his *Honour*, *Mich.* 1728. in the Caſe of *Brace* and *Dutcheſs of Marlborough*, 2 *Will. Rep.* 495.

10. *Puiſne* Incumbrancer buys in a *Prior* Mortgage, in order to unite the ſame to the *Puiſne* Incumbrance, and there was a Mortgage *prior* to that. His *Honour* held clearly, that the *Puiſne* Incumbrancer, where *he had not got the legal Eſtate*, or *where the legal Eſtate was veſted in a Truſtee*, could there make no Advantage of his Mortgage, but *in all Caſes where the legal Eſtate is ſtanding out*, the ſeveral Incumbrances muſt be paid according to their *Priority* in Point of Time; *Qui prior eſt in tempore, Potior eſt in jure. Ibid.* 495, 496.

11. *A.* a Copyholder in Fee, mortgaged to *J. S.* who is admitted by *B.* the Steward of the Manor. Then *A.* makes a ſecond Mortgage to *C.* who is alſo admitted by *B.* And afterwards *A.* mortgages to *B.* who buys in *J. S.* And Lord Chan. *King* decreed that *B.* the Steward, ſhould not poſtpone *C.* becauſe of the Notice he muſt neceſſarily have of the *Meſne* Mortgage to *C.* by his being Steward of the Manor when *C.* was admitted. *Hil.* 3 *Geo.* 2. *Brotherſe* and *Bence*, 2 *Fitz-Gibb. Rep.* 118.

12. *A.* lent Money on a Mortgage of Lands in *Middleſex*, and the Mortgage was duly regiſtered. Afterwards *B.* lent Money on the ſame Security, and his Mortgage was regiſtered. Then *A.* advanced a farther Sum upon the ſame Lands, without Notice of the ſecond Mortgage. And it was held by Lord Chan. *King* that the Regiſtry of the ſecond Mortgage was not conſtructive Notice to the firſt Mortgagee before his Advancement of the latter Sum, for tho' the Statute avoids Deeds not regiſtered as againſt *Purchaſers*, yet it gives no greater Efficacy to Deeds that are regiſtered than they had before; and the conſtant Rule of Equity is, that if a *firſt* Mortgagee lends a farther Sum of Money *without* Notice of a ſecond Mortgage, his whole Money ſhall be paid in the firſt Place. *Nov.* 26, 1730. *Bedford* and *Backhouſe vel Bacchus*, *MS. Rep.*

(H) Mortgage Money, to whom to be paid; — And what Act will diſcharge a Mortgage.

1. *J. S.* had a *Rent-charge of* 166 l. per Annum *granted to him and his Aſſigns for three Lives.* He and his Lady mortgaged the ſame to *A.* his *Executors*, *Adminiſtrators and Aſſigns*, *Habendum* to *him*, *his Heirs and Aſſigns during the three Lives* for which this Rent was originally granted, upon this *ſpecial* Truſt that *A.* his *Executors*, *Adminiſtrators and Aſſigns*, *ſhall enjoy* 100 l. per Annum *out of it to their own proper Uſe 'till the Mortgage Money was ſatisfied*, if *the three Lives ſhould laſt ſo long.* *A.* made his Will, and thereof Plaintiff Executor, but to this Will there were no ſubſcribing Witneſſes. The Bill was brought by the Plaintiff againſt *A.*'s Heir at Law and others, to

Barnard. Rep. in Chan. May 20, 1740. *Kendal* and *Micfield*, S. C. *in totidem verbis.*

to have the Benefit of ſo much of the Rent-charge as *A.* the Mortgagee was intitled to. His *Honour* (after Time taken to conſider of it) ſaid, there were two Queſtions for his Conſideration: Firſt, What Sort of a *legal* Eſtate *A.* had in this Rent-charge, *viz.* Whether it was ſuch an Eſtate as would go to his Heirs or his Executors for the three Lives? And ſuppoſing the *legal* Eſtate would go to his Heirs, the next Queſtion is, Whether the Truſt of it does not belong to his Executors? What makes this a very particular Caſe is, that this is an Eſtate *pur auter vie*, and the firſt Point of the Caſe is ſo new, that was it not for the ſecond, he ſhould have thought it proper to have had the Opinion of a Court of Law upon it; for tho' the Rules are fully eſtabliſhed how far the *Habendum* of a Deed ſhall vary and explain the Premiſſes of it, yet when we come to apply the preſent Caſe to thoſe Rules, there ariſes a good deal of Difficulty; and he ſaid, he could not find a ſingle Authority which would come up to the firſt Point of the preſent Caſe. That the general Rules are, that the Office of the *Habendum* is to explain, limit and declare the *Quantum* of the Eſtate which is to paſs by the Deed. It has never been diſputed but that it will carry the Limitation of the Eſtate further than the Premiſſes of the Deed did. If a Man gives an Eſtate to *A. for Life*, Habendum *to him and his Heirs*, a Fee-ſimple clearly paſſes. On the other hand it is clear, that the *Habendum* never *abridges* the Eſtate granted by the Premiſſes of the Deed. It may indeed *vary* and *alter* it; as if an Eſtate be granted to *A.* and *B. Habendum* to *A. for Life*, the Remainder to *B.* the Premiſſes of the Deed in that Caſe will be controuled by the *Habendum*. So if an Eſtate is granted to *A.* and *to the Heirs of his Body*, Habendum *to him and his Heirs*, this is a Fee-ſimple. Some Books ſay, that it is only an *Eſtate-tail*, with a Remainder in Fee; but his *Honour* ſaid, it is difficult to maintain that Opinion; and he thought it not Law. That ſo far the Rules relating to an *Habendum* were plain and clear. That the particular Nature of the preſent Caſe is ſuch, that a Grant of this Kind to a *Man* and *his Executors* is the ſame as a Grant to a *Man* and *his Heirs*; and in both theſe Caſes the *Heirs* and *Executors do not take as Repreſentatives to the Party*, but as *ſpecial Occupants*; and therefore it has been held, that if Lands are granted to *A.* and *his Heirs for three Lives*, he may *grant it to another*, and *his Executors for thoſe Lives*. So if granted to *A.* and *his Executors for three Lives*, he may *grant it to another and his Heirs during thoſe Lives*; from whence it follows, that if one of theſe Limitations is in the *Premiſſes* of the Deed and the other in the *Habendum*, the *Habendum* ſhall take Place; as if the *Premiſſes* of the Deed in the Grant of the Eſtate *pur auter vie* is to *A.* and *his Executors during the Life of* B. *Habendum* to *A.* and *his Heirs during that Life*, the Heirs in that Caſe ſhall have the Benefit of that Eſtate; ſo if the Grant of ſuch Eſtate is to *A.* and *his Heirs during the Life in being*, Habendum *to* A. *and his Executors during that Life*, the Executors ſhall have the Benefit of it, becauſe the *Habendum* does not attempt to give a *leſs* or *larger* Eſtate than contained in the *Premiſſes*, but is *merely* explanatory; and tho' *before* the Statute of *Frauds* and Perjuries *no Grant of a Rent* pur auter vie *could be good any longer than the Party* (*i. e.* the *Grantee*) *himſelf lived*, becauſe a Rent lay not in Occupancy, ſo that it was certain there could not be a *general* Occupancy of it, nor could the *Common* Law admit, in that Caſe, of a *ſpecial* Occupancy. But his *Honour* was of Opinion that ſuch Rent was within the Statute of Frauds, *&c.* that Statute intending to make a *general* Alteration with regard to all Sorts of Eſtates that were granted

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pur auter vie, and a Rent-charge is as much *within* the Intention of the Act as any other Sort of Inheritance. The Difficulty then concerning the Rent-charge may be quite laid aſide, and then the Matter concerning the *legal* Eſtate depends upon the *Habendum*, which his *Honour* thought ought to take Place for the Reaſons before mentioned, and conſequently that the *legal* Eſtate in this Rent belonged to the Heir at Law. But then his *Honour* was of Opinion, that within the Meaning of the Deed of Truſt, the Plaintiff, Executor of *A.* is intitled to it, it being expreſsly declared by the Deed that the Mortgage was made upon the *ſpecial* Truſt that *A.* his *Executors, Adminiſtrators and Aſſigns*, ſhould enjoy the Benefit of 100 *l. per Annum*, Part of the Rent-charge, 'till the Mortgage was ſatisfied, if the three Lives continued ſo long. That the only Thing that made any Difficulty in this Part of the Caſe, is, that it is pretty hard to conceive how a *Man* and *his Heirs* ſhould be *Truſtees* for a *Man* and *his Executors*, but that this is the Caſe of every Mortgage *in Fee*. And his *Honour* decreed *accord'*. *Eaſt.* 1740. *Anon. MS. Rep.*

2. *A.* borrowed of *B.* 3000 *l.* and mortgaged Lands to him for five hundred Years to ſecure the Payment thereof. A Bond was given for Performance of Covenants. The Bond and Mortgage were kept in the Hands of a Truſtee. A few Years after *A.* brought the Box, in which were the Mortgage and Bond, to *B.*'s Houſe, told him that he had brought them him, in order that he might keep them himſelf; upon this (as it was ſworn on the Part of *A.*) *B.* put back the Writings with his Hand, and ſaid, "*Take back your Writings, I* "*freely forgive you the Debt*;" and at the ſame Time in the Preſence of *M.* the Mother of *A.* ſaid, "*I always told you that I would be kind* "*to your Son, now you ſee that I am as good as my Word.* But this Evidence was contradicted on the Part of the Plaintiff. *B.* died, leaving *J. S.* his Son and Heir, who brought his Bill againſt *A.* to compel him to pay the Mortgage Money, or elſe that he might ſtand foreclоſed. Lord Chan. *Hardwicke* was of Opinion, that in Caſe *B.* the Mortgagee did forgive the Debt in the Manner as had been ſworn on the Part of *A.* that the Plaintiff could not be intitled to Relief, (ſuppoſing that the Statute of *Frauds* and *Perjuries* to be out of the Caſe), and that the Bill (if that Fact be true) muſt be diſmiſſed; that this being a *mortgaged* Intereſt in Lands, his *Lordſhip* thought this Evidence might be allowed conſiſtent with the Statute of Frauds. The Statute, indeed, lays down a very ſtrict but proper Rule relating to real Eſtates, *That no Intereſt in Lands any longer than for three Years ſhall paſs without Writing, nor any Truſt in them for a longer Time, unleſs the Truſt ariſes by Operation of Law.* The ſame Rule, by that Statute, relates to the Deviſing of real Eſtates. But in all theſe Caſes there is a *Difference*, both in Law and Equity, between *abſolute Eſtates in Fee* or *for a Term of Years*, and *conditional Eſtates for Security of Money*. In the Caſe of *abſolute* Eſtates it cannot be admitted of, that *parol* Proof of the Gift of Deeds ſhall convey the Land itſelf. But where a Mortgage is made of an Eſtate that is only conſidered as a Security for Money due, the Land is the *Accident* attending upon the other, and when the Debt is diſcharged the Intereſt in the Land follows of Courſe. At *Law* the Intereſt in the Land is thereby defeated, and in *Equity* a *Truſt* ariſes for the Benefit of the Mortgagor. And his *Lordſhip* ſaid, that if an Obligee delivers up a Bond with Intent to diſcharge the Debt, the Debt will

In an Ejectment where a Title is made under a Mortgage, if *Evidence is given that the Debt is ſatisfied*, it is conſidered as defeating the Eſtate in the Land which the Mortgagee had; and in ſuch Caſes, eſpecially where the Mortgage is ancient, the Court will preſume that the Money was paid at the Day, and will direct the Jury to find accordingly, unleſs it *clearly* appears that the Money could not be paid at the Day; no Writing is in theſe Caſes neceſſary, which ſhews that even the Law conſiders the *Debt* as the *Principal*, and the Land as an *Accident* only. But Equity goes farther, and in all Caſes ſays, That where the Debt appears to be ſatisfied, there ariſes a

Truſt by Operation of Law for the Benefit of the Mortgagor, and this Caſe is within the Exception of the Statute of Frauds, of Truſt ariſing by Operation of Law, and in theſe Sort of Caſes the Court receives any Kind

Kind of Evidence of Payment; and therefore if a Mortgage is made by *one Partner* to *another*, and the Mortgagor agrees that the other ſhall take a certain Part of the Profits of the Partnerſhip in Diſcharge of the Mortgage, that of itſelf will diſcharge it. *Per Lord Chancellor. Ibid.*—*Barnard. Rep. in Chan.* S. C. *accord'.*

will certainly be thereby diſcharged; and if the Bond is diſcharged, in the preſent Caſe, the Mortgage will be diſcharged with it; and directed an Iſſue to try whether the Mortgagee ſaid the Words *ut ſupra* or not. *Eaſt.* 1740. *Richards* and *Syms*, *MS. Rep.*

(I) In what Caſe the Profits, &c. received by the Mortgagee, ſhall be ſet againſt the Intereſt;——And in what Caſe a Mortgagee may not commit Waſte in Equity, et econt'.

1. THE Profits were ſet againſt Intereſt in an old Mortgage. 25 *June* 1715. *Bail* (*alias Baſil*) and *Acheſon*, *Vin. Abr.* Tit. *Mortgage*, (C) in a Note to *Ca.* 2.

2. A *Mortgagee in Fee* may at *Law* commit Waſte, but never in *Equity*, unleſs the Mortgage appears to be a defective Security. *Per Price* B. who ſat for *Lord Chancellor*. *Trin.* 11 *Geo.* 1. in the Caſe of *Withrington and Banks* and *Coteſworth*, *Select Caſes in Chan.* 31.

(K) Caſes relating to Tenant for Life, and the Remainder Man of a mortgaged Eſtate.

2 *Vern.* 267, *Eaſt.* 1692, *James et al'* and *Hales et al'*, S. C.—*Vide* 1 *Will. Rep.* 650.

1. IF an Eſtate in Mortgage be ſettled on *A. for Life*, Remainder *to* B. *in Tail* or *in Fee*, *Tenant for Life* ſhall bear two Fifths of the *Principal* and *Intereſt*, and the *Remainder Man* three Fifths. *Eaſt.* 1692. *James* and *Hailes*, *Prec. in Chan.* 44.

2. *J. S.* makes a Mortgage, and then deviſes the Lands to *A. for Life*, and *Reverſion* deſcends to his Heir. The *Tenant for Life* enters into Poſſeſſion and brings a Bill againſt the Mortgagee to redeem, and the Heir likewiſe brought his Bill to redeem; Tenant for Life did not proſecute his Bill, but continued to receive the Profits and purchaſes in the Mortgage in Defendant's Name, whom he made Executor, and died. Lord Keep. *Somers* decreed the Deviſee for Life to pay one Third of what was due at the Death of the Deviſor, with the Intereſt, and the Heir to pay the reſt (*i. e.* two Thirds), and the *Maſter* to take the Account accordingly. And his *Lordſhip* ſaid, that ſo it would have been if the Mortgagee had received the Profits during the Life of Tenant for Life. And *Clyatt* and *Battſon*, *Trin.* 1686. was cited to that Purpoſe. *Mich.* 1696. *Ballett* and *Sprainger*, *Prec. in Chan.* 62.

Tenant for Life and *Remainder Man* joined in mortgaging Lands, *they both covenanted* and *gave Bond to pay the Money*. Tenant for Life dies. And per Lord Chan. *Cowper*, If the *Remainder Man pays the Money* and *takes up the Bond*, or *gets the Covenant aſſigned*, he may prefer his Bill againſt the Executors of the Tenant for Life, but not elſe. *Ibid.*

3. A *Remainder Man* can only force the *Tenant for Life* to keep the Intereſt down if the Land is charged, but he cannot compel him to redeem *directly* or *indirectly*; he may, by purchaſing in the Mortgage, then to pay but one Third, or part with the Poſſeſſion. Agreed by Sir *Thomas Powis*, *arg' Eaſt.* 7 *Ann. in Caſu Hungerford* and *Hungerford*, *Gilb. Rep. in Eq.* 69.

4. *A.* a Papiſt, ſeiſed in Right of *M.* his Wife of a real Eſtate, and being intitled to be Tenant by the Curteſy by his having Iſſue the Plaintiff, levied a Fine of the Lands, and mortgaged the ſame, with a Proviſo, that on Payment of the Mortgage Money the ſame ſhould be reconveyed to *A.* for Life, *without* Impeachment of Waſte. *A.* being afterwards attainted of Treaſon, his Eſtate was veſted in Commiſſioners for the Benefit of the Publick. *B.* the eldeſt Son of *A.* and *M.* claimed the Reverſion, free and diſcharged of Committal of Waſte, which was allowed by the Commiſſioners, who conveyed all *A.*'s Eſtate, with all Privileges thereto belonging, to Defendants, who afterwards bought in the Mortgage, and cut down a large Quantity of Timber. *B.* the *Reverſioner* prayed an Injunction, and that the Money raiſed by Sale of the Timber ſhould be for his Benefit. Decreed by *Price* B. (in the Abſence of *Lord Chancellor*) that *B.* ſhould have it *free* from *Committal* of *Waſte*, for that *A.* being a Papiſt could take no larger Eſtate under the Fine than he had before, tho' as large a one he might. That an Account ſhould be taken by the *Maſter* of what was cut down, the Money to be applied in the firſt Place to the Payment of the Intereſt, and then to the ſinking of the Mortgage; and an Injunction to ſtay any more felling. *Trin.* 11 *Geo.* 1. *Withrington and Banks* and *Coteſworth*, *Select Caſes in Chan.* 30.

(L) In what Caſe a Mortgagee ſhall not be relieved (*a*) againſt a Forfeiture.

(*a*) *Vide* (E) *P.*

1. ON the Marriage of Defendant's Father, Lands were ſettled on the *Father for Life*, Remainder *to the firſt and other Sons of the Marriage ſucceſſively in Tail Male*, with other Remainders over. Defendant was the eldeſt Son of that Marriage, and there were ſeven or eight other Children. After the Birth of all thoſe Children the Father and Mother mortgaged this Eſtate for 300 *l.* which was done by Leaſe and Releaſe, and Fine *come ceo*, *&c.* This Mortgage Money by the Addition of other Monies lent, and Intereſt from Time to Time increaſed, 'till at laſt it came to 700 *l.* and then it was aſſigned to the Plaintiff, and another Leaſe and Releaſe and Fine were levied by the Huſband and Wife, for making good this Aſſignment. The Huſband died, and this Bill was brought againſt the Widow and eldeſt Son, that they might redeem or be foreclоſed, the Mortgage Money being near the Value of the Eſtate; and to be relieved againſt the Forfeiture. The Son pleaded the Marriage Settlement of his Father and Mother, whereby *they were but Tenants for Life*, and *inſiſted on the Forfeiture.* And Lord Chan. *Macclesfield* allowed the Plea, ſaying, that this was a *Contrivance to deſtroy the Settlement* and *diſinherit the Heir*; and ſaid, he had declared his Opinion before in Caſes of this Nature; that there could be no Relief, particularly in the Caſe of *Sir Harry Peachy* and *Duke of Somerſet*; ſo the Plaintiff loſt her whole Money. *Trin.* 1722. *Lady Whetſtone* and *Sainſbury*, *Prec. in Chan.* 591.

Notice, vide Tit. **Mortgage**, *P.* and **Purchaſer**, *P.*

CAP. LXIX.

Papiſt.

(A) **His Diſability (*a*) to purchaſe, &c.---And how affected by the Stat. of the 11 & 12 W. 3. (*b*).**

(*a*) Ld *Dover* being poſſeſſed of a long Term for Years, made his Will, and his Lady, who was a Papiſt, Executrix. And it was reſolved *per Lord Chancellor*, That notwithſtanding the diſabling Act of 11 & 12 *W.* 3. the Term veſted abſolutely in her, and that this was not a Purchaſe within that Act; and he ſaid, that a Papiſt *may be Tenant in Dower* or *by the Curteſy*, becauſe in all theſe Caſes it is *by Operation of Law*, and *not by any Act of the Party*, that the Eſtate comes to him. The Caſe of Lord *Dover*'s Will, 3 *New Abr. of the Law* 799.——(*b*) It is remarkable that the Clauſe of the Stat. of 11 & 12 *W.* 3. made to prevent the Growth of Popery, which ſays, "*The next of Kin which is a Proteſtant ſhall enter* "*and enjoy the Lands during the Life of the Papiſt, or until he ſhall conform*," extends only to the Caſe *where the Papiſt is under eighteen at the Time that any Lands come to him*; but *where the Papiſt is above eighteen when the Lands come to him*, or *in Truſt for him*, ſuch Papiſt is utterly diſabled to take, and the Eſtate is void. *Per* Lord Chan. *Cowper*, *Trin.* 1717. *in Caſu Vane* and *Fletcher*, 1 *Will. Rep.* 354.

This Act is a bare *Diſability*. It creates only a *Diſability*, but makes no Forfeiture; it prevents a veſting, but diveſts nothing that is veſted. *Per* Lord Chief Juſtice *Pratt* in the Caſe of *Roper* and *Radcliffe*, 2 *Mod. Caſes in Law and Eq.* 199.

1. STAT. 11 & 12 *W.* 3. §. 4. if any Perſon educated in the Popiſh Religion, or profeſſing the ſame, ſhall not *within ſix Months after he ſhall attain the Age of eighteen Years* take the Oaths of Allegiance and Supremacy, and ſubſcribe the Declaration in 30 *Car.* 2. in the *Chancery*, *King's Bench*, or *Quarter-Seſſions* of the County where ſuch Perſon ſhall reſide, every ſuch Perſon ſhall in reſpect of himſelf only, and not in reſpect of his Heirs or Poſterity, be diſabled to inherit or take by *Deſcent*, *Deviſe* or *Limitation*, in Poſſeſſion, Reverſion or Remainder, any Lands, Tenements or Hereditaments within *England*, *Wales* or *Berwick*, and during the Life of ſuch Perſon, or until he take the Oaths and make the Declaration, the next of his Kindred which ſhall be a Proteſtant ſhall have and enjoy the Lands, *&c.* without being accountable for the Profits; but in Caſe of wilful Waſte, the Party diſabled, his Executors and Adminiſtrators, ſhall recover treble Damages againſt the Perſon committing ſuch Waſte, his Executors or Adminiſtrators, by Action of Debt in any of his Majeſty's Courts at *Weſtminſter*.

If Lands are *deviſed to be ſold in Truſt* in the firſt Place *to pay Debts and Legacies*, and *to pay the Surplus to J. S. a Papiſt*, *J. S.* is rendered incapable by this Clauſe to take the Surplus, foraſmuch as it is a Profit ariſing out of Land, and ſuch Deviſee, by laying down the Money, may prevent the Sale; and if ſuch Contrivances were to prevail, the Statute would ſignify little or nothing;—ſo tho' this Surplus be made payable to a Perſon at a future Day, (*viz.*) at *twenty-one* or *Marriage*, with a Deviſe over, if the *firſt* Deviſee ſhould die before twenty-one or Marriage. *Eaſt.* 1722. cites *Roper* and *Ratcliffe*, 2 *Will. Rep.* 5.—So if Land deſcend to a Papiſt *above* the Age of eighteen and a half, this being a Deſcent is *not* within the *latter*, but is within the *firſt* Clauſe of the ſaid Statute; and ſuch Papiſt ſhall not be capable of taking until he doth conform, but he, by the Words of the Act is diſabled to take in reſpect of himſelf only, and not in reſpect of his Heir. *Ibid.*

2. That from and after the 10th of *April* 1700, every Papiſt, or Perſon making Profeſſion of the Popiſh Religion, ſhall be diſabled to purchaſe either in his own Name, or in the Name of any other Perſon or Perſons to his Uſe or in Truſt for him, any Manors, Lands, Profits out of Lands, Tenements, Rents, Terms or Hereditaments, within *England*, *Wales* or *Berwick*, and that all Eſtates, Terms, and any other Intereſts or Profits whatſoever out of Lands from and after the ſaid 10th of *April* to be made, ſuffered or done to or for the Uſe or Behoof of any ſuch Perſon or Perſons, or upon any Truſt or Confidence mediately or immediately, to or for the Benefit or Relief of any ſuch Perſon or Perſons, ſhall be utterly void.

3. The Stat. of 11 & 12 *W.* 3. was intended to abridge the Power and Intereſt of Papiſts, and if a *Deviſe* ſhould be conſtrued to be *no Purchaſe* within that Act, then Papiſts were in a Capacity to take great Part of the Lands in *England*; therefore a Deviſe to a Papiſt muſt be a Purchaſe, *i. e.* to ſuch a Papiſt who was a Stranger to the Inheritance, but not where a particular Eſtate or Intereſt comes to the Heir at Law by a *Deviſe*, for that is but a *Modification* of that Eſtate which would otherwiſe deſcend to him, ſo as he is *under* eighteen Years of Age, and conforms within ſix Months after he ſhould arrive at that Age. Said *arg'*, and ſo reſolved in the Caſe of *Roper* and *Radcliffe* in the Houſe of Lords, 2 *Mod. Caſes in Law and Eq.* 170.

Taking by *Deviſe* is taking by *Purchaſe*, as was adjudged by the *Lords* in *Roper* and *Radcliffe*, and muſt not now be diſputed. *Per* Lord Ch. *Macclesfield*, *in Caſu Hill* and *Filkin*, *Eaſt.* 1722. 2 *Will. Rep.* 9.

4. By (*a*) the expreſs Words of the Stat. of the 11 & 12 *W.* 3. a Term *for two Years*, nay, (for ought his *Lordſhip* ſaw) a Term for *one Year*, or *for any certain Time*, is prevented from being made to Papiſts. *Per Pratt* C. J. in the Caſe of *Radcliffe* and *Roper*, 2 *Mod. Caſes in Law and Eq.* 192.——Perhaps for half a Year. *Ibid.* 193.

(*a*) And the *Truſt of a Term* is as much within the Act as the *legal Intereſt of a Term. Per Pratt* C. J. *Ibid.* 192.

5. By Act of Parliament in *Ireland*, *Lands leaſed to a Papiſt at leſs than two Thirds improved Value*, and *for any Term above thirty-one Years*, are forfeited to the Diſcoverer. *May* 8, 1719. *Cuſack* and *Buckley.*—*Mar.* 10, 1724. *Latin* and *March.*—*Mar.* 8, 1724. *Eyre* and *Burk.* *Jan.* 18, 1724. *Blake* and *Blake*, *Vin. Abr.* Tit. *Recuſant*, (O) *Ca.* 4. *P.* 253.

6. A Papiſt in *Ireland cannot make a Will*, but his Land ſhall deſcend to all his Sons equally; but if the Heir conform within a Year after his Age of twenty-one, he may enter. *June* 22, 1717. *Burk* and *Morgan*, *Vin. Abr.* Tit. *Recuſant*, (O) *Ca.* 3. *P.* 253.

7. A Papiſt being Tenant in Tail ſuffered a Recovery, and declared the Uſes to himſelf and his Heirs. This is not a Purchaſe within the Stat. 11 & 12 *W.* 3. *Vide Lord Derwentwater's Caſe*, 2 *Mod. Caſes in Law and Eq.* 172.

8. If a Papiſt is ſeiſed of a *defeaſible* Eſtate, and levies a Fine thereof with Proclamations, and five Years paſs without any Claim, by this Means the Eſtate is now become *indefeaſible*; this is certainly an Alteration of the Eſtate, but Nobody will ſay it is a Purchaſe. Said *arg'* *Hil.* 5 *Geo.* 1. in *Lord Derwentwater's Caſe*, 2 *Mod. Caſes in Law and Eq.* 175.

So where a Father, being a Papiſt, ſettles his Lands on his Son, with a *Power of Revocation*, and after he executes that Power, ſo that the Eſtate is veſted in the Father, this is an Alteration of the Eſtate; but it was never yet called a Purchaſe. *Ibid.*

9. It is plain that a Papiſt *under* the Age of eighteen Years, at the Time of making the Stat. of 11 & 12 *W.* 3. may either take by *Deſcent* or *Purchaſe*, and that the Word *Purchaſe* in this Statute is only a *Modification of the Eſtate*, and ſhall not be taken in the full Extent of the Word; for tho' *Purchaſes are only intended by the Statute, by which Papiſts enlarge and extend their Landed Intereſt*, and not where by Deeds of Settlement the ancient Family Eſtate is new modelled, without making any *new Acquiſition*, ſo that even at this Day *a Purchaſe by Limitation in a Settlement*, or *by a Deviſe to a Papiſt* under *the Age of eighteen Years*, is *good*, ſo as ſuch Papiſt, within ſix Months after he comes to that Age, conforms and takes the Oaths, *&c.* otherwiſe he loſes the *Pernancy* of the Profits during his Life only. *Powis*, *Tracy*, J. *Mountague*, and *Page* B. againſt *Forteſcue* J. *Hil.* 5 *Geo.* 1. *Lord Derwentwater's Caſe*, 2 *Mod. Caſes in Law and Eq.* 172, 180.

10. Upon (*a*) the Conſtruction of the before two Clauſes (in the Stat. 11 & 12 *W.* 3.) in the great Caſe of *Roper* and *Radcliffe*, it was decreed for the Papiſt by Lord *Harcourt Mich.* 11. *Ann.* aſſiſted by the two Chief Juſtices and Mr. Juſtice *Powell*, (Chief Juſtice *Parker ſtrenue opponente* (*b*);) but that Decree was afterwards reverſed in the Houſe of Lords, and it was determined againſt the Papiſt, (*viz.*) That a Papiſt above the Age of eighteen and a half is not capable of taking Lands by a *Deviſe*, and the Word [*Purchaſe*] in the latter Clauſe of the Stat. 11 & 12 *W.* 3. is uſed in Contradiſtinction to the Word [*Deſcent*]; notwithſtanding it was urged, that the Expreſſion of [*purchaſed by a Papiſt*], eſpecially when the Words following, *viz.* [*in his own Name, or in the Name of any Perſon in Truſt for him*], muſt be intended where ſuch Papiſt is active, and does ſomething for himſelf; whereas in Caſe of a *Deviſe* to him, or *Settlement* upon him, the Perſon taking is merely paſſive, and may know nothing of the Matter before it is done. However it is now ſettled by the Houſe of Peers, that either a *Deviſe* or *Settlement* to a Perſon profeſſing the Popiſh Religion, of *above* eighteen Years and a half, is *void*, and the Perſon not capable of taking; the Act *extending utterly to diſable the Papiſt of that Age to take any new Acquiſitions*, or *what was not his ancient Inheritance. Eaſt.* 1722. 2 *Will. Rep.* 4, 5.

11. A Deviſe of the perſonal Eſtate to a Papiſt *under* eighteen, who afterwards turns Proteſtant and conforms, was admitted to be good. *Eaſt.* 1722. in the Caſe of *Hill* and *Filkins*, 2 *Will. Rep.* 7.

12. *J. S.* deviſed Lands to Truſtees and their Heirs, *to the Uſe of* A. *the eldeſt Son of* B. *for two Years next after her* (J. S.'s) *Death*, and *if* A. *within theſe two Years ſhould become a Proteſtant*, then the Truſtees were to ſtand ſeiſed *to the Uſe of* A. *in Tail Male*; and for want of ſuch Conformity, then to the Uſe of the *ſecond and every other Son of* B. *being Proteſtants*, and *to the Heir Male of their Bodies, being Proteſtants*; and for want of ſuch Conformity in any of the Sons, or if they ſhould die without Iſſue Male, then *to the Uſe of the eldeſt Daughter of* B. *being a Proteſtant*, and *to the Heir of her Body, being Proteſtants*, Remainder *to the* ſecond, *&c. Daughter of* B. *being a Proteſtant, in Tail*, Remainder *to* C. *the eldeſt Son of* D. *who was actually a Proteſtant*, and born of Proteſtant Parents. *B.* had ſeveral Sons that were all Papiſts, and continued ſo, but his *eldeſt* Daughter being *above* the Age of eighteen Years and ſix Months did conform, and brought her Bill againſt the Truſtees to compel them to join with her in ſuffering a common Recovery of the Premiſſes. Lord Chan. *Macclesfield* ſaid, that no Eſtate or Right is to veſt in any of the Sons or Daughters of *B.* until they conform and become Proteſtants; that their Converſion to the Proteſtant Religion was a Condition precedent to their taking the Eſtate; and that the Act of 11 & 12 *W.* 3. againſt Papiſts, does not affect this Caſe, but on the contrary is excluſive of a Papiſt; and that

(*a*) But if a Papiſt was *above* the Age of eighteen Years and ſix Months when this Statute of *W.* 3. was made, ſo as it was impoſſible to comply with the Statute, then ſuch Perſon is *not within* the *former* Clauſe, nor ſhall ſuffer by it. Held *per* Lord Chan. *King*, *Trin.* 1726. in the Caſe of *Carrick* and *Errington*, 2 *Will. Rep.* 364.

(*b*) *Vide* his *Lordſhip*'s Argument, 2 *Mod. Caſes in Law and Eq.* 181.

Ibid. 134, 135. it appears that the Will charged the Lands with Annuities to be paid by the Truſtees to ſeveral of the Brothers and Siſters; and his *Lordſhip* ſaid, that if any of theſe Annuities are ſtill ſubſiſting, he did not think that without the Conſent of the Annuitants the legal Eſtate could be forced out of the Truſtees Hands, they being Truſtees as well for the Annuitants with regard to their Annuities as for the Plaintiff with reſpect to the Profits of the Land. But it being ſaid, that the Brothers and Siſters of the Plaintiff were Papiſts, his *Lordſhip* directed the *Maſter* to enquire what Age they were of at *J. S.*'s Death, and when the Annuities were to veſt, and ſaid, that if they ſhould appear to be *above* eighteen Years and ſix Months, then the Deviſe to them is void, but if they were not above *three* or *four Years old*, and conſequently incapable of profeſſing of the Popiſh Religion, they ſhall retain their Annuities 'till their Age of eighteen Years and ſix Months, from which Time the Annuities are to go to the Proteſtant Kindred '*till the Death or Conformity* of the Annuitants; but if the Infants were thirteen or fourteen at the Time of the veſting of theſe Annuities, it was his *Lordſhip*'s Opinion, that then they might be looked upon as capable of profeſſing the Popiſh Religion; and if in Fact they did profeſs the ſame, they were thereby incapable of taking, and the Deviſe to them of their Annuities was void.——*Lucas's Rep.* 512. *Hil.* 9 *Geo.* 1. *Cartwright* and *Cartwright*, S. C. ſtates it thus: *J. S.* deviſed to Truſtees and their Heirs *for the Life of* B. *and two Years longer*, and then taking Notice that the Children of *B.* were all beyond the Seas educated in the *Romiſh* Religion, directs, *that in Caſe any of the Sons*

that therefore if this eldeſt Daughter of *B.* be a ſincere Convert, ſhe is intitled to take, but in regard there might be ſome Doubt of the Sincerity of her Converſion, his *Lordſhip* directed it to ſtand over. *Eaſt.* 1723. *Carteret* and *Carteret*, 2 *Will. Rep.* 132.

Sons of B. ſhould within thoſe Years become a Proteſtant, and receive the Sacrament according to the Uſage of the Church of England, then the Truſtees were to hold the Eſtate *in Truſt for ſuch Son* in Tail, Remainder over, &c. and in Caſe no one ſhould conform, then in Caſe any one of the Daughters ſhould within thoſe two Years become a Proteſtant, and take, &c. then the Truſtees were to hold the Eſtate *in Truſt for that Daughter* in Tail, Remainder over, &c. and then *J. S.* charges his Eſtate with ſome *Annuities payable to the Sons and Daughters of* B.—*B.* dies; no one of the Sons did within the two Years become a Proteſtant, or receive the Sacrament, &c. but *one of the Daughters did* within *the two Years receive the Sacrament twice according*, &c. and the Truſtees actually permitted her to receive the Rents of the Lands. The Daughter brings a Bill *againſt the Truſtees* and *all the Children*, and one in Remainder being an Infant, (who had a Right to the Eſtate in Caſe the Daughter was not well intitled to it) to compel the Truſtees to convey to her, in order to enable her to dock the Intail, by ſuffering a Recovery, and ſo to make a good Title to a Purchaſer. The Truſtees ſay they permitted Plaintiff to receive the Rents, conceiving ſhe was intitled thereto by having received the Sacrament, &c. the Teſt pitched upon by the Teſtator, of the Sincerity of her Converſion, and pray that a Receiver may be appointed, and that they may be diſcharged of the Truſt. All the Children by their Anſwers conſent to the Sale of the Eſtates, and that the Truſtees may convey; the Plaintiff having given a Bond of 1500*l.* in Satisfaction of the Annuities given to them and charged upon the Eſtate. *Lord Chancellor* ſaid, he was not ſatisfied with the Reality of the Converſion of the Plaintiff, the Proof offered being *no more than the bare Act of receiving the Sacrament* (*a*); an Act very common for Roman Catholicks to do upon a worldly Motive, and then we hear no more of them. Remarkable that the Witneſs who ſwears to her Converſion, *does not ſay that he believes her now to be a Proteſtant, but that four Years ago ſhe was one.* The Readineſs of the Children in their Anſwers to do what is deſired of them, looks very ſuſpicious. As to the 1500*l.* he ſuſpected a Defeazance in Caſe this Bill miſcarry, and he did not ſee any Conſideration for the giving it, for the Annuities charged upon the Land are certainly Profits ariſing out of the Land, and the Children being all Roman Catholicks, the Deviſe is void as to *that*.—That if the Daughter had had a clear Title, and her Converſion been out of Doubt, there was no Occaſion for coming here; for if the Daughter had *ſuffered a common Recovery*, or *levied a Fine of the Truſt in Tail*, it had been binding in Equity. Ordered a Receiver to be appointed, and he would conſider of the Decree. It was preſſed that in the mean Time they might have Liberty to give farther Evidence of her Converſion, and quoted *Rawlinſon* and *Rawlinſon* before Lord *Cowper*, where that Liberty was indulged, but his *Lordſhip* ſaid he would do nothing now *Ibid.* 514.

(*a*) Lord Chan. *King* admitted the external Acts, pitched upon by the Act of *Parliment*, as a ſufficient Evidence of Conformity. *Trin.* 11 *Geo.* 1. *Hill* and *Hilkins et Ux'*, *Lucas's Rep.* 513.

13. Perſons eighteen Years old at the Time of making the Stat. 11 & 12 *W.* 3. are out of the Letter of the Act, but within the Intent and Meaning of it, for the Law-makers could never intend to put Infants of tender Years in a worſe Condition than thoſe who were of Age. But be that as it will, ſuch Perſons being Heirs at Law are proper to make Application to Chancery to ſet aſide a Conveyance got by Fraud from their Anceſtor. *Trin.* 9 *Geo.* 1. *Carrick* and *Errington*, 2 *Mod. Caſes in Law and Eq.* 35.

14. *J. S.* the eldeſt Son of *A.* became a *Monk*; thereupon *B.* the next Brother of *J. S.* aſſumed the Title and poſſeſſed himſelf of the Eſtate of the Family, but being concerned in a *Rebellion* and taken Priſoner, he was tried and found guilty of High Treaſon, and being pardoned as to his Life, the Commiſſioners ſeized the Eſtate. And thereupon *J. S.* (the Monk) claimed it, inſiſting before the Commiſſioners, that his Brother had no Right. *J. S.* on his Examination before the Commiſſioners confeſſing himſelf a *Monk*, they decreed for the Crown, for that by *J. S.*'s *Profeſſion* he was dead in Law, and by Conſequence incapable to take; and therefore the Eſtate muſt immediately veſt in his Brother, who being attainted of Treaſon, the Eſtate muſt be forfeited. And thereupon by the Opinion of four of the Commiſſioners againſt three, a Decree was made for the King, from which *J. S.* appealed, and *Powis*, *Tracy* and *Forteſcue* J. *Mountague* and *Page* B. Commiſſioners delegated, reverſed the Decree, ſo far as to order that the Appellant might bring an Ejectment againſt the Commiſſioners and try his Title at Law; and that the Decree ſhould not ſtand in the Way. *Trin.* 9 *Geo.* 1. *Sir Lawrence Anderton*, *Bart.* and *The Commiſſioners of the forfeited Eſtate* (*b*), 2 *Mod. Caſes in Law and Eq.* 54.

(*b*) But afterwards *J. S.* took the Oaths and received the Communion, &c. and became a Proteſtant; and ſo enjoyed his Eſtate without any farther Trial. *Ibid.* 56.

15. *J. S.*

15. *J. S.* a Papiſt, ſeiſed in Right of his Wife, and having Iſſue by her, he thereby became intitled to be Tenant by the Curteſy. *J. S.* joined in a Fine with his Wife. And Baron *Price*, in the Abſence of *Lord Chancellor*, decreed that *J. S.* being a Papiſt could take no larger Eſtate under the Fine than he had before; that he might take as large, as had been determined. *Trin.* 1725. *Withrington and Banks* and *Cotefworth*, *Select Caſes in Chan.* 30.

2 Will. Rep. 6. Trin. 1722. S. C.

16. A Deviſe to a Papiſt *under* the Age of eighteen is good, if he conform within ſix Months after he comes to that Age, otherwiſe the Words in the Statute which directs when that Conformity ſhall be made, are in vain, and tho' the Deviſee had not conformed at the Time appointed, yet the Inheritance is in him, and ſhall deſcend to his Heir, and he ſhall maintain an Action of Waſte by Virtue of the Stat. 11 & 12 *W.* 3. againſt the next Proteſtant Heir, who is intitled to take the Profits during the Diſability. Said *arg'*, and agreed to *per Cur'*, *Trin.* 11 *Geo.* 1. *Hill* and *Filkins*, 2 *Mod. Caſes in Law and Eq.* 156.

17. Lord Chan. *Parker* held that being a Papiſt at the Death of the Teſtator, the Eſtate would never veſt; but Lord Chan. *King* held that the Deviſee conforming at eighteen, made him capable. *Trin.* 11 *Geo.* 1. *Hill* and *Filkins*, *Lucas's Rep.* 536.

18. Tho' the firſt Limitation of an Eſtate is to a *Papiſt* who is diſabled by the Stat. *W.* 3. to take, yet it is not ſuch a void Limitation, as the Remainder ſhall immediately veſt as if the firſt was dead without Iſſue. *Per Cur'*, cites it as ſettled in the Caſe of the *Dutcheſs of Hamilton*, 9 *Geo.* 1. 2 *Mod. Caſes in Law and Eq.* 34.

It was inſiſted for Plaintiff, that the Account of the Profits ſhould be from the Time this Will took Effect, as it was reſolved *in Dom. Proc'* between *Blake* and *Blake*, *viz.* That a Papiſt muſt be accountable for the Profits ſince the Time of the original Purchaſe

19. *J. S.* being poſſeſſed of a long Term which he enjoyed twenty-ſeven Years, by Will declared, that this Term was taken by him in Truſt for the Defendant *B.* to whom he deviſed the Remainder thereof, and declared, that it was in Purſuance of the ſaid Truſt; and Plaintiff exhibited a Bill, ſuggeſting that both *J. S.* and *B.* were *Papiſts*, and by the Stat. *W.* 3. were incapable to take this Term; and therefore he being the next Proteſtant Heir, prayed that the Reſidue of the Term might be aſſigned to him; and it appearing that *J. S.* had enjoyed the Premiſſes for twenty-ſeven Years, and until his Death, the Court would not intend this to be a Truſt, and therefore decreed for the Plaintiff, with an Account of the Profits ſince the filing of the Bill. *Trin.* 11 *Geo.* 1. *Winter* and *Bermingham*, 2 *Mod. Caſes in Law and Eq.* 146.

But *per Cur'*, That Decree was made upon ſome *extraordinary* Circumſtances; but that the preſent Decree ſhould be according to the Precedents in this Court, and denied to give the Plaintiff Coſts, for that it was *Hardſhip* enough for him to loſe the Lands. *Ibid.* 147.

It was ſtrongly objected, that the Conveyance being by way of *Leaſe* and *Releaſe*, the whole Eſtate paſſed out of the Grantor, and could not return to him again, but muſt go to the next in Remainder, capable of taking; and that this being a *Truſt* (which *is a Creature of Equity*) during the Life of *A.* the Papiſt, the Court ought to let *B.* the next Remainder Man into Poſſeſſion, and that in Caſe *A.* ſhould leave Proteſtant Sons, the Court might then order the Truſt for their Benefit, and ſecure the Profits to them. But his *Lordſhip* ſaid, this would

20. *J. S.* ſeiſed in Fee, *by Leaſe and Releaſe*, ſettled the ſame *to the Uſe of himſelf for Life*, Remainder *to his firſt*, &c. *Son in Tail Male ſucceſſively*, Remainder *to* A. *a Papiſt*, *for Life*, Remainder *to Truſtees*, *to preſerve*, &c. Remainder *to the firſt*, &c. *Son of* A. *in Tail Male ſucceſſively*, Remainder *to* B. *a Proteſtant*, *for Life*, Remainder *to Truſtees*, *to preſerve*, &c. Remainder *to the firſt*, &c. *Son of* B. *in Tail Male ſucceſſively*, Remainder *to his own right Heirs*. *J. S.* died without Iſſue, leaving two Siſters, who were his Heirs at Law and Proteſtants. And one Queſtion was, What ſhould become of the Eſtate, and who ſhould take the Profits thereof during the Life of *A.* the Papiſt, whether the Heirs at Law of *J. S.* or the Remainder

mainder Man? Lord Chan. *King* held, that in regard if the Eſtate ſhould go to the ſubſequent Remainder Man *B.* the Proteſtant, it would not afterwards go back to any Sons of *A.* the Papiſt, who might be Proteſtants; and this being an *Hardſhip* and *Wrong to a third Perſon*, therefore the Rents and Profits of this Eſtate from the Death of *J. S.* the Grantor, and during the Life of *A*, ſhould go back to the Siſters and Heirs at Law of *J. S.* the Grantor, being Proteſtants. *Trin.* 1726. *Carrick* and *Errington*, 2 *Will. Rep.* 361.——This Decree in *May* 1728 was affirmed *in Dom. Proc'.*

would be making uſe of an extraordinary Power of diveſting and diſplacing Eſtates, which he could not take upon himſelf to do, and that the Intent and Meaning of

the Statute was in a more plain and eaſy Manner complied with, by conſtruing the Eſtates and Truſts to be void as to the Papiſt only, but not to let the next Proteſtant Remainder Man into Poſſeſſion before his Time, ſo as to prejudice or endanger a third Perſon, the Son or Sons of *A.* the Papiſt. *Ibid.* 363, 364.

21. Ruled by *King* C. and given up by the Counſel on all Sides, that ſince the great Caſe of *Roper* and *Radcliffe*, which was reſolved in the Houſe of Lords, the *latter* Clauſe of the Stat. of 11 & 12 *W.* 3. *c.* 4. for preventing the Growth of Popery, and which diſables a Papiſt from taking any *Land* or *Truſt*, or *Intereſt in or out of Land*, by Purchaſe, muſt not only be underſtood to *prevent a Papiſt from buying Lands*, but alſo *to diſable him from taking any Lands by Purchaſe*; and therefore in the ſaid Caſe of *Roper* and *Radcliffe*, where the *Deviſe was of Lands to be ſold for the Payment of Debts, and the Surplus to the Papiſt*, foraſmuch as the Papiſt would be intitled to the Surplus of the Eſtate, paying the Debts, this was conſtrued a void Deviſe as to the Papiſt. *Trin.* 1726. in the Caſe of *Carrick* and *Errington*, 2 *Will. Rep.* 362.

22. If Lands are limited by Leaſe and Releaſe *to the Uſe of* A. *a Proteſtant, for Life*, Remainder *to* B. *a Papiſt, for Life*, Remainder *to* C. *a Proteſtant*, and *A.* dies; in ſuch Caſe the Remainder to *B.* the Papiſt, being void, the next Remainder to *C.* ſhall take Effect preſently, in the ſame Manner as if a Remainder were limited to a Monk *for Life*, or to one who refuſes to take, or if ſuch Remainder Man were dead, and there had never been ſuch Limitation. Held *per* Lord Chan. *King*, *Trin.* 1726. in the Caſe of *Carrick* and *Errington*, *ibid.*

23. The Stat. of 11 & 12 *W.* 3. extends to *Truſts* as well as *legal Eſtates*; and therefore where a Remainder was limited *to Truſtees to preſerve contingent Remainders*, and to let the *firſt Remainder Man*, who was a Papiſt, *take the Rents and Profits during his Life*, this laſt is a *void* Truſt; but the *Truſt to preſerve the contingent Remainders to the firſt*, &c. *Son of the Papiſt*, is good. Declared *per Cur'*, *ibid.*

24. A Papiſt cannot take by Leaſe or Grant, and conſequently cannot take a Mortgage. This is within the expreſs Words of the Act; for it is an Intereſt in Land, and on Nonpayment the Eſtate is abſolute in Law, and his Intereſt is good in Equity to intitle him to receive and enjoy the Profits 'till Redemption or Satisfaction; and on a Foreclоſure he has the abſolute Eſtate both in Law in Equity. *Per* Lord Chief Juſtice *Pratt* in the Caſe of *Roper* and *Radcliffe*, 2 *Mod. Caſes in Law and Eq.* 196.

A Mortgage made to a Papiſt is void, for the *Incapacity* of taking Lands in any Caſe is meant by the Stat. *W.* 3. *Ibid.* 197. *arg'* in *Lord Derwentwater's Caſe.*

25. A Mortgage made to a *Papiſt*, who aſſigned to a *Proteſtant for a full Conſideration*. An Ejectment was brought againſt the Aſſignee by *a ſubſequent Mortgagee*, who recovered by reaſon of the *Diſability* of the *firſt* Mortgagee. All this appeared upon a Bill brought in Chancery; and *Lord Chancellor* was of Opinion, that a Mortgage to a *Papiſt* is void. *Mich.* 1729. *Pelham* and *Fletcher*, 3 *New Abr. of the Law* 790.

But in this Caſe the Aſſignment to the *Proteſtant*, and the Trial in Ejectment, were both before the 3 *Geo.* 1. which, were it otherwiſe, would, it ſeems, have made an Alteration.

26. It has been adjudged, That a *Papiſt* may deviſe to a *Proteſtant*; in which Caſe it was agreed, That where an Anceſtor dies ſeiſed of an Eſtate of Inheritance, it deſcends upon and veſts in his Heir, (tho' a Papiſt), for the Benefit of his Heirs, and the next Proteſtant Kin has always a Right to the Reception of the Profits during the Nonconformity of the Heir. *Eaſt.* 1738. *C. B. Mallom* and *Bringloe*, *ibid.*

Tho' it is objected, That this is not the Caſe of a Forfeiture, becauſe the Eſtate was never veſted, yet it falls under the ſame Reaſon; and an Incapacity or Diſability to hold at all by Act of Parliament, is certainly as much a Penalty as the Forfeiture of an Eſtate by a Perſon who had a Right to enjoy it before the Forfeiture. *Per Lord Chancellor. Ibid.* in S. C.——*MS. Rep. accord'.*

27. A Bill was brought, praying, that Defendant might diſcover whether *J. S.* (*under whoſe Will the Defendant claimed*) was a Papiſt or not. The Defendant pleaded the Statute of 11 & 12 *W.* 3. and *Lord Chancellor* was of Opinion, that he was not obliged to diſcover; that there is no Rule better eſtabliſhed than *that a Man ſhall not be obliged to diſcover what may ſubject him to the Penalty of an Act of Parliament*; and there can be no Doubt but this is a penal Law, inflicting *Diſabilities* and *Incapacities*. If a Bill is brought againſt a Perſon for a Diſcovery whether he is a Papiſt or not, he is not bound to diſcover; and where is the Difference between him and the Perſon claiming under him? Beſides, what ſways with me very much, is the great Inconvenience that would follow. Should this Plea be diſallowed, we ſhould have nothing in this Court but Bills of Diſcovery whether ſuch and ſuch Perſons were Papiſts or not, and Nobody knows what Confuſion would follow. *Trin.* 12 *Geo.* 2. *Smith* and *Read*, *ibid.*——*MS. Rep.* S. C. *accord'.*

CAP. LXX.

Paraphernalia (a).

(a) *Vide* Tit. *Baron and Feme*, (N) *P.* 155.

1 *Vol. Abr. Eq.* 66. *Ca.* 1. S. C. but *not* S. P.

1. JEWELS and Chamber Plate of 500 *l.* Value bought out of the Wife's *Pin Money* was decreed the Wife as her *Paraphernalia*, the ſame being of ſo ſmall Value in reſpect of her Huſband's Eſtate. *Trin.* 1691. *Offley* and *Offley*, *Prec. in Chan.* 27.

Sir *Joſ. Jekyll* ſaid, Creditors may come in againſt the Wife to have her *Paraphernalia*, but not a Deviſee under the Huſband's Will, and there is not one Caſe in the Law to warrant ſuch a Deviſe, and it is no Argument to ſay that the Huſband may diſpoſe of them in his Life time, therefore he may give them away by Will, for he may diſpoſe of his Wife's Wearing Apparel, or a Term in the Wife in her Life-time, but he can diſpoſe of neither by his Will. *A.* the Relict of *B* did claim her *Paraphernalia* againſt the Deviſee of her Huſband, but *he* ſaid he believed the Matter was made up between the Parties, for he did not remember that any Judgment was given in that Caſe. See *Cro Car.* 343 ——*Per North* Attorney General, there is not one Authority in the Law that the Huſband cannot deviſe the *Paraphernalia* of his Wife; it is true, the Huſband's Executor ſhall not take the *Paraphernalia* of the Wife from her, and the Caſe in *Cro. Car.* 343. goes no farther. It is the conſtant Practice in great Families to give the Family Jewels to the Wife for her Life, and after her Death to the eldeſt Son, and he ſaid he never knew ſuch a Deviſe called in Queſtion, but always ſubmitted to. *Ibid.*

2. The Queſtion was, If the Huſband can deviſe the *Paraphernalia* of the Wife to any other than the Wife? Lord Chan. *Harcourt* ſaid, that this is a Point of Conſequence, and he would reſerve the Conſideration of it 'till after the *Maſter*'s Report upon the Account; *Curia adviſare vult. Trin.* 13 *Ann. Wilcox et Ux'* and *Gore et al'*, *Vin. Abr.* Tit. *Executors*, (Z. 5.) *Ca.* 19. *P.* 180.

3. Where a Baron borrowed of his Siſter Jewels to preſent to his Wife on his Marriage, *Cowper* C. ſaid, this giving of them is a Change of the Property, and a Kind of Sale in Market-overt, and on a Deviſe of the real and perſonal Eſtate for Payment of Debts, if the *perſonal* is *not* ſufficient, and the *real* be, and the Huſband *deviſes to her all her Jewels*, &c. ſhe ſhall have the ſpecifick Legacy of her Jewels. *Eaſt.* 1715. *Parker* and *Harvey*, *Vin. Abr.* Tit. *Executors*, (Z. 5.) *Ca.* 20. *P.* 181.

4. *A.* by Articles before Marriage, covenanted for himſelf and his Heirs to lay out 3500 *l.* in a Purchaſe of Lands to be ſettled on the Wife for her Jointure, Remainder to the firſt, *&c.* Son of that Marriage in Tail Male ſucceſſively, and died inteſtate, leaving *Aſſets in Fee* deſcending to his Nephew, who was his Heir at Law, but the *perſonal* Eſtate was not near ſufficient to pay his Debts. The Widow claims her *Paraphernalia*, and alſo that ſhe may have her Jointure, and to have the Deficiency of the perſonal Eſtate ſupplied out of the *real* Aſſets. And the Queſtion was, Whether the Wife's *Jewels*, &c. (of above 200*l.* Value) in the firſt Place, and in Eaſe of the *real* Aſſets, ſhould be applied to ſatisfy this Covenant, ſince *Bona Paraphernalia* were *perſonal* Eſtate, and the *Rule* (as it was ſaid *arg'*) is that all *perſonal* Eſtate ought to be applied in Exoneration of the *real?* And Lord Chan. *Macclesfield* decreed that, putting the Creditors out of the Caſe, the Widow ſhould have her *Paraphernalia* (*a*). *Mich.* 1721. *Tipping* and *Tipping*, 1 *Will. Rep.* 729.

(*a*) *Bona Paraphernalia* are preferable to Legacies, and a *ſpecifick* Legatee ſhall not compel the Application of the *Bona Paraphernalia* to pay any Debt in Favour and Eaſe of his *ſpecifick* Legacy, *per Lord Chancellor*, who denied it to be a *Rule* that in all Caſes the perſonal is applicable in *Eaſe* of the real Eſtate, for it ſhall not be ſo applied, if thereby the Payment of any Legacy will be prevented, much leſs where it will deprive the Widow of her *Bona Paraphernalia* (*b*). *Ibid.* 730. (*b*) So decreed by his *Lordſhip in Caſu Puckering* and *Johnſon* the ſame Term. *Ibid.* 731. in a *Note* by the *Editor*.

5. *Bona Paraphernalia* are not deviſeable by the Huſband from the Wife any more than *Heir Looms* from the Heir, ſo that the Right of the Wife to her *Bona Paraphernalia* is to be preferred to that of a Legatee. *Per* Lord *Macclesfield*, *Mich.* 1721. in the Caſe of *Tipping* and *Tipping*, 1 *Will. Rep.* 730.

6. *Bona Paraphernalia* are liable only to Debts, and in Favour of Creditors, *not* of an Heir. *Per* Lord Chan. *Macclesfield*, *Mich.* 1721. in the Caſe of *Tipping* and *Tipping*, *ibid.*

But any Creditors by *Specialty* are wholly unconcerned in this Queſtion, they being by reaſon of their Bonds, *&c.* in all Events ſecure, which muſt make it indifferent to them whether they are paid out of the *real* Aſſets or out of the *Bona Paraphernalia*, for ſtill they are ſure of being paid. And putting the Creditors out of the Caſe, the *Bona Paraphernalia* ſhall be retained by the Wife.

7. *J. S.* upon his Marriage with *A.* ſettled his real Eſtate on *himſelf for Life*, Remainder *to his Wife for Life*, Remainder *to the firſt*, &c. *Son* of this Marriage *in Tail Male*, Remainder *to his own right Heirs*. *J. S.* having a ſmall Eſtate in Fee-ſimple, unſettled, *deviſed* A.'s *Jewels to her*, and likewiſe the *Uſe of the Plate to her for her Life*, and then by the ſame Will deviſed *all* his *real* Eſtate *ſubject to his Debts and Legacies*, and *after the ſame were paid*, *to* B. and died, leaving two Infant Sons of this Marriage. At the Time of *J. S.*'s Death the *real* and *perſonal* Aſſets were not ſufficient for Payment of his Debts; whereupon the Creditors inſiſting to be paid, the Widow gave up her *Jewels* and *her Plate* and *a twenty-five Guineas Purſe*, (being her *Dowry Money*), which were all applied towards the Debts. But in the Decree *obtained for the Sale of the real Eſtate*, and *for an Account of the perſonal as well as real Aſſets*, the *Widow's Claim of her Jewels*, *Plate*,

Plate, and Dowry Money, was ſaved to her. *J. S.*'s two Sons died under Age, whereby the *Eſtate-tail of the ſettled Lands expired*, the *Reverſion in Fee falling in, became liable by the Will to the Debts*, and the following Point, and the Points in the *Margin*, were determined by Lord Chan. *Macclesfield*. *Firſt*, That as to the *Dowry Money* claimed by the Widow, it could not be *Bona Paraphernalia*, for *theſe are confined to the Ornaments of her Perſon*, nor could it be Part of her ſeparate Eſtate, *it being given to herſelf* and *not to her Truſtee*; but this *Dowry Money*, in the Nature of it, was rather a Gift to the Church, being to be laid upon the Book (*a*). Cites *Gibſon's Codex Juris Eccleſiaſtici*, *Part* 1. *P.* 519. *Trin.* 1722. *Burton* and *Pierpont*, 2 *Will. Rep.* 78.

(*a*) *Secondly*, That with reſpect to the Claim of the Jewels, as *Bona Paraphernalia*, the Widow could have no Title to them, and that this Caſe differed from that of *Tipping* and *Tipping*, *Regard being to be had* here *to the Time of the Death of the Teſtator when the* real *and* perſonal *Aſſets were not ſufficient for the Payment of the Debts*; nay, at the Time when theſe Jewels were applied to the Debts, there was a Deficiency of Aſſets *real* and *perſonal* for Payment thereof, and tho' afterwards upon a *remote* Contingency, which was not to be preſumed *or* waited for, (*viz.*) *a Death without Iſſue*, Aſſets had fallen in, yet that this ſhould not alter the Caſe as to the *Bona Paraphernalia*, for the ſame might not have happened until twenty or thirty Years after the Teſtator's Death, nor (poſſibly) until the Death of the Widow, when the End and Deſign of the Widow's wearing her *Bona Paraphernalia*, in Memory of her Huſband, could not have been anſwered; and therefore it was reaſonable that this ſhould be reduced to a Certainty, (*viz.*) *That if there ſhould not be Aſſets* real *or* perſonal *at the Teſtator's Death*, or at leaſt *at the Time when the Jewels were applied towards the Payment of Debts*, then *the Jewels ſhould be liable*. But *Thirdly*, If the *Creditors by Judgment* of the Teſtator ſhould after his Death have taken the *Jewels* in Execution, when the Heir, or Executor, or Truſtees, had other Aſſets to have paid ſuch Debts, this would have been a Default in the Truſtees, for which the Widow ought not to ſuffer as to her *Bona Paraphernalia*. But in the *preſent Caſe* here was no Default, nor any Thing done, but what ought to have been in regard the Teſtator's juſt Creditors were not to be kept out of their Debts, nor the Jewels, which were legal Aſſets, detained from them in Expectation of that which might never happen; *a ſubſequent Contingency of Aſſets falling in, muſt not exempt the Jewels from Debts*, which, at that Time, both at Law and in Equity they were liable to anſwer. However, in the *preſent Caſe*, foraſmuch as there was *an expreſs Bequeſt of the Jewels to the Widow*, notwithſtanding that, *at the Time of the Death of the Teſtator, there were not Aſſets either real or perſonal*, yet ſince afterwards, tho' by a remote Accident, Aſſets had happened, his *Lordſhip* held, that there could be now no Inconvenience to any Creditor or others, and that this Legacy ſhould be paid, and the Intention of the Teſtator performed, and the rather, for that *here* the *real* and *perſonal* Aſſets were by the Will made liable to the Debts and Legacies, eſpecially it being the *conſtant Rule*, That a *Legatee, where the real Eſtate is made liable to pay Debts on the Creditors exhauſting the perſonal Aſſets, ſhall ſtand in the Place of Creditors, and be paid out of the Land*; and that this was ſtronger in the Caſe of a *ſpecifick* Legatee (the principal Caſe), which was to be preferred in Payment before a *pecuniary* Legacy.——In this Caſe *all the Legatees* were decreed to be paid before *B.* the *reſiduary* Legatee took any Thing. *Ibid.* 79 to 81.

8. *A.* is Principal in Recognizance of 5000 *l.* and *B.* and *C.* are Sureties. *A.* does *afterwards* jointure his Wife before Marriage in ſome Lands without Notice either to the Wife or her Friends of this Recognizance, and deviſes his *real* and *perſonal* Eſtate to *B.* one of his Sureties, and dies. As to the *Bona Paraphernalia* of *A.*'s Widow, tho' there be Debts of *A.* more than the *perſonal* Eſtate will extend to pay, yet as the *Bona Paraphernalia* are *liable only in Favour of Creditors*, and *not of the Heir* nor *of the Deviſee*, who ſtands in the Place of the Heir, and is *Hæres factus*; if the Lands deviſed be ſufficient to pay the Recognizance, the *Bona Paraphernalia* ſhall be enjoyed by the Widow; but if thoſe deviſed Lands ſhould prove *inſufficient*, the *Bona Paraphernalia* muſt be ſubject before the Sureties Lands ſhall be extended. *Trin.* 1729. *Tynt* and *Tynt*, 2 *Will. Rep.* 542.

9. *J. S.* having a *Crochet of Diamonds* which was his firſt Wife's; In 1695 makes his Will, and (*int' al'*) deviſes this *Crochet* to his eldeſt Son, and that it ſhould go in Succeſſion to the Heir of his Family as an *Heir Loom*. In 1699 he marries a ſecond Wife (the now Defendant), and turns this *Crochet* into a *Necklace*, and adds ſeveral new Diamonds to it, to the Value of 200 *l.* which was more than the Value of the *Crochet*. The Plaintiff as Heir to *J. S.* (tho' not the eldeſt Son to whom it was ſpecifically deviſed) demands this *Crochet* of *J. S.*'s Widow. Lord Chan. *Parker* ſeemed to doubt at firſt that

turning

turning the *Crochet* into a *Necklace*, and adding new Diamonds to it, and permitting his Wife to wear it, was a Revocation of the Deviſe, but at laſt ordered the *Maſter* to examine and ſeparate the old Diamonds from the new, and decreed the Diamonds of the *Crochet* to the Plaintiff as Heir at Law, and *ſpecifically* deviſed to him as an Heir Loom. *Mich.* 5 *Geo.* 1. *Calmady* and *Calmady*, *Vin. Abr.* Tit. *Executors*, (Z. 5.) *Ca.* 21.

CAP. LXXI.

Pariſh Rates.

1. THE Church-Wardens of *A.* made a Rate on all the Pariſhioners. Plaintiff being libelled againſt in the Spiritual Court for Nonpayment, brought his Bill here, ſuggeſting a Cuſtom that he was an Inhabitant of a ſeparate Village within the Pariſh, which had Time immemorial aſſeſſed and collected their own Rates, and was never aſſeſſed to the publick Rates of the Pariſh. Defendant demurred for that all Church Rates were properly conuſable in the Spiritual Court, and not elſewhere. Demurrer allowed. *Mar.* 15, 1734. *Dunn* and *Coates*, *MS. Rep.*

For *per Talbot* C. Plaintiff has miſtaken his Remedy. Inequality of Rates is properly conuſable in the Eccleſiaſtical Court, but where a Cuſtom comes in Queſtion, the Spiritual Court cannot properly try it, but ought to be prohibited at Common Law. This is nothing but an *Engliſh* Bill to prohibit, which is a Method never before thought of. As to the Objection, that it is to eſtabliſh a Cuſtom, and the Suit here tends to prevent Multiplicity of Diſputes elſewhere; it's true that a Bill in this Court is proper to eſtabliſh a Cuſtom that has been once tried at Law, which this has not, and there is no Colour in objecting Multiplicity of Suits, for every Thing may be tried in one Prohibition. *Ibid.*

CAP. LXXII.

Partition.

1. A Partition was decreed of the Eſtate late *J. S.*'s, two Thirds whereof belonged to *A.* and one Third to *B.* The Eſtate conſiſted (*int'-al'*) of a great Houſe called *Cobham Houſe*, and *Cobham Park* in *Kent*, and of Farm and Lands about it of 1000 *l.* *per Annum*. *B.* inſiſted to have a Third of the Houſe and Park aſſigned to him by the Commiſſioners, who were to make the Partition; and this coming on before Lord Chan. *Parker* upon Petition, his *Lordſhip* held that tho' *B.* muſt have a *third Part in Value of this Eſtate*, yet there was no *Colour of Reaſon* that any Part thereof ſhould be leſſened in Value, in order that he may have a third Part of it; that if

If there were three Houſes of different Value to be divided among three, it would not be right to divide every Houſe, for that would be to ſpoil every Houſe; but ſome Recompence is to be made either by a Sum of Money, or Rent for *Owelty* of Partition to thoſe that have the Houſes of leſs Value. It is true, if there were but *one* Houſe, or Mill, or Advowſon to be divided, then this *entire* Thing muſt be divided in the

the Manner as the Counſel for *B.* contend for, (which was, that as *B.* was intitled to a Third of the whole, ſo conſequently he was to have a Third of the Houſe and Park; and that in many Caſes in the Law, Things *entire* in their Nature, as an Houſe, a Mill, or an Advowſon, might be divided; ſo a Tenant in Common ſhall have half the Houſe, every other Toll Diſh, and every other Turn of a Church, *&c.* and that thus it would be at Law in Caſe of a Writ *de Partitione facienda*, and in this Caſe *Æquitas ſequitur legem)*; *ſecus* when there are other Lands which may make up *B.*'s Share.——By the ſame Reaſon every Farm Houſe upon the Eſtate muſt be divided, which would depreciate the Eſtate, and occaſion perpetual Contention; and in the preſent Caſe it may be *B.*'s Intent, when this Partition is made, to compel *A.* to give him forty Years Purchaſe for his Third of the Houſe and Park; wherefore his *Lordſhip* recommended it *ut ſupra*. *Ibid.* 447.

B. ſhould have one Third of the Houſe and of the Park, this would very much leſſen the Value of both; and recommended that the *Seat* and *Park* be allowed to *A.* ſhe having two Thirds, and that a liberal Allowance out of the reſt of the Eſtate be made to *B.* in Lieu of his Share of the Houſe and Park. *Trin.* 1718. *Earl of Clarendon et al'* and *Hornby*, 1 *Will. Rep.* 446.

It was objected, That the Will of *J. S.* under whom the Infant Plaintiff claimed, was not proved. *Sed per Cur'*, This will not be material; for an Infant, *when Plaintiff*, is as much bound, and as little privileged, as one of full Age. *Ibid.* 519.

2. *J. S.* deviſed Lands to Truſtees and their Heirs, *In Truſt* for *A.* (married to *B.*) and *C.* (married to *D.*) for *their Lives, Share and Share alike*, Remainder *to the Heirs of their reſpective Bodies, and to Heirs of their Bodies reſpectively*, with divers Remainders over. *J. S.* died, and *C.* and *D.* died, leaving Plaintiff, an Infant, the only Iſſue of their Bodies. Plaintiff brought his Bill for a Partition, and that the Truſtees ſhould convey the legal Eſtate of the ſeparate Moiety to be allotted to him, or this Partition to him and the Heirs of his Body, in regard tho' there might be a Doubt whether *A.* had more than an Eſtate for Life, (the Words of Inheritance being ſubſequent to the Limitation to the Heirs of the reſpective Bodies of *A.* and *C.*); yet as to Plaintiff, who was the only Son and Heir of *C.* it muſt be agreed he was intitled to an Eſtate-tail; which was admitted. Lord Chan. *King* decreed a Partition, and directed a Commiſſion to allot one Moiety *in Severalty* to Plaintiff, and the other Moiety *in Severalty* to *A.* to hold to them according to their reſpective Eſtates under the Will, and to be reſpectively quieted in the Poſſeſſion of the Premiſſes ſeverally to be allotted as aforeſaid; but becauſe Plaintiff cannot join in a Conveyance of the Moiety to *A.* by reaſon of his *Infancy*, and ſo there cannot be mutual Conveyances, the Conveyances to be made by the Truſtees of the *legal* Eſtate were reſpited until Plaintiff ſhould be twenty-one, (or until farther Order of the Court), at which Time all Parties intereſted may join in mutual Conveyances. *Hil.* 1728. *Lord Brook* and *Lord and Lady Hertford*, 2 *Will. Rep.* 518.

CAP. LXXIII.

Partners.

1. IF where there are two joint Traders, and one dies, and the Survivor carries on the Trade after the Death of the Partner, the Survivor ſhall anſwer for the Gain made by this Trade. *Per* Lord Keep. *Harcourt*, *Eaſt.* 1711. *in Caſu Brown* and *Littleton*, 1 *Will. Rep.* 141.

2. *A.* and *B.* Partners in a Goldſmith's Trade, in 1693 were bound in a Bond to *J. S.* for the Payment of 1000 *l.* and Intereſt, which 1000 *l.* was *that* Year employed in the Partnerſhip Trade; and in the

ſame

ſame Year they diſſolved the Partnerſhip, when *A.* by Ready Money and his own Bond ſecured to *B.* his Share of the Partnerſhip Stock, and took on himſelf all the Partnerſhip Debts, *covenanting* to ſecure *B.* from ſuch Debts. *Publick Notice was given to all the Creditors of the Joint Stock that they were either to receive their Money, or to look on A. only as their Paymaſter.* *B.* died, leaving *C.* his Executor, and *D.* his reſiduary Legatee. *J. S.* in 1708 called in his Money from *A.* but then continued it upon *A.*'s ſubſcribing the Bond at 6 *l. per Cent.* *A.* continued ſolvent 'till 711, and *J. S.* might, 'till that Time, when he pleaſed, have had his Money. *J. S. outlawed B.*'s Executor (*a*), and brought this Bill againſt *D.* *B.*'s reſiduary Legatee, to recover the 1000 *l.* and Intereſt out of the Aſſets of *B.* *A.* having in 1711 become a Bankrupt, and inſolvent. Lord Chan. *Parker* ſaid, the Defendant's Teſtator being bound in the Bond, he muſt lie at Stake until the Bond be paid; and tho' *J. S.* continued the Money on the Bond, this was not material, ſince it was upon the Credit of both the Obligors. As to the Notice given by *A.* to the joint Creditors to bring in their Securities, and that *A.* alone would be thereafter liable, that being *Res inter alios acta*, could not bind *J. S.* and his changing the Intereſt did not alter the Security, for ſtill it was the Bond of both, but that the Defendant could not be liable to more than 5 *l. per Cent.* for the Arrear of Intereſt; wherefore *J. S.* had a Decree for his Debt, Intereſt and Coſts. *Mich.* 1720. *Heath* and *Percival*, 1 *Will. Rep.* 682.

(*a*) The Executor (*in Truſt*) being *outlawed*, and a Witneſs proving that he had enquired after, but could not find him, this was thought to be a full Anſwer to the Objection that ſuch Executor was not made a Party. *Ibid.* 684.

Vide Tit. Bankrupt, *P.*

CAP. LXXIV.

Party.

(A) Of making Parties to Bills in Equity (*b*).

(*b*) *Vide* Tit. *Bills*, (B) *P.* 165.

1. CITY of *London* brought Debt for Rent againſt their Leſſee of the Water-Works. The Aſſignees file their Bill, and obtain an Injunction. The City file their Croſs Bill againſt the Aſſignees for a Diſcovery. It came out by the Defendant's Anſwer to the Croſs Bill, *that it was turned into Stock-Jobbing*, and *divided into Shares.* Objected to the Croſs Bill, That the Defendants were only Truſtees for the Shares; beſides, a Demand for Rent was only proper at Law, but if they will come into Equity they muſt make the *Ceſtuy que Truſt* Parties. But decreed that the Croſs Bill was well brought, the Plaintiff in it being driven into Equity by the Defendants, and they might have their Remedy from the Sharers who were their Under-Tenants. 9 *Feb.* 1702. *Richmond* and *Mayor of London*, *Vin. Abr.* Tit. *Party*, (B) *Ca.* 15. *P.* 250. 2 *Vern.* 241. S. C.—*Prec. in Chan.* 156. *Eaſt.* 1701. S. C.—*Vide P. Ca.*

2. In directing an Iſſue a *bare Truſtee* ought not to be a Party, for that might hinder his being an Evidence. 1703. *Dawſon* and *Franklin*, *ibid.* Tit. *Party*, (B) *Ca.* 71. *P.* 257.

3. A Bill was diſmiſſed becauſe the *Tenants* were only Parties, and *not the Lord*, they having attorned to a new Title againſt their firſt Leſſor,

Leſſor. 7 *Mar.* 1717. *Ward* and *Reily*, *Vin. Abr.* Tit. *Party*, (B) in a Note to *Ca.* 46. *P.* 253.

4. *Appellant* to pay the *Coſts of the Day* for want of proper Parties, and to be at Liberty to amend his Bill. 9 *Mar.* 1718. *Morriſon* and *Neſbite*, *Vin. Abr.* Tit. *Party*, (C) *Ca.* 2. *P.* 257.

5. *A.* charged all his Lands in *C.* in *Eſſex* and *Endfield* in *Middleſex* with 20 *l.* a Year to the Poor of *Enfield*. In a Suit on Behalf of this Charity, for the *Arrears of this Rent-charge*, it is not neceſſary to make all the *Tertenants of the Lands, out of which the Rent iſſued*, Parties. *Hil.* 1719. *Attorney General* and *Wyburgh et al'*, 1 *Will. Rep.* 599.

6. A *nominal* Perſon only that has *no* Intereſt is no neceſſary Party, and a Suit may go on without him. 12 *Mar.* 1720. *Butler* and *Pendergraſs*, *ibid.* Tit. *Party*, (A) *Ca.* 5. *P.* 248.

7. An Eſtate is *charged with ſeveral Incumbrances*, come ſemble; *one Incumbrancer may ſue without making the reſt Parties*; at leaſt it is cured by a Decree directing an Account to be taken of all the Mortgages and Incumbrances that affect the Eſtate. 12 *July* 1721. *Odell* and *Graydon*, *ibid.* Tit. *Party*, (B) *Ca.* 51.

8. Where a *Settlement is ſet up*, all the *Meſne Incumbrancers*, and likewiſe the Remainder Man, muſt be made Parties. 1721. *Edgeworth* and *Edgeworth*, *ibid.* Tit. *Party*, (B) *Ca.* 52.

9. A Decree was made *Temp. Car.* 1. for Payment of 40 *l. per Annum* out of particular Lands, formerly Part of the Foreſt of *Bladen*, to the Vicar in *C.* in *Wilts* in Lieu of Tithes. A Bill being brought againſt the Land Owners to eſtabliſh a Right to this 40 *l. per Annum*, it was objected, That the Land Owners were Tenants to the Crown of Lands lying within the Bounds of the Foreſt which formerly paid no Tithes, and that the Attorney General ſhould for that Reaſon have been made a Party. Anſwered, That it did not appear by the Bill that they are Leſſees under the Crown, and Defendants have not inſiſted upon it in their Anſwers, and ſo that is out of the Caſe. And the Court took no Notice of the Objection. *Eaſt.* 12 *Geo.* 1. *Cuthbert* and *Weſtwood et al'*, *in Scac'*, *Gilb. Rep. in Eq.* 230.

It was alſo objected, That the *Occupiers* as well as the *Land Owners* ought to be made Parties to the Bill, for that a Decree againſt the *Land Owners* would not affect the *Occupiers*. To which it was anſwered, That it would be endleſs to make all the *Occupiers* Parties; and if that was neceſſary to be done, the Plaintiff could never come at his Right, for there were great Numbers of them, and any ſingle one dying would put the Plaintiff to his Bill of Revivor, and cited the Caſe of *Biſcoe* and *The Undertakers of the Land Mark*, before Lord Keep. *Wright*, who ſaid, he would not oblige them to bring them all before the Court, ſince the Right might be determined by having a few, which the Court thought reaſonable; and *per Cur'*, Tho' we can (in the preſent Caſe) decree only againſt the *Land Owners* who are before the Court, yet that will affect the Land; the 40 *l. per Annum* ought to be *apportioned* among the Owners, and the original Decree may be carried againſt the *Occupiers*. And decreed a Commiſſion ſhould go to enquire into, and aſcertain the Value of the Lands, the Owners and Occupiers Names, and what Proportion of the 40 *l. per Annum* each Tenant ought to pay. *Ibid.*

10. In a Court of Equity it may be neceſſary to make one Perſon Defendant in the Cauſe, becauſe another is intitled to his Aſſiſtance. *Per* Lord Chan. *Hardwicke*, *Hil.* 1740. in the Caſe of *Lowther* and *Carlton*, *Barnard. Rep. in Chan.* 361.

11. Where a *real* Eſtate is in the Hands of a Truſtee, and the Truſtee conveys it over to another *who has no Notice of the Truſt*, if a Bill is brought by the *Ceſtui que Truſt*, the Truſtee muſt be made a Defendant. *Per* Lord Chan. *Hardwicke*, *Hil.* 1740. in the Caſe of *Harriſon* and *Pryſe*, *Barnard. Rep. in Chan.* 325.

12. *J. S.* who had been *Governor* in the *Eaſt-Indies*, in 1720 purchaſed 1000 *l. South-Sea* Stock, and accepted it in the *South-Sea* Books a ſhort Time after he had bought it. There was likewiſe another *J. S.* who at the ſame Time was Owner of ſome *South-Sea* Stock, and he was known by the Deſcription of *J. S.* of *R.* By

ſome Means *J. S.* of *R.* got the 1000 *l.* belonging to Governor *J. S.* placed to his Account in the *South-Sea* Books, under the Deſcription of 1000 *l. South-Sea* Stock belonging to *J. S.* of *R.* In 1725 *J. S.* of *R.* tranſferred this 1000 *l. South-Sea* Stock to *B.* his Broker, in order to ſell it for him, which *B.* did accordingly. Governor *J. S.* died, and his Widow became his Repreſentative, and then the Fraud being diſcovered, the Widow demanded Satisfaction of *J. S.* of *R.* which ſtruck him with a great deal of Confuſion, and he died the Day after. The Bill was brought by the Governor's Widow againſt the Adminiſtrator of *J. S.* of *R.* and likewiſe againſt the *South-Sea* Company, in order to have a Satisfaction for this Fraud. On the Hearing it was objected, That *B.* the Broker, ought to have been made a Party. But Lord Chan. *Hardwicke* was of Opinion, that there was no Occaſion for it. *Hil.* 1740. *Harriſon* and *Pryſe*, *Barnard. Rep. in Chan.* 324.

CAP. LXXV.

Pauper.

1. PLAINTIFF brought a Bill *in formâ pauperis*, and had a Decree to recover the Duty with Coſts; the *Maſter* taxes Coſts as uſual for Perſons *not* Paupers. Defendant moves, that he may tax only *pauper* Coſts, and ſaid it was unreaſonable the Plaintiff ſhould have more Coſts than he was out of Pocket, and that it would encourage *Paupers* to be vexatious to be aſſured when the Cauſe went againſt them they ſhould pay no Coſts, and if for them, ſhould recover not only the Thing in Demand but a good Sum of Money too, which they never expended; and cited the Caſe of *Harvey* and *Tuder*, 22 *Dec.* 9 *W.* 3. where the Plaintiff, who was a *Pauper*, having obtained a Decree with Coſts, and the *Maſter* having taxed Coſts as uſual, on Exceptions to the Report for that Cauſe, the *Chancellor* allowed only *pauper* Coſts. On the other Side it was ſaid, that the Council, Clerks and Solicitors, gave their Labour to the *Pauper* out of Charity, and not to his Adverſary, and therefore he ought to have Coſts as others, where the Decree is for Coſts *generally*; tho' the Court may if they find him vexatious, order *pauper* Coſts only, but that is by *ſpecial* Order, in Caſes of Contempt, inſufficient Anſwers, *&c.* but where Coſts are ſtated, of Courſe he is to have the ſame as thoſe that are *not Paupers*; and cited the Caſe of *Hautton* and *Hager*, where the Plaintiff, a *Pauper*, had a Decree with Coſts, and the *uſual* Coſts were taxed; and on Petition that it might be *pauper* Coſts only, the Lord *Somers* would not allow it. *Lord Keeper* ſaid, it was unreaſonable any one ſhould have more Coſts than out of Pocket; and ordered the Plaintiff and his Solicitor to make Oath before the *Maſter*; and what they ſwore they had paid or were to pay, was to be allowed, but no further. *Eaſt.* 1703. *Angell* and *Smith*, *MS. Rep.*

Prec. in Chan. 219. S. C. *in totidem verbis.*

CAP. LXXVI.

Pawn.

Upon the Appeal it was inſiſted, that theſe Exchequer Annuities, as well as Stocks, were uſually ſold at the *Exchange*; and that this was but a Pawn; and that tho' there was no expreſs Power to ſell in the Defeazance, yet by *J. S.*'s Letter it was plainly ſubmitted to, when he deſired the Sale might be deferred for a Week; that the Convenience of theſe Securities among Merchants, was, that after the Day of Payment paſt, they were taken to be Ready Money; and that it would be infinitely troubleſome and dilatory, if there could be no Sale of ſuch Annuities thus pledged without a Decree of Foreclоſure; that this would ſet aſide ſeveral Sales that had been made in the like Caſes, and occaſion Multiplicity of Suits; and that this Caſe was the ſtronger, it being that of an Adminiſtrator, who was obliged to diſpoſe of the Aſſets to pay the Teſtator's Debts and Legacies. *Ibid.* 262.

1. *J. S.* poſſeſſed of an Exchequer Annuity for ninety-nine Years, borrowed Money of *A.* and for ſecuring the ſame, abſolutely transferred the Annuity, but with a Defeazance, that if the Mortgage Money was paid at ſuch a Day, the Aſſignment ſhould be void. The Money was not paid at the Day; upon which *A.* frequently deſired the Money, and gave Notice that he would ſell, and appointed a Time for that Purpoſe, deſiring *J. S.* to be preſent to ſee that the Annuity was ſold at the full Value. *J. S.* by Letter deſired Forbearance for a Week, which was complied with, and then *A.* dying ſuddenly, *B. A.*'s Adminiſtrator, ſold the Annuity at the *Exchange* by a ſworn Broker for the full Value that thoſe Annuities then ſold for, and which was leſs than what the Money due to the Adminiſtrator (the Defendant) amounted unto. The Annuities afterwards roſe in Value, whereupon *J. S.* brought a Bill to redeem, or to compel *B.* to purchaſe another Annuity on the ſame Fund, and of the ſame yearly Value, to be transferred to him on Payment of Principal and Intereſt. And *per* Lord Chan. *Harcourt*, Here is no expreſs Power to ſell, and Annuities for ninety-nine Years are like Rent-charges out of Lands, and not like Stocks, which may be thought to be of *imaginary* Value, and there being no Decree for foreclоſing *J. S.* nor any Agreement in Writing that the Mortgagee ſhould ſell, his *Lordſhip* decreed the Defendant to procure an Annuity of the like Value and upon the ſame Fund to be conveyed to *J. S.* upon Payment of Principal and Intereſt, and the *Maſter* to compute what is due. But on Appeal to the Lords the Decree (for the Reaſons in the Margin) was reverſed *Nemine contradicente*. *Trin.* 1714. *Tucker* and *Wilſon*, 1 *Will. Rep.* 261.

CAP. LXXVII.

Payment.

1. *J. S.* ſettles an Eſtate on *himſelf in Tail*, and if he *die without Iſſue*, then to Truſtees for a Term, *In Truſt* to *raiſe any Sum not exceeding* 1500*l.* for Payment of his Debts which he ſhould owe at his Death. Afterwards *J. S.* borrows 1000*l.* of *A.* and by Deed *appoints his Truſtees to pay it out of the Truſt Eſtate*, and dies

ſans Iſſue, indebted to ſeveral other Perſons in more than 1500 *l.* Decreed the 1000 *l.* ſhould be *paid* in the firſt Place. *Eaſt.* 1692. *Seymour* and *Fotherby*, *Prec. in Chan.* 44.

2. *A.* was bound to *B.* in 1000 *l.* for Payment of 500 *l.* After *A.* and *C. as his Surety*, give a Bond to *B.* of 200 *l.* for Payment of 100 *l.* and Intereſt, as a farther Security for ſo much of the 500 *l.* Then *A.* aſſigns a Judgment to *B.* of 500 *l.* towards Satisfaction of the Debt, and *B.* receives ſeveral Sums on this Judgment; and *A.* by the Conſent of *B.* receives 30 *l.* alſo Part of the Money ſecured on this Judgment. This ſhall not go in *Exoneration* of any Part of the Money ſecured by the 200 *l.* Bond, as it would do if *B.* had actually received it and lent it to *A.* *Mich.* 1700. *Halford* and *Byron*, *Prec. in Chan.* 178.

3. If *J. S.* owes 40 *l.* by Bond for the Payment of 20 *l.* at ſuch a Day, and 20 *l.* by Contract to the ſame Perſon payable at the ſame Day, and at the Day *J. S.* pays 20 *l.* without telling for which it is, it ſhall be a *Payment* in Equity *upon the Bond*, becauſe *that is moſt penal upon him.* *Mich.* 13 *W.* 3. *Anon. Caſes in B. R. Temp. W.* 3. 559.

4. A Creditor who obtains Judgment *after the* Debtor *has made a Conveyance of his Eſtate for Payment of his Debts*, ſhall be paid only in Average. *Per Lord Keeper*, *Hil.* 1710. *Stephenſon* and *Hayward*, *Prec. in Chan.* 310.

Vide Tit. Creditor and Debtor, P.

CAP. LXXVIII.

Policy of Inſurance.

1. *J. S.* and others came to the Inſurance Office, and bought a Policy for the inſuring the Life of *A.* (upon whoſe Life they had no Concern or Intereſt depending) for a Year, and the Policy ran whether intereſt or not intereſted, and the *Premium* 5 *l. per Cent.* And they took this Way to draw in Subſcribers: They agreed with *M.* a known Merchant upon the *Exchange*, and a leading Man in ſuch Caſes, to ſubſcribe firſt, but in Caſe *A.* died within the Year, *M.* was to loſe nothing, but on the contrary was to ſhare what ſhould be gained from the other Subſcribers. Upon the Credit of *M.*'s ſubſcribing, ſeveral others (who had enquired of *M.* about *A.* who was his Neighbour) ſubſcribed likewiſe. *A.* died in four Months, and the Bill was to be relieved againſt this Policy; and this Matter being all confeſſed by Anſwer, the Policy was decreed to be delivered up, and the *Premium* to be paid, the Plaintiff deducting thereout his Coſts. *Hil.* 1690. *Wittingham* and *Thornborough*, *Prec. in Chan.* 20.

The Court ſaid, this Way of Inſuring was firſt ſet up for the Benefit of Trade; that when a Merchant happened to have a Loſs, he might not be undone by it, the Loſs by this Way being born by many; but if ſuch ill Practices were uſed, it would turn to the Ruin of Trade, inſtead of advancing it. *Ibid.*

2. *J. S.*

And his *Lord-ſhip* ſaid, the Inſured has not dealt fairly with the Inſurers; that he ought to have diſcloſed to them what Intelligence he had of the Ship's being in Danger, and which might induce him, at leaſt, to fear that it was loſt, tho' he had no certain Account of it; for if this had been diſcovered, it is impoſſible to think, that the Inſurers would have inſured the Ship at ſo ſmall a *Premium* as they have done, but either would not have inſured it at all, or would have inſiſted on a larger *Premium*; ſo that the Concealment of this Intelligence is a Fraud. *Ibid.*

2. *J. S.* having a doubtful Account of his Ship that was at Sea, (*viz.*) that a Ship deſcribed like his was taken, inſured her, without giving any Information to the Inſurers of what he had heard, either as to the Hazard or Circumſtances which might induce him to believe that his Ship was in great Danger, if not actually loſt. The *Inſurers* bring a Bill for an Injunction, and to be relieved. And Lord *Macclesfield* decreed the Policy to be delivered up with Coſts, but the *Premium* to be paid back, and allowed out of the Coſts. *Trin.* 1723. *De-Coſta* and *Scandret*, 2 *Will. Rep.* 170.

3. *A.* had inſured for *B.* and Plaintiffs his Aſſignees, on the Ship *E.* with the Cargo, and the *Entry* in the Company's Book of the Contract was in ſhort Items called a Label, which was thus: "At and from "Fort *St. George* to *London*, loſt or not loſt." And the Policy was ſoon after made out and taken in the following Words: "*That the* "*Adventure was to commence from the Ship's departing from Fort* St. "George *to* London." *Before the Inſurance was made, the Ship was loſt in* Bengal *River, whither ſhe had been ſent from Fort* St. George *to refit.* The Bill was brought to *have the Inſurance Money paid*, being 500 *l.* as a Loſs, *&c.* and *founded the Equity that the Policy was not made agreeable to the Label, according to which the Riſque is to commence from the Ship's coming firſt to Fort* St. George, *and the going to* Bengal *to refit being a Thing of Neceſſity for performing the Voyage, was no Deviation*, and the *Loſs being during that Time, was within the Intent of the Contract for the Inſuring.* Lord Chan. *Harwicke* ſaid, this was not proper to determine here. Firſt Queſtion is as to the Agreement. Second, as to the Breach; and doubted as to the Agreement. The Memorandum is not a printed Form as to the material Points, and the Policy muſt be governed by that, if not varied. The Words in the Memorandum or Label (*at Fort* St. George) include the Stay of the Ship there, and the Policy follows the Words, but adds this; *viz. The Beginning of the Adventure to be from the Ship's departing from Fort* St. George *for* London, which excludes the Riſque whilſt the Ship ſtayed there; and this ſeems an Inconſiſtence in the Policy firſt to deſcribe the Voyage at and from, *&c.* and then to exclude the Riſque at, *&c.* This ſeems a Miſtake in writing the Policy, as is to be rectified as in the Caſe of *Articles* and a *Settlement.* And decreed the Words to be added in the Policy, *For the Adventure to commence at and from Fort* St. George. *Dec.* 6, 1739. *Motteux* and *London Aſſurance*, *Vin. Abr.* Tit. *Bottomry-Bonds*, (A) *Ca.* 10. *P.* 281.

Vide Tit. **Bonds**, &c. *P.*

CAP. LXXIX.

Poſthumous Child.

(A) How favoured in Equity.

1. *A.* Conveys a Term for Years to *J. S.* Upon Truſt to *raiſe* 1500 l. *for ſuch Child or Children of* A. *as ſhould be living at his Death.* *A.* dies, leaving no Child, his Wife *enſient* with a Daughter, which was afterwards born. And Lord Keep. *Somers* declared that this *poſthumous* Daughter is a *Child living at the Death of* A. within the Meaning of the Truſt, and that a Direction of a Truſt is not to be ſtrictly conſtrued as a Limitation of an Eſtate at Law; and one *Lutterel*'s Caſe was cited in Lord *Bridgeman*'s Time, where a Bill was exhibited on the Behalf of an Infant *in Ventre ſa mere* to ſtay Waſte, and an Injunction granted upon it (*a*). *Mich.* 1692. *Hale* and *Hale, Prec. in Chan.* 50.

(*a*) *Vide* 2 *Vern.* 711.

2. *A.* gives a Bond to pay 900 *l.* to his Daughter in Caſe he ſhould have no Son living at his Death, and he died, his Wife being *enſient* of a Son. Decreed that the Daughter ſhould not have this 900 *l.* for altho' there was no Son living at *A.*'s Deceaſe, ſo that it is not recoverable at Law, yet it cannot be preſumed to be his Intention that if a Son was born after his Deceaſe, the Daughter ſhould run away with the Eſtate; and in this Caſe it appeared that the Mother was quick at the Death of the Father. And by the Civil Law *Poſthumous pro nato habetur.* *Mich.* 1698. *Gibſon* and *Gibſon*, 2 *Freem. Rep.* 223.

3. A *poſthumous* Child ſhall be intitled within the Stat. 1 *Jac.* 2. *c.* 17. *ſect.* 7. to a Share in a Brother's or Siſter's perſonal Eſtate, equally as if ſuch Child had been born in the Life-time of the Brother or Siſter. *Per Lord Chancellor, Hil.* 1740. *Wallis* and *Hodſon*, *Barnard. Rep. in Chan.* 272.

4. A *poſthumous* Child ſhall (upon the Statute of Diſtributions) claim the Benefit of a Share in the perſonal Eſtate of a Father equally with another Child. This is agreeable to that Statute, and to that Debt of Nature which Parents owe their Children, nor will any Inconveniencies ariſe from this, becauſe the Event of there being ſuch Child muſt happen in a reaſonable Time. *Ibid.* 273.

5. An Infant *in Ventre ſa mere* is capable of taking within the Statute of *Jac.* 2. equally with other Perſons. *Ibid.* 274.

CAP. LXXX.

Portions.

(A) Portions, by what Means and at what Times to be raiſed and paid, &c.——And in what Caſes a Portion ſhall carry Intereſt, and from what Time.——And here of Maintenance,——Satisfaction, &c.

(B) Of veſted Portions.

(C) Portions lapſed or merged, et cont'.

(D) Portions and Proviſions for Children favoured in Equity.

(A) Portions, by what Means and at what Times to be raiſed and paid, &c.——And in what Caſes a Portion ſhall carry Intereſt, and from what Time.——And here of Maintenance,——Satisfaction, &c.

1. PORTION charged by Virtue of a Power [was decreed] to be raiſed by Sale or Mortgage, and not by Perception of Rents. *Feb.* 28, 1701 or 1707. *Kelly* and *Bellew*, *Vin. Abr.* Tit. *Portions*, (A) *Ca.* 1. *P.* 432.

2. Sir *W. D.* had an Eſtate in *S.* by his firſt Lady, which was to her in Tail; they levy a Fine, and declare the Uſes to them and the Iſſue of their Bodies, Remainder to Sir *W.* and his Heirs; they have a Daughter *Mary*, and the Feme dies. On this Marriage there were Articles that Sir *W.* ſhould leave his Daughter 2500 *l.* if the Truſtees demanded it within one Year after his Death, *&c.* Sir *J.* the Father of Sir *W.* was then living. Sir *W.* marries a ſecond Wife, and by her had ſeveral Daughters. By Deed executed in his Life-time he gives the Eſtate in *S.* to *Mary* and her Heirs; and by Deed alſo charges his Lands in *D.* which he had purchaſed, with 5000 *l.* apiece to the three Daughters, and dies. *Mary* demands the 2500 *l.* and Intereſt. Lord Keep. *Harcourt* decreed *Mary* the 2500 *l.* with Intereſt from her Father's Death at 5 *l. per Cent.* That the Eſtate in *S.* could not be an Equivalent, becauſe it moved from her Mother, and was the Condition of the Agreement for the 2500 *l.* That the Reverſion of the Lands in *D.* could not be ſo, becauſe Sir *W.*'s Father was then living, and there was no Reſpect had to theſe Reverſions, neither were they then in Being, and to make it an Equivalent, it ought to be in Being and in View at the Time of giving the Equivalent. *Mich.* 9 *Ann. Vin. Abr.* Tit. *Condition*, (E. d.) *Ca.* 38. *P.* 292.

3. In a Marriage Settlement *the Term raiſed for Daughters Portions at their Ages of ſeventeen*, provided, *that if the ſaid* A. *ſhould have Iſſue Male upon the Body of the ſaid* M. *that ſhould attain the Age of*

twenty-one,

twenty-one, or ſhould marry, or *if the ſaid* A. *ſhould have no Daughters*, or *if the Perſon inheritable ſhould pay off the Portions intended to be raiſed, the Term ſhall ceaſe.* A. *had a Son who attained twenty-one.* Decreed that the Term ceaſe, and the Daughters loſt their Portions; tho' it was urged, that the Meaning muſt be, that if he had a Son he ſhould not pay 'till he arrived at twenty-one Years, which was enough in Favour of the Heir. *Feb.* 12, 1706. *Colt* and *Arnold*, *Vin. Abr.* Tit. *Charge*, (G) *Ca.* 18.

4. *J. S.* ſettled his Eſtate upon *himſelf for Life*, Remainder *to his firſt*, &c. *Son in Tail Male*, with a Proviſo, that if *B.* his Son ſhould die without Iſſue Male, and leave a Daughter, the Truſtees ſhould raiſe out of Part of the Premiſſes 5000 *l.* to be paid to ſuch Daughter within a Year after her Marriage or at her Age of twenty-one, which ſhould firſt happen. *B.* on his Marriage ſettled all the ſaid Eſtate (including the Premiſſes charged with the 5000 *l.*) on *himſelf for Life*, Remainder *to his firſt*, &c. *Son in Tail Male*, Remainder *to Truſtees for two hundred Years*, In Truſt to raiſe 8000 *l.* for Daughters Portions (if no Iſſue Male), payable at eighteen, if then married, or when married, after. *B.* having no Iſſue Male, deviſed all his Lands to *C.* in Tail Male, chargeable with his Legacies, and deviſed to *E.* his Daughter *for her Portion*, 8000 *l. viz.* 4000 *l.* to be paid at eighteen, and 4000 *l.* within a Year after Marriage, or in all Events at twenty-one, and deviſed to her 150 *l. per Annum* until eighteen, and afterwards 200 *l. per Annum* for her Life. *E.* the Daughter brought her Bill for the Recovery of all theſe Sums of 5000 *l.* 8000 *l.* and 8000 *l.* inſiſting, that none of them being given in Satisfaction of the other, and it being the Caſe of an Heir at Law, and theſe Sums payable at different Times, ſome leſs beneficial than others, therefore all theſe Portions, or at leaſt the 5000 *l.* given by *J. S.* and the 8000 *l.* given by *B.* the Father, ſhould be paid her. But Lord Chan. *Harcourt* decreed that ſhe ſhould only have but one 8000 *l.* but that ſhe may when of Age elect which of the Portions ſhe pleaſes. *Trin.* 1711. *Copley, an Infant*, and *Copley*, 1 *Will. Rep.* 147.

5. *J. S.* was Tenant for Life, Remainder to ſuch Woman as *J. S.* ſhould marry, for her Life, Remainder to the firſt, *&c.* Sons of *J. S.* in Tail Male, Remainder to *A.* in Tail Male, Remainder to *J. S.* in Fee, with a Power to *J. S.* by Deed or Will to charge the Lands with 2000 *l.* for Portions for younger Children *living at his Death.* *J. S.* marries, and has Iſſue two Daughters only, *M.* and *N.* *N.* was born *after his Death.* *J. S.* by Will *charges the Lands with* 2000 l. *to his Daughter* M. *payable at twenty-one* or *Marriage*; but *if the Child with which his Wife was then* enſient *ſhould prove a Daughter, then he directs that the* 2000 l. *ſhould be equally divided betwixt them.* *J. S.* dies, and the two Daughters *M.* and *N.* being of very tender Years, brought their Bill for the raiſing of this 2000 *l.* out of the reverſionary Eſtate, and to have Intereſt in the mean Time for their Maintenance. With Regard to that Part of the Bill which prays to charge the *Remainder* only with this 2000 *l.* Lord Chan. *Harcourt* held, that the Power and the Charge made purſuant thereto did affect the Wife's Eſtate for Life, as well as the Remainder; and that it was like the 2000 *l.* was to go to the *younger* Children that *J. S.* ſhould have *living at his Death.* But *per Cur'*, The eldeſt Daughter, tho' firſt born, when there is a Son, has been often ruled to be a *younger* Child (*a*). Every one but the Heir is a *younger* Child in Equity, and the Proviſion which ſuch Daughter will have is but as a *younger* Child's, in regard the Son goes away with the Land as Heir; ſo here, the Eſtate by the Settlement goes all to the Remainder Man, who is *Hæres factus*, and neither of the two Daughters is Heir; wherefore the *eldeſt* Daughter having no more

In this Caſe it was objected, That the *elder* Daughter is not intitled to any Part of this 2000 *l.* becauſe it was only to go to the *younger* Children, and the *younger* Daughter cannot claim any Part of it, becauſe ſhe was *not living at the Time of* J. S.'s *Death*; and by the Words of the Settlement

(*a*) *Vide* the Caſe of *Butler* and *Duncombe*, 1 *Will. Rep.* 448.

more than the *younger*, is (as to this Proviſion) a *younger* Child, and conſequently capable of taking it. like a Power of leaſing, which over-reaches all the Eſtates; for which Reaſon it is uſual to inſert a Proviſo to ſuch Power of charging, that it ſhall not prejudice the Jointure, or other precedent Eſtates. *Hil.* 1713. *Becle* and *Becle*, 1 *Will. Rep.* 244. *Ibid.* His *Lordſhip* ſaid, it would be very hard in a Court of Equity, that a Child, becauſe it happened not to be born at ſuch a Time, muſt, therefore, be unprovided for; but as the Law in many Reſpects regards an Infant *in Ventre ſa mere*, ſo as to allow ſuch Child to be (*a*) vouched; alſo, as the Mother may be guilty of the Murder (*b*) of a Child *in Ventre ſa mere*, if ſhe takes Poiſon with an Intent to poiſon it, and the Child is born alive, and afterwards dies of the Poiſon, ſo there is more Reaſon that Equity ſhould conſider ſuch Child, in order to its being *provided for*. And therefore this *poſthumous* Child may be well looked upon in Equity to be (*c*) living at her Father's Death *in Ventre ſa mere*. *Ibid.* 245, 246. ——*Prec. in Chan.* 405. S. C. (*a*) 1 *Inſt.* 390 (*b*) 3 *Inſt.* 50, 51. (*c*) *Vide Northey* and *Strange*, 1 *Will. Rep.* 340. and *Burdet* and *Hopegood*, *ibid.* 486.

Gilb. Rep. in Eq. 31. S. C.

6. By a Marriage Settlement, after the common Limitations to the firſt, *&c.* Sons, a Term was limited to Truſtees for three hundred Years, In Truſt upon Failure of Iſſue Male to raiſe with all convenient Speed 3000*l.* for Daughters Portions, payable at eighteen or Marriage, which ſhould firſt happen after the Death of the Father *or* Mother; they have Iſſue two Daughters only, and no Son, and the Father by Will taking Notice of this Proviſion for his Daughters, deviſed to them 500*l.* apiece more, to be paid at the ſame Time as their original Portions; but in Caſe either of them died before eighteen, then the additional Portion of 500*l.* apiece to both was to ceaſe; but the Eſtate charged with theſe Portions he deviſed to *J. S.* The Daughters were about ſixteen at the Death of their Father and Mother. The Plaintiff intermarries with one of the Daughters, and ſhe being now about the Age of twenty, the Bill was brought againſt *J. S.* the Deviſee, *&c.* and againſt the Truſtee of the Term, to have the Portion raiſed, and Intereſt from the Death of the Father. And Lord Chan. *Harcourt* was of Opinion, that the Daughters ought to have either Intereſt or Maintenance from their Father's Death, (he being the Survivor), and thought it much the ſame whether it was called Intereſt or Maintenance; that the Father never intended they ſhould ſtarve 'till their Portions became payable, and therefore referred it to a *Maſter* to ſee what Maintenance was reaſonable from the Time of their Father's Death, and decreed the original Portions to be raiſed by Sale, *&c.* with Intereſt at 5*l. per Cent.* from their reſpective Ages of eighteen, unleſs *J. S.* ſhould by Payment prevent ſuch Sale; and his *Lordſhip* would allow but 5*l. per Cent.* being charged on Land, tho' it was preſſed to have 6*l. per Cent.* *Eaſt.* 1713. *Greenhill* and *Waldoe*, *Prec. in Chan.* 367.

7. In a Marriage Settlement a Power was lodged in Truſtees to raiſe 3000*l.* for a Daughter to be paid her at twenty-one or Day of Marriage, which ſhould firſt happen, when *J. S.* and his Wife ſhould die without Iſſue Male; and in the mean Time 100*l. per Annum* to be paid to her for Maintenance. *Reſolved* by Lord Chan. *Cowper*, upon the Authority of the Duke of *Southampton*'s Caſe, that the Words *when* J. S. *and his Wife ſhould die without Iſſue Male*, amounted to a Condition precedent, and that the Time of raiſing the Portion did not commence when one of them ſhould be dead without Iſſue Male, and ſo the other be Tenant in Tail *after Poſſibility of Iſſue extinct*, but when both of them ſhould be dead without Iſſue Male. Reſolved that the *mean Time* in which the 100*l. per Annum* was payable for a Maintenance, muſt neceſſarily relate to the intermediate Time between the raiſing the Money and her attaining the Age of twenty-one or Day of Marriage. *Eaſt.* 1 *Geo.* 1. *Champney* and *Champney*, *Lucas's Rep.* 314, 315.

8. *J. S.*

8. *J. S.* ſeiſed in Fee of a real Eſtate, upon his Marriage ſettled the ſame *upon himſelf for Life*, Remainder *to his Wife for Life*, Remainder *to Truſtees for ninety-nine Years*, Remainder *to his firſt*, &c. *Son*, Remainder *to the firſt and every other Son of* B. *his Brother in Tail Male ſucceſſively*. The Truſt of the Term of ninety-nine Years was declared to be, that if *J. S.* ſhould die without Iſſue Male of the ſaid Marriage, and ſhould leave one or more Daughters, then the Truſtees ſhould *out of the Rents and Profits* raiſe 8000 *l.* for the Daughters of that Marriage, to be *paid them as ſoon as conveniently could be*, without limiting any expreſs Time when the Portions were payable; but then a farther Truſt of the Term was declared, that if there ſhould be a Son and a Daughter or Daughters by the Marriage, in ſuch Caſe the Truſtees ſhould *as ſoon as poſſible* raiſe 1000 *l.* apiece for the Daughters, *payable at twenty-one or Marriage*. This Term of ninety-nine Years was not made without Impeachment of Waſte. *J. S.* and his Wife both died, leaving three Daughters (the Plaintiffs) all married, but no Son, and the Remainder in Tail became veſted in Defendant, the Nephew of *J. S.* On a Bill brought by the Daughters, the Queſtions were, Firſt, Whether this 8000 *l.* ſhould be raiſed otherwiſe than out of the yearly Rents and Profits, or by Sale or Mortgage? And Secondly, Whether it ſhould carry Intereſt, and from what Time? And it was inſiſted for the Daughters, that the Portions being payable preſently on *J. S.*'s Death, (the Daughters being then twenty-one) they conſequently would carry Intereſt, and the rather ſince they were to ariſe out of Land which yielded yearly Rents and Profits. And Lord Chan. *Parker farther* obſerved, that by the Truſt if there were a Son and a Daughter, or Daughters by the Marriage, the Son ſhould pay Intereſt to his Siſters for their Portions from their Age of twenty-one or Marriage, and it could not be imagined that *J. S.* would be kinder to his Nephew in excuſing him from paying Intereſt, than to his own Son, if he had one, who was bound to pay Intereſt; wherefore it was decreed that the Portions ſhould be raiſed by Sale or Mortgage, as ſhould be agreed by the *Maſter* and the Parties, with Intereſt from *J. S.*'s Death, and Coſts. *Eaſt.* 1718. *Trafford* and *Aſhton*, 1 *Will. Rep.* 415.

In this Caſe it was ſaid for the Daughters, and *ſo ruled per Cur'*, that they *were Purchaſers of the Portions by the Mother's Marriage and the Marriage Portion*, but the Limitation to the Defendant (who was the Grantor's Brother's Son) was *voluntary*. That the Meaning of the Word (*Portion*) was a Proviſion for Marriage; but the *leiſurely* Way of raiſing Money by yearly Rents would not anſwer ſuch End. That the Words [*Profits of Lands*] eſpecially when to pay Debts or Portions, *implied* any Profits that the Land would yield, either by ſelling or mortgaging, and that this had been the conſtant Conſtruction in the like Caſes. And 2 *Chan. Caſes* 205. *Lingen* and *Holey*, and 1 *Chan. Caſes* 176. *(Vide Prec. in Chan.* 586*)*. and 2 *Vern.* 420. *Warberton* and *Warberton*, were cited. And it was inſiſted, that here was a certain Time appointed for Payment of the Portions, and that *implied*, tho' *not expreſſed*, viz. *it was ſaid that they ſhould be paid as ſoon as conveniently might be.* Now that this was *preſently*, for the Daughters being twenty one at *J. S.*'s Death and marriageable, it was *then* convenient they ſhould have the Portions. That tho' the Words [*yearly* (*a*) *Profits*] might make a Difference, yet here that was not material; the Word [*yearly*] being omitted. *Ibid.* 418.——*Lucas's Rep.* 401. *Eaſt.* 4 *Geo.* 1. *Aſhton* and ——; *in Chancery*, S. C. here was a Time limited for Payment of theſe Portions, *viz.* upon the Death of the Father *without* Iſſue Male (which was the Caſe), for then ſays the Deed the Portions ſhall be raiſed *as ſoon as conveniently they may*, which is in Judgment of Law *preſently*, from which Time the Portions are to carry Intereſt. *Per* the Opinion of *Lord Chancellor*, who decreed *accord'*. *Ibid.* 402.——*Trafford* and *Aſhton*, 1 *Vol. Abr. Eq.* 213. *Ca.* 8. is not S. C. nor P.

(*a*) 1 *Vern.* 104.

9. *J. S.* ſeiſed in Fee of ſome Lands *in Poſſeſſion*, and of others *in Reverſion* after the Death of *A.* and having a Son and a Daughter, deviſes the Lands in Poſſeſſion to his Wife for Life, and after her Death, and the Death of the Leſſee for Life of the other Lands, he deviſes theſe reſpective Premiſſes to his Son and his Heirs, upon Condition, " *That the Son ſhould within a Year after the Death of* B. " (after whoſe Life it was ſaid, *but not proved*, that the Teſtator had " other

Prec. in Chan. 500. S. C. ſays, his *Honour* decreed the Portion to be raiſed by Sale of the Reverſions to be ſold, and the 1000 *l.* to be paid to the Plaintiff, with Intereſt from twelve Months after the Death of *B.* and ſaid, that the Clauſe which gave a Power of Entry was only to be intended in Caſe the Eſtates for Life fell in the mean Time, ſo that the Daughter might thereby enter,

" other Lands in Reverſion) *pay* 1000 l. *to* J. S.'*s Daughter, with a* " *Proviſo, that upon Nonpayment the Daughter might enter.*" *B.* dies, and a Year after her Death the Daughter marrying, brings a Bill for Sale of this Reverſion, in order to raiſe the 1000 *l.* Portion, and Intereſt from the End of the Year of *B.*'s Death. The *Maſter of the Rolls* decreed the Portion to be raiſed by Sale, unleſs the Son ſhould pray it might be done by Mortgage (*a*). *Mich.* 1718. *Bacon* and *Clerk*, 1 *Will. Rep.* 478.

enter, but not to delay the Payment of the Portion 'till that Time, but ſays nothing of the Decree being affirmed on Appeal to *Lord Chancellor*. *Ibid.* 502.

(*a*) This Decree was affirmed by Lord Chan. *Parker*, *ibid.* 481.

10. Upon the Marriage of *A.* eldeſt Son of *B.* with *C.* (which *C.* had 2000 *l.* a Year in Land, and 20,000 *l.* in Money, and *A.* being an Infant) the Settlement was made by a private Act of Parliament (9 *Ann.*) whereby (*int' al'*) the Manor of *Dale* (being together with the caſual Profits about 1000 *l. per Annum*) was ſettled upon ſaid *B.* for Life, Remainder to ſaid *A.* for Life, Remainder to Truſtees for one thouſand Years, In Truſt for raiſing 20,000 *l.* for a Daughter of this Marriage, if but one, payable at twenty-one or Marriage; and in the mean Time 300 *l. per Annum* for her Maintenance until twelve Years of Age, and after 4000 *l. per Annum* until the Portion ſhould become due; the Maintenance and Portion to be raiſed by the Truſtees either by the *Rents* and *Profits*, or by *Sale* or *Mortgage*; the Maintenance to be paid Quarterly, the *firſt Payment to be made at ſuch of the four moſt uſual Feaſts as ſhould next happen after the Deceaſe of* A. *the Huſband.* *A.* dies, leaving Iſſue of this Marriage a Son and a Daughter, and the Daughter brings a Bill for the 300 *l. per Annum* Maintenance, and to have it raiſed by *Sale* or *Mortgage*, in regard it could not be raiſed by the *Profits*, *B.* the Grandfather being alive, and having an Eſtate for Life in the Premiſſes. Lord Chan. *Parker* ſaid, he would conſider the Infant's Good, and take Care that her Demand of Maintenance ſhould not defeat her other Demand of her Portion, it being one and the ſame Fund that is to provide both. That it is a hard Caſe to mortgage a Reverſion, to heap Intereſt upon Intereſt, and ſubject the Eſtate to a Foreclоſure, for that it might come to ſuch a Sum as that many Perſons may be under a Neceſſity of calling it their Money; and that tho' he did admit that he muſt take the Act as he found it, *viz.* the firſt Quarter Day after the Death of *A.* the Maintenance Money is to be raiſed by *Profits*, *Mortgage* or *Sale*, yet that this Court (which is the Guardian of the Infant) muſt conſider the Good of the Infant, and that it might be for her plain Benefit, and a Kindneſs to her, that her Maintenance ſhould not be raiſed; wherefore he decreed the *Maſter* to ſee what was the Value of the Eſtate charged with the Maintenance and Portion, together with the Incumbrances that were upon it, and his *Lordſhip* ſaid, that this would influence his Judgment. *Mich.* 1718. *Pierpoint* and *Lord Cheney*, 1 *Will. Rep.* 488 to 494.

And his *Lordſhip* ſaid, that as Lord *Cowper* in the Caſe of *Corbet* and *Maidwell* had declared that he would not go beyond the eſtabliſhed Precedents in Caſes of this Nature, as taking it that the Court had already gone too far, ſo *he* ſhould obſerve the ſame Rule, not having been able to find out one ſingle Precedent for *mortgaging a Reverſion for Maintenance*, and that it was leſs reaſonable in the preſent Caſe, becauſe *B.* the Grandfather had offered in Court to maintain both the Son and Daughter. *Ibid.* 494. *Prec. in Chan.* 503. *Lady Pierpoint* and *Lord Cheney*, S C. ſays, *Lord Chancellor* ſaid he was of the ſame Opinion of thoſe who had ſat in this Court before him, that it was hard to extend the Conſtruction on theſe Settlements to the Sale or Mortgage of ſuch a reverſionary Intereſt, and that in Settlements drawn with Skill, there was always a Reſtriction that it ſhould not be done 'till the Term commenced in Poſſeſſion; but that ſince there was no Reſtriction in the preſent Caſe, and yet that this was only for raiſing the Maintenance, and not the Portion itſelf, which might by ſubjecting the Term to an immediate Mortgage or Sale, be in Danger of being very much leſſened or ſunk, his *Lordſhip* ſent it to a *Maſter* to enquire and ſtate the Value of the Eſtate, and then to refer to the Court for farther Directions. *Ibid.* 504. ——*Note*; In the Report of this Caſe in *Prec. in Chan.* it is ſtated as if by the Words of the Act of Parliament, this *Maintenance Money* was to be raiſed out of the *Rents and Profits of the Term*, and that the Daughter was for having *that extended to a Sale* or *Mortgage* by an equitable Conſtruction only; whereas this is a Miſtake, and the Words [*Sale* or *Mortgage*] being expreſsly mentioned in the Act, and the Reader will obſerve that good Part of the Argument in Mr. *P. Williams*'s Report of the Caſe is founded thereon. 1 *Will. Rep.* 488 by way of Note.

11. A Term of forty Years was limited for raiſing 2000 *l.* either by Profits or Sale of the Term. The Truſtee takes Poſſeſſion, and it ſeems he made no Intereſt of the Profits. Lord *Somers* decreed that no Intereſt ſhould be paid for the 2000 *l.* becauſe the Truſtee was admitted into Poſſeſſion. But this Decree was reverſed, becauſe the Truſtee had Power to raiſe it immediately, and the Eſtate was ſufficient. 26 *Jan.* 1720. *Lord Roſeberry* and *Taylor*, *Vin. Abr.* Tit. *Portions*, (D. 2.) *Ca.* 1.

12. Where Portions are limited by Deed to be raiſed as ſoon as conveniently they may be, they are due in Judgment of Law preſently, and carry Intereſt from that Time. *Eaſt.* 4 *Geo.* 1. *in Caſu Aſhton* and ———, *Lucas's Rep.* 402.

Vide Ca. 8. *P.* 641.

13. *J. S.* on his Marriage with *M.* in Conſideration thereof, and of 5000 *l.* Portion, ſettled Lands of 587 *l. per Annum* to the Uſe of himſelf for Life, Remainder as to Part of the Premiſſes (amounting to 500 *l. per Annum*) to *M.* for her Life, as a Jointure, Remainder to the firſt, *&c.* Son of that Marriage in Tail Male, Remainder to Truſtees for five hundred Years *ſans Waſte*, In Truſt to raiſe Portions for Daughters, the ſame to be raiſed by *Sale or Mortgage* or by *Rents and Profits*, *viz.* 5000 *l.* if but one Daughter, 6000 *l.* if more than one, and to be paid to the Daughters at twenty-one or Marriage, if after fourteen or under, if with the Conſent of the Mother, and two other Perſons, if then living. *J. S.* had Iſſue four Daughters and no Son by *M.* and on her Death married again. The eldeſt Daughter after fourteen married the Plaintiff, who brought this Bill for the raiſing of his Wife's 1500 *l.* (being a fourth Part of the 6000 *l.*) in the Life-time of the Father. On hearing the Cauſe, the Scantineſs of the Eſtate being inſiſted upon, and that it would be greatly detrimental to ſell or mortgage the Reverſion in the Life-time of the Father, eſpecially as the *Daughters had other Proviſions left them by their Grandmother*, and that this Matter of Truſt was entirely in the Diſcretion of the Court; Lord Chan. *Macclesfield* referred it to a *Maſter* to ſtate the Value of the Eſtates compriſed in the Settlement; and afterwards on the Cauſe coming on, his *Lordſhip* decreed that the Truſtees ſhould ſell or mortgage a ſufficient Part of this Term (ſubject to a Power reſerved to the Father by the Settlement of making a Jointure of 150 *l.* on a ſecond Wife) for raiſing a Portion of 1500 *l.* and Intereſt from the Marriage, ſaying, that tho' this was a Matter of Truſt, yet ſince all the Contingencies had happened, and nothing remained to ſuſpend the Execution of ſuch Truſt of the Term, and it did *not* evidently appear but that the Parties intended the Portions ſhould be raiſed out of the reverſionary Term, therefore his *Lordſhip* did not look upon it to be within the Diſcretion of the Court any more than in the Option of the Truſtees, whether they would raiſe the Money or not, but ſaid it was a Thing not to be encouraged. That as to the other Proviſions left by the Grandmother, his *Lordſhip* did not think that material; for if they had a Right to their Portions by the Settlement, they ought not to loſe their Right by another Relation's Kindneſs in leaving them a farther Proviſion. *Trin.* 1721. *Sandys* and *Sandys*, 1 *Will. Rep.* 707.

His *Lordſhip* obſerved that the *ſelling* or *mortgaging* Reverſions ſeems a great Hardſhip, being in Effect to ruin a Family for the raiſing of Daughters Portions; and therefore his *Lordſhip* ſaid, he would not go one Step farther than Precedents ſhould force him. That this Method cannot fail of tempting Daughters to Diſobedience towards their Fathers, and encouraging improvident Marriages. That had the Portion been intended to have been raiſed by Sale of the reverſionary Term in the Father's Life-time, it ſhould (and in his *Lordſhip*'s Opinion would) have been ſo expreſſed. By the ſame Reaſon that a reverſionary Term may be ſold for the raiſing

Daughters Portions, ſo may it be for the raiſing Portions for younger Children by Virtue of the common Clauſe in Marriage Settlements to that Purpoſe, which would be ruining an Heir at Law for the Sake of younger Children. That the Intention ſeems to have been againſt any Sale or Mortgage, until ſuch Time as the Truſtees could take the Profits; the Word (*Profits*) ſtanding in Oppoſition to the Words (*Sale or Mortgage*) and the Caſe of the Mother's leaving Daughters which ſhould claim their Portions againſt their Father, does not appear to have been within the View of thoſe who made the Settlement. But at length (*animo reluctante*) his *Lordſhip* decreed *ut ſupra*. *Ibid.* 709. ——— 2 *Will. Rep.* 486. S. C. cited *per* his *Honour*, *Mich.* 1728. in the Caſe of *Brome* and *Berkley*, that tho' nothing appeared in the Truſt of the Term, ſhewing it to be the Intent of the Parties that the Portion ſhould *not* be raiſed out of the reverſionary Term, yet the Portion was decreed (tho' *reluctante Curia*) to be raiſed in the Father's Life-time.

14. If

14. If there be one or more Sons and but one Daughter, ſuch Daughter to have 500 *l.* and to every other younger Daughter 200 *l.* apiece in a Deed of Settlement; there being three Daughters, the eldeſt ſhall have but 200 *l.* the Eſtate being ſmall, and not able to bear a greater Charge. *April* 26, 1721. *Chamberlain* and *White*, *Vin. Abr.* Tit. *Portions*, *Ca.* 7.

15. The Truſt of a Term was (in Default of Iſſue) for raiſing Portions for Daughters by Rents and Profits, or by Sale or Mortgage, and payable at eighteen or Marriage, provided, that no Maintenance ſhould commence until the Death of the Father; but the ſame to begin at the firſt Quarter Day after; and provided, that if all the Daughters die before eighteen or Marriage, then the five hundred Years Term to be void, with a Power to the Father, with Conſent of Truſtees, to revoke all the Uſes. The Mother died without a Son, and leaving only one Daughter, who married *A.* without her Father's Conſent. *A.* and his Wife brought a Bill for the Recovery of her Portion of 3000 *l.* praying a Sale or Mortgage of the *reverſionary* Term in her Father's Life-time for raiſing the ſame. Lord Chan. *Macclesfield* thought that the Portions remained yet ſubject to a Contingency, and therefore not to be raiſed until this Contingency is out of the Caſe, which cannot be during the Life of the Father. *Hil.* 1722. *Rereſby* and *Newland*, 2 *Will. Rep.* 93. Decree affirmed *in Dom. Proc'*, *ibid.* 102.

16. *J. S.* being ſeiſed in Fee of Lands purſuant to Marriage Articles, ſettled the ſame on *himſelf for Life*, Remainder as to Part to his *Wife for Life*, for her Jointure, Remainder as to the Whole to his *firſt*, &c. *Sons of the Marriage in Tail Male*, Remainder to Truſtees for one hundred and twenty Years for *raiſing Portions for Daughters of that Marriage*, *on Failure of Iſſue Male*, Remainder *to himſelf in Fee*. The Truſt of the Term was, that the Truſtees *ſhould raiſe and pay out of the Rents and Profits of the Premiſſes*, *as well by Sale for one*, *two or three Lives*, *or for any Number of Years determinable thereon*, *or for twenty-one Years abſolutely* at the old Rent, 1500 *l.* to be paid to the only Daughter of the Marriage, if but one, and to be divided amongſt them, if more than one. There was but one Child of the Marriage, a Daughter, named *J.* who married *H. G.* the Defendant *G.*'s Father, but the Portion was not paid on the Marriage, nor raiſed 'till after the Father's Death (*a*). *J. S.* having reſerved to himſelf the Reverſion in Fee, ſettled the ſame expectant on his own Death, without Iſſue Male, and ſubject to the ſaid Term to Truſtees for ten Years, Remainder to *A.* his Nephew *for Life*, Remainder *to his firſt*, &c. *Son in Tail Male*, Remainder to *B.* Son of his ſaid Daughter *J. for Life*, Remainder *to his firſt*, &c. *Son in Tail Male*, Remainder *to himſelf in Fee*. The Truſt of the ten Years Term was, that in Caſe *J.* and her Huſband ſhould releaſe 1500 *l.* Portion ſecured by the firſt Term, then the Truſtees of the ten Years Term ſhould raiſe 1900 *l. viz.* 1500 *l.* of it to be laid out in Land for the Benefit of *J.* and her Huſband, and 400 *l.* to be paid to the Huſband of *J.* himſelf. *J. S.* died *without Iſſue Male*, leaving *B.* his Grandſon his Executor. *J.*'s Portion not being yet paid, *A.* the Nephew entered by Virtue of his Eſtate for Life, given by the voluntary Settlement ſubject to the one hundred and twenty Years Term for Daughters Portions, but for four Years afterwards *J.*'s Portion was unpaid. *J.* having adminiſtered to the *ſurviving* Truſtee of the one hundred and twenty Years Term, ſhe and her Huſband and the

Vin. Abr. Tit. *Portions*, (A) in a Note to *Ca.* 3. S. C. ſays, that the Truſtees raiſed the whole Money by *Mortgage of all the Term*; that the Mortgage was ſet aſide, and decreed to account for the Rents and Profits, *there being an expreſs Proviſion that the Monies ſhould be raiſed by Rents and Profits*; beſides, the *Power to make Leaſes for twenty-one Years*, ſhews, *that they could not mortgage for the whole Term.* In ſome Caſes where it is *doubtful*, the whole Term may be aſſigned, but here it is *apparent*. *Ibid.* ——*Prec. in Chan.* 583. S. C.—— 2 *Will. Rep.* 504. S. C. cited by his *Honour*, *Hil.* 1731. in the Caſe of *Evelyn* and *Evelyn*, *vide P. Ca.*

(*a*) *Quære* If the Wife of *J. S.* was not dead? It ſeems to me ſhe was.

the Remainder Man *A.* the Nephew, join in aſſigning the one hundred and twenty Years Term to the Plaintiff's Father, who advanced the 1500 *l.* *A.* (who had the Remainder for Life, ſubject to the one hundred and twenty Years Term for raiſing Daughters Portions) died *without Iſſue Male*, having *enjoyed the Premiſſes from the Death of his Uncle* J. S. *to his own Death*, but *left no Aſſets.* The Queſtion was, Whether by the Words of the Truſt, the Portion could be raiſed by Mortgage or any other Way than by annual Profits or leaſing? And Lord Chan. *Macclesfield* ſaid, he thought it very *material* to know the yearly Value of the Premiſſes charged with this Portion, in order to ſee within what Time the Portion would be raiſed, tho' it ſeems as if by the ſecond Settlement for creating a Term of ten Years, *&c.* the Parties thought the ſame would, in a reaſonable Time, be a proper *Fund* or Security for the raiſing of this leſſer Portion of 1500 *l.* That he took it to be a *Rule*, that where a Truſt of a Term for raiſing Portions for Daughters does direct a particular Method for raiſing them, it implies a *Negative*, that they ſhall not be raiſed any other Way; and when the Truſt of a Term (as in the preſent Caſe) is to raiſe the Portions by leaſing for *one*, *two* or *three Lives*, or for any Term of Years determinable, *&c.* or for twenty-one Years abſolutely, it ſhall not be raiſed by any other Way; and that it is conſiderable, that even by this Way, (*viz.*) of leaſing, it could not be raiſed, but by making ſuch Leaſes upon which the old Rent was reſerved. That the natural Meaning of raiſing a Portion by *Rents*, *Iſſues* and *Profits*, is by the yearly Profits; but to prevent any Inconvenience, the Word [*Profits*] has in ſome particular Inſtances been *extended to any Profits which the Lands will yield either by Sale or Mortgage* (*a*); but where there are *ſubſequent* Words to explain and reſtrain it, as *by leaſing*, his *Lordſhip* ſaid, he had not heard of any other Method to be made uſe of for raiſing of it. That it is as much the Intent of the Settlement to confine the Manner of raiſing this Portion to *leaſing*, as to ſecure any Portion at all; and conſequently it would be a plain Breach of Truſt to raiſe it any other Way. And his *Lordſhip* ſaid, that at the Time of making this Settlement in 1657, he thought the Word [*Profits*] was not extended to ſignify the Profits which might be made of Land by Sale or Mortgage. And decreed that the *Maſter* ſee how far the Lands might have been charged by leaſing, and whether any Lives were vacant, and reſerved the Conſideration how far the Eſtate ſhall be chargeable thereby, and that the Repreſentatives of *A.* the Nephew pay the Mortgage Money, as far as the Aſſets will extend. *Eaſt.* 1722. *Ivy* and *Gilbert et al'*, 2 *Will. Rep.* 13 to 21. ——This Decree in *Feb.* 1723 was affirmed in the Houſe of Lords, tho' thought a very hard Caſe. *Ibid.* 21.

(*a*) *Vide* the Caſe of *Trafford* and *Aſhton*, *P. Ca.*

17. Where a Portion is to be raiſed by annual Profits or Fines, if no Time be appointed, the Portion is due when the Profits can raiſe it, and it carries no Intereſt in the mean Time. *Eaſt.* 1722. in the Caſe of *Ivy* and *Gilbert et al'*, 2 *Will. Rep.* 20.

18. Upon the Marriage of *J. S.* with *M.* a Term of five hundred Years was limited to Truſtees to raiſe 2000 *l.* apiece for Daughters of the Marriage (in Caſe of no Iſſue Male by the Marriage) payable at eighteen, with Maintenance at the Rate of 40 *l. per Annum* to each Daughter from the Deaths of their Father, and Grandfather by the Mother's Side, until their Portions ſhould become payable. *J. S.* died,

His *Lordſhip* ſaid, that it was againſt his Opinion to raiſe a Portion or Maintenance by ſelling a reverſionary Term, and

this under the Colour of the Word *(Profits)*, but that it had been ruled before his Time that *(Profits)* ſhall extend to any Advantage which ſhall be made of the Land by Sale or Mortgage, as well as Rents, eſpecially

in Caſes of Neceſſity, and when the Daughter has had no other Maintenance, it has been decreed to be raiſed by a Mortgage of a reverſionary Intereſt of a Term. But his *Lordſhip* ſaid, that the preſent Caſe was much ſtronger, for here the Truſt Term for raiſing this Maintenance and Portion is come into Poſſeſſion,

died, leaving two Daughters, one eight and the other nine Years old. The Term did not commence in Poſſeſſion until the Death of the Father-in-Law of *J. S.* which happened ſome Time afterwards. The Truſt of the Term was to *raiſe the Portions by Sale, Mortgage* or *Profits*, but the Truſt to *raiſe the Maintenance was by Rents and Profits.* It was objected, That the Maintenance ſhould not begin until the five hundred Years Term commenced in Poſſeſſion, at which Time only the ſame could be raiſed by Rents and annual Profits. But Lord Chan. *Macclesfield* decreed the Arrears of the Maintenance Money from the Time the ſame became payable by the Settlement to be raiſed out of this Term; and tho' it was objected, that the Daughters had other Proviſion by the Will of their Father, and alſo by Deſcent from him, yet his *Lordſhip* held this not to be material, as long as by the Settlement there was no other Proviſion, except this Maintenance Money, until the Portion ſhould become payable, and that any Matter ſubſequent to the Settlement ought not in Juſtice to vary the Conſtruction thereof (*a*). *Trin.* 1723. *Ravenhill* and *Darſey*, 2 *Will. Rep.* 179.

ſo that at preſent the Maintenance Money may be raiſed out of the annual Profits; it is like a Rent granted out of a Reverſion to commence preſently, in which Caſe tho' the Reverſion does not fall into Poſſeſſion until many Years after, yet when it does fall, it ſhall anſwer all the Arrears; and ſo decreed *ut ſupra. Ibid.* 180.

(*a*) *Vide* the Caſe of *Sandys* and *Sandys, P. Ca.*

And his *Lordſhip* obſerved, that in all the Caſes cited, the ſecond Sum was more or at leaſt equal to the firſt Proviſion; and ſo decreed both Sums to be raiſed, and that the greater Sum

19. A Proviſion was made by a Marriage Settlement for Daughters Portions, and after a further Proviſion was made of a further Sum, amounting to half the firſt Sum, and this is made by the Father's Will by Virtue of a Power in the Marriage Settlement. The leſs Sum was certain, the greater was on a Contingency, which happened after the leſs was to be received; and it was obſerved, that in Caſe of double Portions, there was no Inſtance where the ſecond Proviſion is leſs than the firſt, that ever it was held a Satisfaction. And *Tracey* J. (who ſat for *Lord Chancellor*) held *accord*. *Trin.* 1725. *Savile* and *Savile, Select Caſes in Chan.* 32.

be raiſed, with Intereſt and Coſts from the Time the Contingency happened, which was the Death of the Brother within Age and without Iſſue Male. *Ibid.*

(*a*) In another MS. it is *raiſed. Ibid.*

20. Where Portions are to be raiſed out of the Rents and Profits, no Intereſt is to be allowed 'till the whole is *paid* (*a*). *Mar.* 13, 1725. *Bagnal* and *Bagnal, Vin. Abr.* Tit. *Portions*, (D. 2.) by way of Note to *Ca.* 1.

And the *Reporter* ſays, that the Court (as he underſtood it) declared that the ſurviving Daughters ſhould not have their Shares of *B.*'s Part until they ſhould reſpectively

21. *J. S.* has three Daughters, *A. B.* and *C.* and being ſeiſed in Fee, by Will *charges his Lands with Payment of* 1000 l. *apiece to his Daughters, payable at twenty-two* or *Marriage*, and *if any die before her Portion becomes payable, the Share of her ſo dying, to go to the Survivors. B.* died before twenty-two, unmarried. *A.* attains her Age of twenty-two. Held by Lords Commiſſioners *Jekyll* and *Gilbert*, that *B.*'s Share ſhall not be paid to the ſurviving Daughters 'till ſuch Times as ſuch deceaſed Daughter, had ſhe lived, would have come to twenty-two. *Eaſt.* 1725. *Feltham* and *Feltham*, 2 *Will. Rep.* 271.

have attained twenty-two, or be married, it not being the Intention of the Teſtator to truſt any of his Daughters with their Portions until twenty-two or Marriage. *Ibid.* 272 ——*Select Caſes in Chan.* 15. S. C. ſays, the Court was of Opinion it ſhould be paid when the Deceaſed would have received it, becauſe elſe it would be ſo many ſeveral Diviſions of it as each Perſon's Title to it accrued, whereas it was deſigned to be one entire Payment.

22. By a Truſt in a Marriage Settlement, Portions for Daughters were to be raiſed, payable at eighteen or Marriage, and Maintenance

in

in the mean Time payable half yearly, at *Lady Day* and *Michaelmas*, until the Portions become payable. The eldeſt Daughter attained eighteen on 16 *Auguſt*. The Queſtion was, If any Proportion of the Maintenance was to be paid from the *Lady Day* to the 16th of *Auguſt*, when the Portion became due? And the *Maſter of the Rolls* decreed Maintenance to be paid for that Time in Proportion, and ſaid that Maintenance is always favoured, being for the daily Subſiſtence of Children, and not like Intereſt, which is only for Delay of Payment of what is due; but in this Caſe the Portion is not due 'till eighteen or Marriage, and therefore no Delay. *Mich.* 1728. *Hay* and *Palmer*, 2 *Will. Rep.* 501.

23. This was a Bill brought by the Plaintiff againſt Sir *Gilbert Rivers* and a Truſtee in his Settlement, to have a Term of five hundred Years limited in Remainder after the Death of Sir *Gilbert* and his Lady, ſold for raiſing Daughters Portions, of whom the Plaintiff had married one; and the Truſt of the Term was, that in Default of Iſſue Male the Truſtees might out of the Rents and Profits after the Commencement of the Term, or by Sale or Mortgage of the Premiſſes, or any Part thereof, raiſe the Sum of 4000 *l.* if one Daughter, 5000 *l.* if two, 6000 *l.* if more, payable at nineteen or Marriage, with Intereſt at 4 *l. per Cent.* from the Death of Sir *Gilbert* or Lady *Dorothy* his Wife, which ſhould firſt happen, until their Portions ſhould become payable. Sir *Gilbert* had two Sons by his Wife, but ſhe and the Sons all died without Iſſue Male. And *per* Lord Chan. *King*, the Truſt was governed by the Words in Default of Iſſue Male, and that in Equity the Term became ſubject to be ſold from that Time; and ſo decreed the Term expectant on the Life Eſtate of Sir *Gilbert* to be ſold, and Intereſt to be paid from the Year 1727, when the laſt Son died, Lady *Rivers* dying long before; and that if after Payment of the 6000 *l.* there ſhould be any Surplus, that it ſhould be paid to Sir *Gilbert*, who had the Inheritance. 4 *Geo.* 2. *Goodall* and *Rivers*, *MS. Rep.*

24. *J. S.* was *Tenant for Life* ſans Waſte, Remainder *to his eldeſt Son* J. *for Life*, Remainder *to his firſt*, &c. *Son in Tail Male ſucceſſively*, Remainder in like Manner to his ſecond Son *G.* Remainder to his third Son *E.* (the Defendant) in like Manner, with Truſtees to ſupport all theſe contingent Remainders, Remainder *to the Heir Male of the Body of* J. S. Remainder *to him in Fee*, with a Power to *J. S.* by Deed or Will to charge by Leaſe, Mortgage or otherwiſe, the Premiſſes with raiſing or paying any Sum not exceeding 6000 *l.* alſo with a Power to every one of the Sons when in Poſſeſſion, by Deed atteſted, *&c.* to limit before or after Marriage to the Wife of any of the ſaid Sons for a Jointure, all or any Part of the Premiſſes, ſo as ſuch Jointure ſhould not exceed 100 *l. per Annum* for every 1000 *l.* which ſuch Son ſhould have received as his Wife's Fortune, with farther Power to the ſaid Sons reſpectively, when in Poſſeſſion, by any Deed, *&c.* atteſted, *&c.* to make any Leaſes for Years *ſans* Waſte (*but without Prejudice to any Jointure to be made by Virtue of the ſaid Power*) for the raiſing of Portions for the Daughters of ſuch Sons, but ſuch Portions not to exceed their Mother's Fortune, and ſo as ſuch Leaſes ſhould *not take Effect* until *there ſhould be a Failure of Iſſue Male of ſuch Son making ſuch Leaſe*, with the *uſual* Power to *J. S.* the Father, and his ſaid Sons reſpectively when in Poſſeſſion, to leaſe for twenty-one Years at the moſt improved Rent. *J. S.* by another Settlement ſettled other Lands

In this Caſe his *Honour* cited the Caſe of *Ivy* and *Gilbert*, (*P.* 645. *Ca.* 16.) as decreed by Lord *Macclesfield* and affirmed *in Dom. Proc'*, where a Truſt Term was limited to raiſe 1500 *l.* for Daughters Portions by *Rents, Iſſues and Profits*, and decreed that the directing the Portion to be raiſed in this particular Manner, implied a *Negative* that it ſhould be raiſed *in no other* Manner; and

therefore not by Mortgage or Sale, or any more Money to be raiſed than the 1500 *l. without* Intereſt, which his *Honour* ſaid, was exactly the ſame with the *principal* Caſe; an Inſtance of a Portion to be raiſed by Perception

tion of Profits *without* Intereſt. And his *Honour* concluded that there was not one ſingle Precedent where a Sale had been decreed of a Truſt Term for a Portion appointed to be raiſed by *Rents and Profits*, and *no Time limited* for Payment. 2 *Will. Rep.* 604.

Lands of which he was ſeiſed in Fee to the *ſame Uſes*, with this Difference only, (*viz.*) that as to the Son's Power of leaſing for raiſing Daughters Portions, theſe Words were added, [*ſo as ſuch Leaſe or Leaſes ſhould ceaſe and determine upon the raiſing of ſuch Portions, and Coſts and Charges for raiſing the ſame.*] *J. S.* died, then *J.* the eldeſt *dying without Iſſue*, *G.* the ſecond Son entered upon the Premiſſes compriſed in the Settlement, and on his Marriage with *M.* in Purſuance of the ſaid Power, limited a Term of five hundred Years to Truſtees, to commence from and after Failure of Iſſue of the ſaid *G.* by and out of the Rents, Iſſues and Profits, or by Sale, Mortgage or Leaſes, or otherwiſe *as ſoon as conveniently might be after his Deceaſe*, (or in his Life-time, if he ſhould think fit to have the ſame ſooner raiſed, and ſo direct) raiſe 8000 *l.* (ſo much being *M.*'s Fortune) for Daughters Portions, to be paid to her or them, if more than one, Share and Share alike, with a Proviſo, that the Term ſhould not prejudice the Jointure; and that immediately after the raiſing the 8000 *l.* with all Coſts, *&c.* the ſaid Term ſhould ceaſe. *G.* died inteſtate, leaving three Daughters of this Marriage, but no Son, who by their Mother brought their Bill againſt *E.* the third Son of *J. S.* and *James* his eldeſt Son, (being the Remainder Man in Tail) praying a preſent Sale of the five hundred Years Term to raiſe the Portions; the eldeſt Daughter of *G.* not being then above four Years old. It was agreed by Lord Chan. *King*, *Raymond* C. J. and the *Maſter of the Rolls*, that the 8000 *l.* ſhould be raiſed out of the Rents, Iſſues and Profits of Premiſſes compriſed in the five hundred Years Term, and not by any Sale or Mortgage thereof; and that no more than 8000 *l.* in the whole ſhould be raiſed, and the Profits to be accounted from the Death of *G.* the Huſband. And his *Honour* took Notice of the different Limitations in the two ſeveral Settlements, and that thereby it was plain that a Sale was not intended, and that it was not poſſible that the Term could ceaſe upon raiſing the Portions in any other Senſe or Way than by raiſing them out of the growing Profits. And *Raymond* C. J. relied much on the Intent of the Maker of the Settlement, which appeared to be plainly to preſerve the Eſtate in the *Male* Line of the Family; and ſo thought there could be no Deſign to extend the Power for raiſing Portions for Daughters to a Sale or Mortgage, conſequently ſuch Power being neither *expreſſed* or *implied*, nor any Thing limited for the Payment of the Portions, it would (he thought) be extreme hard for the Court to decree that which would be the Deſtruction of the Eſtate againſt the Intention of the Party. *Hil.* 1731. *Evelyn* and *Evelyn*, 2 *Will. Rep.* 591 (*a*).—This Decree was afterwards appealed from to the Houſe of Lords, where on the 2d of *May* 1733, the Parties on both Sides came to an Agreement, which (7 *Geo.* 2.) was confirmed by Act of Parliament. *Ibid.* 605.

(*a*) 591 in the *Original*, but it ſhould be 659.

25. Where no Time is limited for Payment of Portions, and the Claimants are of very tender Years, tho' the Right to the Portions veſted in ſuch Infant Daughters, yet they are to be raiſed by Rents and Profits. *Per* his *Honour*, *Hil.* 1731. in the Caſe of *Evelyn* and *Evelyn*, 2 *Will. Rep.* 603.

26. Where a particular certain Time is limited for the Payment of a Portion, it may imply a Power of Sale. *Per* his *Honour*, *Hil.* 1731. in the Caſe of *Evelyn* and *Evelyn*, 2 *Will. Rep.* 601.

27. A particular certain Time being limited for Payment of a Portion, it carries Intereſt from that Time. *Per* his *Honour*, *Hil.* 1731. *in Caſu Evelyn* and *Evelyn*, *ibid.*

28. The Plaintiff *Garnier*'s Bill was to have a Truſt executed for raiſing his Wife's Portion under the Settlement of Sir *John Cowper* her late Father, againſt *William Cowper* her Brother, and the Defendants *Lebeups*, as Mortgagees under him. The Caſe was thus: Sir *John Cowper* by his Marriage Settlement made in 1691 conveyed certain Meſſuages and Lands to the Uſe of himſelf for Life, and from and after his Deceaſe to the Uſe of Truſtees for five hundred Years, Upon Truſt that in Caſe the ſaid Sir *John Cowper* ſhould at the Time of his Death have living more Children than one Son by him begotten on the Body of *Ann* his then intended Wife, then the Daughter and Daughters, and younger Son and younger Sons of the ſaid Sir *John Cowper* on the Body of the ſaid *Ann* to be begotten, ſhould have the the Sum of 3000 *l.* to be ſhared and divided amongſt them, and the Survivor of them, by ſuch Shares and Proportions, in ſuch Manners and at ſuch Times, and with ſuch Intereſt in the mean Time, until Payment thereof, as the ſaid Sir *John Cowper* by any Deed or Writing, or by his laſt Will, atteſted by two or more credible Witneſſes, ſhould direct or appoint. The ſaid Sir *John Cowper* ſurvived his Wife, and had Iſſue by her *William Cowper* his eldeſt Son, and alſo *Thomas Cowper* and the Plaintiff's Wife *Ann Garnier*, his younger Children. In *February* 1722 Sir *John Cowper* by Deed Poll appointed that 1500 *l.* Part of the ſaid 3000 *l.* ſhould *within ſix Months* after his Deceaſe be raiſed out of the Premiſſes, chargeable therewith, and paid to the ſaid *Thomas Cowper*, with Intereſt until Payment thereof, he having before made the like Appointment in Favour of the Plaintiff *Ann* his Daughter. *Thomas Cowper* afterwards died inteſtate in the Life-time of Sir *John* his Father, and ſhortly after Sir *John* died, whereupon the Plaintiff *Ann Garnier* became intitled to have her Portion raiſed. The Defendant *William Cowper* took Adminiſtration of the Goods, *&c.* of his Brother *Thomas*, by Virtue whereof he pretended a Right veſted in him to have the 1500 *l.* that Sir *John Cowper* had appointed ſhould be raiſed for the ſaid *Thomas Cowper*. For Plaintiff *Ann* it was inſiſted, that her Father had no Power to appoint any Part of the Money to any Child who ſhould not be living at the Time of his Death, and that ſhe being the only ſurviving younger Child, was intitled to the whole 3000 *l.* The Cauſe was heard on Bill and Anſwer before his *Honour*, who, upon hearing the Settlement read, decreed the whole 3000 *l.* to the Plaintiff *Garnier* and his Wife, with Intereſt from Sir *John Cowper*'s Death, and their Coſts of Suit. *Eaſt.* 1732. at the Rolls, *Garnier et Ux'* and *Cowper et al'*; and *Lebeups et al' and Cowper* and *Garnier et Ux'*, *MS. Rep.*

29. The *Quantum* of a Proviſion for a Child is in the Father's Power and Diſcretion, and a Man is bound by Nature to provide for all his Children. *Per Lord Chancellor*, *Hil. Vac.* 1733. *Vin. Abr.* Tit. *Copyhold*, (W. e.) *Ca.* 12.

30. Lord Chan. *Talbot* ſaid, that in Caſes where the Portion is to be raiſed out of the reverſionary Term after the Tenant for Life's Death, and to be paid at twenty-one or Marriage, and the Child marries, and then dies, it would be very hard to decree it to merge. That in *Butler* and *Duncomb*'s Caſe, 2 *Vern.* 760. a Sum was borrowed by Direction of the Court to aſſiſt the Huſband in his Trade, the Term not yet being come into Poſſeſſion. That in the Caſe of *Brome* and *Berkley*, 1 *Vol. Abr. Eq.* 340. the Lord *Trevor* delivered his Opinion in the

Indeed in Caſes where the Child dies ſo young that the Portion could never be wanted, the Court will not decree it to be raiſed, becauſe there is no Occaſion for it, as

in the Caſe of *Brewen* and *Brewen*, 2 *Vern.* 439. and in that of *Tournay* and *Tournay*, but that there is no Precedent where the Court has dealt ſo hardly with a Child who dies after Marriage, as to take away what was intended

intended for it's Proviſion; and that a future Intereſt is an Intereſt,

the Houſe of Lords, That in all Caſes where the Portion is contingent, and the Child marries, and then dies, the Repreſentative ſhall have it. —*Vide Caſes in Eq. Temp. Lord Talbot* 122.

tho' not ſo good as an Intereſt in Poſſeſſion; and it is and may be a Conſideration of Marriage, that tho' ſuch an Intereſt does not abſolutely veſt, yet it is carrying it too far to ſay it does not veſt at all, or ſo as that it may not be tranſmiſſable. *Per* his *Lordſhip*, *ibid.*

His *Lordſhip* ſaid, that the Precedents in raiſing Daughters Portions have gone both Ways, ſome Times they have been decreed to be raiſed in the Parent's Life-time, and at other Times not, which ſhews that the raiſing or not raiſing muſt depend upon the particular penning of the Truſt. That in this Caſe, all the Contingencies precedent to the raiſing of the Portions have happened, as that of not having Iſſue Male, (by reaſon of *M.*'s Death without ſuch Iſſue, which in this Court is decreed a total Failure of Iſſue Male between them), and alſo the Daughter's marrying or attaining twenty-one. That *J. S.*'s Death is made no Part of the Condition; and tho' the raiſing it out of the Rents and Profits cannot be done during *J. S.*'s Life, and that the Mortgage or Sale is to be during the Term, which is not to commence in Poſſeſſion 'till *J. S.*'s Death, yet they may be raiſed in *J. S.*'s Life time, it being no where ſaid, that the Portions ſhall not be raiſed 'till ſuch Time as the Term ſhould take Effect in Poſſeſſion. That indeed had there been no expreſs Authority given to the Truſtees to ſell or mortgage, there might have been ſome Difficulty, but now they may do either; and that the Proviſo to make the Term void in Caſe *J. S.* in his Life-time ſhould prefer the Daughters in Marriage with Portions equivalent, will not controul ſuch Power of the Truſtees. And ſo decreed *ut ſupra*. *Ibid.*

31. *J. S.* on his Marriage with *M.* ſettled his Eſtate to the *Uſe of himſelf for Life*, Remainder *to his firſt and other Sons in Tail Male*, Remainder *to Truſtees for one thouſand Years*, Remainder *to his Brother* C. *for Life*, Remainder *to the Heirs Male of his Body hereafter to be begotten.* And then the Truſt of the Term was declared to be, that in Caſe of no Iſſue Male of the Bodies of *J. S.* and *M.* begotten which ſhould live to twenty-one, or be married, and have Iſſue, and that there ſhould be one or more Daughter or Daughters of the Bodies of the ſaid *J. S.* and *M.* that then ſuch Daughter, if but one, ſhould have 4000 *l.* for her Portion, and if two or more, 5000 *l.* equally to be divided between them, payable at their Ages of twenty-one or Marriage, which ſhould firſt happen. And if one Daughter only, then ſhe to have 100 *l.* a Year Maintenance, payable half yearly; and if two or more, then the like Sum of 100 *l.* to be paid half yearly, in equal Shares, 'till their reſpective Portions ſhould be raiſed and paid. And in Caſe of Nonpayment of the Portions, then the Truſtees, their Executors, *&c.* out of the Rents, *&c.* or by Mortgage or Sale of the Premiſſes, or any Part thereof, during the Term, were to raiſe and pay the ſeveral Portions before limited; provided, that if *J. S.* ſhould in his Life-time prefer them in Marriage with Portions equivalent to thoſe herein limited, or that after his Death the Remainder Man ſhould upon their Marriage pay them Portions equivalent, or that there ſhould be no Daughter or Daughters who ſhould live to attain twenty-one, or be married, that then the Term ſhould ceaſe. *M.* died, living *J. S.* leaving no Iſſue Male, but only three Daughters, who were *all unmarried* (*a*). The Queſtion was, If the Portions were to be raiſed in *J. S.*'s Life-time. And *Lord Chancellor* decreed the Portions to be raiſed, with Intereſt, from *M.*'s Death, at which Time they firſt veſted. *Eaſt.* 1734. *Hebblethwaite* and *Cartwright*, *Caſes in Eq. Temp. Lord Talbot* 31.

(*a*) So in the *Original*, but by what is ſaid by *Lord Chancellor*, *ibid. P.* 33. it appears that they were *all married* and twenty-one.

32. In a Settlement a Term was raiſed for Daughters Portions, *i. e.* 10,000 *l.* with a Proviſo, that if the Father by Deed or Will ſhould give or leave 10,000 *l.* to his ſaid Daughters, it ſhould be a Satisfaction. The Father leaves Land to the Daughters of 10,000 *l.* Value. This is no Satisfaction. *Eaſt.* 1734. *Chaplin* and *Chaplin*, 3 *Will. Rep.* 245.

33. *A.* by Settlement after Marriage creates a Truſt Term of one hundred Years by Mortgage or Sale to raiſe 2000 *l.* for the Portion of each of his Daughters, provided they married with their Mother's Conſent, and directs a yearly Payment out of the Rents 'till they marry, and if any of them die before Marriage with ſuch Conſent,

her

her Portion to ceaſe, and the Premiſſes to be exonerated thereof; and if it be raiſed, to be paid to ſuch Perſon to whom the Premiſſes ſhould belong. And by Will he creates another Truſt Term to raiſe by Sale or Mortgage 4500 *l.* whereof 2000 *l.* to be paid to each of his Daughters in Augmentation of their Fortunes, ſubject to the Conditions in the Settlement. And by a Codicil (in Purſuance of a Power of Revocation) he creates another Truſt Term for the better raiſing of his Daughters Portions. *A.* dies. The Daughters married without Conſent. Tho' this Proviſion is only *in terrorem*, and makes no Forfeiture, yet upon the Huſbands applying to the Court for Payment of their Wives Portions, the *Maſter of the Rolls* ordered the ſame to be raiſed; but that Propoſals be made before the *Maſter* as to the ſettling the Wives Fortunes. *Mich.* 10 *Geo.* 2. *Hervey* and *Aſhton*, *Caſes in Eq. Temp. Talbot* 212.

34. An Objection ariſing from double Portions, holds only where both Portions come from one and the ſame Perſon. *Per Lord Chancellor*, *Trin.* 1740. in the Caſe of *Sir Robert Walpole* and *Lord Conway*, *Barnard. Rep. in Chan.* 156.

(B) Of veſted Portions.

1. BY a Marriage Settlement a Term for five hundred Years was created to raiſe 5000 *l.* for *Daughters Portions, payable at twenty-one or Marriage*, Proviſo, *that if any of the Daughters ſhould attain the Age of twenty-one, or marry in the Life of the Father, then her Portion to be paid at the End of the Year after the Death of the Father*; and with another Proviſo, *that if any of the Daughters ſhould die before her or their Portion or Portions became payable, and before her or their Age of twenty-one or Marriage, her or their Share or Shares to go to the ſurviving Daughter or Daughters.* There was Iſſue by the Marriage one Son and three Daughters, *A. B.* and *C.* *A.* married, and had a larger Portion given her than was ſecured to her by the Marriage Settlement, and ſo her Third of the 5000 *l.* was ſatisfied. *B.* attained twenty-one, married, and died in the Father's Life-time, without Iſſue, and her Huſband adminiſtered. It was inſiſted by *Talbot* Solicitor General, on the Behalf of the Huſband the Adminiſtrator, that *C.* (who ſurvived both her Siſters) could not be intitled to *B.*'s Share, becauſe *B.* attained twenty-one, and was married; whereas to intitle *C.* to take, *B.* muſt have died under twenty-one, or before Marriage; that *B.*'s Share could not ſink into the Land, becauſe the Reaſon of that Conſtruction was for the Benefit of the Heir, in Preference to the Adminiſtrator of the deceaſed Daughter, where ſuch Daughter died before twenty-one or Marriage, ſo that ſhe had no Occaſion for her Portion, no want of it to advance her in Marriage, nor could ſhe diſpoſe of it by Deed or by any Act in her Life-time until her Age of twenty-one; whereas that Reaſon could not hold in the preſent Caſe, *B.* having attained twenty-one, and being married. That the Meaning of this Proviſo was a prudent Caution to prevent a Sale of the Reverſion of the Land limited to the Father, in the Father's Life-time, which had been found by Experience to diſtreſs and ruin Family Eſtates; but that it was hard when the Term was

His *Lordſhip* obſerved that Equity had ſtrained ſometimes to help a Daughter married in her Father's Life-time to her Portion, but never to deprive a married Daughter thereof. And that this *firſt* Proviſo, that if any of the Daughters attain to twenty-one Years or Marriage, &c. was without any Negative Words that ſhe ſhould not be paid her Portion *'till then*, but that the Meaning of it was, that then *in all Events*, even tho' the Grandfather of ſuch Daughter, who had Part of the Eſtate compriſed in his five hundred Years Term limited to him for his

Life, had been living, the Reverſion ſhould notwithſtanding have been ſold for the raiſing of this Portion. And his *Lordſhip* decreed that the Huſband of *B.* ſhould have the third Part of the 5000 *l.* with Intereſt from the End of the Year after the Father's Death, to be raiſed by the Sale of a third Part of this Term; and if that is not ſufficient,

was come into Poſſeſſion, that the Huſband who married this Daughter ſhould have no Portion with her. And of this Opinion was Lord Chan. *King*. *Hil.* 1728. *Petfield's Caſe*, 2 *Will. Rep.* 513.

ſufficient, then in Caſe the Son who was Tenant in Tail, ſhould happen to die without Iſſue Male, and under twenty-one, the Huſband of *B.* ſhould have Liberty to apply to the Court to be paid what remained due out of another Term, which was to ariſe by the Settlement on the Son's Death without Iſſue. *Note*; This was a Cauſe by Conſent. *Ibid.*

2. Land limited *to* A. *for Life*, Remainder *to* B. *his Wife for her Jointure*, Remainder *to Truſtees to preſerve contingent Remainders*, Remainder *to the firſt and every other Son of the Marriage in Tail Male*, Remainder *to Truſtees for a Term of Years*, On Truſt *that if there ſhould be no Son born in the Life-time of the Father*, or *after his Deceaſe*, or *if there ſhould be a Son who ſhould die before twenty-one*, and *there ſhould be Daughters of the Age of ſixteen*, then *to raiſe* 6000 l. *for their Fortunes, equally to be divided amongſt them, with Benefit of Survivorſhip*; and *if only one Daughter*, then *the ſaid* 6000 l. *to be paid at her Age of ſixteen, in Caſe either* A. *or his Wife ſhould be then dead*, or *if both living, within ſix Months after the Death of one of them.* Provided, that at the Time of Failure of Iſſue Male of *A.* by his ſaid Wife, there be no ſuch Daughter, or ſhall not after be born, or ſhall die before ſixteen, then the Term to attend the Inheritance. *A.* had a Daughter, Plaintiff's Wife, who died about twenty-two, living her Father and Mother, and the Mother dying afterwards without any Son, Plaintiff, as Adminiſtrator of his Wife, brought his Bill for the Portion. But it was diſmiſſed; for the Fortune not being to ariſe but in Caſe there be no Son born of the Marriage, and that not being to be known 'till after the Death of the Huſband or Wife who had ſurvived the Plaintiff's Wife, the Portion muſt always be contingent 'till the Death of the Mother, and there being no Daughter living at that Time, nothing could ever veſt. *Gadon* and *Sir Richard Raynes*, *Eaſt.* 5 *Geo.* 2. Decreed with the Aſſiſtance of Lord *Raymond* and the *Maſter of the Rolls*, *MS. Rep.*

But where the Land was limited *to* A. *for Life*, Remainder *to Truſtees to preſerve contingent Eſtates*, Remainder *to* B. *for her Jointure*, Remainder *to the firſt and other Sons of the Marriage in Tail*, and *for Default of ſuch Iſſue* to Truſtees *for a Term, In Truſt that if there ſhould be no Iſſue Male* int' A. *and* B. *who ſhould attain twenty-one, or be married, and have Iſſue*, then *to raiſe* 5000 l. *for Daughters Portions, payable at twenty-one or Marriage*; and if the Portions be not then paid, the Truſtees to raiſe them by *Rents and Profits, or by Mortgage*, &c. Provided, if the next in Remainder ſhould pay the Portions at the Days of Payment before appointed, or if *A.* in his Life ſhould prefer his ſaid Daughters in Marriage with equal or greater Portions, then the Term to ceaſe. *B.* died firſt, and then *A.* the Portions being unpaid; and held that the Truſtees might upon the Death of *B.* without a Son have raiſed the Money out of the Rents, tho' they could not ſell. And as to the Power that the Father had of diſcharging the Eſtate, by giving equal Portions in his Life, the Court held that was for the Father's Benefit; that after the Marriage of the Daughters, or their Arrival to twenty-one, the raiſing their Portions was not to be ſuſpended, the Term being veſted immediately on the Death of *B.* And Intereſt was decreed them from that Time.——Another Point was, that one Daughter married, and died before the Death of *B.* And the Queſtion was, Whether her Repreſentatives were intitled to a Share of the 5000 *l.* But this was not determined. And the *Lord Chancellor* approved of the raiſing of the Money when the Children wanted it, without ſtaying for the Death of Tenant for Life; and ſaid, that tho' the Father had it in his Power during Life to prefer his Daughters in Marriage, that was to be underſtood only of their firſt Marriage, and a ſecond not to be expected. *Ibid.*——And this ſeems to be the Caſe of *Hebblethwaite* and *Cartwright*.

(C) Portions lapſed or merged, et cont'.

1. PLAINTIFF being a Suitor to Defendant's Daughter-in-Law, came to a Treaty with him; and the Defendant being then poſſeſſed of the perſonal Eſtate that was left by his Wife's former Huſband, a Share whereof was due to Plaintiff's Wife, the Plaintiff and Defendant entered into Articles, in which it was recited,

2 *Freem. Rep.* 57. S. C. *accord*, and ſays, *Lord Chancellor* cited Lord *Delaware*'s Caſe lately decreed here,

where an Agreement was to pay the Marriage Portion to ſuch Perſon as he ſhould appoint in the Space of ſix Months, and he was in Conſideration thereof to ſettle certain Lands. The Marriage took Effect, the Wife died, and the ſix Months elapſed and no Perſon appointed to receive the Money; and yet the Portion was

cited, that whereas the Defendant was to pay the Plaintiff 1000 *l.* for the Wife's Marriage Portion, the Plaintiff covenanted to ſettle certain Lands, *&c.* It fell out that the Share of the perſonal Eſtate which the Plaintiff was intitled to was but 320 *l.* But it was decreed that he ſhould pay the 1000 *l.* And *per Cur'*, An Action of Covenant will lie upon this Recital. Whereupon it was inſiſted, that the Plaintiff ought to be diſmiſſed to Law, and bring his Action of Covenant. But *per Lord Chancellor*, Where there is a Remedy at Law for one Thing in a Bill which is complicated with other Matters which are proper in Equity, there this Court will determine the whole Matter. And altho' it was objected, That the Wife lived but ſix Months, and that the Plaintiff was not able to have made the Settlement he agreed upon, and that the Wife had very bad Uſage from the Plaintiff the Time ſhe lived with him, yet decreed *ut ſupra*. *Trin.* 1680. *Graves* and *White*, *MS. Rep.*

decreed to be paid to the Lord *Delaware*, without examining his Capacity to make a Settlement according to the Agreement. *Ibid.* 58.

2. *J. S.* married *M. without* her Father's Conſent. Afterwards *M.*'s Father by Articles agreed with *J. S.*'s Father to pay 1000 *l.* into Truſtees Hands to be laid out in the Purchaſe of Lands, to be ſettled to the *Uſe of* J. S. *for Life*, and then *to his Wife*, Remainder *to the Iſſue of their Bodies*. Before the Articles were executed, *M.* died *ſans* Iſſue, and *J. S.* brought his Bill for the Portion. And the Court decreed Payment of the 1000 *l.* to *J. S.* it being the Wife's Portion; and it appearing that a Settlement was made upon *J. S.* by his Father in Purſuance of the Articles. *Trin.* 1694. *Harvey* and *Chamberlaine*, 2 *Freem. Rep.* 200.

In this Caſe Sir *Jonathan Atkyns*'s Caſe was cited, where the Huſband's Friends and the Wife's did article to lay out 1500 *l.* apiece in Land, to be ſettled upon them and their Iſſue, and *no Limitation over*, and the Wife dying without Iſſue before the Money laid out (as in the above Caſe) the Portion was decreed to the Huſband by the Lord *Jefferies*. *Ibid.*

3. *J. S.* having mortgaged Part of his Eſtate to *A.* for one thouſand Years for ſecuring 6000 *l.* ſettled his Eſtate upon *himſelf for Life*, Remainder *to* B. *his Son, and the Heirs of his Body*, Remainder *to his own right Heirs*; and afterwards made his Will, and thereby gave his Daughter *C.* 4000 *l.* for her Portion, if ſhe married with her Mother's Conſent, (otherwiſe but 1000 *l.*), to be paid at her Marriage or Age of twenty-one, and appointed that the mortgaged Term ſhould be kept on Foot for the better raiſing of the Legacies. *C.* dies at ſixteen, her Mother took out Adminiſtration, and married the Plaintiff, and afterwards made her Will, and thereof Plaintiff Executor, who alſo adminiſtered to *C.* And the ſole Queſtion was, Whether Plaintiff was intitled to the 4000 *l.* or any Part thereof, or, Whether the ſame was to ſink for the Benefit of the Heir, *C.* dying between twenty-one or Marriage? And *Lord Keeper* and his *Honour* both agreed that the 4000 *l.* was ſunk for the Benefit of the Heir, it being by the Will to be raiſed out of Land, inaſmuch as the Teſtator appointed the mortgaged Term to be kept on Foot for raiſing of this 4000 *l.* and that ſince Lord *Pawlett*'s Caſe it had been the conſtant Practice of this Court, that where a *Legacy* or *Portion* by Will or Deed is appointed to be *raiſed out of Lands*, there, if the Party dies before it is payable, it ſhall ſink for the Benefit of the Heir. And the Court held that altho' (in the preſent Caſe) the Mortgage Leaſe, out of which the 4000 *l.* is to be raiſed, be but a Term for Years, yet *it is not a Term in groſs*, but *a Term attendant upon the Inheritance* (and ſuch a Term is not forfeited as a perſonal Eſtate or Chattel in groſs is) *after the Debts*

Prec. in Chan. 140. *Hil.* 1700. S C. ſtates it thus: *J. S.* ſeiſed of the Manor of *P.* mortgaged it for one thouſand Years to *A.* for ſecuring 6000 *l.* and Intereſt; and afterwards by Deed and Fine ſettled it to the Uſe of *himſelf for Life*, Remainder *to* B. *his Son, in Tail*, with other Remainders *over*, Remainder *to himſelf in Fee*; and by Will deviſed the ſaid Lands, and all his Lands not before ſettled in Jointure, to his Wife and two other Perſons, Truſtees, and

their Heirs, Upon Truſt by Sale, *&c.* to raiſe Money to pay his Debts, *provided, that upon paying of the ſaid Mortgage, the ſame ſhould be kept on Foot for ſecuring his Daughter's Portion*; and his other Legacies and Debts,

if the Lands deviſed were not ſufficient to pay the ſame; and thereby deviſed to his Daughter 4000 *l.* for her Portion, if ſhe married with the Conſent of her Mother

Debts paid, and the Truſts performed; but if it had been a Term in groſs, it had been a Chattel and perſonal Eſtate; but it is not ſo here. And *Lord Keeper* held that if this 4000 *l.* had been to have been paid out of the *perſonal* Eſtate, the Plaintiff could have had no Title to it, becauſe it is given upon a Contingency, which not happening in the Life-time of *C.* was never veſted in her, and ſo could not go to the Adminiſtrator, for ſhe never married, nor came to twenty-one; and that this is a Condition *precedent*, and all one as if *J. S.* had ſaid, *If my Daughter marry with Conſent of my Wife, I give her* 4000 l. *Hil.* 1700. *Yate* and *Fettiplace*, 2 *Freem. Rep.* 243.

and Truſtees, payable at twenty-one or Marriage, otherwiſe but 1000 *l.* and made his Wife Executrix, and died. The Daughter died about ſixteen. Afterwards the Mother married Plaintiff, and took out Adminiſtration to her Daughter, and by Will made Plaintiff Executor and Deviſee of all, who by Virtue thereof pretended to be intitled to a Moiety of the 4000 *l.* deviſed to the Daughter, and alſo to ſo much of the *perſonal Eſtate of* J. S. *as was not ſpecifically deviſed away* (*a*), for that he had made Proviſion for Payment of his Debts by his Lands, and had, as was pretended, directed *E.* who drew his Will, to give his perſonal Eſtate to his Wife; but that he had omitted to do, becauſe he thought that the making of her ſole Executrix was a Gift of it in Law, and had examined *E.* to that Purpoſe, (and whoſe Depoſition was allowed to be read). Plaintiff brought his Bill to have *an Account of* J. S.'*s perſonal Eſtate, and that he might have the Surplus of it*; and *for a Moiety of the* 4000 l. And the Infant Heir of *J. S.* brought a Croſs Bill againſt him *for an Account of the real and perſonal Eſtate of his Father*, (his Mother having been the only acting Truſtee). The Creditors brought their Bill *to have the Truſt performed, and their Debts paid.* An Account being directed, and the *Maſter* having made his Report, Lord *Somers*, aſſiſted by his *Honour*, diſmiſſed the Bill as to the Plaintiff's Demands touching the Surplus of *J. S.*'s Eſtate, but took farther Time to conſider of his Demand as to a Moiety of the 4000 *l.* But before any Judgment was given therein, the Seal was given to Sir *N. Wright*, and on a Rehearing, *Lord Keeper*, aſſiſted with his *Honour*, affirmed Lord *Somers*'s Order as to the Demand of the perſonal Eſtate, and alſo diſmiſſed the Bill as to the Demand of a Moiety of the 4000 *l.* And this Diſmiſſion was affirmed *in Dom. Proc'*, *ibid.* 142. ——2 *Vern. Rep.* 416. S. C. and ſtates, that the Deviſe for *Payment of Debts and Legacies* was of ſome *Leaſehold* and *perſonal* Eſtate; and that on the Part of the Plaintiff it was endeavoured to *diſtinguiſh* this Cauſe from that of *Pawlet* and *Pawlet*, Firſt, Becauſe *that was by Deed*, and *this by Will.* Secondly, *There it was to be raiſed out of Land only*, whereas *here the perſonal Eſtate is liable as well as the Land*, and *has been applied in Part to pay off the Mortgage that was on the Land.* But *Cur'* held it to be within the Reaſon of that Caſe.—— *Caſes in B. R. Temp. W.* 3. 276. *Hil.* 1698. *Yates* and *Fettiplace*, S. C. but ſtates it thus: *A.* ſeiſed of Lands in Fee, had Iſſue a Daughter, and by Will charged his Lands with 5000 *l.* for her Portion, payable at twenty-one or Marriage; and dies. The Daughter dies at ſixteen; (ſix in the Original). The ſecond Huſband of the Daughter's Mother takes out Adminiſtration to the Daughter, and to the Mother his Wife. And the Queſtion was, If he ſhould have the 5000 *l.* or if it ſhould be ſunk for the Benefit of the Heir? And Lord *Somers* decreed for the Heir; and held that in all Caſes where a Man charged a Sum certain to be paid, as here, out of the real Eſtate, there, if the Perſon dies, the Money ſhall be ſunk for the Benefit of the Heir. But if a Man deviſes a *perſonal* Legacy, or a Sum, to be paid out of a Term for Years, and the Legatee dies before the Age, &c. the Executors or Adminiſtrators of the Legatee ſhall have the Money, becauſe it was *debitum in præſenti*, tho' *ſolvendum in futuro. Ibid.* (*a*) *Note*; In 2 *Freem. Rep.* 243. nothing is ſaid of the Deviſe being of a *perſonal* Thing, but reſts it wholly upon the Lands deviſed, and the keeping on Foot the mortgaged Term.

4. The Reaſon why a Legacy or *Portion* charged upon Land ſhall ſink into the Eſtate for the Benefit of the Heir, where the Party dies before it becomes payable, and that not to do ſo when it is charged upon the perſonal Eſtate, is, becauſe the *Heir is more favoured at Law* and *in Equity* than *an Executor* or *Adminiſtrator*; and becauſe the *Heir is looked upon to be the Stay and Support of the Family*; when *an Executor is ſometimes a mere Stranger to it. Per* Lord Keep. *Wright*, *Hil.* 1700. in the Caſe of *Yate* and *Fettiplace*, 2 *Freem. Rep.* 244.

5. Where a Child's Portion *is to be raiſed out of a Truſt Eſtate, created by a voluntary Family Settlement, with a Power of Revocation*, and the *Child dies unmarried* and *inteſtate before his Father*, Equity will never raiſe the Portion, but it muſt ſink into the Eſtate. 1702. *Warburton* and *Warburton*, *Vin. Abr.* Tit. *Portions*, (I) *Ca.* 8.

6. By a Marriage Settlement, a Term is created for raiſing 400 *l.* apiece for younger Children, *by Rents*, &c. or *by Mortgage or Sale* of the Term, *to be paid within a Year's Time after the Father's Death, with Intereſt at* 5 l. per Cent. *from his Death 'till paid.* There were three Daughters and a Son, and *one of the Daughters dies after the Father*, but *within a Year after his Death.* Her Mother takes out Adminiſtration, and brings this Bill againſt the Truſtees and the Heir at Law, to have the 400 *l.* raiſed and paid, with Intereſt. And *per* Lord

Chan. *Cowper*, the 400*l.* apiece was raiſable by the Truſtees preſently after the Father's Death, if they had thought fit, but the Children could not have demanded it 'till after the Year; 'twas *not* abſolutely due upon the Commencement of the Term, becauſe there was a whole Year given for the raiſing of it; and that therefore ſince one of the Daughters is dead within the Year, and before ſuch Time as ſhe could have demanded it, in Favour to the Heir, and for the Benefit of his Inheritance, the Caſes have all gone this Way, that ſuch Portions ſhould ſink, and not be raiſed at all (*a*). And decreed accordingly. *Hil.* 1709. *Tournay* and *Tournay*, *Prec. in Chan.* 290.

(*a*) But as to the other Children (who were alſo Plaintiffs) an Account was decreed to be taken of the Rents and Profits of the Term, and their Portions to be forthwith raiſed and paid by Sale or Mortgage. *Ibid.*

7. A Term of ninety-nine Years was raiſed to ſecure Daughters Portions; the Truſt thereof is declared to be, that if the Huſband ſhould die without Heirs Male of his Body by *M.* and *leaving a Daughter or Daughters*, that then ſuch Daughter or Daughters ſhould have 3000*l.* if but one, but if more, 3000*l.* amongſt them, payable at their Ages of twenty-one or Marriage, with a Proviſo, that if the Huſband ſhould not have any Daughter by *M. living at his Death*, then the Term to ceaſe. The Huſband had no Iſſue Male by *M.* but had a Daughter *E.* who attains twenty-one, and marries the Plaintiff, and has Iſſue by him. *M.* dies, and *E.* dies *in her Father's Life-time*, and then the Father dies. And Plaintiff having adminiſtered to *E.* his Wife, brings a Bill for this Portion. But Lord Chan. *Cowper* held that he was not intitled to his Wife's Portion (*b*). *Hil.* 1717. *Wingrave* and *Palgrave*, 1 *Will. Rep.* 401.

(*b*) For by the firſt Words the Truſt of the Term never ariſes, that being to commence upon a Condition precedent, (*viz.*) *if the Father ſhould die without Heir Male*, and *leaving a Daughter or Daughters*, which cannot be intended having had a Daughter, but leaving a Daughter; and the Father leaving no Daughter at his Death, the Truſt of the Term does not ariſe. That the *Proviſo* determines the Term itſelf by not having a Daughter living at his Death, and that if the Term be determined at Law by the expreſs Proviſion of the Parties, it would be very ſtrange for Equity to revive it. That the Intention of the Settlement might be and probably was, that this Term ſhould ceaſe, and that no Portion ſhould ever, in ſuch Caſe, be raiſed for the Benefit of an Executor or Adminiſtrator, after the Daughter's Death, for whoſe *perſonal Advantage* this might be deſigned; but in Caſe of her Death in the Life of the Father, the Intent of the Parties might be, to prefer the Heir of the Family (who in this Caſe was the Defendant, a Son by an after-taken Wife) before any Executor or Adminiſtrator of a deceaſed Daughter. *Per Lord Chancellor, ibid.* 402.

8. *Part of Lands charged with* 400 l. *Portion are deviſed to the Party to whom the Portion is payable*; altho' the Lands deviſed are more than the Portion, yet it is no Extinguiſhment of the Charge. *Feb.* 28, 1725. *Ruſhout* and *Ruſhout*, *Vin. Abr.* Tit. *Portions*, (I) *Ca.* 11.

9. *J. S.* being ſeiſed in Fee of a conſiderable Eſtate, and having no Children, covenanted to ſuffer a Recovery of all his Lands to the *Uſe of himſelf for Life*, then *to his Wife for Life*, then *to the Iſſue of their Bodies*, and *for want of ſuch Iſſue*, In Truſt for his Siſter *A.* *for her ſole* and *ſeparate Uſe*, *during Life*, and *after her Death if* E. *her Huſband ſhould ſurvive her*, to *permit him to receive the clear yearly Sum of* 1000 l. *during his Life*, and afterwards to *D.* (eldeſt Son of ſaid *E.* and *A.*) *for Life*, Remainder *to his firſt*, &c. *Sons*, with *like Remainders to* T. and *all the other Sons of ſaid* E. *and* A. Provided alſo, *that it ſhall and may be lawful to and for the ſaid* A. *with the Conſent of the ſaid* E. *her Huſband*, and *for the ſaid* E. *her ſurviving*, *from Time to Time*, *by Sale*, *Mortgage*, *or otherwiſe charging the Premiſſes*, *to raiſe and ſecure ſuch Sums of Money* (*not exceeding*

His *Lordſhip* held that tho' by the firſt Clauſe 12,000*l.* only was to be raiſed, yet that the ſecond Clauſe is ſubſidiary to the firſt, and that in Caſe the firſt does not take Effect, then the ſecond was to prevail, whereby *J. S.* made a certain direct Charge of 3000*l.* for each Daughter, and 2000*l.* for each younger Son, without any Proviſion (as there is in the firſt Clauſe) that the whole ſhould not amount to more than 12,000*l.* That by the firſt Clauſe ſuch

such Children only can be conſidered as intitled to any Share under the Appointment as were living at the Survivor's Death; but no Appointment having been made, it ſtands upon the ſecond Clauſe, which is a direct Charge upon the Land of 2000 *l.* for for each Son, and 3000 *l.* for each Daughter.—That tho' the Payments were to be at twenty one, yet no certain Intereſt veſted in any of the Children until the Survivor's Death, and altho' ſome of them attained their Ages of twenty-one in their Mother's Life time,

ing in the whole the Sum of 12,000 l.) *as the ſaid* A. *notwithſtanding her Coverture, ſhall, with the Conſent in Writing of the ſaid Huſband, think fit, and for the ſaid* E. *her ſurviving, as he ſhall think fit, for the Maintenance and Portion of any of the Children of them the ſaid* E. *and* A. *born or to be born. And if the ſaid* E. *and* A. *his Wife, or the Survivor of them, ſhall not appoint in what Proportion ſuch their Children ſhall be provided for,* then *all the Parties to theſe Preſents are agreed that* 2000 l. *apiece ſhall be raiſed* and *payable to each ſuch younger Sons,* and 3000 *l. apiece for the Daughters of the ſaid* E. *and* A. *And if there ſhall be but one Daughter,* then 6000 l. *for ſuch only Daughter, at their Ages of twenty-one, with Intereſt for the ſaid ſeveral Sums after the Rate of* 5 l. per Cent. *for their ſeveral and reſpective Maintenances until their reſpective Portions ſhall become payable*; and *ſuch Maintenance to begin from the Time that ſhall be appointed by the ſaid* E. *and* A. *his Wife,* or *the Survivor of them*; and *in Caſe no ſuch Appointment,* then *from the Death of the Survivor of them, the ſaid* E. *and* A. *his Wife.* Then comes this Proviſo, *that if any of the younger Children die before their reſpectiwe Shares become payable,* then *the Share of ſuch Child ſo dying ſhall be equally divided among the ſurviving Children. J. S.* died ſoon after *without Iſſue,* and then in 1722 *E.* died, *leaving Iſſue by* A. his Wife *four* younger Sons, and two Daughters *G.* and *H.* which laſt died an Infant ſoon after her Father's Death; and in 1734 the *Mother* died, *having never charged the Lands with the* 12,000 l. *or any other Sum for the Childrens Proviſion,* nor *given any Direction in what Manner* or *Proportion they ſhould be provided for.* Some of the Children attained their Age of twenty-one in her Life-time. *Lord Chancellor* decreed the whole 12,000 *l.* to be raiſed, and Intereſt from the Mother's Death only. *Hil.* 1735. *Rolt* and *Rolt, Caſes in Eq. Temp. Lord Talbot* 189.

yet all being contingent until the Survivor's Death, no Intereſt can be due but from the Time of the happening of the Contingency. And ſo decreed *ut ſupra.*

3 *Will. Rep.* 414. S. C. *in Dom. Proc'*, ſtates it accordingly, and ſays that Lord *Talbot*'s Decree was affirmed by the Lords 16 *Mar.* 1735, with *Coſts.*

10. *J. S.* being poſſeſſed of a conſiderable real and perſonal Eſtate, deviſes thus, (*viz.*) " *I give and bequeath unto my Daughter* M. *at* " *her Age of twenty-one, or Day of Marriage, which ſhall firſt happen, the Sum of* 2500 l. and *my Will and Meaning is, that if my* " *Son* A. *ſhould die without Iſſue Male of his Body then living,* or " *which may afterwards be born,* that then *my ſaid Daughter ſhould* " *have and receive at her Age of twenty-one, or Day of Marriage,* " *which ſhall firſt happen, the farther Sum of* 3500 l. *over and above* " *the ſaid Sum of* 2500 l. But *in Caſe the Contingency of my ſaid* " *Son's dying may not happen before the ſaid Age of my Daughter,* or " *her Day of Marriage,* that then ſhe ſhall receive and be paid the " Sum of 3500 *l. whenever it might after happen.*" Then the Teſtator *deviſes his real Eſtate to his Son in Tail,* and *for want of ſuch Iſſue,* Remainder *to his Brother in Fee*; and then ſays, " *And my Will and* " *Meaning is, that the Lands and Premiſſes hereby deviſed ſhall be* " *liable to and chargeable with the Payment of the ſaid Sum of* 3500 l. " *whenever it ſhall become due and payable*;" and directs, *that in Caſe of Failure of Iſſue of his Son, his Daughter, her Heirs or Aſſigns, ſhould join in a Surrender of ſome Copyhold Lands to the Uſe of his Brother, otherwiſe the Legacy of* 3500 l. *to be void.* The Daughter marries, having attained her Age of twenty-one, and dies in her Brother's Life-time, leaving the Plaintiff her Huſband, who adminiſtered to her, and then her Brother dies without Iſſue Male. And the Queſtion was,

Whether

Whether the 3500 *l.* Legacy ſhould be raiſed out of the *Land*, the *perſonal* Eſtate being deficient? And Whether it was ſuch an Intereſt in the Daughter as ſhould go to her Adminiſtrator? And *Lord Chancellor* obſerved, that three Things were by the Will neceſſary to happen to intitle *M.* to this Legacy of 3500 *l. viz.* the Death of *A.* the Son without Iſſue Male, Marriage, or *attaining her Age of twenty-one*; and that all three had happened; and that tho' it is to be raiſed out of Land, it remains Money ſtill; and tho' ſhe has not lived to receive it, yet the Contingency having happened, it muſt go to her Huſband, who is her Repreſentative, and who may well be thought to have married in Contemplation of this additional Fortune of 3500 *l.* tho' depending upon a Contingency; and decreed *accord'*. *Trin.* 1735. *King* and *Withers*, *Caſes in Eq. Temp. Lord Talbot* 117.

16 *Mar.* 1735, this Decree was affirmed *in Dom. Proc'. Ibid.*—— 1 *Vol. Abr. Eq.* 112. *King* and *Withers*, is not S. C.

11. J. S. *Tenant for Life*, Remainder *to* A. *his eldeſt Son in Tail.* They two agreed to reſettle the Eſtate, and a Recovery was accordingly ſuffered to the *Uſe of* J. S. *for Life as to Part*, then to Truſtees for two hundred Years to *raiſe* 1100 l. *to be paid to* B. (*the ſecond Son of* J. S.) *within ſix Years after* J. S.*'s Death*, or *as ſoon after as the ſame could be raiſed*, and *in the mean Time Intereſt* (*after the Rate of* 5 l. per Cent.) *from* J. S.*'s Death*, *for and towards his Maintenance until the Portion be paid him*, Remainder *to ſaid* A. *for Life*, *and to his firſt*, &c. *Sons in Tail*, &c. *B.* died indebted, leaving no Aſſets, and two Years after him *J. S.* died, by whoſe Death an Eſtate of 700 *l.* a Year came to *A.* *Lord Chancellor* thought that this 1100 *l.* muſt be conſidered as a Portion, as it moved from the Father, and was intended by him as a Proviſion for his Child. The Term and Truſt are not to ariſe 'till the Father's Death, but no particular Time is limited for Payment of the 1100 *l.* but barely within ſix Years after *J. S.*'s Death, and not made payable to him, his Executors and Adminiſtrators, but barely to him, with a Proviſo, *that from* J. S.*'s Death* 5 l. per Cent. *ſhall be raiſed for and towards his Maintenance*, which looks like an Intent to poſtpone the veſting 'till *J. S.*'s Death, ſince the 5 *l. per Cent. for and towards his Maintenance* can never be raiſed by them to that Purpoſe, when he died in *J. S.*'s Life-time. This *firſt* Act which the Truſtees are to do, *viz. that of providing for his Maintenance*, neceſſarily ſuppoſes him living at *J. S.*'s Death, and where the Intereſt is contingent, as here it is, it is moſt conformable to Reaſon to conſider the Principal as contingent likewiſe; and ſhould the Conſtruction be otherwiſe, the Term by the expreſs Words of the Truſt can never ceaſe, it being to endure *for and towards his Maintenance until the Portion be paid unto him*, which it can never be, ſince he died in *J. S.*'s Life-time; and his *Lordſhip* thought the whole contingent, Principal as well as Intereſt, and that the Portion muſt ſink for the Benefit of the Owner of the Eſtate; and ſo diſmiſſed the Bill. *Eaſt.* 1736. *Bradley* and *Powel*, *Caſes in Eq. Temp. Lord Talbot* 193.

The Rule of Portions ſinking in the Land, where the Party dies before the Term out of which they are to ariſe comes into Poſſeſſion, has not always held without Exception, as appears from *Butler* and *Duncombe*'s Caſe, 2 *Vern.* 760. where the Words were from and after the Commencement of the Term, and therefore the Portion not payable during the Life of the Father and Mother, the Term not being yet commenced, but yet the Court enabled the Huſband and Wife to raiſe Money upon the Intereſt by way of Mortgage, which was to conſider it in ſome Sort as already veſted; ſo in that of *Broome* and *Berkeley*, 1 *Vol. Abr. Eq. Ca.* 340. notwithſtanding the Portions were decreed not to be raiſed immediately, yet they were conſidered as tranſmiſſable Intereſts; the ſame in *King* and *Withers*, *in Dom. Proc'*. In all theſe Caſes the Limitation was, that the Portions ſhould be paid them at ſuch a Time, as upon Marriage, or at ſuch an Age, and the Intent of the Parties was plain that upon either of theſe Contingencies happening the Child ſhould be intitled to the Portion, altho' it was contingent, ſince *a contingent Intereſt is tranſmiſſable*, and *a future Proviſion may well be looked upon as a Conſideration for Marriage*. *Per* Lord Chan. *Talbot*, *ibid.* 194, 195.

12. In general where Land is charged for Payment of Portions, and the Legatee dies before the Time of Payment, the Legacy ſhall not be raiſed, but ſink for the Benefit of the Eſtate. But where *Portions are directed by a Will to be raiſed* and *paid within two Years after the Death of the Teſtator*, and a Daughter ſurvives theſe two

Years, and then dies, this is not within the above general Rule, but had ſhe died within the two Years it had been otherwiſe. *Per Parker* J. who ſat for Lord Chan. *Hardwicke*, *Eaſt.* 1740. in the Caſe of *Webb* and *Webb*, *Barnard. Rep. in Chan.* 89.

(D) Portions and Proviſions for Children favoured in Equity.

1 *Vol. Abr. Eq. P.* 66. *Ca.* 1. *Offley* and *Offley*, is *not* S. P.

1. IN a Marriage Settlement there was a Term for raiſing 10,000*l.* for a Daughter, but it was ſo ſhort that the ordinary Profits of the Lands would not raiſe above half the Sum; but there was a Coal Mine in the Land, which was open at the Father's Death, which the Court ordered ſhould be wrought, and the Truſtees to have Power to make *Soughs* and *Drains* in any other the Lands of the Heir, as Need ſhould require, ſo as it were done in an orderly Manner, ſo that the Money might be raiſed. And Lord Commiſſioner *Hutchins* ſaid, that in ſuch Caſe where the uſual Profits of the Land will not raiſe the Money appointed within the Time, this Court may order Timber to be felled off the Land to make it up. *Trin.* 1691. *Offley* and *Offley*, *Prec. in Chan.* 26, 27.

2. Money placed out upon Bonds *by a Father in the Name of a Child*, ſhall be looked upon to be towards a Proviſion for ſuch Child. *Feb.* 14, 1706. *Parker* and *Lamb*, *Vin. Abr.* Tit. *Portions*, (L) *Ca.* 4.

3. A Father upon his Son's Marriage ſettles Lands, which he covenants to be 800*l. per Annum*, and reſerved Power to himſelf to charge 1200*l.* for his younger Children. He charges the Eſtate with 600*l.* only, and dies. The Son objected to the Payment of the 600*l. becauſe the Value of the Lands was defective, being only* 600l. *a Year*, which ought to be made 800*l.* a Year before the Charge ſhould take Effect. But decreed that the Money was well charged, the Father having only charged a Moiety of the 1200*l.* and in Caſe there were a Deficiency, he ought to ſue for Satisfaction out of his Father's Eſtate for the Breach of Covenant. *Jan.* 12 (*a*) 1712. *Ormſbey* and *Dodwell*, *Vin. Abr.* Tit. *Portions*, (L) *Ca.* 7. *P.* 454.

(*a*) In another MS. it is 20 *Jan.* 1702. *Ibid.*

4. The Intereſt of 500*l.* was ſettled to be paid to the Wife for Life, then the Principal and Intereſt to Truſtees, to be paid to ſuch Daughter or Daughters as ſhall be begotten on the Body of the Wife, Share and Share alike; but if the Huſband ſhould die without any Daughters, then the Money was to be paid to the Wife. At the Time of making this Settlement there was a Daughter, and the Huſband died without any other Daughter. Inſiſted that this Daughter was intitled to nothing under this Settlement, becauſe being in *eſſe* at the Time when it was made, ſhe was not within the Words of the Settlement, which run in the *future* Tenſe, which *ſhall be begotten* upon the Body of the Wife, Share and Share alike. But Lord Chan. *Parker* declared that this was to put the moſt abſurd Interpretation upon a Settlement that could be ſuppoſed, *viz.* that Parents ſhould be ſolicitous for Children *in embrio* and unborn, and take no Care of a Child *in eſſe*. That the *Futurity* meant by the Settlement did not relate to the Time of the Birth of the Daughters, but to the Death of the Huſband, at which Time all the Daughters then in Being, that were the Offspring of the Coverture, became intitled to the Money by this Settlement. *Eaſt.* 4 *Geo.* 1. *Slingſby* and ———, *Lucas's Rep.* 397.

5. What is expreſsly paid towards a Portion ſhall be firſt applied to diſcharge the Intereſt of ſuch Portions. *Feb.* 17, 1724. *Lord Kingſland* and *Lady Tyrconnel*, *Vin. Abr.* Tit. *Portions*, (L) *Ca.* 8. *P.* 454.

CAP. LXXXI.

Power.

(A) Of the right Execution of a Power;——Where Equity will aid or ſupply a defective Execution of a Power;——And in what Caſes Equity will decree a Power unexecuted to be executed.

(B) Concerning the Revocation and Extinguiſhment of a Power.

(A) Of the right Execution (a) of a Power;—Where Equity will aid or ſupply a defective Execution of a Power;—And in what Caſes Equity will decree a Power unexecuted to be executed.

(a) If *A.* has a Power by *B.*'s Will to diſpoſe of 400 *l.* in his Will, and *A.* makes a general Will of his perſonal Eſtate, as the 400 *l.* was not an Intereſt veſted in him, his Will ſhall not amount to an Execution of his Power, neither can parol Evidence be permitted to ſhew his Intention to execute it, nor will Equity ſupply it as a defective Execution in Favour of Volunteers, tho' otherwiſe there will not be Aſſets to pay Legacies. *Moulton* and *Hutchinſon* (*b*), *MS. Rep.*——A Power to makes Leaſes under Hand and Seal. They were ſealed, but not ſigned, by reaſon of the Gout. Not well executed. *Blockvill* and *Aſcott* (*c*), *MS. Rep.*——If *A.* covenants under a Power to limit ſeveral Eſtates, being of particular Value in Jointure, and there is no Covenant that they are or ſhall continue of that Value, or to make up the Value, it ſeems any Defect in Value ſhall not be ſupplied. *MS. Notes.* (*b*) *Quære* What Term and Year. (*c*) *Quære* What Term and Year.

1. IN a Marriage Settlement was a Proviſo, that the Baron by Deed or Will might limit any of the Lands (except thoſe in Jointure) to ſuch Perſons and for ſuch Eſtates as he ſhould think fit for raiſing 500 *l.* apiece for younger Children, to be paid at ſuch Times and in ſuch Manner as he by *Deed* or *Will* ſhould declare, and covenanted to do ſo accordingly. The Baron died, leaving ſeveral younger Children of the Marriage, but made no Appointment, tho' ſome Lands not ſettled in Jointure were limited to the Baron *for Life*, and *after to the Iſſue Male of his own Body*, with Remainder *over*; yet it was decreed that it was a Charge on the Land, and bound the Iſſue in Tail; and the 500 *l.* was ordered to be raiſed for each of the younger Children immediately. *Note*; The Covenant in this Caſe was looked upon as an Execution of the Appointment in Purſuance of the Powers. *Cited* as the Caſe of *Dr. Sarth* and *Lady Blankfrey*, 1695. *Vide Gilb. Rep. in Eq.* 166, 167.

2. A. *Tenant for Life*, Remainder *to his firſt and other Sons in Tail*, Remainder *to* B. *for Life*, Remainder *to his firſt and other Sons in Tail*, Remainder *to* C. *with a Power to* B. *after* A.*'s Death without Iſſue to make a Jointure.* B. *marries in the Life of* A. *and before Marriage covenants to make a Jointure*, and *to execute this Power when he ſhould come into Poſſeſſion.* A. *dies without Iſſue Male*, and B. *ſurvives*, but *dies without making a Jointure*, or *executing this Power.* *B.*'s Widow brought a Bill againſt *C.* to have a Jointure made, becauſe

2 *Will. Rep.* 231. S. C. cited *arg'* in the Caſe of *Lady Coventry* and *Earl of Coventry.*

B.

B. ſurviving *A.* he might have executed this Power, and had covenanted ſo to do; and decreed *accord'*. *Cited* as decreed *at the Rolls* 1709, in the Caſe of *Alford* and *Alford*. *Vide Gilb. Rep. in Eq.* 167.

1 *Vol. Abr. Eq. P.* 216. *Ca.* 6. *Hutton* and *Simpſon*, S. C. but not S. P.

3. *J. S.* by Will gives his perſonal Eſtate to ſuch Uſes as his Wife, with the Conſent of his Truſtees, ſhould direct, and the Wife takes upon her to diſpoſe of it by her Will without any ſuch Conſent. *Per Lord Chancellor* (after Time taken to conſider of it) This is a void Diſpoſition, and the Teſtator, as to that, muſt be ſaid to die inteſtate *ab initio*; and ordered a Diſtribution accordingly. *Mich.* 1716. *Sympſon* and *Hornſby*, *Prec. in Chan.* 452.

4. A general Power to raiſe Daughters Portions reſtrained by a particular Proviſo. *Feb.* 16, 1718. *Fane* and *Duke of Devonſhire*, *Vin. Abr.* Tit. *Powers*, (A. 13.) *Ca.* 3. *P.* 477.

Vide 1 *Vol. Abr. Eq.* 42. *Ca.* 5.

5. A Settlement is directed to be made on *A.* with a Power to make a Jointure of a *Moiety* of the Premiſſes. *A.* before the Settlement made by the Truſtees to him makes a Jointure of more than a *Moiety* of the Premiſſes. And *per* Lord Chan. *Parker*, here neither is nor can be any Jointure, for as yet *A.* has no *legal* Eſtate 'till the Truſtees convey to him, and until he has an Eſtate he can paſs none; and therefore his *Lordſhip* ſaid, he could take no Notice of this *equitable* Appointment, nor can it properly come in Queſtion at this Time, not being to take Effect 'till after *A.*'s Death, and perhaps never will, as he may ſurvive his Wife. *Hil.* 1719. *Blackborn* and *Edgley*, 1 *Will. Rep.* 604.

6. A Feme, before her Marriage with *J. S.* did with his Conſent convey her Eſtate to Truſtees *to ſuch Uſes* and *for ſuch Purpoſes as ſhe ſhould by Deed or Will*, or *by any Writing in the Nature of a Will, appoint*. Lord Chan. *Macclesfield* doubted if a Will, atteſted by two Witneſſes only, would be a good Appointment, becauſe when a Power is given to appoint the Uſes of Lands by Deed or Will, the Will muſt be intended (*a*) ſuch an one as is proper for the Diſpoſition of Land, and conſequently ſhould be ſubſcribed by three Witneſſes in the Preſence of the Teſtatrix according to the Statute of Frauds; for this is within all the Inconveniencies that this Statute intended to prevent; and the other Words, *in the Nature of a Will*, mean the ſame as a Will, which muſt therefore be ſubſcribed by Witneſſes in the Preſence of the Teſtatrix. *Mich.* 1721. *Longford* and *Eyre*, 1 *Will. Rep.* 740, 741.

(*a*) *Vide Wagſtaff* and *Wagſtaff*, 2 *Will. Rep.* 258.

7. If *A.* has a Power to charge Lands by Writing under his Hand *atteſted by three Witneſſes*, with 7000 *l.* for Childrens Portions, and he (in Fear of ſudden Death, and being abſent from home, and ſo not being able to have a Sight of the Deed where this Power was contained) by a Paper *atteſted by two Witneſſes* charges it with 8000 *l.* it is good as to the 7000 *l.* *Eaſt.* 8 *Geo.* Cites *Parker* and *Parker*. *Vide Gilb. Rep. in Eq.* 168.

Lucas's Rep. 463. *Eaſt.* 8 *Geo.* 1. S. C. And *per Lord Chancellor*, As to the 500 *l. per Annum M.* has certainly a very ſtrong and a very favourable Caſe; there can be no Queſtion *whether*, tho' there may *from whence*, ſhe ought to have it. His *Lordſhip* ſaid the *Judges* were of Opinion, that the Marriage Articles entered into by *J. S.* together with the Deed of Settlement drawn by his

8. *J. S.* by Virtue of his Father's Will was Tenant for Life, with Power to make a Jointure of 500 *l. per Annum*, ſo as ſuch Wife brought a Portion equivalent to ſuch Jointure. *J. S.* on his Marriage with *M.* and previous thereto, by Articles in Conſideration of the Marriage, and 10,000 *l. Marriage Portion*, covenants on Requeſt, *&c.* according to the Power given to him by the ſaid Will, *or otherwiſe*, to ſettle Lands of the Value of 500 *l. per Annum* upon the ſaid *M.* his intended Wife, for Life, as her Jointure. The Marriage takes Effect,

Effect, and *J. S. being requeſted to make a Jointure of the* 500 l. per Annum *purſuant to the Power*, did *accordingly direct the Jointure to be made*, and *Lands were ſet apart for that Purpoſe of* 500 l. *a Year within the Power*, and the Draught of the Jointure was drawn and ingroſſed, but *J. S.* dies ſuddenly before it was executed, without Iſſue Male, leaving *A.* his only Daughter (the Wife of *B.*) Executrix and reſiduary Legatee; and the Eſtate came to *C.* the Remainder Man, by Virtue of the ſaid Will. *M.* brought her Bill for a ſpecific Performance of the Articles againſt the ſaid *A.* and *B.* her Huſband, and *C.* the Remainder Man. Lord Chancellor *Macclesfield* conceived *M.* ought to be relieved, ſhe claiming under a valuable Conſideration, but whether againſt the Remainder Man or out of the perſonal Eſtate of *J. S.* remained a Queſtion with his *Lordſhip*, and therefore he deſired to be attended with Precedents; and afterwards on a ſecond Hearing, and after great Debate, his *Lordſhip* being aſſiſted by his *Honour* and the Barons *Gilbert* and *Price*, decreed that the Remainder Man ſhould during his Life confirm and make good the Jointure. 16 *May* 1724. *Counteſs Dowager of Coventry* and *William Earl of Coventry and Sir William Carey et Ux'*, 2 *Will. Rep.* 222 to 233.

His Direction in Purſuance of the Articles, was ſuch an Execution of the Power reſerved in the Will of his Father as was binding in Equity; and accordingly it was decreed that *M.* ſhould have for her Jointure the Lands mentioned in the ſaid intended Settlement. *Ibid.* 479, 480. ——2 *Will. Rep.* 597. (but ſhould be 665.) S. C. cited *per* Lord Chan. *King*, *Hil.* 1731.

thus: *J. S.* on his Marriage with *M.* (*J. S.* being but Tenant for Life, with a Power to make a Jointure of Lands not exceeding 500 *l. per Annum* on any Wife he ſhould marry) covenanted in Conſideration of the intended Marriage, that *he* or *his Heirs* would after the Marriage, according to the Power given him by his Father's Will, *or otherwiſe*, ſettle Lands of 500 *l. per Annum* on his Wife for her Jointure; and it being in Proof that *J. S.* directed his Steward to look over his Rent Rolls for a fit Parcel of the Eſtate to make good the Jointure, and afterwards the Jointure Deed was drawn and ingroſſed, but not executed; tho' this depended only on a Covenant, yet the Jointure of Land being the chief Thing in View, the Decree was, that the Land ſhould be ſettled, and the Covenant *not* made good out of the perſonal Eſtate.——*Ibid.* 625. S. C. cited *per* Lord Chan. *King*, *Trin.* 1731. who ſaid, that this Caſe being adjudged upon ſolemn Debate, and with the Aſſiſtance of the Judges, is a great Authority, and to be obſerved by him; and that from thence it may be inferred, that whatever is in the Power of the Perſon covenanting to do, provided the Covenant be for a valuable Conſideration, Equity ought to look upon as done, and ſupply the Want of Circumſtances againſt a Remainder Man. *Maxims in Equity* at the End, S. C. reported.——*Gilb. Eq. Rep.* 160. S. C.——1 *Vol. Abr. Eq.* 348. *Ca.* 19. S. C. but it being a very particular Caſe, I have here inſerted it.

9. *J. S.* and *M.* his Wife by Deed of 18 *Jan.* 1698 covenanted to levy a Fine of ſeveral Manors, *&c.* being *M.*'s Inheritance, of the yearly Value of 1200 *l.* the Uſes of which Fine were declared to be to *A.* and *B.* and the Survivor of them, and Executors, *&c.* of ſuch Survivor, for one thouſand Years, In Truſt *to raiſe* 2500 l. *for the Benefit of* J. S. and after the Determination of that Eſtate, *to the Uſe of* J. S. *for Life, without Impeachment of Waſte*, with Remainder to Truſtees, to preſerve, *&c.* with Remainder *to* M. *for Life, without Impeachment*, &c. Remainder *to the Iſſue of the Marriage*, Remainder *to the Iſſue of* M. *by any after-taken Huſband*, Remainder *in Default of ſuch Iſſue to* J. S. *and his Heirs for ever.* Provided, *that if* M. *ſhould die in the Life-time of* J. S. *and there ſhall be no Iſſue of her Body by him lawfully begotten, or to be begotten, at the Time of ſuch her Deceaſe, that then and in that Caſe it ſhall be lawful for the ſaid* M. *at any Time or Times during her natural Life, by any Deed or Deeds in Writing, or by her laſt Will and Teſtament in Writing, or any Writing purporting her laſt Will and Teſtament, the ſame to be reſpectively atteſted by three or more credible Witneſſes, to charge all and every the ſaid Manors, &c. or any Part or Parts thereof, with any Sum or Sums of Money not exceeding* 1000 l. *in the whole, to be paid to ſuch Perſon or Perſons, and at ſuch Days and Times, and in ſuch Manner as the ſaid* M. *ſhall by ſuch Deed, &c. from Time to Time appoint; and by the ſame Deed or Deeds, &c. for that Purpoſe, to limit or appoint any Term or Number of Years of and in the ſaid Manor, &c. or any Part thereof, to any Perſon or Perſons whatſoever, re-*

deemable and to become void on Payment of ſuch Sums of Money as ſhall be thereon charged or appointed, not exceeding 1000 l. *ſo as ſuch Sums of Money be not payable 'till the End of ſix Kalendar Months next after the Deceaſe of* D. *any Thing to the contrary*, &c. Provided alſo, *that if ſaid* J. S. *ſhall happen to die, and* M. *ſhall him ſurvive, and there ſhall be no Iſſue of this Marriage living at the Death of* M. *then in ſuch Caſe it ſhall be lawful for the ſaid* M. *at any Time or Times during her Life, by any Deed* (ut ſupra) *to charge the ſaid Manors with any Sum not exceeding* 2000 l. And then goes on as in the other Proviſo, only ſays 2000 *l.* inſtead of 1000 *l.* A Fine was accordingly levied, and by Indenture of the 17 *July* 1703 *inter* ſaid *M.* of the one Part, and *T. N.* of the other Part, reciting the ſaid Deed of the 18 *Jan.* 1698, and the ſaid Powers for *M.* to charge the Eſtate with 1000 *l.* in Caſe ſhe died before *J. S.* and with 2000 *l.* in Caſe ſhe ſurvived him; and in Conſideration of 150 *l.* ſaid *M.* purſuant to the ſaid two ſeveral Proviſoes, did *thereby charge all and every the ſaid Manors*, &c. in Manner following, (*viz.*) That in Caſe ſaid *M.* ſhould die in the Life-time of *J. S.* and there ſhould be no Iſſue of her Body by the ſaid *J. S.* lawfully begotten, *&c.* living at the Time of ſuch her Deceaſe, then ſhe did thereby charge all and every the ſaid Manors with 1000 *l.* and ſhe did thereby direct and appoint the ſaid 1000 *l.* to be paid to ſaid *T. N.* or his Aſſigns, in Manner following, (*viz.*) 500 l. *on the firſt Day after the End of ſix Kalendar Months next after the Deceaſe of the ſaid* D. *and* 500 l. *Reſidue of the* 1000 l. *on the Day next following the ſaid firſt Day, both which Payments to be made at or in the* Guildhall *of the City of* Exeter *between the Hours of Two and Six of the Clock in the Afternoon of the ſame reſpective Days, and* M. *did for that Purpoſe limit and appoint the two thouſand Years Term of and in the ſaid Manor to the ſaid* T. N. *his Executors, Adminiſtrators and Aſſigns, the ſaid Term to commence and begin immediately from and after ſuch Death of the ſaid* M. nevertheleſs *redeemable and to become void on Payment of the* 1000 l. *in Manner as aforeſaid; and if the ſaid* J. S. *ſhould happen to die, and the ſaid* M. *ſhould ſurvive him, and that there ſhould be no Iſſue of the Body of the ſaid* M. *by the ſaid* J. S. *lawfully begotten*, &c. *living at the Time of the Deceaſe of her the ſaid* M. *then in ſuch Caſe the ſaid* M. *did thereby charge the ſaid Manors*, &c. *with the Sum of* 2000 l. *and did thereby direct and appoint the ſaid* 2000 l. *to be paid to the ſaid* T. N. *or his Aſſigns*, in Manner following (to wit) 1000 l. *Part thereof, on the firſt Day after the End of ſix Kalendar Months next after the Deceaſe of ſaid* D. *and* 1000 l. *Reſidue of the ſaid* 2000 l. *on the Day next following the ſaid firſt Day, both which laſt mentioned Payments to be made in the* Guildhall, &c. *between*, &c. ut ſupra. And the ſaid *M.* for that Purpoſe did thereby *limit and appoint the ſaid Term of two thouſand Years of and in the ſaid Manor*, &c. *to the ſaid* T. N. *his Executors, Adminiſtrators and Aſſigns, the ſaid laſt mentioned Term to commence and begin immediately from and after the Death of ſaid* J. S. nevertheleſs *redeemable and to become void on Payment of the ſaid* 2000 l. *in Manner as aforeſaid*; which ſaid Deed was *executed by* M. and *atteſted by ſix credible Witneſſes. D.* died in the Life-time of *J. S.* and then *J. S.* died, after whoſe Death *M.* brought her Bill againſt *W. N. Heir at Law, and Executor of ſaid* T. N. to be relieved againſt the Aſſignment of her Intereſt in the ſaid two Powers, offering to pay the ſaid 150 *l.* and Intereſt to this Time. And *W. N.* brought his Croſs Bill againſt *M.* to eſtabliſh the ſaid Aſſignment, and to have the Benefit of it as to the 2000 *l.* Upon hearing of the Cauſes, *Lord Chancellor* directed that as to *N.*'s De-

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mand of 2000*l.* under the Deed of 17 *July* 1703, that a Caſe ſhould be made on the ſaid Deeds of the 18 *Jan.* 1698 and of the 17 *July* 1703, and that the ſame ſhould be laid before the Judges of *B. R.* for their Opinion upon theſe Queſtions, Firſt, Whether the Deed of the 17 *July* 1703 be a good Execution of the Power by *M.* to raiſe the ſaid 2000*l.* Secondly, Suppoſing it to be a good Execution then when the ſaid 2000*l.* is to be raiſed. The Judges (*a*) were of Opinion, that the Deed of 17 *July* 1703 was a good Execution of the Power to raiſe the 2000*l.* and that the ſame ought to be raiſed upon the Death of *J. S. Sclater* and *Travell*, *Vin. Abr.* Tit. *Authority*, (G) *Ca.* 8. *P.* 427. but has no Date.

(*a*) *viz.* Lord Chief Juſtice *Raymond*, *Page*, *Reynolds* and *Probyn* J.

10. The Huſband, Tenant for Life, has a Power to make a Jointure on his Wife *by Deed under his Hand and Seal.* The Huſband having a Wife for whom he had made no Proviſion, and being in the *Iſle of Man*, by his laſt *Will under his Hand and Seal* deviſed Part of his Lands within his Power to his Wife for her Life. His *Honour* held this a good Proviſion, and the *legal* Eſtate being in Truſtees, they were decreed to convey an Eſtate to the Widow for her Life in the Lands deviſed to her by her Huſband's Will. *Mich.* 1728. *Tollet* and *Tollet*, 2 *Will. Rep.* 489.

His *Honour* obſerved, that this was a Proviſion for a Wife who had none before, and within the ſame Reaſon as a Proviſion for a Child not before provided for;

and that as a Court of Equity would, had this been the Caſe of a Copyhold deviſed, have ſupplied the Want of a Surrender, ſo where there is a defective Execution of a Power, be it either for Payment of Debts or Proviſion for a Wife, or Children unprovided for, he ſaid he would equally ſupply a Defect of this Nature. That the Difference is betwixt a *Nonexecution* and a *defective Execution of a Power*; the *latter* will always be aided in Equity under the Circumſtances mentioned, it being the Duty of every Man to pay his Debts, and an Huſband or Father to provide for his Wife or Child. But this Court will not help the *Nonexecution* of a Power, ſince it is againſt the Nature of a Power which is left to the free Will and Election of the Party whether to execute or not, for which Reaſon Equity will not ſay he ſhall execute it, or do that for him which he does not think fit to do himſelf. *Ibid.* 490.

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11. *Baron* and *Feme* ſeiſed in Fee, in Right of the *Feme*, by Deed and Fine ſettled the Premiſſes to the Uſe of the *Baron and Feme for their Lives*, Remainder *to Truſtees, to preſerve*, &c. Remainder *to their firſt*, &c. *Son in Tail Male ſucceſſively*, Remainder *to their Daughters in Tail general*, Remainder *to the Huſband and Wife, and their Heirs*, with a *Power* to the Huſband at any Time during the joint Lives of him and his Wife, *by his laſt Will, or any Writing purporting to be his laſt Will under his Hand and Seal, atteſted by three or more credible Witneſſes* (if he ſhould die before his Wife without any Iſſue between them then living) *to charge the Premiſſes with any Sum or Sums not exceeding* 2000*l.* *to be paid to ſuch Perſons and in ſuch Proportions as he ſhould appoint*, with the like Power to the Wife if ſhe ſhould die without Iſſue in the Life of her Huſband. There was no Iſſue of the Marriage, and the *Huſband by his laſt Will atteſted by three Witneſſes*, but *not ſealed*, reciting his Power, diſpoſed of the 2000*l.* *Two* of the Witneſſes to the Will ſwore, that the Will was ſigned by the Teſtator in the Preſence of all the three Witneſſes; but the third ſwore, that the Teſtator having written and ſigned the Will before, called for the Witneſſes and declared that Writing to be his laſt Will, and that all the three Witneſſes were then preſent and ſubſcribed their Names in his Preſence. *King* C. for the Satisfaction of both Parties, and as it was a Matter of Law, referred it to the Judges of *B. R.* and they determined (*upon Argument*) that the Will was void as a Charge for want of being ſealed. *Hil.* 1728. *Dormer et al'* and *Thurland et al'*, 2 *Will. Rep.* 506 to 511.

His *Lordſhip* ſaid, that tho' he himſelf inclined to think the Will of the Land good, if the Teſtator ſhould acknowledge the Name to be his, and the Witneſſes ſhould ſubſcribe in the Preſence of the Teſtator, yet that that Point ſhould be reſerved to the Defendant; and after having heard Defendant's Counſel, his *Lordſhip* ſaid, he took the Will to be a good one, and ſo a good Charge. That the Power was in the *Diſjunctive*,

Firſt, In reſpect of the *Huſband, who could make a Will*, and Secondly, In reſpect of the *Wife, who could not make a Will*, but *only a Writing purporting to be a Will*; but for the Satisfaction, &c. referred it *ut ſupra.*

12. 20 *Nov.*

12. 20 *Nov.* 1711 *J. S.* and *M.* his Wife were admitted to the Copyhold Premiſſes in Queſtion, *Habendum* to them two, and to the Heirs of *J. S.* In *Sept.* 1717 *J. S.* and *M.* ſurrendered theſe Copyhold Premiſſes *to the Uſe of the Wife for Life*, and afterwards *to ſuch Uſes as ſhe by any Writing or by her laſt Will, atteſted by three Witneſſes, ſhould appoint. M.* by a *Writing, purporting to be her laſt Will*, and *atteſted by three Witneſſes*, gave, deviſed, limited and appointed the Premiſſes to her Daughter in Tail, Remainder to her Brother in Fee. Afterwards *M.* ſurviving *J. S.* (he being attainted of Treaſon and executed) on her Marriage with a ſecond Huſband, by *Deed* or *Writing*, atteſted by *two* Witneſſes only, covenanted to ſurrender the Premiſſes *to the Uſe of her intended Huſband and herſelf*, and *the Heirs of the intended Huſband*, who covenanted within twelve Months to ſettle an Annuity or Rent-charge of 30 *l. per Annum* on *M.* for Life. The Marriage took Effect, and *M.* died *within* the Year. The Huſband brought his Bill againſt the Infant Daughter of *M.* by her *firſt* Huſband, to compel her to perform her Mother's Covenant. Lord Chan. *King* ſaid, that theſe Articles being for a valuable Conſideration, (*viz.*) that of Marriage, tho' not in Strictneſs purſuant to the Power, yet he would ſupply the Want of Circumſtances in the ſame Manner as he would the Want of a Surrender; otherwiſe had the Agreement been voluntary. And decreed the Plaintiff to enjoy; and the Daughter (when of Age) to convey, unleſs ſhe ſhews Cauſe to the contrary within ſix Months after ſhe attains twenty-one. *Trin.* 1731. *Cotter* and *Layer*, 2 *Will. Rep.* 623, 625.

13. An Eſtate (*int' al'*) is deviſed to *J. S.* for Life, with Power to make a Jointure (when in Poſſeſſion) of 100 *l. per Annum* for every 1000 *l.* which any Wife ſhould bring as a Marriage Portion, and ſo for more, more, *&c.* The Jointure to be for the Wife's Life, and to commence and take Effect from the Death of the Huſband, with the like Power for every Tenant for Life. *J. S.* previous to his Marriage with *M.* by Articles, reciting the Power, and thereby in Conſideration of 8000 *l.* left *M.* by her Father's Will, covenanted to ſettle within a Month after the Marriage 800 *l. per Annum* Jointure on *M.* for her Life, and alſo to make an additional Jointure of 100 *l. per Annum* for every 1000 *l.* which he ſhould receive, or be intitled by Virtue of *M.*'s Father's Will, and ſo in Proportion for any leſſer Sum than 1000 *l. M.* being then an Infant, the Articles were ſigned by her and her Guardians. The Marriage took Effect, and within a Month a Jointure of 800 *l. per Annum* was ſettled on *M.* for her Life. Afterwards *J. S.* received 1500 *l.* more, and made a further Settlement of 150 *l. J. S.* died without Iſſue. Defendant, the next Remainder Man, entered upon ſuch Part of the Eſtate as was not comprehended in the Jointure, *M.* being by her Father's Will intitled, together with her Siſter, to a Moiety of the Surplus of his perſonal Eſtate, and likewiſe by the Will of her Mother having a Right to ſome Lands in Fee-ſimple in *Ireland.* And *J. S.* dying much indebted, it was prayed by the Creditors Bill that they might have the Benefit of *M.*'s Share of her Father's and Mother's Eſtate, and in Lieu and Recompence thereof ſhe might have an additional Jointure made to her after the Rate of 100 *l. per Annum* for every 1000 *l.* which they ſhould recover out of her Eſtate, towards Payment of their Demands. And *M.*'s Bill was, that ſhe might have ſuch an additional Jointure made to her purſuant to *J. S.*'s Covenant, but in Caſe ſhe could not, then that no Part of her Eſtate ſhould be taken from her by the Aid of Equity, unleſs ſhe had the Recompence which it was agreed ſhe ſhould have by her

Marriage

Marriage Articles, *viz.* after the Rate of 100 *l. per Annum* for every 1000 *l.* ſhe ſhould bring. The only Queſtion of Difficulty ſeemed to be, how far the Power given by the Will for every Tenant for Life to make a Jointure, and the Covenant by *J. S.* to make a Jointure of 100 *l. per Annum* for every 1000 *l.* which *M.* his Wife ſhould bring, in regard it was not executed by *J. S.* in his Life-time, could bind the Defendant the Remainder Man. And *per* Lord Chan. *King*, the Intention of this Power is to enable every Tenant for Life under the Will to ſettle a Jointure after the Rate of 100 *l. per Annum* for every 1000 *l. &c.* That accordingly *M.* has had a Jointure of 800 *l. per Annum* for 8000 *l.* and 150 *l. per Annum* for 1500 *l.* which ſhe has brought; and it not appearing that ſhe brought any further Portion to *J. S.* he did not ſee ſhe could be intitled to any additional Jointure. That it was not reaſonable that the Eſtate for Life of the Defendant, or of any other of the ſubſequent Remainder Men (who in no Sort claimed under *J. S.*) ſhould be bound or affected by *J. S.*'s Covenant for making a Jointure, any further than the original Power warrants, which is to ſettle 100 *l. per Annum* for every 1000 *l. &c.* ſuch Wife ſhould bring her Huſband. That the Eſtate of the Teſtator ſo carefully ſettled ought not to be incumbered with Jointures to take Effect upon remote Contingencies, or Poſſibilities of further Portions coming in, when it does not appear what they are, or when, or whether they will ever come in. On the other hand his *Lordſhip* did not think it reaſonable that *J. S.*'s Creditors ſhould have any Benefit of the Reſidue of *M.*'s Fortune, if ever *that* ſhould be recovered, in regard ſhe cannot have the Recompence in Conſideration whereof it was agreed by the Articles that ſhe ſhould part with it. And decreed her therefore to keep ſuch Overplus of her Eſtate to herſelf, without having any additional Jointure out of the Teſtator's Eſtate. *Mich.* 1731. *Holt* and *Holt*, 2 *Will. Rep.* 648.

14. A Power aroſe upon a Settlement made with the Approbation of Truſtees by a Perſon during his Infancy, and confirmed by Act of Parliament. By the Settlement a Power was reſerved of charging divers Lands at any Time during his Life with 3000 *l.* He borrowed this Sum of *A.* and having executed his Power while an Infant, died ſoon after he came of Age. Plaintiff his Son brought his Bill to redeem on Payment of the principal Sum borrowed; but the Court decreed a Redemption on the common Terms of Payment of Principal, Intereſt and Coſts, becauſe here was a Power given to him to raiſe Money, and immediately to give Security, which was actually done; and altho' (perhaps) had he been of Age at that Time, he ſhould have been obliged to keep down the Intereſt during his Life; yet being an Infant at the Time intended for the Execution of this Power, and therefore not capable of making his Perſon liable to any Part of the Engagement, the Land muſt, from the Neceſſity of the Thing, have ſtood engaged for Intereſt as well as Principal, or it had been impoſſible for him during his Infancy to have raiſed any Money at all which the Nature of the Tranſactions required. *Per* his *Honour*, *Hil.* 1731. in the Caſe of *Evelin* and *Evelin et econt'*. Cites it as the Caſe of *Lord Killmurry* and *Dr. Gery*, out of 2 *Salk.* 538 (*a*). *Vide* 2 *Will. Rep.* 603 (*b*).

(*a*) 2 *Salk.* 538 no State of the Caſe, and reports it *Eaſt.* 12 *Ann.* *Vide* 1 *Vol. Abr. Eq.* 341. *Ca.* 4. (*b*) 603 in the Original, but ſhould be *P.* 671.

15. *H. T.* Tenant for Life, with *Power to make Leaſes for Years determinable on three Lives*, &c. Remainder *to* T. T. *his Son, for Life*, His *Honour* ſaid, that one of the Leaſes claimed by

the Plaintiff is only an Agreement that the Covenantee ſhould enjoy, whereas the *Covenant is to make good Leaſes to be made by the Mortgagee*, and *not Agreements for Leaſes*, &c. *Lord Chancellor* ſaid, that as to the two

two Leaſes before the Aſſignment to the Defendant, the Queſtion is, What Influence the Marriage Settlement and the Covenant of the Mortgagee ſhould have on theſe two Leaſes? And held this not good within the Settlement, and by the Mortgage the Power was gone; and as to the Covenant, it muſt be ſhewn that the Leaſe is within the Limitations. A Covenant or Agreement to make a Leaſe by Mortgagor, is not within the Power which is to make good all Agreements for Leaſes, but Leaſes actually made.

Life, with *like Power to make Leaſes after the Death of* H. H.—H. H. *and* T. T. *join in a Mortgage to* C. *in Fee*, with a Covenant by *C. for himſelf, his Heirs, Executors and Adminiſtrators, to ratify and confirm all Leaſes made by* H. *and* T. under certain Reſtrictions, not perfectly agreeable with the Power in the Marriage Settlement, particularly the Leaſes were to be for Money really and *bona fide* paid, *&c.* *H.* and *T.* made two Leaſes, and then *C.* aſſigns his Mortgage to *E.* and after the Aſſignment *H.* and *T.* make two other Leaſes. The Plaintiff *claims* all the four Leaſes, and brings his Bill to eſtabliſh them. Inſiſted for Defendant, that the Leaſes were void, *Firſt*, They could not be good under the Power in the Marriage Settlement, becauſe that being a Power coupled with the Intereſt or Eſtate of *H.* Tenant for Life, and he and *T.* having departed with all their Eſtate by the Mortgage, the Power was gone, *&c.* *Secondly*, The Defendant had no Notice of the two firſt Leaſes at the Time of taking his Aſſignment from *C.* nor were the Leaſes purſuant to the Covenant by *C.* to ratify, *&c.* And, *Thirdly*, As to the Leaſes ſince the Aſſignment, the Covenant by *C.* being only for *himſelf, his Heirs, Executors and Adminiſtrators*, this Covenant could not bind the Defendant, as Aſſignee, being collateral to the Land, and the Eſtate and Intereſt aſſigned; and *T.* joining in the Aſſignment to Defendant, and no Power or new Covenant reſerved, as in the firſt Mortgage; and therefore the Leaſes made after by *T.* are void. Objected, That the Defendant does not deny Notice of the Leaſes when he took the Aſſignment. But it was anſwered, That Defendant ſays he knew nothing of them, and the Plaintiff has not charged Notice particularly, and Poſſeſſion never went with the Leaſes ſo as to give or imply Notice to the Defendant. Bill diſmiſſed (*a*). *Mich.* 4 *Geo.* 2. *Vincent* and *Ennys*, *Vin. Abr.* Tit. *Authority*, (G) *Ca.* 10. *P.* 432.—Says, a like Caſe of *Corker* and *Ennys*, two or three Days before, and the Bill diſmiſſed. *Ibid.*

As to the two ſubſequent Leaſes, when *T.* joined in the Aſſignment and granted all his Eſtate, *&c.* this Power under the Covenant was gone. As to the laſt Leaſe made by the Receiver under the Order of this Court, tho' by the Order the Receiver was to make Leaſes generally with Conſent of *T.* that muſt be with reaſonable Reſtriction, *i. e.* to make Leaſes in order to receive the Profits annually; and here is a Leaſe made for a Life upon a Fine much leſs than the Value, therefore not good; and no Proof of Payment of the Fine nor Poſſeſſion, which ſhews it fraudulent. *Ibid.*

(*a*) I have ſeen a MS. Rep. of this Caſe (which I now cannot find), and to the beſt of my Remembrance this Caſe is *there* more clearly ſtated.

Caſes in Eq. Temp. Lord Talbot 72. *Menzey* and *Walker*, *Eaſt.* 1735. S. C. ſtates it thus: Mr. *Walker* upon his Marriage ſettled his Eſtate upon *himſelf for Life*, Remainder *to his Wife*, Remainder *to Truſtees for a Term of three hundred Years*, Remainder *to his firſt, and other Sons*; and the Truſt of the Term was declared to be for the *raiſing ſuch Sum and Sums of Money for the Portion and Portions, and Maintenance of all and every Child and Children of that Marriage* (other than an eldeſt Son), *in ſuch Manner and at ſuch Time, and under ſuch Limitations as ſaid Mr.* Walker *ſhould appoint by his laſt Will, or by Deed under Hand*

16. *Job Walker*, before his Marriage with *R.* Daughter of Lord *Folliat*, ſettled Lands (amongſt other Uſes) to Truſtees *for a Term of Years to provide a Portion for Daughters in Caſe there ſhould be no Son of that Marriage*; with this further Limitation, that *if the ſaid* Job Walker *ſhall have any Son living at the Time of his Deceaſe*, or *which ſhall be after born, then in ſuch Caſe to raiſe, pay and ſatisfy ſuch Sum or Sums of Money for Portion or Portions, and Maintenance of all and every the Child and Children of him the ſaid* Job Walker *and* R. *his Wife, begotten or to be begotten, in ſuch Manner and Form, at ſuch Times and under ſuch Limitations as he the ſaid* Job Walker, *by his laſt Will, or by any Deed or Deeds in Writing under his Hand and Seal, to be teſtified by three credible Witneſſes, ſhould appoint, ſo as all the Sums for Portions do not exceed* 2000 l. nor *thoſe for Maintenance* 120 l *a Year*; and *for want of ſuch Limitation* and *Appointment, the Truſtees are by Leaſe* or *Mortgage to raiſe and pay the Sum of* 2000 l. *for*

for the Portion of all and every the Child and Children of the ſaid Job *and* R. *in equal Shares*, (except *only the eldeſt Son*); if *Females*, *at the Age of twenty-one*, or *Marriage*; if *Sons*, *at the Age of twenty-one Years*. *Job* had two Sons and two Daughters, and by his Will, reciting the Power, gave the whole 2000 *l.* to his ſecond Son *Thomas Folliat Walker*, and nothing to the Daughters. Plaintiff purchaſed the Land from the eldeſt Son of *Job*, who had barred an Eſtate Tail limited to him by the Settlement; and now brought his Bill to know in what Manner and Shares he was to pay the Money charged on the Eſtate, (*and I ſuppoſe alſo to have the Term aſſigned to him*). *Thomas* the ſecond Son, in Support of the Aſſignment, attempted to prove that his Siſters were otherwiſe provided for by their Grandfather Lord *Folliat*. But this was not properly made out, neither did it appear, that admitting ſuch a Portion, it was made before the Father's Death. And Sir *Joſeph Jekyll*, on hearing the Cauſe, decreed the 2000 *l.* ſhould be equally divided among the younger Children (*a*). And from this Decree *Thomas* appealed; and for him were cited 1 *Vern.* 355, 414. 2 *Vern.* 513.—*Liſter* and *Robinſon*, *Mich.* 1732. where a Man gave Power to his Wife to deviſe a Sum of Money to and among ſuch Child and Children, and in ſuch Manner and Proportions to each Child as ſhe ſhould think fit. There were two Children, and the eldeſt being otherwiſe provided for, the Wife deviſed the whole to the younger, and the eldeſt brought his Bill for his Share, which was diſmiſſed, becauſe the Execution of the Power was reaſonable, he being provided for before.—*Auſtin* and *Auſtin*, 2 *Mar.* 1733. (heard before *Lord Chancellor*) where the Truſt of a Term was declared, "That if "*Robert Auſtin* the Father ſhall happen to die, leaving Iſſue by his "Wife a Son, and other Iſſue then living, then to raiſe a Sum not "exceeding 1500 *l.* as ſoon as may be, for the ſole Benefit and Advantage of ſuch Child or Children, (other than the eldeſt Son of "that Marriage, in ſuch Proportions, Manner and Form, in all Reſpects, as the ſaid *Robert Auſtin* ſhall for ſuch Purpoſe, by his laſt "Will in Writing, direct, limit and appoint; and in Default of ſuch "Direction and Appointment, then to the ſole Benefit of ſuch Child, "if but one, and if more (other than the eldeſt) to them equally." *Robert Auſtin* by his Will directed the Money to be raiſed, and appointed 450 *l.* of it to *Robert* one of his younger Sons, and 1050 *l.* to his Daughter *Jane*, but gave nothing to *Edward* another younger Son, who brought his Bill to be let into a Share of the 1500 *l.* but it appearing he was otherwiſe provided for by Sir *George Shute*, who had given him an Eſtate of 4 or 500 *l. per Annum* before the making of the Will, and becauſe there was a diſcretionary Power in the Father which he had exerciſed in a reaſonable Manner, the Bill, after long Conſideration, was diſmiſſed.—*Talbot* Lord Chancellor: The firſt Queſtion is, If *Job Walker* has purſued the Power of the Settlement, and if he has obſerved the Terms of it? And the ſecond is, If he has exerciſed it in a reaſonable Manner? As to the firſt, If the Power is not rightly purſued 'tis the ſame as if there had been no Execution at all, and then the 2000 *l.* is to be equally divided by the Direction in the Settlement. The Perſons in Favour of whom this Power was created are all and every the Child and Children of *Job Walker* and his Wife, except the eldeſt Son, by which 'tis plain the Power, if executed, was intended to be for the Benefit of all the younger Children, and not for ſuch particular Child or Children as the Father ſhould think fit, and therefore, I think, he has not purſued the Power, ſo that it is not material whether the Diſpoſition be reaſonable or not, for the Direction

Hand and Seal, atteſted, &c. ſo as ſuch Sum or Sums do not in the whole amount to above 2000 l. *if but one younger Child, or* 3000 l. *if more than one, and ſo as all the Sums for ſuch Maintenance do not in the whole amount to above* 120 l. per Annum; *and for want of ſuch Appointment, then In Truſt to raiſe ſuch Portion or Portions, equally to be divided amongſt all his younger Children, Share and Share alike, to be paid to them reſpectively at the Age of twenty-one, or Day of Marriage.* The Teſtator had three younger Children, and by Will duly executed, reciting that his two Daughters were amply provided for by their Grandfather, he appoints the Sum of 2000 *l.* to his ſecond Son. And decreed at the Rolls, that this was *not* a good Appointment; and affirmed by Lord Chan. *Talbot*, *Ibid.* 78.

(*a*) Every one but the Heir is a younger Child. 1 *Will. Rep.* 244.

rection in the Settlement muſt take Place. If *A.* has a Power to appoint a Sum of Money to three Perſons, and he limits it to one or two of them, no one can ſay he has obſerved his Power. Tho' the Father might have made ſome Difference in the *Quantum*, yet, I think, each muſt have had ſomething; tho' 'tis not neceſſary now to determine that Matter. The Reaſonableneſs of ſuch Executions may come under the Conſideration of the Court, where the Power has been regularly purſued in the Terms of it, or where the Application is made to ſupply a defective Execution of it; but there's no Occaſion to enter into that now, becauſe this Power is not followed; but if it were to be determined, the Proviſion of Lord *Folliat* would be a Matter very proper to be conſidered; for if a Father has a Power to appoint the whole to one, and the reſt are ſufficiently provided for otherwiſe, I ſhould think it a great Stretch to ſet ſuch an Appointment aſide for Inequality only, if it was reaſonable for the Father ſo to do, therefore I ſhould ſend that Matter to a *Maſter* to enquire whether there was any ſuch Proviſion from Lord *Folliat* or not. As to the 1 *Vern.* 355, 414. it is incorrectly reported, and in the other Caſes the Power given to the Party was ſtrictly purſued, and then tho' the Appointment directed more to be paid to one than the other, yet if that was done on reaſonable Grounds, what Power could this Court have to controul the Diſpoſition? So Sir *Joſeph Jekyll*'s Decree was confirmed. *Eaſt.* 8 *Geo.* 2. *Mearey* and *Walker et al'*, *MS. Rep.*—*Note Midmay's Caſe*, 1 *Co.* 175. *a.* 177. *a.*

17. Where there is a Sum of Money provided for younger Children, and one of the younger Children becomes eldeſt, he ſhall have no Part of this Money; but where the Money was by a private Act of Parliament appointed to be among *A. B.* and *C.* (naming them) and *A.* afterwards becomes eldeſt, he is capable of an Appointment in his Favour. *Eaſt.* 1735. *Jermyn* and *Fellows*, *Caſes in Eq. Temp. Lord Talbot* 93.

18. If a Feme Covert aſſigns her perſonal Eſtate in Truſt, with a Power to appoint 1500 *l.* to whom ſhe thinks proper; when the Power is executed, the Money veſts in the Appointee, as if it had never been compriſed in the original Truſt. *Mich.* 9 *Geo.* 2. *Manſell et al'* and *Price*, *at the Rolls*, *MS. Rep.*

19. In this Caſe was great Variety of Queſtions, and amongſt others theſe following: *A.* upon his Marriage covenanted, that his Eſtate ſhould be chargeable with 1000 *l.* for the Benefit of younger Children; and his Wife having an Eſtate of her own, ſhe and her Huſband after Marriage levied a Fine of it, and the Uſes declared were, that *A.* and his Wife ſhould have a Power by any Deed or Writing under their Hands and Seals, or the Survivor, by his or her laſt Will, to appoint and divide the Eſtate among their younger Children in ſuch Proportions as they or the Survivor ſhould think proper. *A.* ſurvived, and by his Will gave his Daughter (who was the only younger Child) 3000 *l.* which he declared ſhould be in Lieu and in full Satisfaction of the 1000 *l.* covenanted to be raiſed out of his own Eſtate, and charged the 3000 *l.* upon his Wife's Eſtate, intending thereby to execute his Power. Upon this two Points were made, Firſt, If this was a good Execution of the Power. Secondly, If the Covenant upon the Marriage Settlement was diſcharged. It was urged, that this was a naked Power, and ought to be executed in the very Terms of it, and was compared to a Condition, which muſt be ſtrictly performed. But reſolved *per* Lord Chan. *Hardwicke*, that the Power was in Subſtance well executed. It is true the direct

Terms

Terms of the Power are not purſued, but the Intent and Deſign of it are. It is admitted that the Father might have appointed Part of the Eſtate to be ſold, and the Money raiſed by ſuch Sale, and what is done is exactly the ſame Thing; this Court may order a Sale. It is the ſame to the Heir or Remainder Man which Way the Child is to be provided for, only that giving a Portion of the Eſtate itſelf might be a Means to tear it to Pieces; whereas now the Eſtate will be kept entire, and it is better for the Daughter, and perhaps thought ſo by the Teſtator, that ſhe ſhould have a Sum of Money than a ſmall Eſtate; and tho' the Will may not enure as a good Execution of the Power in Strictneſs, yet within the Meaning and Deſign of it, it is a good Charge for the young Lady's Benefit; and the Caſe of *Thwaytes* and *Dye*, 2 *Vern.* 80. is a very ſtrong one to this Purpoſe; but ſtill I think this will not diſcharge the Covenant. Where a Gift is to diſcharge a former Debt, ſomething ſhould move from the Giver, but here the whole is to ariſe out of his Wife's Eſtate; and therefore to ſatisfy the Father's Covenant, this Declaration is entirely void; however, as an Intention was only to give his Daughter 3000 *l.* and it does not appear ſhe was to have any Thing more, I think only 2000 *l.* ought to be raiſed upon the Wife's Eſtate, and the other 1000 *l.* out of *A.*'s own Eſtate. And it was decreed accordingly. 8 *Dec.* 1738. *Roberts* and *Dixall*, before Lord *Hardwicke* at *Lincoln's Inn Hall*, *MS. Rep.*

20. E. H. *Tenant for Life, and* M. *his eldeſt Son, Remainder Man in Tail of Lands of* 900 l. *Value*, in 1715 joined in a Settlement (*a*) on the Marriage of *M.* whereby *Part* of the Lands were agreed to be *to the Uſe of* E. H. *for Life*, Remainder *as to the other Part to* M. *for Life*, Remainder *in that Part which was to* M. *to the Wife for Life*, Remainder *in the whole to the firſt and every other Son of* M. *in Tail*; provided, *that if* C. *the Wife of* E. H. *ſhould die in his Life-time, and he ſhould marry any other Wife, that then and ſo often* E. H. *might ſettle ſo much of the Premiſſes as ſhould be of the yearly Value of* 603 l. per Annum *for a Jointure and Proviſion for ſuch Wife, for and during her natural Life.* *C.* died, and *E. H.* intermarried with *J.* and previous to this Marriage, in Conſideration thereof, and of 2000 *l.* Fortune, in 1725 a Settlement was made of all the Lands compriſed in the *firſt* Deed, to Truſtees and their Heirs, to hold during the Life of *J.* the intended Wife, On Truſt out of the Rents and Profits to raiſe 100 *l.* a Year for the ſeparate Uſe of *J.* during the Coverture, and after the Deceaſe of *E. H.* to raiſe 300 *l. per Annum* for the Benefit of *J.* during her Life, for a Jointure; and upon this farther Truſt to permit the Owner of the Premiſſes to receive the Reſidue of the Profits. In *September* following, ſubſequent to the Marriage, another Deed was made by *E. H.* of the ſame Premiſſes, and to the ſame Truſtees, in like Manner during the Life of *J.* to ſecure to her another Annuity of 300 *l. per Annum.* In 1731 *E. H.* made another Deed, reciting the ſaid ſeveral Deeds, whereby the ſame Premiſſes were conveyed to the ſame Truſtees, In Truſt to raiſe 100 *l. per Annum* for the ſeparate Uſe of *J.* during the Coverture, and after *E. H.*'s Deceaſe to raiſe an Annuity of 600 *l. per Annum* for her Life, by way of Jointure. And it was declared that the above recited Indenture was made to ſecure the ſaid Sum of 600 *l.* during the Coverture for her ſeparate Maintenance, and after *E. H.*'s Deceaſe to ſecure to her a Sum not exceeding 600 *l. per Annum*, according to the Power reſerved to *E. H.* by the Indenture of 1715. *E. H.* died, *J.* ſurvived him, and thereupon ſhe brought her Bill againſt *M.* and the Truſtees, to have the Benefit of the 600 *l.*

(*a*) Without ſuffering a *Recovery* to dock the Intail under the original Settlement in 1679. *Vide Barnard. Rep. in Chan.* 110.

per Annum ſecured to her by the laſt mentioned Deed. *Lord Chancellor* ſaid, that the Execution of the Power by the Deed in 1725 was void both in Law and Equity, and decreed that it be referred to the *Maſter*, to ſet out ſo much of the Lands compriſed in the Settlement of 1725 as ſhould be ſufficient to make the Plaintiff a Jointure of Lands of 600 *l. per Annum*. *Eaſt.* 1740. *Harvey* and *Harvey*, *Barnard. Rep. in Chan.* 103 to 109. This Decree was affirmed on a Rehearing. *Ibid.* 116.

His *Lordſhip* ſaid, that the Rule which had been laid down, *that a Wife* or *Child who comes into Equity to have the Benefit of a defective Execution of a Power*, or *a defective Proviſion* for them, *muſt be a Wife* or *Child totally unprovided for*, is a wrong Rule. That in Caſes on this Subject it has been rightly ſaid by the Court, that the *Huſband* or *Father are the proper Judges whether the Wife* or *Children are ſufficiently provided for or not*, and the Court will not examine whether the Proviſion made was a ſuitable Proviſion or not, but will leave it to the Huſband or Father to judge when they ſhall be ſufficiently provided for; and was the Court to enter into any Enquiry of that Sort, it muſt examine into ſuch Circumſtances of Families which would not be fit for them to do. If the Father or Huſband has ſaid, that they are not ſufficiently provided for, and has conſidered them as ſuch, the Court has conſidered them in the ſame Manner; but on the other Hand, the Court has conſidered whether a Wife or Child has been totally unprovided for, or left in ſuch a Condition as is not fit for their State or Quality, and has given Relief where a ſufficient Proviſion has not been made, but has never relieved by reaſon of the Exceſs of it; and tho' it has been ſaid that no Caſe can be cited for that Purpoſe, yet the Counteſs of *Oxford*'s Caſe, cited in 1 *Chan. Caſes* 264. contradicts that Aſſertion (*b*). *Per Lord Chancellor*, *Eaſt.* 1740. in the Caſe of *Harvey* and *Harvey*, upon a Rehearing, *Barnard. Rep. in Chan.* 113.

21. In aiding defective Executions of Deeds in favour of a Wife or Children, it has been never required that thoſe Deeds ſhould be founded on any valuable Conſideration in the ſtrict Senſe of the Word, but the Deeds being in order to make a Proviſion for a Wife or Children, has been thought to be ſufficient, *per* his *Lordſhip*; and his *Lordſhip* further ſaid, as this is the general Doctrine, ſo was it not for the prior Deeds that have been in the above Caſe of *Harvey* and *Harvey*, it is one of the ſtrongeſt that can come before this Court for Relief, becauſe for want of a common Recovery to dock the Intail under the original Settlement, in 1679, Plaintiff the Widow could have no Title at Law to have the Benefit of her Jointure, and by that Means was abſolutely forced to come into this Court for Relief; and where that is the Caſe, that the whole Eſtate over which the Power is executed is merely an equitable Eſtate, there being an abſolute Volunteer is no Objection againſt the Party's having the Aſſiſtance of this Court to ſupply the Defect of a Deed; for the Eſtate being merely an equitable Eſtate, obliges this Court to make a Determination concerning it; and, where that is the Caſe, the Party's being a meer Volunteer is no Objection to the having a defective Execution of a Power ſupplied, which is exerciſed over ſuch an equitable Eſtate. *Eaſt.* 1740. in the Caſe of *Harvey* and *Harvey*, *Barnard. Rep. in Chan.* 110, 111.

(*b*) His *Lordſhip* ſaid he had directed that that Decree ſhould be ſearched for, but the Decree could not be found. *Ibid.*

22. If a Power reſerved over a legal Eſtate is executed defectively at firſt, ſuch a Power may be executed over again, and the laſt Execution ſhall ſtand, becauſe the firſt is a mere Nullity. *Per Lord Chancellor*, *Eaſt.* 1740. *in Caſu Harvey* and *Harvey*, *ibid.* 111.

(B) Concerning the Revocation and Extinguiſhment of a Power.

1. *J. S. voluntarily makes a Leaſe for ninety-nine Years,* In Truſt *for raiſing* 6000 *l. for his Children,* with a *Power to revoke it with the Conſent of his Lady and three of her Friends.* Afterwards he having Occaſion for Money, prevails with his Lady and the other three, to conſent to a Revocation, which they did, ſo far as to charge it with 2000 *l.* which *J. S.* borrowed of *A.* and then to be ſubject to the firſt Charge. Afterwards *J. S.*'s Lady died. This being ſettled upon her for her Jointure, the Jointure Settlement took Notice of this Power and the Revocation, and the Mortgage to *A. but it did not appear either by the Mortgage to* A. *or by the Jointure Deed, whether or no this Revocation was total or not. Lord Chancellor* held that this Settlement ſhould not be held fraudulent within the Stat. of 27 *Eliz.* becauſe this was not an abſolute Power in *J. S.* but he muſt have the Conſent of his Lady and the other three. *Mich.* 1676. *Lord Banbury's Caſe,* 2 *Freem. Rep.* 8.

His *Lordſhip* took this Difference, that if a Man reſerves ſuch a Power with the Conſent of *B.* who is his own Relation, or one that may be ſuppoſed to be at his Command, that ſhall be *fraudulent* within the Statute; but if it be with the Conſent of others, as here it is of the Wife's Friends, who cannot be ſuppoſed to conſent but upon very good Grounds, there it will not be fraudulent. And he cited *Bennet*'s Caſe, 19 *Jac.* where it was adjudged, that a Grant of an Annuity, with a Power of Recovation, provided he ſettled an Annuity as good, was not within the Statute; and he ſaid, in that Caſe Lord *Hobart* held, that if there were a Power to revoke with (on) the Payment of 20 *l.* only, that ſhould make it not within the Statute.

2. A Man made a Settlement, with *Power of Revocation, and limited new Uſes, in the Preſence of two or more Witneſſes*; and he *revoked*, and *limited new Uſes by his Will, in the Preſence of two Witneſſes.* And decreed by *Lord Chancellor* to be good enough; for the Appointing three Witneſſes was only that there might be clear Proof that it was done; and here it was clear enough, tho' here were only two Witneſſes. *Hil.* 1680. *Anon.* 2 *Freem. Rep.* 63.

This ſeems to me to be the Caſe of *Sayle* and *Freeland*, 2 *Vent.* 350. *Vide* 1 *Vol. Abr. Eq.* 345. *Ca.* 15.

3. Lands were conveyed to Truſtees *for ſuch Uſes as* M. *ſhould direct, limit and appoint.* M. *voluntarily* by Writing under her Hand and Seal limited the Uſes to the Plaintiff, and (ſhe being a Feme Covert) the Deed was kept in her's or Huſband's Hands. Afterwards ſhe deſtroyed this Deed, and limited the Uſes to the Defendant. And there was no *Power of Revocation* reſerved in the Deed to the Plaintiff. And the Queſtion was, Whether ſhe was ſo bound by the firſt Limitation that it was not in her Power to alter it? And *Lord Chancellor* ſaid, that tho' this was a Caſe of Value, yet there was no Difficulty in it; for when the Power was once executed by Deed, there being no Power reſerved by that Deed to revoke or alter it, a ſubſequent Limitation by another Deed will be void; for the firſt Deed and the laſt Will always take Place. But otherwiſe it is if the Limitation be by Will; for there the Party may make his Will *toties quoties*, and the laſt ſhall take Place (*a*). *Mich.* 1680. *Anon. MS. Rep.*

2 *Freem. Rep.* 61. *Mich.* 1680. *Hatcher and Curtis* and *Sir Richard Alderſon*, S. C. *in totidem verbis.*

(*a*) If a Power be reſerved to limit a Truſt by Deed or Will, if it be once limited by Deed, it can never afterwards be altered; but a Will being of it's own Nature revocable and alterable, it may be revoked or altered as the Party pleaſeth, for *Truſts are governed by the Rules of Law*, tho' *the Execution of them is compellable only in this Court*; but if the Power reſerved to limit by Deed be from Time to Time, then he may limit and revoke *toties quoties.*

4. *J. S.* ſettles great Part of his Eſtate upon *A.* with *a Power of Revocation by Deed* or *Will, to be executed in the Preſence of ſix Witneſſes, three whereof to be Peers,* and *upon Tender of* 6 d. About ſix Years afterwards he makes his Will, *atteſted by ſix Witneſſes,* but *none*

of

of them Peers, and gives his Eſtate to *B.* and *no Tender was made of the* 6 d. It was agreed that this was not a *legal* Revocation, becauſe the Circumſtances were not purſued according to the Power, there being no Peers Witneſſes to the Will, nor any Tender made of the 6 *d.* And *Lord Keeper*, aſſiſted by the two *Chief Juſtices* and Baron *Parker*, delivered their Opinions for *A.* and that the Deed of Settlement was not revoked by the Will neither in Law nor Equity. *Eaſt.* 1692 and *Mich.* 1693. *Dutcheſs of Albemarle* and *The Earl of Bath*, 2 *Freem. Rep.* 121.

5. Lands ſettled *to the Uſe of* A.*'s Wife during her Life*, Remainder *to* B. *in Tail*, &c. *with a Power for* A. *and his Wife to revoke the Uſes, and limit others.* A. *having Occaſion for Money* to purchaſe a Place, *prevailed with his Wife to join with him in raiſing of it by Virtue of the Power, upon a Promiſe it ſhould be repaid out of the Profits of the Place, and takes the Aſſignment of the Mortgage Term to himſelf*, and *left the Money charged to his younger Children.* Decreed for the younger Children, but reverſed for the Debt, being the Debt of *A.* and he having covenanted to repay it, the Term ſhall attend the Inheritance. *Jan.* 8, 1702. *Earl of Huntington* and *Counteſs*, *Vin. Abr.* Tit. *Eſtate*, (B. b. 2.) *Ca.* 17.

And *per Lord Chancellor*, there are two Sort of Powers, one *annexed* to the Eſtate as a Power to make Leaſes, *&c.* which is deſtroyed by parting with the Eſtate; another, which may be termed *collateral* to the Eſtate,

6. *J. S.* by Settlement was *Tenant for ninety-nine Years, if he ſhould ſo long live*, Remainder *to Truſtees during the Life of* J. S. &c. Remainder *over*, with a Power to charge the Lands with divers Sums of Money. *J. S.* and the Truſtees, and the Remainder Man in Tail, join in ſuffering a Recovery, and declare the Uſes thereof, *viz.* to the Uſe of *J. S. for Life*, Remainder *over*. And *per* Lord Chan. *Macclesfield*, this joining of *J. S.* in making the new Settlement *without reſerving a Power to charge the Premiſſes with the ſaid Money*, has *deſtroyed* that Power which *J. S.* had of charging, for the contrary Conſtruction would enable him to defeat his own Grant. *Hil.* 1721. *Savile* and *Blacket*, 1 *Will. Rep.* 777.

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have ſurvived the Term of ninety-nine Years, for ſtill he might charge the Premiſſes therewith, ſo might he have done tho' he had aſſigned in the Term, but having joined in the new Settlement, he muſt not now derogate from his own Act, or undo what he has done before. *Ibid.* 778.

His *Lordſhip*, in Anſwer to the Objection that it would be a Breach of Truſt in the Truſtees to join in ſuch Revocation, ſaid, that it might not be only a juſtifiable, but commendable Thing in the Truſtees, under ſome Circumſtances, to conſent to ſuch Revocation; as ſuppoſe the Daughter ſhould be drawn in to marry ſome very unworthy Man, who ſhould uſe her in a moſt barbarous Manner; and the Daughter ſhould afterwards die without Iſſue, upon which the Huſband ſhould ſue for the Portion; in this Caſe it would be very reaſonable in the Truſtees to join with the Father in revoking theſe Uſes; or ſuppoſe the Daughter ſhould leave Children by ſuch Marriage, it would be reaſonable for the Truſtees, by conſenting to the Revocation, to prevent the Portions going to the Huſband, and (if practicable) to carry it to the Children of the Daughter, ſo that this Power ſeems to be ſtill a ſubſiſting Power, which there may be hereafter very good Reaſon to put in Execution; and for theſe Reaſons his *Lordſhip* thought the Portion remained as yet liable to a Contingency, and therefore not to be raiſed until this Contingency is out of the Caſe, which cannot be during the Life of the Father.

7. The Truſt of a Term in a Marriage Settlement was for raiſing 3000 *l.* Portions for Daughters, in Default of Iſſue Male, payable at eighteen, or Marriage, or as ſoon after as the ſame might conveniently be raiſed, with a *Power for the Father, with Conſent of Truſtees, to revoke all the Uſes.* The Wife died, leaving no Son, and only one Daughter, who afterwards married. It was inſiſted, that when the Portion became abſolutely due (as here it was) it would be then too late for the Power of Reverſion to deveſt what was actually veſted. But Lord Chan. *Macclesfield* held the Power of Revocation to be ſtill ſubſiſting, and conſequently ſuſpends and prevents the Portion from being as yet payable, becauſe the Father, by the Conſent of the Truſtees, may revoke at any Time *during his Life, and before the Portion*

Portion is raiſed and paid; and if the Term falls, the Truſt for raiſing the Portion muſt fall alſo. *Hil.* 1722. *Rereſby* and *Newland*, 2 *Will. Rep.* 93, 102.

Father. *Ibid.* 101, 102. —This Decree was affirmed in the Houſe of Lords. *Ibid.* 102.

8. A Settlement was made, with *Power of Revocation by Deed, ſealed in the Preſence of two Witneſſes*, and *Tender of a Guinea to the Defendant*. The Proof was, that the Party who had this Power being in a Paſſion with the Defendant, high Words paſſed between them, and ſhe told him ſhe would undo the Settlement, and in her Anger threw a Guinea upon the Ground. *Per Cur'*, This ſhall not amount to a Revocation in Equity; but if it had been proved that a Guinea had been deliberately tendered, and the Party had at the ſame Time declared that ſhe did it with an Intent to revoke the Settlement, altho' the Deed had never been ſealed; or if it had been ſealed to revoke it, and no Guinea tendered, this Court would have ſupplied the Defect of one particular Circumſtance where it appeared that the Party did deliberately and adviſedly intend the Thing, but what was ſaid in Paſſion the Court will not regard. *Trin.* 1688. *Arundel* and *Philpott* (*a*), 2 *Freem. Rep.* 102.

2 *Vern.* 69. S. C. mentions it as a voluntary Settlement, with *Power of Revocation on Tender of a Guinea*; that ſhe never tendered the Guinea, or ever declared ſhe intended to revoke the former Settlement, which, had ſhe done, and it had been a ſober, ſolid Act, and done *animo Revocandi*, it would in Equity have been ſufficient, tho' it had not all the Formalities mentioned in the Power; and *per Cur'*, this Court may ſupply *an informal* or *defective Revocation*; but *cannot make a Revocation where there is no Revocation. Per* Lord Chan. *Jefferies*.——*Lucas's Rep.* 476. S. C. cited by Mr. *Talbot*, *Eaſt.* 8 *Geo.* 1. in the Caſe of *Lady Coventry* and *Lord Coventry*, ſays, the Plaintiff could not prevail to ſet aſide the Settlement (even in a Court of Equity) for want of being able to prove the Tender of a Guinea; but being a *Volunteer*, was ſent to Law to have it tried *revoked* or *not revoked*; and at Law the Party was ſo fortunate as to prove the Tender.——2 *Freem. Rep.* 196. *Mich.* 1693. S. C. cited *per* Mr. Baron *Powel*, ſays, it was *held* that the Guinea being tendered was no Revocation, the Deed not being executed. (*a*) This Caſe is *miſplaced* in Point of Time.

9. Reſolved *per Cur'*, that after the Stat. 27 *Hen.* 8. of *Uſes*, the Courts of Common Law held, that Powers of Revocations of Eſtates executed were to be taken ſtrictly, and ſo if not purſued, they would not impeach or deſtroy an Eſtate already executed by legal Conveyances; but in the Courts of Equity they ſoon found that the Conſtruction was too artificial, and not according to natural Equity, and ſo they conſtrued thoſe Powers as a Reſervation of ſo much of the antient Dominion of the Eſtate, to be under the Controul of the Tenant for Life, *et cujus eſt dare, illius eſt diſponere*; and as often as any ſuch Dominion is reſerved, the Tenant for Life may contract about it; and that when a Marriage Contract is made in Contemplation of ſuch a Power, it was a Lien upon the Eſtate. *Eaſt.* 8 *Geo. in Caſu Lady Coventry* and *Lord Coventry*, *Gilb. Rep. in Eq.* 165.

10. If a Man has a Power of Revocation, and of limiting new Uſes, and he grants to new Uſes, that has been over and over determined to be a Revocation; but if he has other Lands, then there is ſomething for the Words to operate upon, and will not be a Revocation. If a Man has Lands over which he has a Power of Revocation, and other Lands; if he gives all his Lands, that will not amount to a Revocation, in reſpect of the Lands over which he has a Power, becauſe the Words may be ſatisfied as to the other Lands. *Trin.* 11 *Geo.* 1. 21 *July* 1725. *Degg* and *Earl of Macclesfield*, *Select Caſes in Chan.* 44.

11. *J. S.* Tenant for Life of Lands in *Dale*, with a Power by any Inſtrument in Writing, *atteſted by two or more credible Witneſſes*, to revoke theſe Uſes. *J. S.* by Will, atteſted by three Witneſſes, expreſsly deviſed all his Lands in *Dale* to *B.* and *C.* to different Uſes, *&c.* *J. S.* had no other Lands in *Dale* excepting theſe Lands. Upon a Re-

ference to the Judges of *C. B.* they determined that the Will operated as a Revocation of the Power, tho' the Will made no Mention of the Power. *Trin.* 1727. *Deg* and *Deg*, 2 *Will. Rep.* 412, 415.

Vide Ca. P.

12. A Conveyance to *different* (*a*) Uſes is an effectual Revocation. *June* 1730. *Fitzgerald* and *Lord Fauconberge*, *Fitz-Gibb. Rep.* 215.

(*a*) Without any Recital of the Power in the Deed of Revocation. *MS. Rep.*

CAP. LXXXII.

Precedents.

(A) Precedents regarded in the Law (*b*).

(*b*) *Eaſt.* 22 *Car.* 2. *in Chan. Vaughan* C. J. in the Caſe of *Fry* and *Porter*, ſaid, he wondered to hear of citing of Precedents in Matters of Equity, for if there be Equity in a Caſe, that Equity is an *univerſal Truth*, and there can be no Precedent in it; ſo that in any Precedent that can be produced, if it be the ſame with this Caſe, the Reaſon and Equity is the ſame in itſelf; and if the Precedent be not the ſame with this Caſe, it is not to be cited, but not to that Purpoſe. But *Bridgeman* Lord Keeper ſaid, certainly Precedents are very neceſſary and uſeful to us, for in them we find the Reaſon of the Equity to guide us; and, beſides, the Authority of thoſe who made them is much to be regarded. We ſhall ſuppoſe they did it upon great Conſideration, and weighing of the Matter, and it would be very ſtrange and very ill if we ſhould diſturb and ſet aſide what has been the Courſe for a long Series of Time and Ages.—Lord Chief Baron *Hale* ſaid, he knew there is no *intrinſical* Difference in Caſes by Precedents, but there is a great Difference in a Caſe wherein a Man is to make, and where a Man ſees (and is to follow a Precedent); in the one Caſe a Man is more ſtrictly bound up, but in the other he may take a greater Liberty and Latitude, for if a Man be in Doubt *in Æquilibrio* concerning a Caſe, whether it be equitable or no, in Prudence he will determine according as the Precedents have been, eſpecially if they have been made by Men of good Authority for Learning, *&c.* and have been continued or purſued. *Mod.* 307.—— A *Counſellor* ought not to be heard to ſpeak againſt common Precedents. 1 *Show.* 124. Cites 13 *Hen.* 7. 23.

It is dangerous to alter old eſtabliſhed Forms. *Per* Lord Chan. *Talbot*, *Eaſt.* 1736. in the Caſe of *Hunter* and *Maccray*, *Caſes in Eq. Temp. Lord Talbot* 196.

1. THE *altering ſettled Rules concerning Property is the moſt dangerous Way of removing Land Marks. Per* Lord Chief Juſtice *Parker*, *Hil.* 1717. in the Caſe of *Goodright* and *Wright*, 1 *Will. Rep.* 399.

2. Where Things are *ſettled* and *rendered certain*, it will not be ſo material *how*, as long as they are ſo, and that all People know how to act. *Per* Lord Chief Juſtice *Parker*, *Trin.* 1718. in the Caſe of *Butler* and *Duncombe*, 1 *Will. Rep.* 452.

3. Lord Chan. *Talbot* ſaid, he thought it much better to ſtick to the *known general Rules* than *to follow any one particular Precedent* which *may be founded on Reaſons unknown to us*; ſuch a Proceeding would confound all Property; and then citing the Caſe of *Lady Laneſborough* and *Fox*, as of the ſtrongeſt Authority to the Caſe in Point, his *Lordſhip* ſaid, that tho' it had not been in the Houſe of Lords he ſhould have thought himſelf bound to go according to the *general and known Rules of Law*. *Caſes in Eq. Temp. Lord Talbot* 26, 27.

CAP. LXXXIII.

Preſentation and Collation.

1. DEfendant *A.* and others were Truſtees of an Advowſon by *Settlement, Upon Truſt to preſent ſuch Perſon as the Heir of* J. S. *ſhould by Writing under Hand and Seal nominate, and in Default of ſuch Nomination, to preſent in their own Right*, as they ſhould think fit. The Church becomes void, *and the Heir of* J. S. *is about nine Months old.* The Truſtees contend that the Infant is not capable of nominating by Writing, *&c.* and that therefore they have Right to preſent *Proprio Jure, &c.* Bill was brought by the Infant to compel the Truſtees to preſent according to his Nomination, *&c.* Injunction was granted as to Defendants to reſtrain them from preſenting without Leave of the Court, and *an Order that the Archbiſhop of* York (the Ordinary) *ſhould not admit*, &c. And the Queſtion was, Whether this Order would prevent the Archbiſhop from collating when the ſix Months for preſenting expired, or that there ſhould be a particular Order to reſtrain the Archbiſhop from collating, *&c.* And after a good deal of Debate it was agreed by Lord Chancellor *et omnes, that the Order to prevent Admiſſion was ſufficient to prevent Collation, becauſe Collation was Admiſſion, Inſtitution, and every Thing but Induction*; and at Law, upon a *Quare Impedit* and *Ne admittas*, the Ordinary cannot collate or take Advantage; and this Order *is in it's Nature an* Engliſh Ne admittas. And as to the Queſtion, Whether the Biſhop in this Caſe could take Advantage of Lapſe or not, *Lord Chancellor* held clearly that he could not; for as at Law Lapſe was prevented by a *Ne admittas*, ſo when the Title is in Equity, the Biſhop is equally reſtrained and prevented of Lapſe by an Order not to admit pending the Diſpute in this Court. And this was obſerved to have happened ſeveral Times before in the Caſe of Mortgagor and Mortgagee, where the Mortgagee having the legal Title pretended to preſent, whereas in Equity the Preſentation or the Right of Nomination belongs to the Mortgagor. As to the main Point, *Lord Chancellor* ſeemed ſtrongly to incline that the Nomination by the Infant was good; for, by Law, Infants of never ſo tender Age are to preſent, and theirs, and all other Preſentations, are uſually in Writing, and cannot be otherwiſe (but) when the Infant cannot ſpeak, *&c.* But a Difference was endeavoured to be put, that here was a particular Method preſcribed by the Truſt, *viz.* by Writing under Hand and Seal, *&c.* which muſt ſuppoſe the Perſon who created the Truſt did intend the Heir to nominate, and ſhould exerciſe a Diſcretion, and be capable of knowing as well as executing a Writing, *&c.* *Mich.* 4 *Geo.* 2. *Arthington* and *Sir Walter Coverly et al'* (*a*), *Vin. Abr.* Tit. *Collation*, (A) *Ca.* 10. *P.* 550.

(*a*) *Vide* Tit. *Infant*, *P.* 518. *Ca.* 3. *Hil.* 6 *Geo.* 2. S. C. from a MS. Rep.

CAP. LXXXIV.

Prohibition.

Salk. 672. the ſame Point argued, but no Reſolution.

1. COX was libelled againſt in the Spiritual Court at *Exeter* for teaching School without a Licence from the Biſhop, and on Motion an Order was made to ſhew Cauſe why a Prohibition ſhould not go, and in the mean Time all Things to ſtay, which Order was from Time to Time continued, and it being now moved to diſcharge the Order, Lord Keep. *Wright* declared, that he always was, and ſtill is of Opinion, that the keeping of School is by the old Laws of *England* of Eccleſiaſtical Cognizance; and therefore diſcharged the Order for a Prohibition. But being moved, that the Libel was for teaching School *generally*, without ſhewing what School, and that the Court Chriſtian could not have Juriſdiction of *Writing Schools*, *Reading Schools*, *Dancing Schools*, &c. which his *Lordſhip* aſſenting to granted a Prohibition as to the teaching of all Schools but Grammar Schools, which he thought to be of *Eccleſiaſtical* Cognizance. *Mich.* 1700. *Cox's Caſe*, 1 *Will. Rep.* 29.

2. If one be ſued in an inferior Court for a Matter out of the Juriſdiction, the Defendant may either have a Prohibition from one of the Common Law Courts out of *Weſtminſter-Hall*, or in regard this may happen in the Vacation, when only the Chancery is open, he may move that Court for a Prohibition; but then it muſt appear by Oath, that the Fact did ariſe out of the Juriſdiction, and that the Defendant tendered a Foreign Plea, which was refuſed. And if a Prohibition has been granted out of Chancery *improvidè*, and without theſe Circumſtadces attending it, the Court will grant a *Superſedeas* thereto. But in caſe it ſhall happen on the Face of the Declaration, that the Matter is out of the Juriſdiction of the Court, then a Prohibition will be granted, *without* Oath of having tendered the Foreign Plea. And in theſe Caſes Equity imitates the Common Law (*a*); and in a late Caſe, which was moved the laſt Seal after *Trinity* Term, where the Court had granted a Prohibition to an Action brought in the Courts at *London*, upon an Affidavit that the Matter aroſe out of the Juriſdiction, it appearing at another Day that the Defendant had imparled *generally* (which admitted the Juriſdiction), and ſo could not afterwards be allowed to plead a Foreign Plea, the Court granted a *Saperſedeas* to the Writ of Prohibition. *Trin.* 1718. *Anon. ibid.* 476.

(*a*) *Vide Salk.* 549. And 1 *Will. Rep.* 657. *Saunderſon* and *Clagget* in *B. R.*

CAP. LXXXV.

Purchaſor.

(A) Who is deemed a Purchaſor in Equity.
(B) Purchaſors, in what Caſes favoured in Equity.
(C) Where a Purchaſor pleads himſelf ſuch for a valuable Conſideration, &c.
(D) Purchaſors, in what Caſes affected; —— And here of Purchaſors without Notice, and of preſumptive Notice.
(E) Diſpute, Intereſt, Vendor and Vendee.

(A) Who is deemed a Purchaſor in Equity.

1. THE Wife joins with her Huſband in letting in an Incumbrance on her Jointure Lands, and barring the Eſtate-tail, and then limits the *Uſes to the Huſband for Life*, Remainder *to the Wife for Life for her Jointure*, Remainder *to the Sons of them two in Tail*, then *to the Daughters in Tail.* The Huſband died without Iſſue Male, leaving two Daughters of that Marriage. *Per* Lord Keep. *Wright*, the Daughters are not Purchaſors ſo as to ſhut out a Judgment Creditor of the Huſband's, antecedent to the Barring of the Eſtate-tail (*a*). *Trin.* 1700. *Ball* and *Burnford*, *Prec. in Chan.* 113.

(*a*) His *Lordſhip* obſerved that the Wife's joining to bar her Jointure, and letting in the Incumbrance, (tho' this might have been a good Conſideration) was not expreſſed in the Deed to be any Conſideration for ſettling the Eſtate upon the Daughters, ſo that the ſame was a voluntary Gift of the Wife to the Huſband, and therefore the Daughters Eſtate muſt be taken to be voluntary, and ſo a Judgment Creditor ought to have the Aſſiſtance of this Court before them. *Ibid.* 114.

2. Every Leſſee is a Purchaſor. *Per Lord Chancellor*, *Mich.* 10 *Geo.* 1. in the Caſe of *Aſhton* and *Bretland*, 2 *Mod. Caſes in Law and Eq.* 59.

3. *J. S.* ſeiſed in Fee, ſettled his Eſtate in 1712 to *the Uſe of himſelf for Life*, Remainder *to* B. *in Tail*, but with Power of Revocation by any Writing atteſted by three Witneſſes. In 1715 *J. S.* by Deed, atteſted by two Witneſſes only, reciting that he was indebted, as in a Schedule annexed, conveyed his Eſtate to *W. R.* and *W. S.* and their Heirs, *In Truſt to pay his ſaid Debts by the Profits, Mortgage or Sale*, and *after Payment thereof to pay the Overplus*, and *reconvey ſuch Part as ſhould be unſold to him the ſaid* J. S. *or ſuch other Perſon*, and *for ſuch Uſes, as he by any Writing, ſigned and ſealed by him, atteſted by two Witneſſes, ſhould direct. J. S.* died without Iſſue, but left *B.* and *C.* the Daughters of two Siſters, his Heirs at Law. The Deed of 1715 was kept private 'till after the Death of *W. S.* the ſurviving Truſtee, in 1724, and was then laid before the Counſel, who directed that the Heir of *W. S.* ſhould aſſign the legal Eſtate to the Truſtees in the Deed of 1712, which was done. Afterwards in 1726, upon a Treaty of Marriage between Lord *Fauconbridge* and *B.* a

Marriage Settlement was prepared by the ſame Counſel as Counſel for Lord *Fauconbridge*, who made a Settlement on *B.* in Conſideration of the great Eſtate in Land which he was to have with her. The ſurviving Truſtee in the Deed of 1712 joined in this Marriage Settlement. *C.* brought a Bill, claiming a Moiety of this Eſtate of *J. S.* as Coheireſs with *B.* for that the Deed in 1715 was a Revocation of the Deed in 1712. Lord *Fauconbridge* pleaded that he was a Purchaſor under the Deed of 1712, without Notice of that in 1715, and that the Settlement made by him on *B.* was in Contemplation of that Settlement in 1712; and that the ſurviving Truſtee in that Settlement was Party to the Marriage Settlement; and that tho' the *Purchaſe was not of the legal Eſtate*, but *the Truſt only*, that will make no Difference, according to *Wilker* and *Bodington*'s Caſe, 2 *Vern.* 599. and that neither will it differ the Caſe, tho' there was no actual Conveyance; for as the Truſtees in the Deed in 1712 always acted under that Deed for *B.* that Truſt ſhall ſubſiſt as to himſelf who is a fair Purchaſor, and that he ſhall not be affected by *conſtructive* Notice to his Counſel, as having been adviſed with on theſe two Deeds in 1724; for that it muſt be intended that at the Time of the Counſel's being concerned for him, which was in 1726, he had forgot that he had ever ſeen this Deed of 1715, there being an Interval of two Years between his firſt ſeeing it and his being Counſel for Lord *Fauconbridge*. And for theſe Reaſons the Court held that this could not be Notice to his *Lordſhip*. —Lord Chief Baron *Reynolds* (who aſſiſted the *Lord Chancellor*) held, that the Lord *Fauconbridge* could be a Purchaſor of no more than *B.* had, as no actual Conveyance was made to him. The *Maſter of the Rolls* ☞ ſaid, that to be a *Purchaſor in the Notion of Equity there muſt be an actual Contract*, and a *Conſideration paid*, and therefore if at the Time of the Marriage the Deed of 1712 ſtood revoked, the Truſtees ſhould be ſeiſed only of a Moiety for the Uſe of *B.* and conſequently Lord *Fauconbridge* can be a Purchaſor of no more. *Lord Chancellor* decreed a Moiety of the Eſtate, and an Account of the Rents and Profits to *C.* ſince the Death of *J. S.* 12 *June* 1730. *Fitzgerald* and *Lord Fauconbridge*. *Vide Lilly's Pract. Conv.* 391 to 402. and *Fitz-Gibb. Rep.* 207.

(B) Purchaſors, in what Caſes favoured in Equity.

For here *J. S.* hath parted with his Money, and taken a Bond for Repayment of it, if the Recovery were not ſuffered in

1. *J. S.* bought an Eſtate of *A.* and upon the Bargain it was agreed that a Recovery ſhould be ſuffered within three Years; and *J. S.* paying his Money before the Recovery was ſuffered, took a Bond of *A. that if the Recovery was not ſuffered in three Years*, that then *J. S. reconveying the ſaid Lands ſhould be repaid his Money*. A. *tenders a Recovery*, but *before it was ſuffered a third Perſon makes a Title*

three Years Time, *J. S.* reconveying his Eſtate; and here the Recovery being ſuffered, he hath no Pretence by his own Agreement to have it repaid, and this Court cannot help him, unleſs it ſhould take upon itſelf where any Man had a bad Bargain, or was cheated in his Title, to help him to his Money again; and here being no Manner of *Fraud* or *Surpriſe* in the Caſe, if he be not helped by his Covenants, he ſhall not be helped in Equity; but for the Matter of Reconveying, his *Lordſhip* held, that if *J. S.* ſhould reconvey ſuch Title as he had from them, be it more or leſs, or none at all, yet being a Relative to convey, it would have been well enough; but here the Recovery being ſuffered according to the Agreement, tho' nothing paſſed by it, he held the Party had well performed his Agreement; and ſo no Reconveying nor Repayment of the Money to be made. *Ibid.*— In this Caſe of *Serjeant Meynard* it was ſaid *per* Mr. *Attorney General* (and ſeems to be admitted) that if a Man ſells another's Lands, and covenants to diſcharge it of ſuch particular Incumbrances, and before the Payment of the Money other Incumbrances are diſcovered, this will prevent any Suit for the Money 'till all

the

Title to the Land, and thereupon *J. S.* exhibited his Bill *to have the Money repaid.* But *Lord Chancellor* ſaid, he could give no Relief. *Eaſt.* 1676. *Serjeant Maynard's Caſe*, 2 *Freem. Rep.* 1, 2.

the Incumbrances are diſcharged. *Ibid.* 2.——And if there be no Covenants againſt any Incumbrances, yet, if before Payment of the Money any are diſcovered, the Party may retain his Money 'till they are cleared, *per* Mr. *Keck*, and agreed to *per Lord Chancellor*. But it was ſaid by Sir *John King*, and not denied *per Cur'*, that thoſe muſt be Incumbrances made by the Vendor himſelf, or otherwiſe the Party cannot detain the Money, unleſs they be covenanted againſt. *Ibid.* 2.

2. Equity will never aſſiſt againſt a Purchaſor. *April* 4, 1707. *Party al' Perry* and *Ryley*, *Vin. Abr.* Tit. *Purchaſor*, (B) *Ca.* 1. *P.* 112.

3. Purchaſor for a valuable Conſideration *without* Notice ſhall not be impeached, eſpecially where a Settlement has been ſince made in his Favour. *May* 14, 1717. *Rochford* and *Nugent*, *Vin. Abr.* Tit. *Purchaſor*, (C) *Ca.* 1. *P.* 115.

4. *A.* made a Purchaſe before a *Maſter in Chancery* for 10,500 *l.* and depoſited 1000 *l.* Upon it's being prayed, that *A.* might compleat his Purchaſe, he offered to loſe his Depoſit, and not to proceed. Decreed by *Macclesfield* C. that *A.* ſhould loſe his Depoſit, and be diſcharged of his Contract. *Mich.* 1721. *Savile* and *Savile*, 1 *Will. Rep.* 745. And *P.* 746 in a Note ſays, that the ſame Point was determined ſome little before in *Merret* and *Bennet*, and *Dr. Tenniſon* and *Lord Bulkley*.

His *Lordſhip* obſerved, that a Court of Equity ought to take Notice under what a general Deluſion the Nation was at the Time of this Contract made, (*viz.* in the *South-Sea* Year) when People put imaginary Values on Eſtates. *Ibid.*

5. It is a known and eſtabliſhed Rule in Equity, that from the Time of the Contract the Vendor is a Truſtee for the Vendee 'till the Conveyance is executed, and if the Vendor ſhould afterwards ſell the ſame Lands to another, having Notice of the precedent Contract, Equity ſtill transfers the Truſt, and the firſt Vendee may in ſuch Caſe bring his Bill againſt the ſecond Vendee for a ſpecifick Performance. *Mich.* 10 *Geo.* 1. *Lucas's Rep.* 527.

6. *J. S.* was Tenant *for Life*, Remainder *to* A. *his Son in Tail*, Remainder *to* J. S. *in Fee*, of an Eſtate computed worth 7000 *l.* *A.* being thirty Years of Age, in *J. S.*'s Life-time articled to ſell the Eſtate for 3300 *l.* *to be paid when he ſhould come into Poſſeſſion of it, together with Intereſt for the ſame from the Time of the Articles to the Time when he ſhould be in Poſſeſſion.* *J. S.* dies within two Years after the Agreement made, ſo that the Intereſt amounted to little. *A.* on his coming into Poſſeſſion compleated his Agreement, and now brought his Bill to be relieved. It was inſiſted for the Purchaſor that there was a great Difference between defeating an Agreement and carrying it into Execution; in the one Caſe it is aſking a Favour, in the other merely inſiſting on a Right. And *per* Lord Commiſſioners *Raymond* and *Gilbert*, Had the Bargain been to have paid down 3300 *l.* when he *came* into the Poſſeſſion of the Eſtate, this would not have really been a Purchaſe of the Reverſion, but of an Eſtate in Poſſeſſion, as the Payment and Poſſeſſion were to be at the ſame Time; and in that Caſe on Account of the great Over-value would relieve. That had the Bargain been to pay ſo much down in Ready Money, it would undoubtedly have been good, otherwiſe there is an End of all Sales of Reverſions; and that this is the ſame as buying the Reverſion for preſent Money paid, and will be conſidered as ſo much Money put out at Intereſt by himſelf, and the ſame as if he had immediately received it and lent it to the Vendor at Intereſt. That the Intereſt might have run to the Value of the Eſtate, tho' it has happened otherwiſe, which was a Chance on both Sides, and is it conſiſtent with Common Senſe, that a preſent Agreement ſhould be varied by future Accidents? They muſt be conſidered as they are in themſelves, without any Thing extrinſick. That Bargains for Sales of reverſionary Eſtates by

Heirs

Heirs are never ſet aſide but on Account of Prodigality. That nothing of that appears in the preſent Caſe, but the Reverſe; for it appears that both the Father and the Son were in bad Circumſtances. *Eaſt.* 11 *Geo.* 1. 1725. *Dews* and *Brandt*, *Select Caſes in Chan.* 7, 8.

7. A Bill was brought againſt Defendant to have the Benefit of a Decree obtained againſt *L.* for Recovery of a Leaſehold Eſtate held of the Dean and Chapter of St. *Paul*'s. Defendant was a Purchaſor of this Eſtate *pendente lite* from Defendant *L. viz.* about three Months after the Bill was filed againſt *L.* and a *Subpœna* ſerved upon him, and he in Contempt for not anſwering; but it was proved that the Defendant was a Purchaſor for the *full* Value, and *without any Notice of the Plaintiff's Title, or of the Suit.* And *per* Lord Chan. *King*, Where there is a Conveyance made *pendente lite*, without any valuable Conſideration, and to avoid and elude a Decree, tho' it ought to be highly diſcountenanced, and even tho' the Alienation be for ever ſo good a Conſideration, yet if made *pendente lite*, the Purchaſe is to be ſet aſide, and this in Imitation of the Proceedings in a real Action at Law, where, if the Defendant aliens *after* the *Pendency* of the Writ, the Judgment in the real Action will over-reach ſuch Alienation. But where there is a real and fair Purchaſor without any Notice, it is a very hard Caſe, eſpecially in a Court of Equity, to ſet ſuch Purchaſe aſide; and there being ſome Defect in Part of the Proof in deraigning the Plaintiff's Title, his *Lordſhip* refuſed to give the Plaintiff Leave to amend or make any new Proof after Publication. His *Lordſhip* ſaid, it was a difficult Matter to ſearch for Bills in Equity, or to be able to get Notice of them, many of them being, after filed, kept in the Six Clerk's Deſk, and tho' this Court will oblige all to take Notice of its Decrees as much as of Judgments, yet there does not ſeem to be the ſame Reaſon for obliging People to take Notice of the filing of a Bill; ſo diſmiſſed the Bill, but without Coſts, it being a Slip in Proof. *Trin.* 1728. *Sorrell* and *Carpenter*, 2 *Will. Rep.* 482.

8. *A.* enters into a Judgment to *B.* and *C.* which is defeazanced to the Uſe of *D.* and in the Defeazance *A.* covenants for himſelf, and his Heirs, to pay to *D.* the *Ceſtuy que Truſt* and her Heirs; afterwards *A.* ſells Part, and the other Part deſcending to the Heir, he married and had Children; *B.* one of the Truſtees, died; *C.* the ſurviving Truſtee, makes *A.* the Conuſor of the Judgment, Executor; *D.* the *Ceſtuy que Truſt*, brings a Bill againſt the Executors of *A.* the Heir at Law, and the Purchaſor, for Relief, not being able to recover at Law, the Conuſor being made Executor; but no Relief. Lord Chan. *King* ſaid, tho' it be a mere Accident and a Slip by the Conuſor's being made Executor, yet Equity will not interpoſe or give any Aſſiſtance to affect a Purchaſor; and bid them recover at Law as they could. *Oct.* 27, 1730. *Harvy* and *Woodhouſe*, *Select Caſes in Chan.* 80.

And it muſt be ſuch a reaſonable Title as every Purchaſor would expect. *Ibid.*

9. If *A. contracts for the Purchaſe of an Eſtate*, and *is not abſolute Owner of it*, nor *has it in his Power by the ordinary Courſe of Law or Equity to make himſelf ſo*, tho' the *Owner offers to make the Seller a Title*, yet Equity will not force the Buyer to take it, for every Seller that will have ſuch a Bargain executed muſt be *bonâ fide* a Contractor. *Mich.* 5 *Geo.* 2. *Tendring* and *London*, *in Scac'*, *MS. Rep.*

His *Lordſhip* ſaid, it is very proper that a Will diſpoſing of Lands ſhould be proved in Equity, eſpecially in the Caſe of a modern Will. But this is not abſolutely neceſſary to make out the Title, any more than it would be to prove a Deed in Equity, by which an Eſtate is ſettled from the Heir at Law after the Anceſtor's Death. The Will prevents and breaks the Deſcent to the Heir as much as a Deed,

10. *J. S.* mortgaged his Lands for near the Value, and owing other Debts, he made his Will, and thereby deviſed all his real Eſtate to *A.* and *B.* and their Heirs, *In Truſt* to ſell and pay his Debts and Legacies,

cies, and the Reſidue was to go to his Brother *G.* his Heir at Law, who was beyond Sea in the Service of the *Eaſt-India* Company. After the Teſtator's Death, *B.* alone covenanted by Articles with *W.* to ſell him Part of the Truſt Eſtate, and *W.* covenanted to pay Intereſt for the Purchaſe Money from ſuch a Time, and entered on Part of the Premiſſes. The Creditors of the Teſtator brought a Bill to compel *W.* to compleat his Purchaſe, that they might be paid their Debts. *W.* ſaid he believed *J. S.* the Teſtator did duly execute his Will, and deviſed the Premiſſes to be ſold, and admitted the Articles, and that he was ready to proceed in his Purchaſe, *all proper Parties joining*. The Will was proved in this Court to be duly executed, but the Heir who was beyond Sea, tho' made a Defendant, yet had not appeared to, or anſwered the Bill, and *W.* tho' he was at firſt willing to purchaſe the Premiſſes, and had entered on good Part thereof, yet the other Part of this Eſtate, on which he had not entered, being much out of Repair, the Tenants racked, and the Rents likely to fall, he was now deſirous of being diſcharged from his Purchaſe. *King* C. decreed *W.* to pay the reſt of the Purchaſe Money, with Intereſt according to the Articles, and that the Truſtees and Mortgagee join in proper Conveyances to him. It ſeems in this Caſe to have been a great Help to the Title, that the Mortgage made by the Teſtator, and prior to the Will, was the greateſt Part of the Purchaſe Money, which muſt be kept on Foot for the Protection of the Title. *Trin.* 1733. *Colton* and *Wilſon et al'*, 3 *Will. Rep.* 190.

and the Hands of the Witneſſes to the Will may be as well proved as thoſe to a Deed, and it. is the better, if in the Indorſement *(Atteſtation)* to the Will it is mentioned that the Will is atteſted by three Witneſſes, who ſubſcribed their Names in the Preſence of the Teſtator. Now, as it would be no Objection to a Title, if a modern Deed, on which the Title depended, was not proved in Equity, why ſhould it be ſo in the Caſe of a Will, where the ſame appears to be duly atteſted by three Witneſſes, whoſe Names are mentioned to have been ſubſcribed in the Preſence of the Teſtator? But in the preſent Caſe it appears the Defendant, who articled for the Purchaſe, knew at that Time the Heir was beyond Sea, and ſtill accepted the Title, without inſiſting that the Heir ſhould join, or that the Will ſhould be proved againſt the Heir; alſo, the Defendant admits by his Anſwer, that the Will was duly executed, and by entering upon great Part of the Eſtate, has himſelf executed the Purchaſe; for which Reaſon it was decreed *ut ſupra*.

11. Where it appears that Articles for a Purchaſe are unfairly obtained, tho' not to ſuch a Degree of Unfairneſs as to ſet them aſide, yet, if upon the Proſpect of having the Articles performed the Purchaſor (who is in Poſſeſſion) has improved the Eſtate, it is reaſonable he ſhould have Allowance for *laſting* Improvements, provided he deliver up the Articles, and account for the Profits; but if he goes to Law, he muſt not expect it. *Per* Lord Chan. *Talbot*, *Hil.* 1736. *Savage* and *Taylor*, *Caſes in Eq. Temp. Lord Talbot* 234, 236.

(C) Where a Purchaſor pleads himſelf ſuch for a valuable Conſideration, &c.

1. AN Heir exhibited a Bill for Diſcovery of Evidences concerning Lands that were his Anceſtor's; the Defendant ſwore that he was a Purchaſor of the Lands; and the Heir demanded a Sight of his Deeds and Writings. But *per Lord Chancellor*, he ſhall not ſee them; for altho' the Heir *primâ facie* hath a legal Title, he may go into a Court of Law if he pleaſes, *but this Court will not compel the ſhewing of Writings to any Perſon, unleſs he hath an equitable Title, as a Mortgagee*, &c. and *that is the Difference between a* legal *and an* equitable *Eſtate*. *Trin.* 1677. *Sir John Burlace* and *Cooke*, 2 *Freem. Rep.* 24.

2. A Bill was preferred for Diſcovery of Title and Writings. The Defendant pleads that he was a Purchaſor for a valuable Conſideration *without* Notice of the Plaintiff's Claim, and ſo demurs. The Plea

was ruled to be ill, *per Lord Chancellor*, becauſe *he did not ſet forth the particular Conſideration*; but *if that had been expreſſed, it had been good* (a). *Mich.* 1678. *Millard's Caſe*, 2 *Freem. Rep.* 43.

(a) And ſo it was held in one *Snag's* Caſe. *Ibid.*

3. Defendant pleaded himſelf a Purchaſor for a valuable Conſideration, but ruled no good Plea, in regard he did not *plead himſelf a Purchaſor from ſome of the Plaintiff's Anceſtors*; for a Purchaſe from a Stranger, without Title, was held no good Plea; and therefore the Defendant was ordered to anſwer. *Per* Lord Keep. *Bridgman*, *Hil.* 1670. *Seymer* and *Noſworthy*, 2 *Freem. Rep.* 128.—3 *Chan. Rep.* 40. *Hil.* 1669. S. C.—*Nelſ. Chan. Rep.* 135. S. C.

Hil. Vac. 1674 the Plea (or Motion) was held good by Lord Keep. *Finch*, and all the ſubſequent Proceedings ſet aſide. *Ibid.*

4. A Bill was to redeem Lands mortgaged in 1694 to the Defendant's Grandfather by the Plaintiff's Father for five hundred Years, to be void on Payment of 126 *l.* and Intereſt. The Defendant pleads, that he is a Deviſee of thoſe Lands under his Grandfather's Will, who in 1692 purchaſed them for a two hundred Years Term without Condition of Redemption, and had enjoyed fifteen Years quiet Poſſeſſion. But the Court over-ruled the Plea, for the Defendant's not anſwering ſufficiently as to the Mortgage; and the Plea of the Purchaſe may be true, for it may be only a Term for Years to attend the Inheritance. *Hil.* 12 *Geo.* 1. *Meder* and *Birt*, *Gilb. Rep. in Eq.* 185.

5. A Purchaſor for a valuable Conſideration, *without* Notice, having as good Title to Equity as any other Perſon, this Court will never take any Advantage from him, and conſequently will not grant a Diſcovery againſt him of the only Equity he has to defend himſelf by, which if he ſhould be obliged to diſcover, the other Party would immediately take Advantage of it; and there certainly may be Caſes where a Purchaſor for a valuable Conſideration, *without* Notice of an Act of Bankruptcy, ſhall not be obliged in this Court to diſcover any Thing, (whether Incumbrances that he has got in, or any other Thing) but all Advantages ſhall be left him to defend him by. Suppoſe two Purchaſors *without* Notice, and the ſecond by Chance gets hold of an old Term, he ſhall defend himſelf thereby againſt the firſt, who ſtill is as much a Purchaſor for a valuable Conſideration as himſelf; I do not therefore think a Purchaſor for a valuable Conſideration, without Notice of the Bankruptcy, is to be relieved againſt in this Court within 21 *Jac.* 1. *Per* Lord Chan. *Talbot*, *Hil.* 1734. in the Caſe of *Collet and De Gols* and *Ward*, *Caſes in Eq. Temp. Lord Talbot* 69.

(D) Purchaſors, in What Caſes affected (b);—and here of Purchaſors without Notice, and of preſumptive Notice.

(b) Mr. *Pigott* the *Conveyancer* peruſed a Settlement, and afterwards drew another of the ſame Lands, but at ſuch a Diſtance of Time that he had forgot the Contents of the former Settlement; and upon a Plea of a Purchaſor without Notice on the latter Settlement, the Queſtion was, If this Notice to Mr. *Pigott* of a Thing he had forgotten was ſufficient to affect the Principal? And upon great Conſideration, and upon examining Mr. *Pigott* in Court, it was held by Lord Chan. *King*, aſſiſted by ſeveral of the Judges, that it was not; for, when the Thing had ſlipt out of his Memory, he was as if he never had any Notice at all of the Thing. And *Talbot* Lord C. in the Caſe of the *Attorney General* and *Gower*, ſaid, no Man was obliged to remember a Thing for ever; and that this Determination was perfectly right (c). *MS. Notes.*——Docketting of a Judgment, held by Lord Chan. *Talbot* not to amount to conſtructive Notice, for Judgments are infinite (d). *MS. Notes.*——If *A.* ſells an Eſtate, and takes a promiſſory Note for Part of the Purchaſe Money, and then the Purchaſor ſells to *B.* who has Notice that *A.* had not received all his Purchaſe Money, the Land in Equity is chargeable in the Hands of *B.* with the Money due on the Note. *Gibbons* and *Baddall* (e), *MS. Rep.*—— *Note*; Notice muſt be denied poſitively, and not evaſively. *MS. Notes.*

(c) *Quære* Term and Year.

(d) *Quære* Term and Year.

(e) *Quære* Term and Year.

1. VOluntary Articles ſhall never be ſet aſide againſt an abſolute Purchaſor, altho' ſuch Purchaſor had Notice by being a Party to the Articles. But *Quære*; for there was another Point in the Caſe,

which might be the Foundation of the Judgment. *Jan.* 14, 1702. *Powell* and *Pleydel*, *Vin. Abr.* Tit. *Purchaſor*, (D) *Ca.* 5.

2. *A.* deviſed Freehold Lands to his Brother *B.* In Truſt for Payment of his Debts and Legacies, and makes the Defendant his Executor, and dies. But the Will not being furniſhed with Words requiſite for paſſing the Lands, they deſcended to the Heir, who entered. The Teſtator being indebted to ſome Perſons upon Judgments and Bonds, and to others upon ſimple Contracts, the Executor paid off the Debts upon Judgments and Bonds out of the perſonal Eſtate, leaving the Debts upon ſimple Contract undiſcharged. The Heir conveys the Lands to the Defendant for a valuable Conſideration. Plaintiff, a ſimple Contract Creditor, exhibits his Bill for an Account of the perſonal Eſtate, to be ſatisfied out of that, and if the perſonal Eſtate falls ſhort, then to be ſatisfied out of the real Eſtate; making his Equity, that Defendant had Notice of his Demand before the Purchaſe; and that if the Judgment Debts and Bond Debts had been anſwered out of the real Eſtate, which they affected, then there would have been a Fund ſufficient to anſwer Plaintiff's Demand. Inſiſted for Defendant, that the Judgment Debts and Bond Debts are to be ſatisfied before ſimple Contracts; and if the Executor had diſcharged the ſimple Contract Debts, and left the other undiſcharged, it would have been a Devaſtavit in him. As to the Notice, it was denied that there was any. And then the Caſe is no more than this: A Man being indebted, and his Debts being of that Nature as to affect the Lands, dies, and leaves Lands which deſcend to the Heir; if the Heir doth ſell before an Original brought, or Bill exhibited, the valuable Purchaſor without Notice ſhall not be charged; and the Defendant being Executor, doth not alter the Caſe. But *Lord Chancellor* ſaid, he thought the Purchaſor in the Caſe very much affects it; for he could not ſuppoſe him to be ignorant of the Plaintiff's Equity. Here are Debts due upon Bonds, and perſonal Debts, and the Executor hath Aſſets in his Hands to diſcharge the latter, and he hath Notice of the real Eſtate and the Incumbrances; he ought to manage ſo, that the perſonal Debts ſhall be diſcharged; and the Heir to take Care of the Debts Lien upon the Lands. Decreed an Account to be taken of the perſonal Eſtate; and his *Lordſhip* ſaid, if that prove inſufficient, then the Queſtion will ariſe Whether the Purchaſor or the Executor is liable to the Demand? He ſaid, the Caſe was ſtrong in it's Circumſtances, that there was a good Underſtanding between the Heir and the Executor; however, ſtrict Juſtice requires that the *Maſter* inquire of the Notice. If the perſonal Eſtate proves deficient, he thought it highly reaſonable he ſhould anſwer ſo much as was applied to Judgment and Bond Debts; and ſaid, he ſhould ſo decree; but he found the Heir at Law was inſolvent. *Trin.* 7 *Ann. Hunt* and *Bletroe*, *MS. Rep.*

3. In the Caſe of *Peach* and *Winchelſea*, Lord *Cowper* ſeemed to be of Opinion, That in Caſe of a Covenant to convey Land, the Money being paid, a Judgment confeſſed to a Creditor, between the Time of the Covenant and the Conveyance, ſhould not affect the Purchaſor, becauſe

If one article to buy an Eſtate, and pays his Purchaſe Money, in and afterwards the

Vendor acknowledges a Judgment or Statute to a third Perſon, *who had no Notice*, yet this Judgment ſhall not, in Equity, affect the Eſtate, becauſe from the Time of the Articles, and Payment of the Money, the Vendor would be only a Truſtee for the Purchaſor. Said *arg'*, and *admitted*, and *affirmed per* Lord Chan. *Cowper*, *Trin.* 1715. in the Caſe of *Finch* and *Earl of Winchelſea*, 1 *Will. Rep.* 278.——But Articles made for a valuable Conſideration, and the Money paid, will, in Equity, bind the Land and prevail againſt any Judgment Creditor, Meſne betwixt the Articles and the Conveyance; but this muſt be where the Conſideration paid is ſomewhat *adequate* to the Thing purchaſed; for, if the Money paid is but a *ſmall Sum* in reſpect of the Value of the Land, this ſhall not prevail over a Meſne Judgment Creditor. *Per* Lord Chan. *Cowper*, *ibid.* 282.——But a *Mortgagee for a valuable Conſideration*, and *without Notice* of ſuch Covenant, ſhall hold Place

in Equity the Land is eſteemed to be ſold from the Time of the Covenant. *Vide Lucas's Rep.* 468.

Place againſt ſuch *Covenantee*; for, in this Caſe, the Money is lent upon the Title and Credit of the Land, and attaches upon the Land; but it is not ſo in the Caſe of a Judgment Creditor, who (for ought appears) might have taken out Execution againſt the Perſon, or Goods of the Party that gave the Judgment; and a Judgment is only a general Security, and not a ſpecifick Lien upon the Land. Said *arg'* and *admitted. Ibid.* 279.

4. In the Caſe of *Pagett* and *Hoſkins*, *Hil.* 1715. a Caſe was cited as decreed by Lord Chan. *Cowper*, (when he had the Seals before) where an Executor being poſſeſſed of a Term for Years in Right of his Teſtator, and being indebted to *A.* on his own Account, agreed with his Creditor for the Sale of this Term; and that the Debt ſhould be diſcounted out of the Purchaſe Money; and yet upon a Bill brought againſt him by the Creditors of the Teſtator, he was not allowed to ſink his own Debt, but was decreed to pay the Money, *becauſe he purchaſed with full Notice*; that this was a teſtamentary Eſtate, and nothing came into the Executor's Hands as an Equivalent for it, to make up the *Quantum* of the Teſtator's Aſſets. *Prec. in Chan.* 434.

Prec. in Chan. 478. S. C. *in totidem verbis.* But I have ſeen this Caſe much better ſtated (as I think) in *another* MS. Rep. which I cannot *now* come at.

5. It was held *per Lord Chancellor*, that upon the Statute of Frauds and Perjuries a Judgment ſhall have no Relation but from the Time of the ſigning, not only as againſt Purchaſors of the Lands themſelves, but alſo as againſt *prior* Judgments entered in the *Grand Seſſions* of *Wales*, to *which that Statute does not extend*; and therefore, as objected, the Judgment in the *Common Pleas*, tho' ſubſequent in Time to the other Judgments at the *Grand Seſſions*, yet if it might relate to the firſt Day of the Term, it would take Place of the other Judgments: But his *Lordſhip* ſaid, that a Man who truſted his Money on a Judgment was in ſome Sort a Purchaſor of the Land, as he might take out Execution, and extend the Land itſelf; and therefore, if he found no Judgment *prior*, he thought his Security good; and that the Rule the Statute had laid down for the Safety of Purchaſors of Lands themſelves, was a good Rule to follow in the preſent Caſe, and the Relations were not to be favoured in a Court of Equity. But Sir *T. Powis* inſiſted ſtrongly, that the Statute extended only to Purchaſors of the Lands, and therefore ſaid, a Judgment ſhould have the ſame Relation ſtill, as it would have had at Common Law, againſt a voluntary Settlement, or againſt one who came to the Lands by any Conveyance without valuable Conſideration; and this was not denied by the Court; but in the preſent Caſe, if the ſubſequent Judgment in the *Common Pleas* ſhould have ſuch Relation, it would defeat real Creditors who truſted to the Priority of their Judgments; which his *Lordſhip* thought ought not to be overthrown by a Fiction of Law. *Mich.* 1717. *Anon. MS. Rep.*

6. Purchaſor is not to be affected with a concealed Conveyance. *Feb.* 6, 1719. *Butler* and *Burk*, *Vin. Abr.* Tit. *Purchaſor*, (D) *Ca.* 7. *P.* 118.

7. Bill to have a Satisfaction of a Judgment againſt a Purchaſor of the Equity of Redemption of the Land, or to redeem Incumbrances, *&c.* The Defendants inſiſt on the Stat. 4 *&* 5 *W. & M. cap.* 20 (*a*). This Judgment was not docketted 'till 1721, and the Purchaſe was made in 1718. Inſiſted, that the Defendant the Purchaſor had Notice of this Judgment, and an Allowance for it in the Purchaſe, and that raiſes an Equity for the Plaintiff againſt him. And *per* Lord Chan. *Macclesfield*, it is plain the Defendant had Notice of the Judgment, and did not pay the Value of the Eſtate, and that is a ſtrong Preſumption of an Agreement to pay off the Judgment; and ſince the

(*a*) That no Judgment ſhall affect a *Purchaſor* or Mortgagee, unleſs docketted.

Plaintiff

Plaintiff cannot proceed at Law againſt the Defendant upon the Judgment for want of docketting in due Time, he ought to be relieved in a Court of Equity. Decreed that the Defendant pay to the Plaintiff the Money *bona fide* due upon the Judgment. 9 *Geo.* 1. *Thomas* and *Pledwell*, *Vin. Abr.* Tit. *Creditor and Bankrupt*, (E) *Ca.* 5. *P.* 53.

8. If the Perſons claiming under a Breach of Truſt have Notice of it, then they are ſubject to the ſame Truſt; ſo if the Conveyance be voluntary, or without a valuable Conſideration; but if for a valuable Conſideration, and without Notice, the Purchaſor will hold the Land diſcharged, and the Truſtees muſt buy and ſettle other Lands to the ſame Uſes. *Per Cur'*, *Mich.* 1732. in the Caſe of *Manſel* and *Manſel*, 2 *Will. Rep.* 613.

Caſes in Eq. Temp. Lord Talbot 262. *Trin.* 1732. S. P. in S. C. in theſe Words: If an Eſtate ſubject to a Truſt is purchaſed from the Truſtees for a valuable Conſideration *without* Notice, a Court of Equity cannot affect the Purchaſor, tho' they can the Truſtees; but if ſuch Purchaſor had Notice, then the Truſt goes along with the Eſtate, and the Land ſtill continues ſubject to it.

9. If after the Execution of a Conveyance, but before Payment of the Conſideration Money, the Purchaſor has Notice that the Vendor has no Title to the Lands, this is ſufficient to avoid the Purchaſe. *Jones* and *Stanley*, *Mich.* 5 *Geo.* 2. *in Scac'*, *MS. Rep.*

10. A Church Leaſe was agreed by Marriage Articles to be ſettled upon the Huſband and Wife, and the Iſſue of the Marriage. The Huſband afterwards ſells it to *C.* who had *no Notice of the Articles*. *C.* died, and his Executors ſold the Leaſe to *D. who had Notice of the Articles*, and *C.'s Executors gave* D. *collateral Security for the better aſſuring his Title*. The Plaintiff claimed under the Articles, and prayed that *D. by reaſon of the Notice he had of the Articles, might be conſidered as a Truſtee for him*. *D.* pleaded his Purchaſe, and *confeſſed the Notice*, but inſiſted principally upon *C.*'s Purchaſe *without* Notice, whoſe Title was now in him. Lord *Talbot* decreed for *D.* and ſaid, it would be the ſame tho' *D.* had been only a Volunteer as *C.*'s Executors were, and that *D.* taking *collateral* Security could not make his Caſe the worſe, but if *C.* had had Notice, all would be overturned. *Hil.* 1735. *Lowther* and *Carleton*, *Caſes in Eq. Temp. Lord Talbot* 187.

A Purchaſor with Notice aliened to one who had no Notice, and there tho' the Court would not affect the Purchaſor without Notice, yet it being a Fraud, the Vendor (who was the Purchaſor with Notice) was decreed to make Satisfaction to the Plaintiff his Vendee, who had ſued for Relief. Cited *per* Lord *Talbot*, *ibid.* 188. as a Caſe which he ſaid he remembered.

11. If in an Information for a Charity to ſet aſide ſome Conveyances obtained by Defendant, it was charged, that he had Notice of a Truſt Deed, and that his Agents in obtaining ſuch Conveyances were Members of the Corporation of *Newcaſtle*, and might have Recourſe to the Records of the Town, whereby they might inform themſelves of this Truſt, and the Queſtion aſked was, Whether any Agent for the Defendant had not Notice of the Truſt Deed at the Time of treating for or obtaining ſuch Conveyances? Defendant denied he had any Notice, or that his Agents were Members of the Corporation, or might have Recourſe to the Records, or that, as he knew or believed, ſuch Agents had any Notice of the ſaid Truſt Deed at the Times they reſpectively treated for ſuch Conveyances; but becauſe he did not deny that they had Notice of the ſame at the Time they were obtained, this was held to be inſufficient, and the Plea ordered to ſtand for an Anſwer, with Liberty to except as to the Notice. *Per* Lord *Talbot*, *Attorney General* and *Gower et al'*, *Nov.* 12, 1736. *MS. Rep.*

In this Caſe of *Attorney General* and *Gower et al'*, upon arguing Defendant's Plea of a Purchaſor for a valuable Conſideration without Notice, *Lord Chancellor* then ſaid, if they had Notice before the Deeds were executed that was ſufficient, tho' they had no Notice at the Time of the Treaty; and he ſaid, as to the implied Notice, it was the very ſame as expreſs, for the Principal by truſting his Agent made his Act his own, and became anſwerable for it, for otherwiſe a Man who had a Mind to get another's Eſtate might ſhut his own Eyes, and employ another to treat for him who had Notice of a former Title, which would be a manifeſt Cheat. *Ibid.*

12. *J. S.* became indebted to ſeveral Perſons by Bond, in three of which *G.* was bound with him as a Surety; afterwards *G.* gave his own Bond along with him to one of the Creditors, to whom *J. S.* was bound in a ſingle Bond. *J. S.* being thus indebted, made his Will, and in the Beginning of it ſays, "*My Will is, that all my Debts be paid, and I* "*do charge all my Lands with the Payment thereof.*" Then came this Clauſe: "*Item, I give all my real and perſonal Eſtate to* G. *to hold to* "*him, his Heirs, Executors, Adminiſtrators and Aſſigns, chargeable* "*nevertheleſs with the Payment of all my Debts and Legacies.*" And made *G.* Executor. The Teſtator died in 1724. *G.* proved the Will, and in the ſame Year ſold a Freehold Eſtate of *J. S.*'s to *H.* and in 1727 ſold another Eſtate of the Teſtator's, conſiſting of both Freehold and Leaſehold, to *M.* In the ſeveral Deeds by which theſe Eſtates were conveyed, *J. S.*'s Will was recited, and to one of theſe Deeds *S.* a Creditor of *J. S.* was a ſubſcribing Witneſs. Theſe Lands were ſold in the Neighbourhood by Outcry. At the Time of theſe Sales the Creditors, all of them, either lived in the Town where *G.* lived, or within three or four Miles of it. During all this Time, and 'till 1730, the Creditors received their Intereſt regularly at 5 *l. per Cent.* from *G.* who was a ſolvent Man 'till 1732, and then he became a Bankrupt. In 1734 the Creditors of *J. S.* brought a Bill againſt the Purchaſors of theſe Lands, againſt *G.* and the Aſſignees under his Commiſſion; for Satisfaction out of the Lands ſold by *G.* His *Honour* (for the Reaſons in the Margin) diſmiſſed the Bill with Coſts as againſt *W.* the Purchaſor of the Leaſehold only, there being no Manner of Pretence for the Plaintiffs to come upon that Eſtate, *W.* having purchaſed it of the Executor, who, by Law, is the proper Perſon intruſted to diſpoſe of the Teſtator's perſonal Eſtate; and as to the other Defendants, without Coſts. *Eaſt.* 1740. *Elliott* and *Merryman*, *Barnard. Rep. in Chan.* 78.

His *Honour* ſaid, that with regard to the Leaſehold Eſtate ſold to *W.* the Creditors cannot have Satisfaction out of that, and that this was ſo extremely plain that it would be monſtrous to call it in Queſtion. That the Executors are the proper Perſons that by Law have a Power to diſpoſe of the Teſtator's perſonal Eſtate, which indeed, in ſome Caſes, may be cloathed with ſuch particular Truſt, that poſſibly the Court in ſuch Caſes may require a Purchaſor of it to ſee the Money rightly applied; but unleſs there is ſome particular Truſt or a Fraud in the Caſe, the Sale thereof by an Executor muſt ſtand, and the Creditors cannot break in upon it; and as to the other Sales that have been made, his *Honour* obſerved that the general Rule is, that if a Truſt directs that Land ſhould be ſold for the Payment of Debts generally, the Purchaſor is not bound to ſee the Money rightly applied, but if it be for Payment of certain Debts, mentioning in particular to whom theſe Debts were owing, the Purchaſor is bound to ſee that the Money be applied for the Payment of thoſe Debts. That the preſent Caſe does not fall within either of theſe Rules, for here the Lands are *not given to be ſold for Payment of Debts*, but *are only charged with ſuch Payment*. However, the Queſtion is, Whether that Circumſtance makes any Difference? And his *Honour* was of opinion, that it did not. And if ſuch Diſtinction was to be made, the Conſequence would be, that whenever Lands are charged with the Payment of Debts generally, they can never be diſcharged of that Truſt without a Suit in Chancery, which would be extremely inconvenient. That no Inſtances have been produced to ſhew, that in any other Reſpect the charging Lands with the Payment of Debts differs from directing them to be ſold for ſuch a Purpoſe, and therefore there is no Reaſon that there ſhould be a Difference eſtabliſhed in this Reſpect. An Objection having been made, that where *Lands are appointed to be ſold for Payment of Debts generally*, the Truſt may be ſaid to be performed as ſoon as thoſe Lands are ſold, but that where *they are only charged for Payment of Debts*, that the Truſt is not performed 'till thoſe Debts are diſcharged. His *Honour* obſerved, that this was the only Objection ſeemingly of any Weight as to this Matter, and ſaid, that ſo far it is true that where *Lands are charged with Payment of Annuities*, thoſe Lands will be charged in the Hands of a Purchaſor, becauſe it was the very Purpoſe of making the Land a Fund for that Payment, that it ſhould be a conſtant and ſubſiſting Fund; but where *Lands are not burthened with ſuch ſubſiſting Charge*, the Purchaſor ought not to be bound to look to the Application of the Money, and that ſeems to be the true Diſtinction. That in this Caſe the Circumſtances of the Creditors, their *Acquieſcence* ſo long as 1734, without inſiſting upon any Charge upon theſe Eſtates ſo ſold *ut ſupra*, and the Solvency of *G.* 'till 1732, and their receiving their Intereſt regularly of *G.* 'till 1730, who could not be ſuppoſed ignorant of the Purchaſes made by Outcry, they living either in the Town with, or within three or four Miles of *G.* And *S.* a Creditor being a ſubſcribing Witneſs to one of the Purchaſe Deeds, are Circumſtances far from ſtrengthening the Plaintiff's Caſe, but rather the contrary. That the want of Notice on the Part of the Purchaſors is a conſiderable Circumſtance in their Favour. It appears indeed that the Purchaſors had Notice that there were Debts charged upon the Eſtate, but it does not appear that they knew to whom the Debts were owing. Beſides, *G.*'s being a Co-Obligor in three Bonds, and having given to another of the Obligees his ſingle Bond, (which may be well conſidered as a Satisfaction for that Bond), by this it appears that the Creditors greatly relied upon *G.* for their Payment, and therefore it is not reaſonable that they ſhould reſort to *J. S.*'s Eſtate.

13. A Bill which is not brought to a Hearing is not ſuch a Bill as can properly create a *Lis pendens*, ſo as to affect a Purchaſor claiming under one of the Parties after the filing the Bill; but a Bill which is brought to perpetuate Teſtimony and to pove a Will, is ſuch a Suit wherein the Proceedings under it when they are rightly carried on muſt affect thoſe who claim as Purchaſors under one of the Parties, after the filing of the Bill. *Per Lord Chancellor, Eaſt.* 1741. *Garth* and *Crawford, Barnard. Rep. in Chan.* 454.

(E) Diſputes, Intereſt, Vendor and Vendee.

1. *J. S.* was poſſeſſed of a Term in three ſeveral Houſes as Executrix to her Huſband, and which were in Mortgage at his Death, and there were likewiſe two other Houſes which the Huſband had purchaſed for Years in his own and in his Wife's Name, which were not in Mortgage at his Death. After the Huſband's Death *J. S.* gave out Particulars for Sale of all the five Houſes. *A.* (who was a Creditor of the Huſband) agreed to purchaſe all, and they were conveyed by the Name of all the Houſes as were in Mortgage. *J. S.* being adviſed that the Houſes which were purchaſed in her Huſband's Name and her's were her own by Survivorſhip, and were not liable to her Huſband's Debts, or conveyed to *A.* as not being in Mortgage, ſhe refuſed to let *A.* have theſe two, tho' it appeared in the Cauſe ſhe had often ſaid ſhe had ſold them, as well as the reſt, to *A.* and he had paid the Taxes for them. Upon a Bill brought by *A.* to have the Houſes conveyed, and to have a further Aſſurance of the others according to the Covenant, tho' the Court ſeemed ſatisfied that *J. S.* had covenanted to convey all five to *A.* and tho' ſhe had ſo done, yet there being no Agreement in Writing as to the two Houſes not compriſed in the Conveyance, the Statute of *Frauds* and *Perjuries* ſtood ſo full in the Way that they could not decree the Conveyance of them; for tho' the Particular was in Writing, and theſe two Houſes mentioned in it as well as the others; and tho' it was proved that that Particular was ſhewed to *A.* yet it was not proved to have been ſhewed to him on the Purchaſe, nor that he purchaſed by it. *Mich.* 1691. *Caſs* and *Waterhouſe, Prec. in Chan.* 29.

2. Decreed that where Articles were not obtained with the ſtricteſt Fairneſs, the Conveyance to be ſet aſide, and the Purchaſe to ſtand as a Security for the Conſideration Money. *Feb.* 5, 1702. or *Feb.* 28, 1722. *White* and *Lightburne*, *Vin. Abr.* Tit. *Vendor and Vendee*, (A) *Ca.* 5. *P.* 541.

3. *J. S.* by Articles, reciting that he had an Eſtate for two Lives in a Church Leaſe, covenanted to convey his Title to the Premiſſes by ſuch a Day to *A.* as *A.* or his Counſel ſhould adviſe. It happened that after the Articles and before the Time of the Conveyance, one of the Lives dropt. And *Lord Keeper* decreed, that in regard here was no Default in the Sellers in making the Conveyance, the Loſs of the Life ought to be born by the Purchaſor, in the ſame Manner as if the Reverſioner had articled to ſell the Reverſion expectant upon two Lives, and one had died before the Conveyance, the Purchaſor ſhould there have had the Benefit of it; and in each Caſe in Equity the Eſtate is as conveyed from the Time of the Articles ſealed. *Mich.* 1702. *White* and *Nutt*, 1 *Will. Rep.* 61, 62.

His *Lordſhip* ſeemed to think that if *all* the Lives had dropt before the Execution of the Conveyance, it might have been another Conſideration, for that the Money was to be paid upon the Conveyance, and no Eſtate being left, there could be no Conveyance. The *Reporter* makes a *Quære* of the Reaſon of this Diſtinction between the Loſs of Part and of the Whole, and refers the *Reader* to the Caſe of *Caſs* and *Rudele et al'*, 2 *Vern.* 280.

Lord Chancellor ſaid, Plaintiff goes upon the Fraud, and makes that his Equity. One Man agrees with another to give him ſo much *per* Acre for his Land, and enquires of him how many Acres he hath; if the Vendor doth not inform him of the true Quantity, it is a Cheat, and no Occaſion for an expreſs Warranty in the Deed of Conveyance, the Fraud is the Equity.

4. *A.* agreed with *B.* for the Purchaſe of Lands, and to pay ſo much *per* Acre for the Lands out of Leaſe, and ſo much for the Lands leaſed, after the Rate of twenty-one Years Purchaſe, according to the Rentals. In order to aſcertain the Number of Acres, Defendant produced an old Survey, and according to the Number of Acres in ſuch Survey, the Purchaſe Money was paid. The Conveyancer being willing to be fully ſatisfied in the Number of Acres that he might inſert the Conſideration Money right, ſent to the Defendant for this Survey, and deſired that he would ſign it, which Defendant did. It happened that in this old Survey, in ſome Cloſes there was a great Deficiency of Acres, in others a greater Number than were contained therein; but the laſt not making Amends for the firſt, this Bill was exhibited to refund what was paid over and above the Number of Acres. Decreed *per Lord Chancellor*, that a Commiſſion iſſue to meaſure the Lands out of Leaſe, and the *Maſter* to ſee what Additions or Difference there is ſince the Survey was taken, and what Acres are in Leaſe and what out, and the *Maſter* to adjuſt the Number of Acres. *Trin.* 7 *Ann. Sir Cloudſley Shovel* and *Bogan.*

The Vendee, in the leaſt, does not apprehend but his Account is right, and there is no Intention in him to cheat. The ſigning of the Survey is an Averment of the Quantity, and upon that Averment Plaintiff proceeds to a Purchaſe. *Ibid.*

5. *J. S.* was Proprietor of four Parts in ſeven of the Manor of *Glaſton*. *B.* treated with *C.* who was *impowered to ſell this Manor*, or *Part of it*, and in 1697 he contracted with him in Writing. *B.* lived eight Years afterwards, and during that Time he was ſeveral Times requeſted by *C.* to compleat the Bargain, and pay the Purchaſe Money, but *B.* raiſed Objections to the Title, and would not proceed further in his Purchaſe until they were cleared. But it appeared upon the Depoſitions, that thoſe Scruples were only to ſhuffle off the Payment of the Money, until, by the dropping of ſome Lives, his Bargain would be bettered. One Life dropt in *C.*'s Life, and two ſince. The Plaintiff, after his Father's Death, in 1706, exhibited his Bill for a ſpecifick Performance of the Bargain, but the *Maſter of the Rolls* diſmiſſed it, with Coſts, by reaſon of the Delay. And *Green* and *Green* was cited, where a ſpecifick Performance was denied by reaſon of a much ſhorter Delay than this. *Mich.* 8 *Ann. Coward* and *Oding ſale.*

Vin. Abr. Tit. *Vendor and Vendee*, (E) by way of Note to *Ca.* 1. ſays, in the Caſe of *Hicks* and *Philips*, *Lord Chancellor* ſaid, that there was no Colour for a Court of Equity to aſſiſt this Contract; but if the Plaintiff had ſued at Law upon it, this Court would ſet ſuch a Contract aſide as to the *Copyhold*; and that it was a clear Caſe, but that he could not determine upon the Point of an hard Bargain; but upon the other Point, ordered the Articles to be delivered up and cancelled, and the Money paid down to be repaid.——S. C. cited *arg' Lucas's Rep.* 504. in the Caſe of *Lewis* and *Lord Lechmere*, ſays, that the Vendor offered to procure an *Infranchiſement* of the Copyhold, or make any Compenſation in the Price, and yet the Court diſmiſſed the Bill, the *Price being unreaſonable.*

6. *A.* articles with *B.* for the Purchaſe of an Eſtate of 180*l. per Annum*, for which he was to give thirty-five Years Purchaſe upon executing Conveyances, but *A.* diſcovering afterwards that 30*l. per Annum* of the Land were Copyhold, refuſed to go on with the Purchaſe. *A.* brought his Bill for a ſpecifick Execution of the Articles, and the rather for that *B.* had paid 50*l.* in Part upon executing the Articles. But Lord Chan. *Macclesfield* would not decree a ſpecifick Execution of this Agreement, it being *unequitable*, and a Matter proper for a Jury to mitigate Damages, but ordered the 50*l.* to be paid back, but *without Coſts*. *Trin.* 1721. *Sir Harry Hicks* and *Phillips*, *Prec. in Chan.* 575.

7. Bill for a ſpecifick Performance of Articles for the Purchaſe of Lands. The Caſe was, the Plaintiff agreed to ſell the Manor and Lands in *A.* in *Kent* to the Defendant by a Particular, wherein the *Manor* and *Royalties* are mentioned, but no Value ſet upon them therein. It happened that the Plaintiff had no Title to the Manor, but had been in Poſſeſſion of the Royalties ſeveral Years. The Defendant objected againſt going on with the Purchaſe. And this was a Contract at a *South-Sea* Price, *viz.* forty-ſix Years Purchaſe; and ſecondly, that tho' no Value was ſet upon the Manor and Royalties by the Particular, yet they are valuable in themſelves, and was a great Inducement to him to purchaſe the Eſtate; and, therefore, ſince the Plaintiff cannot ſtrictly perform his Part of the Agreement by conveying the Manor, he ought not to have the Aid of a Court of Equity to compel the Defendant to pay the Money, ſince he cannot have the full Benefit of the Agreement; and for this laſt Reaſon the Bill was diſmiſſed, but without Coſts, if the Plaintiff would deliver up the Articles. *Per* Lord Chan. *Macclesfield, Hil.* 8 *Geo.* 1. *Sir George Hanger* and *Eyles*, *Vin. Abr.* Tit. *Vendor and Vendee*, (A) *Ca* 1. *P.* 520.

Lucas's Rep. 503. S. C. cited *arg'* *Eaſt.* 8 *Geo.* 1. in the Caſe of *Lewis* and *Lord Lechmere*, and ſays, that tho' the Decree was founded upon the Vendor's not being able to convey a Manor according to his Covenant, yet it being acknowledged that this Manor was of little or no Value, it is evident that the other

Circumſtance in the Cauſe, *(viz.)* the unreaſonable Price, was that which really inclined the Court to lay hold upon a Point too inconſiderable otherwiſe to have been taken Notice of.

8. A Bill for a ſpecifick Performance of Articles of 30 *Aug.* 1720 for the Purchaſe of Land was brought by the Vendor, in which Articles was this Proviſo, *viz. provided the Plaintiff did on or before the* 10*th of* November *following lay ſuch an Abſtract of the Title before Vendee's Counſel as they ſhould approve.* This Agreement was for *forty* Years Purchaſe. The Bill was diſmiſſed with Coſts, becauſe the Title was not laid before Counſel within the Time limited. *Per* Lord Chan. *Parker, Trin.* 8 *Geo.* 1. *Lewis* and *Lord Lechmere*, *Lucas's Rep.* 503.

In this Caſe *Lord Chancellor* ſaid, the Time was very material, becauſe the Price of *South-Sea* Stock, from whence the Money for the Purchaſe was to ariſe, being

upon ſaid 10 *Nov.* 260 *l. per Cent.* and at the Time of the Hearing of the Cauſe but 92 *l. per Cent.*——And another Point was, *but not determined* to ſtand, Whether it be conſiſtent with the Rules of Equity to decree a Performance in Specie of ſo extravagant a Bargain as a Sale of Land at forty Years Purchaſe (*a*), tho' it ſeems that that influenced the Decree. (*a*) S.P. debated *in Dom. Proc'*, but undetermined, and a Decree made upon another Point.——*Vide Gilb. Rep. in Eq.* 155, 156.——*Keen* and *Stukely*, in which laſt Caſe it was determined *in Scac'* (before it went up to the Houſe of Lords) that they would inforce a ſpecifick Performance of ſuch Contracts, if the Price was reaſonable at the Time the Contract was made, how diſproportionable ſoever After-Accidents might make it. *Arg'*, *Lucas's Rep.* 504.

9. A Covenant to make ſuch a Title as Vendee's Counſel ſhall approve of, means no more than that the Plaintiff ſhould make out a good Title, for if the Counſel diſapprove of a good and clear Title, (*i.e.* ſuch a Title as a Court of Law or Equity would take to be a good Title) yet the Vendee will be bound by his Bargain. *Trin.* 8 *Geo.* 1. in the Caſe of *Lewis* and *Lord Lechmere*, *Lucas's Rep.* 505.

Upon mutual Articles there ought to be mutual Remedies, and therefore the Vendor may come into Equity for a

ſpecifick Performance as well as the Vendee, and Lord Chan. *Parker* was of Opinion, that the Remedy the Vendor had at Law upon the Articles was not adequate to that of a Bill in Equity for a ſpecifick Performance. *Ibid.* 506. in S. C.

10. If *A.* buys a Houſe, and before the Time agreed for Payment of the ſame, the Houſe is burnt down by Caſualty of Fire, *A.* will not be bound to pay for the ſame; and yet the Houſe may be built up again. *Per* his *Honour*, *Eaſt.* 1722. *in Caſu Stent* and *Baylis*, 2 *Will. Rep.* 220.

11. A Reverſion expectant on an Eſtate for Life is decreed to be ſold to the beſt Purchaſor. *B.* is reported and confirmed the beſt Purchaſor, and the Order made abſolute 1 *Jan.* 1724, but the Conveyance to *B.* was not executed until 1726, two Months before which

B. was ordered to bring his Purchaſe Money into the Bank, and about that Time the Life fell in, ſo that the Purchaſe proving a beneficial one, it was now petitioned that *B.* ſhould pay Intereſt from the 1 *Jan.* 1724, which was the Time he was abſolutely confirmed the beſt Purchaſor. His *Honour* decreed *B.* to pay Intereſt from ſaid 1 *Jan.* to the Time of his bringing the Money into the Bank, for from that Time he was ſure of his Title and of his Purchaſe, tho' the Tenant for Life had died the next Day; and the Life was wearing from that Time, which is equivalent to the taking of the Profits; and had *B.* taken the Profits, he muſt certainly have paid Intereſt alſo, for from the Time of the Report confirmed the Eſtate is bound, and the Party who was to convey it was a Truſtee for the Purchaſor, who ought to have the Money ready, nor did it appear that *B.* had the Money lying dead by him, ſo he ought to have no Advantage of the Uſe or Intereſt thereof, which ſeems to belong to the Seller, or to thoſe Truſts for which the Eſtate was to be ſold. *Eaſt.* 1727. *Ex parte Manning*, 2 *Will. Rep.* 410.

12. Where one articles to ſell an Eſtate, and brings a Bill for an Execution of the Agreement, tho' at the Time of the Agreement he cannot make a Title to the Purchaſor, yet it is ſufficient if he is able to do ſo when the Decree or Report is made; and accordingly it is uſual for the Reporter to mention that if ſuch a third Perſon joins, the Title will be good, for it would be attended with great Inconveniencies were Decrees to direct an Enquiry whether the Contractor to ſell, had, at the Time of entering into ſuch Contract, a Title; for thus all Incumbrances and Defects would be raked into. *Per* the *Maſter of the Rolls*, *Trin.* 1731. 2 *Will. Rep.* 630, 631.

CAP. LXXXVI.

Ranſom.

(A) Ranſom Money of a Ship, how to be raiſed, &c.

1. A SHIP was taken by the *French*; the Maſter (having a Share in her) ranſomed her for 1800 *l.* and was taken to *France* as an Hoſtage for this Money. And by *Lord Chancellor*, The Ranſom Money muſt be raiſed out of the Profits, notwithſtanding any former Mortgage of the Ship; for if there was a precedent Mortgage, what would become of that Security, if the Ship had not been redeemed? After the Ship was redeemed, ſhe performed her intended Voyage, and the Freight Money received after Redemption was the firſt Profits ariſing, and out of them the Ranſom Money is to be ſatisfied. The Inſurers always pay a Part of the Ranſom Money. *Eaſt.* 8 *Ann. Hope* and *Winter*, *MS. Rep.*

CAP. LXXXVII.

Receiver.

1. A Receiver to the Guardian of an Infant who has his Accounts allowed him by the Guardian, ſhall not be obliged to account over again to the Infant when he comes of Age. *Trin.* 1720. *Clavering's Caſe, Prec. in Chan.* 535. *Vide P. Ca. of this Work.*

2. *A.* is appointed Receiver by the Court of Chancery of the Rents of an Eſtate out of which an Annuity is payable Quarterly to *B.* *B.* acquaints *A.* who her Banker was, and orders him to lodge the Money from Time to Time in her Banker's Hands for her Uſe. About *July A.* lodges with the Banker 350 *l.* in order to be ready at *Michaelmas* Quarter, as appeared by his own Affidavit; on *Michaelmas Day B.*'s Banker ſtopped Payment, and afterwards became a Bankrupt; and now on *B.*'s Petition the Queſtion was, On whom the Loſs ſhould fall? And Lord Chan. *Macclesfield* was clear of Opinion, that *B.* ought *not* to bear the Loſs of any Part of it (*a*). *Hil.* 1720. *Lady Shaftſbury's Caſe, MS. Rep.*

(*a*) For 'till *Michaelmas Day* was paſſed *B.* had no Right to demand or receive it; that therefore in the mean Time the Banker was *A.*'s Caſhire, and he might, notwithſtanding his having lodged the Money, have taken it out again before *Michaelmas Day* was paſſed, even tho' it were on *Michaelmas Day* itſelf, provided he had it ready the next Day to pay *B.* That conſequently the Banker could have no Power to receive it for *B.* before, becauſe ſhe had no Power herſelf, nor any Right to demand it before Quarter Day; that ſhe could not demand it, or at leaſt receive it, on *Michaelmas Day* itſelf, becauſe it was one of the Days that no Bankers make any Payments whatſoever; and therefore the lodging the Money before *B.* became intitled to it, ought not to turn to her Prejudice, but *A.* muſt make it good to her. *Ibid.*——*Prec. in Chan.* 558. S. C. *accord*' But whether the Loſs ſhould fall on *A.* himſelf, or be born out of the Eſtate, his *Lordſhip* ſaid, that would come properly in Queſtion when *A.* made up his Accounts with the Owner of the Eſtate on his coming of Age, and he was inclined to think that *A.* was not to be anſwerable for the Loſs any more than if he had been robbed of it. *Ibid.* 559.

3. *A.* at the Inſtance of all Parties concerned, was by the Court appointed Receiver; after in the Midſt of Vacation he commits Waſte; all the Parties concerned ſerve him with a Paper, diſcharging him from being Receiver on that Account. On Motion for Attachment for turning him out who was appointed Receiver by the Court, Lord Chan. *King* ſaid, tho' the general Propoſition may be true, that Attachment is to go where a Perſon appointed Receiver by the Court is turned out, yet it may be otherwiſe when attended with theſe Circumſtances; ſo denied the Motion. *Mich.* 12 *Geo.* 1. 1726. *Bell* and *Spereman, Select Caſes in Chan.* 59.

4. *J. S.* a Copyholder in Fee, by Will charges his Lands with Payment of his Debts; the Lands lay in *England*, but the Teſtator's Heir was an Infant, and lived in *Scotland.* The Creditors bring their Bill to have their Debts paid out of the Copyhold Eſtate, to which the Heir appeared, but was in Contempt for not anſwering. It was moved, that Plaintiffs might have the like Proceſs againſt the Infant as if he were of Age, or elſe that the Court would appoint a Receiver, for that as he enjoyed ſuch Eſtate by the Protection of the Laws of *England*, ſo the ſame ought to be ſubject to the Laws of *England*; and if the Court ſhould not make ſome Order for Relief, there would be a Failure of Juſtice, ſince Defendant being *an Infant, the Proceſs after an Attachment was for a Meſſenger to bring up the Body to anſwer*, which could not be in this Caſe, the Defendant being in *Scotland*;

Scotland; but if he were of Age, the Plaintiffs might proceed to a Sequeſtration of the Land in Queſtion, and ſo have a Remedy. Lord Chan. *King* ſaid, that the Court ought to lend its Aſſiſtance to prevent a Failure of Juſtice, and for want of an Anſwer (the Lands being in *England*) will ſtop the Rents in the Tenants Hands; and directed, that an Anſwer be put in by ſuch a Time, or Cauſe ſhewn why Proceſs ſhould not iſſue againſt him, as if he was of full Age; or why a Receiver ſhould not be appointed. *Eaſt.* 1727. *Leg* and *Turnbull*, 2 *Will. Rep.* 409.

CAP. LXXXVIII.

Recovery [Common].

(A) What Eſtate or Intereſt may be barred by a Common Recovery;——And here of a Tenant to the Præcipe.

(B) In what Caſes Equity will compel an Infant Heir of a Truſtee to join in a Recovery.

(C) Recovery ſuffered by one deaf and dumb.

(D) Of reverſing a Recovery.

(A) What Eſtate or Intereſt may be barred by a Common Recovery;——And here of a Tenant to the Præcipe.

A Fine and Recovery mentioned only *two Meſſuages*, but the Deed of Uſes mentioned *two Meſſuages, by the Name of all other the Meſſuages of the ſaid* A. *in* D. The Deed of Uſes ſhall be the Meaſure of what paſſes, and not the Fine and Recovery. *Vin. Abr.* Tit. *Recovery Common*, (R) *Ca.* 4. *P.* 217.

1. EQUITY will never aſſiſt to avoid a Common Recovery upon Pretence that there is no Tenant to the *Præcipe*, eſpecially when ſuffered by an Heir at Common Law to bar a voluntary Settlement. *Feb.* 13, 1706. *Eyton* and *Eyton*, *Vin. Abr.* Tit. *Recovery Common*, (R) *Ca.* 3. *P.* 217.

And his *Honour* (on the Cauſe coming before him 10 *Mar.* 1718, or on new Bill) held, as the Lords, by the Aſſiſtance of the Judges, had before reſolved, that the Remainders limited to *D.* and *E.* were contingent Remainders, and deſtroyed by the Common Recoveries ſuffered by *C.* *Ibid.* 511.

2. *J. S.* ſeiſed of the Manors of *A.* and *B.* deviſed theſe Manors, *after Debts and Legacies paid*, to *C. for Life*, *ſans Waſte*, and *in Caſe* C. *ſhould have Iſſue Male*, then *to ſuch Iſſue Male, and his Heirs, for ever*; and if *C.* ſhould leave no Iſſue Male, *and after Debts*, &c. he *deviſed the Manor of* A. *to* D. *in Fee*, and *the Manor of* B. *to* E. *in Fee*. *C.* ſuffers Recoveries of both the Manors, wherein he was Vouchee, which were to the Uſe of him and his Heirs. The *Houſe of Lords*, upon an Appeal from Lord *Cowper*'s Decree, *and upon taking the Advice of all the Judges*, were of Opinion, that the Remainders to *D.* and *E.* in Default of *C.*'s leaving a Son, were contingent Remainders, and conſequently barred by the Recoveries ſuffered by *C.* Whereupon they reverſed Lord *Cowper*'s Decree. 1718. *Carter* and *Barnardiſton*, 1 *Will. Rep.* 505.

3. *J. S.*

3. *J. S.* Tenant in Tail, (Remainder in Tail to Defendant) made a Leaſe to *A.* for ninety-nine Years, determinable on three Lives, with a Covenant that *A.* ſhould *renew*, *&c.* Afterwards *J. S.* mortgaged the Lands to *T. S.* in Fee, who aſſigned the Mortgage to *F.* The Leaſe being determined, *J. S.* made a new Leaſe to *A.* purſuant to the Covenant in the firſt Leaſe, and then he and *F.* (the Aſſignee of the Mortgagee) *joined in a Conveyance of the Equity of Redemption to* D. *in order to make him a Tenant to the* Præcipe, and thereupon in 1702 a *Recovery* was ſuffered, in which *J. S.* was vouched, and he vouched over the *Common* Vouchee, and ſoon after died without Iſſue. Then the Defendant (the Remainder Man in Tail) got this Mortgage to be aſſigned to *G.* In Truſt for himſelf, and brought an Ejectment on a double Demiſe by him and ſaid *G.* and thereupon *A.* brought a Bill to ſtay the Proceedings at Law. *Per Cur'*, In this Caſe the *Mortgagee in Fee is a Truſtee for the Mortgagor*, but he is *only ſo far a Truſtee as he derives under the Title of the Mortgagor*, and *hath no Relation to the Remainder over*; and to ſay that the *Remainder of a real Eſtate ſhall be barred by a Recovery ſuffered by a* Ceſtui que Truſt *of a particular Eſtate*, is going farther than *ever* that Point has been carried; and ſeems to croſs the Intention of the Statute *De Donis*, for by that Statute *this Remainder is veſted*; beſides, this *Recovery* was ſuffered by a *Ceſtui que Truſt in Tail*, which *is but a particular Eſtate*, who at that Time had it in his Power to have had the *legal Eſtate*, *by paying off the Mortgage*. It induces a ſtrong Suſpicion that the Defendant, who is the *Remainder Man*, thought himſelf barred by the *Recovery* when he brought the Ejectment, and declared on a double Demiſe, the *one* made by *himſelf*, and the *other* by *Mortgagee's Aſſignee*, which Titles cannot ſtand together; for, if his *Remainder is good*, his Title *under the Mortgage is not*, and it is plain that *A.* hath a Right to be relieved againſt any Right Defendant can claim under the Mortgage; therefore, as to that a *perpetual* Injunction was decreed for *A.* but as to Defendant's Title under the Remainder, a Trial was directed, and after the Trial an Injunction was ordered 'till the *Hearing* the Cauſe. *Eaſt.* 11 *Geo.* 1. *Webber* and *The Earl of Montrath*, *MS. Rep.*

2 *Mod. Caſes in Law and Eq.* 145. S. C. *accord'*, ſays, that it was objected that there was no Tenant to the *Præcipe*; but *per Cur'*, if there had not, it ought to be preſumed that there was a a good one after this Length of Time, *viz.* above twenty-three Years. *Ibid.* 145.— Another MS. Rep. *accord'* in S. C.

4. Articles on Marriage to ſettle Lands on the Huſband and Wife for their Lives, Remainder to the firſt, *&c.* Son of the Marriage, Remainder to the Heirs Male of the Body of the Huſband by any Wife, Remainder to the Heirs of the Body of the Huſband by the firſt Wife, Remainder to the Huſband in Fee, with Proviſions for the Daughters of the firſt Marriage, if no Son. The Huſband has one Daughter by the firſt Wife, ſuffers a Recovery, and marries a ſecond Wife, and takes Notice of the firſt Marriage Articles in his ſecond Marriage Settlement. The Daughter by the firſt Marriage barred this Recovery. *Trin.* 1729. *Powell* and *Price et al' et econt'*, *in Scac'*, 2 *Will. Rep.* 535.

Vide this Caſe more fully abridged, *P. Ca.*

5. *J. S.* deviſed all his Lands to *A.* and his Heirs, *In Truſt* to pay Debts, and then *In Truſt for* B. *and the Heirs of her Body*, Remainder *to* A. *and his Heirs*, upon Condition that he marry *B.* and gave *A.* his perſonal Eſtate, *In Truſt* for *B.* until ſhe ſhould attain twenty-one, and made *A.* Executor, and then died. *B.* refuſed to marry *A.* and married *C.* and afterwards at her Age of twenty-one, *ſhe* and *her Huſband* made

His *Lordſhip* took Notice that it had been ſaid, that a *legal* and *an equitable Intereſt cannot be incorporated together*, but his *Lordſhip*

ſaid, that Objection could not affect this Caſe; for tho' the *legal* and *equitable Eſtates cannot be incorporated together*, yet *J. S.* has not limited an *equitable Eſtate* firſt, and then the *legal Eſtate*, but has at firſt given the whole Fee; that it happens indeed, that the laſt Part of the *equitable Intereſt* may be conſidered as *merged*, *by coming*

coming to one and the ſame Perſon, who had the whole *legal Eſtate in him*; but that it would be *hard*, that by coming to *A.* made a *Bargain* and *Sale* to *D.* in order to ſuffer a *Recovery*, in which *ſhe* and *her Huſband* were vouched, and the *Uſes* thereof were declared *to the Iſſue of the Marriage*, Remainder *to her own right Heirs*. A Queſtion was, If the Intereſt of *B.* and her Huſband was barrable by a *Recovery?* And *Lord Chancellor* held it was. *Hil.* 9 *Geo.* 2. *Sir John Robinſon* and *Comyns*, *Caſes in Eq. Temp. Talbot* 164. altho' *not abſolutely*, (for the *Heir*, upon the *Condition broken*, might have taken the whole *equitable Intereſt* out of him) that this ſhould prevent their Incorporation, and therefore his *Lordſhip* thought it an *equitable Eſtate* in *A.* as well as that which was in *B.* and conſequently that *B.* and her Huſband had a Power to bar it. *Ibid.*

6. It having been ſaid, that a *Feme* Tenant in Tail *and her Huſband* cannot make a Tenant to the *Præcipe* without *a Fine*, *Lord Chancellor* ſaid, that whatever may be the Caſe, *where an Huſband is merely ſeiſed in Right of his Wife*, was not neceſſary in the *principal* Caſe for him to determine, becauſe in *this* Caſe the Huſband by his *Intermarriage*, and *having Iſſue*, is become intitled to *an Eſtate by the Curteſy*, and therefore *he alone*, *without his Wife's joining*, might make a good Tenant to the *Præcipe*. *Hil.* 9 *Geo.* 2. in the Caſe of *Sir John Robinſon* and *Comyns*, *Caſes in Eq. Temp. Lord Talbot* 167.

7. The Bargain and Sale, whereby the Tenant to the *Præcipe* was made, was not inrolled 'till the Recovery compleated. Lord Chan. *Talbot* ſaid, as to that, if the Lord *Hobart's* Opinion, as cited from *Godbolt's* Report, had been Law, ſome judicial Authority would certainly have followed it. If there be no Inrollment, then the Bargain and Sale are void, but if there be an Inrollment within ſix Months, then it is good by relation. *Hil.* 9 *Geo.* 2. *Sir John Robinſon* and *Comyns*, *ibid.*

This Act goes on and ſays, Provided that nothing in this Act ſhall make valid any

8. By the Act of the 14 *Geo.* 2. it is enacted, That all Common Recoveries, ſuffered or to be ſuffered, without conveying the Freehold veſted in Truſtees, or others claiming under them, in order to make a Tenant to the *Præcipe*, ſhall be valid and effectual.

Common Recovery, unleſs ſuch as are intitled to the firſt Eſtate for Life, or other greater Eſtate, (in Caſe there be no ſuch Eſtate for Life in Being, in Reverſion or Remainder, next after the Expiration of ſuch Leaſes) have or ſhall lawfully convey, or join in conveying an Eſtate for Life, at leaſt to the Tenant to the *Præcipe*.—And that nothing therein contained ſhall prejudice the Eſtate of any Leſſees, or Perſons claiming under them. And it is thereby further enacted, That where any Perſon, *&c.* hath or have purchaſed, or ſhall purchaſe, for a valuable Conſideration, any Eſtate or Eſtates in Lands, *&c.* whereof a Recovery is or was neceſſary to be ſuffered in order to compleat the Title, ſuch Perſon, *&c.* and all claiming under him, having been in Poſſeſſion of the purchaſed Eſtate or Eſtates from the Time of ſuch Purchaſe, ſhall and may after the End of twenty Years from the Time of ſuch Purchaſe, produce in Evidence the Deed or Deeds, making a Tenant to the Writ or Writs of Entry or other Writs for ſuffering a Common Recovery, and declaring the Uſes thereof, and the Deed or Deeds ſo produced (the Execution thereof being duly proved) ſhall in all Courts of Law and Equity be deemed as good Evidence for ſuch Purchaſor and Purchaſors, and thoſe claiming under him, her or them, that ſuch Recovery or Recoveries was or were duly ſuffered and perfected according to the Purport of ſuch Deed or Deeds, in Caſe no Record can be found of ſuch Recovery or Recoveries, or the ſame ſhould appear not to be regularly entered or recorded.—Provided, That the Perſon or Perſons making ſuch Deed or Deeds as aforeſaid, and declaring the Uſes of a Common Recovery, had a ſufficient Eſtate, and Power to make a Tenant to ſuch Writ or Writs as aforeſaid, and to ſuffer ſuch Common Recovery or Recoveries.—That from and after the Commencement of this Act, every Recovery already ſuffered, or hereafter to be ſuffered, ſhall be deemed good and valid to all Intents and Purpoſes, notwithſtanding the Fine, or Deed or Deeds making the Tenant to ſuch Writ, ſhould be levied or executed after the Time of the Judgment given in ſuch Recovery, and the Award of the Writ of Seiſin as aforeſaid; provided the ſame appear to be levied or executed before the End of the Term, Great Seſſion, Seſſion or Aſſizes, in which ſuch Recovery was ſuffered, and the Perſons joining in ſuch Recovery had a ſufficient Eſtate and Power to ſuffer the ſame as aforeſaid.

(B) In what Caſes Equity will compel an Infant Heir of a Truſtee to join in a Recovery.

1. UPON the Marriage of *J. S.* who was the eldeſt Son of *A.* the Family Eſtate was ſettled upon *A. for ninety-nine Years, if he ſhould ſo long live*, Remainder *to Truſtees during his Life*, Remainder *to the firſt*, &c. *Son of that Marriage in Tail Male ſucceſſively*, Remainder *to the firſt*, &c. *Son of any other Marriage*, Remainder *over*. There is *B.* a Son of this Marriage, and afterwards the Wife died. *B.* the Son, who was come of Age, and being upon a Treaty of Marriage with *M.* and the *ſurviving Truſtee, for preſerving*, &c. *being dead, leaving an Infant Heir*, *J. S.* and *B.* his Son brought a Bill againſt the *Infant Heir, to join in making a Tenant to the* Præcipe, *in order to ſuffer a Recovery* for making a Settlement upon *B.*'s Marriage. On the Hearing Lord Chan. *Parker* declared, that the Truſtees being appointed to preſerve contingent Remainders, and here being a veſted Remainder in Tail, if this were for the Good of the Family, he did not ſee but ſuch Truſtee might lawfully join, and referred it to the *Maſter* to ſtate whether this was for the Good of the Family, and the *Maſter* reported that *B.* was in Treaty, *&c.* and that it was a beneficial Marriage for the Family, and that it was neceſſary a new Settlement ſhould be made of the Eſtate, which could not be done without a Recovery; and it now coming on upon the *Maſter*'s Report, his *Lordſhip* decreed that the Truſtee join in a Recovery, and making a new Settlement, and that the *Maſter* direct a proper Conveyance, in which the Truſtee ſhould join. *Trin.* 1719. *Winnington* and *Foley*, 1 *Will. Rep.* 536.

His *Lordſhip* ſaid, that it might be greatly miſchievous to a Family, if ſuch a Truſtee ſhould ſtand out and not join with *J. S.* and *B.* in cutting off the old Settlement and making a new one; that this is plainly for the Benefit of the Family, for by the now intended Settlement *B.* is to be but Tenant for Life inſtead of Tenant in Tail, ſo that it is a Means of preſerving the Eſtate longer in the Family; alſo *J. S.*'s Wife dead, there is an End of the contingent Remainders by that Marriage; and as to any Remainders by another Marriage, no Remainder not *in Eſſe* ought to be ſo much regarded as this Remainder in Tail, which is actually veſted in *B.* the Son. Therefore decreed *ut ſupra.*——After the Decree pronounced, it was inſiſted that the Heir of the Truſtee, tho' an Infant, was yet a Truſtee within the 7 *Ann.* 19. and therefore it was prayed that the Infant Truſtee might levy a Fine, which muſt be good, unleſs reverſed during his Infancy; but his *Lordſhip* ſaid, he did not know how he could direct the Judges to take a Fine from an Infant, but let the *Maſter* direct a proper Conveyance (*a*). *Ibid.* 538.

(*a*) See this Reſolution affirmed by the Lord Chan. *King* in the Caſe of *Townſend* and *Lawton*, 2 *Will. Rep.*

(C) Recovery ſuffered by one deaf and dumb.

1. A MAN deaf and dumb ſuffers a Common Recovery of intailed Lands, aſſiſted by his Uncle, and then ſettles the ſame to certain Uſes. Upon the Circumſtances of the Caſe it appeared he had done nothing but what in Conſcience he ought; yet he being under theſe Circumſtances, *Lord Chancellor* ſaid, he ought to be taken Care of in Equity; and it appearing that the Uncle was concerned in Point of Intereſt, the Settlement was ſet aſide. *Trin.* 7 *Ann. Ferres* and *Ferres*, *MS. Rep.*

But had he been aſſiſted by an able and faithful Relation that was not intereſted, Equity would not have relieved him in ſo reaſonable an Act as this appeared to be. *Ibid.*

(D) Of reverſing a Common Recovery.

1. STAT. 23 *Eliz. c.* 3. *ſ.* 2. no Fine, Proclamations upon Fines, or Common Recovery, ſhall be reverſable by Writ of Error, for falſe *Latin*, Raſure, Interlining, Miſentering of a Warrant of Attorney, or of any Proclamation, Miſreturning or not Return of the Sheriff, or any other Want of Form in Words, and not in Subſtance.

2. Stat. 10 & 11 *W.* & *M. c.* 3. *ſ.* 14. no Fine *Recovery* or Judgment ſhall be reverſed for Error, unleſs Writ of Error be brought within twenty Years.

The Act goes on and ſays, Provided always that this Act ſhall not extend to make any ſuch Common Recovery heretofore ſuffered valid and effectual in Law, which

3. Stat. 14 *Geo.* 2. every Common Recovery already ſuffered, or hereafter to be ſuffered, ſhall, after the Expiration of twenty Years from the Time of the ſuffering thereof, be deemed good and valid to all Intents and Purpoſes, if it appears upon the Face of ſuch Recovery that there was a Tenant to the Writ; and if the Perſons joining in ſuch Recovery had a ſufficient Eſtate and Power to ſuffer the ſame, notwithſtanding the Deed or Deeds for making the Tenant to ſuch Writ, ſhould be loſt or not appear.

hath been avoided by any lawful Act or Means, or which ſhall hereafter be avoided by Entry duly made on or before the 16th of *Jan.* 1740, or by Judgment or Decree had or obtained by ſome Action or Suit at Law or in Equity, commenced or to be commenced on or before the ſaid 16th of *January*, and proſecuted with due Diligence, but every ſuch Common Recovery ſhall remain and be of ſuch Force and Effect only as the ſame would have been if this Act had never been made.——Provided, That nothing in this Act contained ſhall be conſtrued to prejudice or affect any Queſtion of Law, which may ariſe upon Common Recoveries, not remedied or intended to be remedied by this Act, but all ſuch Common Recoveries ſhall remain and be of ſuch Force and Effect only, as the ſame would have been if this Act had never been made.

CAP. LXXXIX.

Rector.

(A) Relieved againſt the Fraud of his Predeceſſor.

1. *A.* The *Rector* of *St. Giles's in the Fields*, applied to Chancery to enable him to grant a Building Leaſe of an Houſe veſted in Truſtees, *for the Benefit of the Rector and his Succeſſors for ever*. *A.* in his Bill ſuggeſted the ruinous Condition of the Houſe, and that no Body would undertake to rebuild it, but on having a Leaſe for a long Term, and prayed that it might be enquired under what Rents and Covenants it was proper to have ſuch Leaſe granted. The Court ſent it to a *Maſter*, who reported that the Parties propoſed to lett a Leaſe for ſixty-one Years, and to improve the Rent from 16 *l.* to 20 *l.* and that the Houſe was ruinous, and that it would be for the Benefit of *A.* to have ſuch a Leaſe made with proper Covenants; which the Court ordered accordingly, and a Leaſe was granted; and it appeared by the Evidence that *A.* had taken a Fine

Fine of 600 *l.* of the Leſſee, but nothing of this appeared upon the Leaſe. *A.* died. *B.* his immediate Succeſſor, brought a Bill againſt *A.*'s Executor and the Legatee, either to avoid the Leaſe, as obtained by Fraud upon the Court, and on a Contract injurious to the Succeſſor; or to have the 600 *l.* with Intereſt from the Rector's Death, for *B.*'s Benefit. And Lord Chan. *Talbot* would not ſet aſide the Leaſe, ſaying, that the Leſſee in taking it looked no farther back than to the Decree; he ſaw the Power that *A.* had, and it does not appear that he had a great Bargain, the Repairs having been great, and the rather becauſe he had ſold Part; but as to the late Rector, his *Lordſhip* ſaid, he had no Doubt but that the 600 *l.* ought to be conſidered as a Part of the Truſt from which it flowed, and ought to be repaid to *B.* with Intereſt at 4 *l. per Cent.* from the Death of *A.* And ſo decreed the 600 *l.* to be laid out in a Purchaſe for *B.* and his Succeſſors, and 'till then to be laid out on Security in Truſtees Names, and *A.*'s Executors to pay Coſts out of his Aſſets; but as againſt the Leſſee he diſmiſſed the Bill, *with* Coſts. *Trin.* 1736. *Galley* and *Baker*, *Caſes in Eq. Temp. Lord Talbot* 199.

CAP. XC.

Reference.

(A) Reference to a Maſter in Chancery.

1. *A.* Contracting with *B.* to compile an Abridgment of the Hiſtory of the Pleas of the Crown, the Queſtion was, Whether the Book ſo compiled was an Abridgment of the Pleas of the Crown, or whether it was the ſame Book ſhortened, and made leſs? And *Lord Chancellor* ſaid, he did not ſee what other Method he could take to determine the preſent Queſtion, than by directing an Enquiry before the *Maſter*, to ſee whether the Book was a fair Abridgment, or only a colourable one; and in order that the *Maſter* may better determine it, his *Lordſhip* ſaid, he ought to direct that the *Maſter* ſhould be attended by two Perſons ſkilled in the Profeſſion of the Law to aſſiſt him, and that Directions of this Sort have been made in *Mathematical* and *Algebraical* Enquiries. But his *Lordſhip* ſaid, he ſhould chuſe that two Perſons ſhould be agreed upon by Conſent of both Parties to attend the *Maſter*, rather than that the Court ſhould appoint them; which being afterwards done, his *Lordſhip* ſaid, that the beſt Way was to leave all Matters in Difference to the Arbitration of thoſe two Counſel, and if they ſhould not be able to make an Award, that then they ſhould have Liberty to chooſe an Umpire; accordingly the ſame was agreed to. *Hil.* 1740. *Gyles* and *Wilcox*, *Barnard. Rep. in Chan.* 368 to 370.

2. *J. S.* gave a Bond to *B.* his Attorney, reciting, that "*Whereas* "B. *had been ſerviceable to him in ſeveral Cauſes, and ſtill continues to* "*be ſo, and the ſaid* J. S. *being thoroughly ſenſible of the Services and* "*Favours*;

" *Favours*; *if the ſaid* J. S. *ſhall leave to the ſaid* B. *a Legacy of* " 1000 l. *then the Obligation to be void, otherwiſe to ſtand in full* " *Force.*" *J. S.* died, but leaving no Legacy to *B.* he brought an Action upon that Bond againſt *J. S.*'s Executrix, and obtained Judgment. The Executrix brought a Bill to be relieved againſt this Bond. Lord Chan. *Hardwicke*, at the Hearing, decreed that the Bond could not be relieved againſt; but afterwards, upon a *Rehearing*, his *Lordſhip* reverſed his former Decree, and directed that the *Maſter* ſee what the Services were which *B.* did for *J. S.* and what he ought to be allowed for them, and whether *B.* ought to have any Allowance made him for any extraordinary Services which he did. The Bond to ſtand as a Security for the whole that is due. *Eaſt.* 1741. *Walmeſley* and *Booth*, *Barnard. Rep. in Chan.* 475 to 483.

CAP. XCI.

Refunding.

Ibid. 357. Lord *Cowper* declared that tho' this might be an hard Caſe, yet if the Plaintiffs had a Right to be repaid their Money which they had overpaid on the Mortgage, this Right could not be overthrown by the Executor's applying the Money in any Manner he ſhould think fit, any more than if an Executor at Law ſhould recover a Debt, and pay the Teſtator's Debts with it, and afterwards this Judgment is reverſed in *Error*, the Executor muſt reſtore the Money to the Plaintiff in Error, and his having paid it away in Debts of his Teſtator will not excuſe him from paying it back. And ſo of a Decree which is afterwards reverſed on an Appeal. *Secus* if the Defendant had delayed the Appeal, and willingly ſtood by whilſt the Executor paid away his Money to the Teſtator's Creditors, for this would be drawing the Executor into a Snare.

1. *J. S.* was indebted to *B.* in 400 *l.* by Mortgage. Afterwards *J. S.* died without Iſſue, leaving his two Siſters *C.* and *D.* his Heirs at Law. *C.* died, leaving an Infant Son (a Plaintiff) and by Will deviſed her Moiety of the Eſtate to two Truſtees in Fee, In Truſt to join with *D.* to raiſe by Sale, Mortgage, *&c.* of ſo much of the Eſtate as was neceſſary, Monies ſufficient for Payment of *J. S.*'s Debts. On a Bill brought by *J. S.*'s Creditors to have a Sale for Payment of their Debts, the *Maſter* reported 700 *l.* due on *B.*'s Mortgage, and *B.*'s Executor received the ſame of the Truſtees. Afterwards it appeared by a Copy of an Account under *B.*'s Hand, that 353 *l.* 13 *s.* 1 *d.* had been paid by *J. S.* in his Life-time. Upon this the Truſtees and *Ceſtuy que Truſt* (the Infant Son of *C.*) brought a Bill to be relieved againſt this Over-payment. *B.*'s Executor pleaded all the former Proceedings, and inſiſted that before any Notice of the Over-payment he had paid away this 700 *l.* in Debts of *B.* His *Honour* decreed the Executor to repay the Surplus, and the Executor to be at Liberty to ſue ſuch Creditors as thro' Miſtake he had paid, to make them refund. And on Appeal Lord *Cowper* affirmed this Decree. *Trin.* 1717. *Pooley et al'* and *Ray*, 1 *Will. Rep.* 355.

Rehearing. Vide **Hearing and Rehearing**, *P.* 490.

CAP. XCII.

Releaſe.

1. AN Orphan cannot releaſe her cuſtomary Share, it being a mere future Right; nor can the Huſband do it. *Per* Lord Chan. *Macclesfield.* But whether ſuch Releaſe would amount to a Compoſition or Agreement in Bar of her future Right, or be a Compounding for her cuſtomary Share, was not determined. *Vide Prec. in Chan.* 546. *Ibid.* 594. *Trin* 1722. decreed that it is a Bar. *Per* Lord Ch. *Macclesfield.*

2. *J. S.* had a Leaſe from *A.* of *Froſter-Court* Farm of 263 *l. per Annum*, and was Tenant at Will of a Farm called *Pikes*, of 22 *l. per Annum.* On his Payment of Rent, *A.*'s Steward gave him a Receipt *in his Verbis*, "*Received then of* J. S. *the Sum of* 137 l. 10s. 0d. "*in full for Half a Year's Rent due at* Lady Day *laſt.*" The Releaſe being general, the Defendant inſiſted he was not obliged to account for the Rent of *Pikes.* To be relieved againſt which *A.* brought his Bill, which was diſmiſſed by his *Honour*, in regard that he might have his Action at Law for the Rent of *Pikes*, notwithſtanding the Generality of the Words of the Releaſe. But on Appeal, Lord Chan. *King* declared he was not ſatisfied that *A.* had a Remedy at Law, as both theſe Lands might formerly have been held together, and the general Words in the Leaſe might poſſibly extend to *Pikes*, contrary to the Intent of the Parties; if *A.* ſhould not recover at Law, he muſt have Relief here; ſo it would be ſending it to Law in order to have a new Bill. So decreed an Account. *Mich.* 1724. *Lord Lucy* and *Watts*, *Select Caſes in Chan.* 1. In this Caſe was cited *arg*' the Caſe of *Bacon* and *Harries* two or three Terms ago in this Court, which was thus: A Tenant got a Receipt in full to the Date; Bill was brought for an Account; the Tenant inſiſted he was not obliged to *give* any Account previous to the Receipt, becauſe his Vouchers might be loſt, and not preſerved on account of the Receipt; ſo that he might be made to ſuffer, not thro' any Default of his own, but by relying on the Receipt. But there being great Reaſon to believe the Receipt inſiſted on was obtained either thro' Fraud, or by Miſtake, and that the Tenant had not paid all that was due to the Time of the Receipt, Account was ordered to be taken *previous* to the Receipt, and to pay Coſts. *Ibid.* 2.

CAP. XCIII.

Remainder.

(A) Remainder by whom, and to whom, and when good, &c. ——And here of contingent Remainders.

(B) Remainder barred by a Recovery.

(C) Diſpute between a Remainder Man and the Guardian of Tenant in Tail.

(A) Remainder by whom, and to whom, and when good, &c. — And here of contingent Remainders.

1. *J. S.* ſeiſed in Fee of *Blackacre*, by Indenture of 1677 covenants to levy a Fine thereof to *C.* and *B.* and their Heirs, *to the Uſe of himſelf for Life*, and after, *to ſuch Uſes* as he ſhould by *any Deed or Writing* under his Hand and Seal executed, *&c.* during his natural Life, direct and appoint; and *for want thereof*, In Truſt *for him and his Heirs.* A Fine was levied, and *J. S.* afterwards intermarrying with *M.* by whom he had Iſſue *R.* and *J. S.* being ſeiſed in Right of *M.* of *Whiteacre* in Fee, they, by Leaſe and Releaſe and Fine conveyed theſe Lands to Truſtees and their Heirs, In Truſt *to the Uſe of* J. S. *for Life, then to* M. *for Life*, Remainder *to* R. *the Son in Tail Male*, Remainder *to the right Heirs of the Survivor of the ſaid* J. S. *and* M. *for ever.* Afterwards on the Marriage of *R.* with *N.* by Leaſe and Releaſe of 9 and 10 *July* 1698, made between *J. S. M.* and *R.* of the firſt Part, *A. B.* Daughter and Heir of *B.* the ſurviving Truſtee in the Deed of 1677 of the ſecond Part, ſaid *N.* of the third Part, and others of the fourth and fifth Parts, in Conſideration of a Marriage between *R.* and *N.* and of 4000*l.* Portion, and other Conſiderations, *J. S. M.* and *R.* convey *Blackacre* and *Whiteacre* and other Lands to Truſtees and their Heirs, to the Uſes following, *viz.* As to Part, *to the Uſe of* J. S. *for ninety-nine Years, if he ſhould ſo long live*, Remainder *to Truſtees to preſerve contingent Remainders*, Remainder *to* M. *for Life*, Remainder *to* R. *for ninety-nine Years, if he ſhould ſo long live*, Remainder *to Truſtees to ſupport*, &c. And as to the other Part, *to the Uſe of* J. S. *and* M. *his Wife, for their Lives, and the Life of the Survivor of them*, Remainder *to* R. *for ninety-nine Years, if he ſhould*, &c. Remainder *to Truſtees and their Heirs, to ſupport*, &c. Remainder as to the other Part *to* R. *in Poſſeſſion for ninety-nine Years, if*, &c. Remainder *to Truſtees and their Heirs, to ſupport*, &c. Remainder *to* N. *for Life for her Jointure*, Remainder *of the whole as the ſeveral Eſtates before limited ſhould reſpectively determine, to the firſt Son of the Body of* N. *to be begotten, and of the Heirs Male of the Body of ſuch firſt Son lawfully iſſuing*, and *ſo to the ſecond and other Sons in like Manner*, Remainder *to the Heirs Male of* R. Remainder *to the right*

Prec. in Chan. 338. *Trin.* 1712. *Eure* and *Howard*, S.C. *accord*. —S. P. came before Lord Chan. *Cowper Trin.* 1716 in the Caſe of *Stanhope* and *Thacker*, who ordered an Ejectment to be brought, and on a ſpecial finding of the Matter, the Queſtion to be argued and determined at Law, (it being merely a Point of Law) and his *Lordſhip* ſaid he thought it a very nice Point. *Ibid.* 438.

Heirs of J. S. *for ever.* *J. S.* covenants that he and *M.* would levy a Fine of the ſaid Lands to theſe Uſes, and *A. B.* the Daughter of the ſurviving Truſtee by the Directions of *J. S.* grants, releaſes and conveys, and he ratifies and confirms all the Lands by the Deed of 1677 limited to *C.* and *B.* and their Heirs, to the Uſe of *J. S.* for ninety-nine Years, if, *&c.* Remainder to Truſtees, *&c.* with other Remainders over, to the right Heirs of *J. S.* for ever. A Fine was levied, and the Marriage took Effect, and *R.* and *N.* had Iſſue *W.* a Son, and *S.* a Daughter; then *M.* dies and then *R.* dies. Then *J. S.* by Will deviſes *all his Manors, Lands, Tenements and Hereditaments, in Poſſeſſion, Reverſion, Remainder* or *Expectancy* whatſoever to Truſtees and their Heirs, In Truſt by Sale or Mortgage to raiſe Money to pay his Debts and Legacies. *J. S.* dies, then *W.* the Grandſon dies without Iſſue, leaving *S.* On a Bill brought by the Creditors and Legatees of *J. S.* againſt his Executrix, and *N.* and *S.* her Daughters the Truſtees in the Will of *J. S.* and others, to have a Satisfaction of their Debts, *&c.* *N.* ſets out the Indentures of 1698, and inſiſted in Behalf of *S.* her Daughter, that the Remainder of all that was thereby limited *to* J. S. *for ninety-nine Years, with* Remainder *to his right Heirs,* veſted in *S.* her Daughter as Heir to *W.* her Brother, as a contingent Remainder by Purchaſe, and ſo not ſubject to *J. S.*'s Diſpoſal by Will. And whether they were, and how many, and which of them were ſo ſubject, was the *only* Queſtion? And Firſt, As to the Lands limited *to* J. S. *for Life,* with the *laſt Remainder thereof to his own right Heirs,* there was little or no Queſtion made of it, but *that it was the old Reverſion in Fee in him,* and conſequently *liable to be diſpoſed of as he thought fit*; but as to the *other Lands limited to him for ninety-nine Years,* with *ſuch Remainder to his own right Heirs,* there were very ſolemn Arguments how far he had a Power over it; and that was divided into three Points, Firſt, Whether if theſe Lands not compriſed in the Deeds of 1677, and *whereof he was ſeiſed in Poſſeſſion at the Time of the Marriage Settlement upon* R. *the Son, the Remainder to his right Heirs* ſhould be looked upon to be the *old* Reverſion, and ſo under his Power of deviſing? Secondly, Whether if the Lands compriſed in the Deed of 1677, the Remainder *to his own right Heirs,* ſhould be looked upon to be void, and the *old* Reverſion veſted in himſelf, and ſo paſs by his Will? Thirdly, Whether if the Remainder *to the right Heirs of the Survivor* of *J. S.* and *M.* his Wife, was capable of being ſettled to the Uſes therein limited? And if ſo, Whether the Remainder *to the right Heirs* of *J. S.* was ſo veſted in him as to be ſubject to his Will? And after great Debate, *Lord Keeper* ordered a Caſe to be ſtated on theſe ſeveral Points out of the Deeds, and then he would conſider of them, and give his Opinion; and if it were neceſſary, would deſire the Aſſiſtance of ſome of the Judges in it; but inclined pretty ſtrongly that *J. S.* had Power to ſubject *all theſe Lands by Will as his old Reverſion undiſpoſed of*; and ſaid, they might argue to the contrary from Sun riſing to Sun ſetting, but he thought they would not alter his Opinion. *Mich.* 9 *Ann. Cure* and *Howard, Gilb. Rep. in Eq.* 20.

2. *A.* ſeiſed in Fee, *deviſes to* B. *his Executors and Adminiſtrators, for* 99 *Years,* In Truſt *for himſelf and* M. *his Wife, for their Lives,* and *the Life of the Survivor*; and after the Death of the Survivor, In Truſt *for the Heirs of their two Bodies*; and *in Default of ſuch Iſſue,* then In Truſt *for the Heirs of the Body of* A. and *in Default of ſuch Iſſue,* In Truſt *for the Heirs* of the Survivor of the Huſband and Wife. They have Iſſue *C.* a Son. *A.* dies. Afterwards *C.* dies, living *M.* an In-

fant, and without Iſſue. *M.* adminiſters to *A.* and *C.* and aſſigns the Term to *R.* His *Honour* (on Conſideration of this Caſe) decreed the Title to belong to *R.* the Aſſignee of the Wife, and that this Term ſhould not be attendant on the Inheritance; for that *A.* who raiſed this Term, and had Power to ſever it from the Inheritance, ſhewed his *Intention* ſo to do, *by limiting the Truſt to the Survivor of him and his Wife, and the Heirs of the Survivor*; which, tho' *it was a void Limitation*, yet ſufficed to ſhew his Intention to ſever ſuch Term from the Reverſion. *Trin.* 1717. *Hayter* and *Rod*, 1 *Will. Rep.* 360 to 376.

Vide P. Ca.

3. *A.* ſettles Lands *to the Uſe of himſelf for ninety-nine Years, if he ſo long live*, Remainder to Truſtees and their Heirs, during his Life, *&c.* Remainder *to the Heirs of his Body*, Remainder *to himſelf in Fee. Per* Lord Chan. *Cowper*, This is plainly a *contingent Remainder, being limited to the Heirs of the Body of* A. *who can have no Heir during his Life*; for *nemo eſt hæres viventis*; and that the Meaning of the Limitation is to carry the Settlement as far as may be, and beyond the Limitation to the firſt Son. *Mich.* 1717. *Elſe* and *Oſborn*, 1 *Will. Rep.* 387, 388.

4. *J. S.* deviſes his Freehold Eſtate to Truſtees and their Heirs, In Truſt to convey the Premiſſes *to* A. *his Son for Life*, Remainder *to Truſtees, to preſerve*, &c. Remainder *to his firſt*, &c. *Son in Tail Male ſucceſſively*, Remainder *to his four Daughters in Tail general*, as Tenants in Common; and *if* A. *ſhould die without Iſſue*, then he deviſed that the Premiſſes ſhould be ſettled in Fourths, *viz.* one Fourth to *B.* in Fee, another Fourth to *C.* in Fee, another Fourth to *D.* in Fee, and the remaining Fourth to *E.* in Fee; and in Caſe all or any of the ſaid four Remainder Perſons ſhould be dead at the Time when by Virtue of the ſaid *Settlement* (*a*) his Eſtate was to devolve upon them, then the fourth Part to which the Perſon ſo dead ſhould have been intitled to, if living, ſhould be conveyed to the reſpective Heirs of the Perſon ſo dead. *B. C. D.* and *E.* were Siſters of *A.* Afterwards *E.* died, living *A.* without Iſſue. Lord Chan. *Parker* decreed, that the Remainder in Fee of *E.*'s fourth Part does veſt in her Brother as her Heir; for ſhe having a Deviſe of the fourth Part to her in Fee, the Words directing a Conveyance to be made in Caſe of her Death to her Heir are no more than what would have been otherwiſe implied, *& expreſſio eor' quæ tacitè inſunt nihil operatur. Hil.* 1719. *Blackborn* and *Edgley*, 1 *Will. Rep.* 600, 606.

(*a*) *Settlement* in the Original.

His *Lordſhip* ſaid, that two Queſtions had been made in this Caſe, *Firſt*, Whether *T.* took an Eſtate-tail, or for Life only? *Secondly*, Whether, if he took for Life only, the ſubſequent Accident of his dying without Iſſue Male, or rather his never having had any Iſſue Male, would let in the Limitation to *B.* the ſecond Son? As to the firſt his *Lordſhip* was of Opinion, that *T.* took but an Eſtate for Life, and diſtinguiſhed this Caſe from that of *King* and *Melling*, which was in Caſe of a *Freehold, which may and muſt deſcend to the Iſſue*; but in the principal Caſe it is only of a *Leaſehold*, which, *without a particular Proviſion, ſhall never deſcend*, but *muſt go in a Courſe of Adminiſtration*; and here it is expreſsly limited to *T.* for Life, and ſhall not be enlarged by any ſubſequent Words, eſpecially

5. *J. S.* poſſeſſed of a thouſand Years Term, *deviſed it to Truſtees*, In Truſt *for his Son* T. *for ſo many Years of the Term as he ſhould live*, and after his Death, In Truſt *for the Iſſue Male of* T. *lawfully begotten, for ſo many Years of the ſame as ſuch Iſſue ſhould live*; and when the Iſſue Male of *T.* ſhould happen to be extinct, then In Truſt *for his ſecond Son* B. *for Life*, Remainder In Truſt *for the Iſſue Male of* B. *for ſo many Years of the Term as ſuch Iſſue ſhould live*; the *eldeſt* to be preferred before the *youngeſt*; *and after the Death of* B. *and from the Time his Iſſue Male ſhould happen to be extinct, then the Premiſſes to deſcend and continue in the Iſſue Male of the Name and Family of the* Clares, (which was the Teſtator's Name) *which ſhould be next of Kin, for all the Reſidue of the Term*; and made ſaid *T. ſole* Execu-

tor and reſiduary Legatee. *J. S.* died; then *T.* died *ſans* Iſſue. Lord Chan. *Talbot* decreed this Term belonged to *T.* as being the reſiduary Legatee of *J. S.* his Father, and from him to the Plaintiff, who was *T.*'s Executor. *Eaſt.* 1734. *Clare* and *Clare, Caſes in Eq. Temp. Lord Talbot* 21.

cially when in the Limitation to *B.* he explains what he meant by the Gift to the Iſſue in the firſt Part, for there he gives it *to the firſt and every other Son and the Heirs Male of their Bodies* (*a*); ſo it is plain that he *intended that every Iſſue to be born of* T. *ſhould take*; and *then the Limitation to B. was too remote*, and cannot take Effect. *Secondly*, That the ſubſequent Accident of *T.*'s dying *without* Iſſue will not better the Caſe. *Ibid.*

(*a*) *Note*; Theſe Words do not appear in the *State* of the Caſe.

6. *A.* deviſes all his *Freehold*, *Copyhold* and *Leaſehold*, and *all his real* and *perſonal Eſtate*, *not before deviſed*, to three Truſtees, their Heirs, Executors and Aſſigns, In Truſt *to pay his Son* B. 27 l. *Quarterly*; and *if he ſhould have any Child or Children*, *he gives the Reſidue of the Rents*, &c. *of the ſaid Truſt Eſtate during* B.*'s Life*, *for the Education* and *Benefit of ſuch Child or Children*; and after *B.*'s Deceaſe, he *gives a Moiety of the Truſt Eſtate to ſuch Child and Children as* B. *ſhould leave*, *their reſpective Heirs*, *Executors and Aſſigns*; and *gives the other Moiety to the Child and Children of* C. *his Grandſon*, *and every other Child and Children of* S. *his Daughter*, *their Heirs*, &c. And *if* B. *dies* ſans *Iſſue*, he *gives the firſt Moiety to* C. *and other Child and Children of* S. *and their Heirs*, &c. and directs an annual Payment to ſuch Wife as *B.* ſhould marry. *A.* died. *B.* married, and had Iſſue a Son and a Daughter, and died. Afterwards *C.* married, and had Iſſue *D.* a Daughter, and died. The Limitation to the Daughter of *C.* is well ſupported by the Eſtate in the Truſtees; or, if not, is good as an executory Deviſe; and the Profits, *&c.* ſhall go to the Children of *B.* *Mich.* 1735. *Chapman* and *Bliſſett*, *Caſes in Eq. Temp. Lord Talbot* 145.

(B) Remainder barred by a Recovery (*b*).

(*b*) Stat. 22 & 23 *Car.* 2. *c.* 24. No Tenant in Tail of any Fee-Farm Rents ſhall be enabled of this Act to bar the Remainders, nor ſhall have greater Power over the ſaid Rents than he had before.

1. *J. S.* ſeiſed in Fee of the Manors of *A.* and *B.* (after Debts and Legacies paid) *deviſes theſe Manors to* C. *for Life* ſans *Waſte*, and if *C.* ſhall have Iſſue Male, then to ſuch Iſſue Male and his Heirs for ever; and if *C.* ſhould die without Iſſue Male, then after *C.*'s Death he deviſed the Manor of *A.* to *D.* in Fee, and the Manor of *B.* to *E.* in Fee. *C.* ſuffers a Recovery of theſe Manors; and upon an Appeal to the Houſe of Lords, with the Advice of all the Judges, it was held, that the Remainder to *D.* in Default of *C.*'s leaving a Son, was a contingent Remainder, and conſequently barred by the Recovery ſuffered by *C.* 22 *May* 1717 *in Dom. Proc'.* *Mich.* 1718. in the Caſe of *Copper* and *Barnardiſton et al'*, 1 *Will. Rep.* 503, 509.

(C) Diſpute

(C) Diſpute between a Remainder Man and the Guardian of Tenant in Tail.

His *Lordſhip* ſaid his Opinion was, that there was no Relief in Equity in this Caſe, for this was a *Court of Equity* but *not of Honour:* That the Infant being Tenant in Tail, had a Right to the Timber growing upon his Inheritance, and when ſevered from the Soil it became a Chattel Intereſt in him, and conſequently would go to his Repreſentatives; and the felling the Timber without his Order or Direction, makes no Alteration in the Caſe; be it done by a *Tort Seiſor* or Treſpaſſer, or by Tenant in Tail himſelf, the Law is the ſame. *Ibid.*

1. *J. S.* ſettles Lands of 4000 *l. per Annum* upon his Marriage with *J. M. upon the firſt*, &c. *Son of that Marriage in Tail ſucceſſively*, as uſual in Marriage Settlements, *and dies, leaving Iſſue a Son* and *Daughter, both Infants*, and *their Mother Guardian.* The Son about twenty being ill, and not likely to live to twenty-one, the Mother about two Months before his Death, which happened *at his Age of twenty Years and ſeven Months*, gives *Orders for felling a great Quantity of Timber without her Son's Privity*, and in that Space did fell Timber *to the Value of* 5000 l. *or* 6000 l. in an *improper* Seaſon of the Year, and in a *waſteful* Manner, *in order to increaſe her Son's perſonal Eſtate, which was divided at his Death between her and her Daughter*, as next of Kin by the Statute of Diſtributions. The Bill was brought by Plaintiff as next in Remainder, againſt the Mother and her Daughter, to have an Account and Satisfaction for the Money raiſed by the Sale of this Timber, upon the Foot of Fraud, that the Mother felled this Timber without the Privity and Conſent of her Son, in Prejudice to the Remainder Man and his Inheritance. *King* C. diſmiſſed the Bill *quoad hoc. July* 8, 1727. *Savil* and *Savil, Vin. Abr.* Tit. *Executors*, (U) *Ca.* 76. *P.* 154.

CAP. XCIV.

Rent.

(A) Rent apportioned in Point of Time (*a*).

(*a*) A Parſon of a Pariſh leaſed his Tithes at a Rent payable yearly at *Michaelmas*, and died in *September*; and the Court decreed an Apportionment. *Meeley* and *Webber* (*b*), *in Scac. MS. Notes.*——So where *A.* leaſed Tithes for the Lives of *B.* and *C.* and *B.* died one Day before half a Year's Rent became due; on a Demurrer to a Bill againſt the Executor for this Rent, the Court ordered Defendant to anſwer, and reſerved the Merits to the Hearing. *Talbot* and *Salmon* (*c*), *MS. Notes.* (*b*) *Quære* Term and Year.
(*c*) *Quære* Term and Year.

And with regard to the Notion that *D.*'s remaining in Poſſeſſion ſhewed his Election to continue at the old Rent, this, the Court ſaid, only ſhewed his Election from that Time, and not from the End of the preceding Quarter Day. *Ibid.* 393.——The Act of the 11 *Geo.* 2. *cap.* 19. *ſect.* 15. has altered the Law as to the apportioning of Rent in Point of Time,

1. *J. S. Tenant for Life*, Remainder *in Tail to his Son* B. *C.* a Judgment Creditor of *J. S.* extended the Land, and leaſed to *D.* rendring Rent Quarterly. *J. S.* died the 10 *Mar.* 1710, and *D.* continued in Poſſeſſion 'till the *Lady Day* following. *B.* the Tenant in Tail claimed the Rent from *Chriſtmas* to *Lady Day*, for that *D.* by his holding over ſhewed his Election to continue Tenant at Will to *B.* and that this would be no Hardſhip on *D.* ſince he ought

ought to pay his Rent to ſome Perſon; and *C.* could have no Pretence to the *Lady Day*'s Rent; and tho' in this Caſe *J. S.* died 6 *March*, the Reaſon had been the ſame if he had died the Day after *Chriſtmas Day*. But Lord Chan. *Cowper* held that this was *Caſus omiſſus* out of the remedial Statutes relating to Rent, and that the Law does not apportion Rent into Point of Time (*a*); and did not know that Equity ever did it: That this is an Accident which the Judgment Creditor might have guarded againſt by reſerving the Rent Weekly, ſo that it is his Fault, and becomes a Gift in Law to the Tenant; and held that as to the Profits from the End of the laſt Quarter to the Death of *J. S. D.* ſhould pay nothing; but for the Profits from the Death of *J. S. D.* was to account to *B. Jenner* and *Morgan*, 1 *Will. Rep.* 392. *Hil.* 1717.

for thereby it is enacted, that *where any Tenant for Life ſhall die before or on the Day on which any Rent was reſerved or made payable upon any Demiſe or Leaſe, which of any Lands, &c. which determined on the Death of ſuch Tenant for Life, the Executors or Adminiſtrators of ſuch Tenant for Life ſhall and may in an Action on the Caſe recover of and from ſuch Undertenant or Undertenants of ſuch Lands, &c. if ſuch Tenant for Life die on the Day on which the ſame was made payable, the whole; or if before ſuch Day, then a Proportion of ſuch Rent according to the Time ſuch Tenant for Life lived of the laſt Year or Quarter, or the Time in which the old Rent was growing due, making all juſt Allowances.*

(*a*) 1 *Inſt.* 292. *b.* 10 *Rep.* 128.

Vide Tit. Apportionment, *P.* 82.

CAP. XCV.

Report.

(A) Made by a Maſter in Chancery.

1. A REPORT made by a Maſter in Chancery is as a Judgment of the Court. *Per* Lord Chan. *Parker*, *Trin.* 1720. in the Caſe of *Brown* and *Barkham*, 653.

By a ſtanding Order of the Court of Chancery made by the *Lords Commiſſioners Temp.* 4 *W. & M.* it was directed, that all Reports ſhould be filed within four Days after the making, otherwiſe no Decree, Order, or Proceedings, to be had thereupon; but the Regiſter ſaying, that it was ſufficient if the Report were filed before any Proceedings had thereupon, tho' this were not done within four Days after the making, Lord Chan. *King* agreed to this, adding, that this was the Spirit of the Order, tho' the Letter ſeemed otherwiſe; and ſaid that the conſtant Practice being according to this Conſtruction, many hundred Reports would be liable to be ſet aſide if the Order ſhould be literally obſerved; and no Motion was ever known for filing a Report *nunc pro tunc*. And the Court took it to be well enough, tho' in the principal Caſe the Motion to confirm the Report *Niſi* was made the ſame Day that the Report was filed. *Hil.* 1728. *Eyles and others Truſtees of the South-Sea Company* and *Ward*, 2 *Will. Rep.* 517.

2. It is *not* uſual to confirm Reports of Receiver's Accounts. *Per* his *Honour*, *Mich.* 1734. *in Caſu Cowper* and *E. Cowper*, 2 *Will. Rep.* 661.

CAP. XCVI.

Reverſion.

1. DR. *Cary* being ſeiſed in Fee makes a Settlement *to the Uſe of himſelf for Life*, Remainder *to Sir* George Cary *for Life*, Remainder *to Truſtees to preſerve*, &c. Remainder *to the firſt*, &c. *Son of Sir* George Cary *in Tail Male*, Remainder *to* William Cary *for Life*, with like Remainders *to his firſt*, &c. *Sons in Tail Male*, Remainder *to* N. Cary *for Life*, Remainder *to his firſt*, &c. *Sons in Tail Male*, Remainder *to Dr.* Cary *in Fee*. Dr. *Cary* dies, and on his Death the Remainder to Sir *George* comes into Poſſeſſion, and the *Remainder* (*a*) in Fee deſcended on Sir *George*, who being *ſeiſed of an Eſtate for Life*, with Remainder *to his firſt*, &c. *Sons in Tail Male*, with like Remainders to *William* and *N. Cary*; and being alſo ſeiſed of the *Reverſion in Fee which deſcended to him as Heir to Dr.* Cary, *confeſſes a Judgment*, and *dies*; and *then the Eſtate limited to* William Cary *takes Effect*, and the *Reverſion in Fee deſcends to him*; *he had two Sons*; *they die*; and *ſo the Reverſion in Fee comes into Poſſeſſion.* And the Queſtion was, Whether *this Reverſion, when it came into Poſſeſſion, was liable to the Judgment confeſſed by Sir* George Cary? And Lord Chan. *Hardwicke* was of Opinion, that it was liable to ſuch Judgment, becauſe *it was the Eſtate of Inheritance of Sir* George; and as it was ſo ſubject to the intermediate Eſtates for Life, it was in him liable to be *granted*, or *charged*, or *incumbered* by him as he thought fit; and as he might have *granted* or *charged this Reverſion*, ſo *he might have granted a Leaſe for one thouſand Years out of it* if he had pleaſed, and *which would have taken Effect out of the Reverſion in Fee*; and if *it* had come to *William Cary*, he could not have claimed ſuch Reverſion, but ſubſequent to that Leaſe; and as he might have done ſo, in like Manner might he have charged by Judgment or Statute. *Dec.* 1740. *Giffard* and *Barber*, *Vin. Abr.* Tit. *Charge*, (A) *Ca.* 17. *P.* 452.

His *Lordſhip* ſaid, that the Point that was in the Caſe of *Kellow* and *Rowden* in 3 *Mod.* does not ſeem applicable to this Caſe, for that was an Action on a Bond by the Father againſt the ſecond Son as Heir to the Father; for in that Action the ſecond Son was charged as immediate Heir to the Father; and in this Caſe it appears that the Father had ſettled Lands on himſelf for Life, Remainder to his firſt Son in Tail, Remainder to himſelf in Fee. The Father dies.

The Eſtate comes to the firſt Son, who dies, leaving a Son, and then the Son dies, and on his Death the Lands deſcended to the ſecond Son as Heir to the Father. In this Caſe it was not doubted but that this Eſtate was the Eſtate of the Father, and liable to the Debt. But the Queſtion was, If the Plaintiff in that Action had well charged the Defendant as immediate Heir to his Father, and whether he ought not to have charged him as Heir to the Nephew, and have ſhewed his Pedigree for that Purpoſe? Mr. Juſtice *Giles Eyre* held that he was not well charged; but the other three Juſtices held that he was; but Mr. Juſtice *Giles Eyre* in that Caſe ſaid, that it was not doubted but that the Reverſion in Fee which took Place in the ſecond Son, was veſted in the firſt Son, and that the firſt Son might have charged it with Statute, Judgment or Recognizance, which was not denied by the other Juſtices, ſo that it could not be doubted but that if he had made a Leaſe for Years out of the Reverſion, and ſuch Reverſion had after come to the Brother, but that it muſt have been ſubject to that Leaſe; the ſtating this proves the Difference; and that in the *principal* Caſe it would not be liable to the Bond of Sir *George Cary* as Aſſets by Deſcent, becauſe that cannot be where there is an intermediate Eſtate, but muſt be where the Heir takes as immediate Heir to the Anceſtor that entered into the Bond; but on Judgment you charge the Tertenant of the Eſtate that was in the Perſon that was the Conuſor of the Judgment, but not ſo by this Bond, unleſs the Lands came as Aſſets by Deſcent to the very Heir of Sir *George Cary*. This will not be liable to the Inconveniencies as were by me at firſt apprehended, for if either of the Perſons that took an Eſtate-tail had ſuffered a Common Recovery, there would have been an End of the Reverſion in Fee. Where there is a Tenant in Tail with Reverſion to him in Fee, and this Reverſion deſcends to the Defendants, they muſt take it liable to the Judgment or Statute, or Recognizance of any of their Anceſtors in whom the Eſtate at any Time was; and therefore his *Lordſhip* was of Opinion, that this Reverſion is liable to the Judgment. As to a *Fine* that was mentioned, as it was not produced, his *Lordſhip* ſaid he could not give any Determination upon it; but ſaid that it ſeemed to operate no otherwiſe than as a Grant of the Reverſion, which being ſubſequent to the Lien that was on it by this Judgment, and the Plaintiffs filing their Bill in 1726, which was but two Years after ſuch Fine, the ſame is no Bar to the Plaintiffs. *Ibid.*

(*a*) *Remainder* in the Original.

CAP. XCVII.

Scotch Peer.

1. QUEEN *Ann* by Letters Patent, dated about two Years after the Union of *England* and *Scotland*, created the *then* Duke of *Queenſberry*, then a *Scotch* Peer, to be an *Engliſh* Peer. In Purſuance of this Patent, the Duke was ſummoned to Parliament, where he took his Seat, and continued to ſit and vote in two ſucceſſive Parliaments, no Objection being made to ſuch his Right at any Time during his Life. The Duke died during the Infancy of the preſent Duke, who coming to Age petitioned the King to cauſe a Writ of Summons to be iſſued to him for his coming and voting in Parliament. This was referred by the King to the Houſe of Lords, who after having heard Counſel and upon Debate the Majority of the Peers were againſt allowing the preſent Duke the Privilege of ſitting in their Houſe. *Mich.* 1719. *The Duke of Queenſberry* and *Dover's Caſe, in Dom. Proc'*, 1 *Will. Rep.* 582.

The Difficulty in this Caſe was, that in the late Duke of *Hamilton*'s Caſe it was reſolved by the Lords (*Die Jovis* 20 *Decembris* 1711) that no Patent of Honour, granted to any Peer of *Great Britain* who was a Peer of *Scotland* at the Time of the Union, ſhould intitle him to ſit in Parliament. *Ibid.* 583.

CAP. XCVIII.

Scrivener.

1. *J. S.* depoſited 300 *l.* in *A.* a Scrivener's Hands. *A.* placed the ſame out at Intereſt upon a Mortgage of Houſes, and took the Mortgage in *J. S.*'s Name, which Mortgage after proved defective. *J. S.* for many Years received the Intereſt, but it did not appear by the Proofs that *J. S. did ever aſſent to this Mortgage*, or *that he did give* A. *a general Authority to diſpoſe of it at Intereſt as he thought fit*, neither did it appear that *he had laid any Reſtraint upon* A. *not to diſpoſe of it without his Approbation. Lord Chancellor* ſaid it was a Caſe of great Conſequence, and ſo he would conſider of it before he would deliver any Opinion. And it afterwards appearing by the Proofs that *J. S.* had by his Agents received Intereſt for ſeveral Years, and *in the Receipts had taken Notice of the Principal being in Mortgage upon the ſaid Security*, *Lord Chancellor* was of Opinion that *J. S.* ought to ſuſtain the Loſs; and reverſed a Decree made by his *Honour cont'*. *Hil.* 1679. *Clarke* and *Perrier*, 2 *Freem. Rep.* 48.

But if it had ſtood barely upon the Conſtruction of the Law, without any Proof of the Conſent or Approbation of *J. S.* there *A.* muſt have ſuſtained the Loſs according to the Rules of Common Law in Caſe of *Bailment* (*a*), as 1 *Inſt.* 89.

and his *Lordſhip* cited *Exod. c.* 22. that the *Levitical* Law was ſo. *Ibid.* 49. *Note*; This Caſe reſted merely upon the Conſtruction of Law, which is, Whether a Scrivener diſpoſing of Money depoſited generally in his Hands upon bad Security ſhall be anſwerable for it, there being no Proof of any Fraud or Colluſion in the Scrivener? Or, Whether the Owner of the Money ſhould ſtand to the Loſs of it? *Ibid.* 48.

(*a*) As if I deliver Goods to another to keep, and he loſe them by any Accident, the Loſs ſhall fall upon him, unleſs he qualifieth the Conſtruction of Law, by ſaying that he will keep them as his own, and then the Loſs, if it be *involuntary*, falleth upon me.

2. A Bond was taken for 1400 *l.* in the Name of *L.* a Scrivener, In Truſt for *J. S.* *L.* having Occaſion for Money, *without the Privity* of *J. S.* borrows it of *B.* and *aſſigns this Bond for Security*; *B.* having *no Notice of the Truſt*, and there being nothing of the Truſt appearing by the Bond, the Queſtion was, Which of them ſhould have the Benefit of the Bond? It was agreed, that *if it had been a Mortgage*, and *it had been aſſigned to* B. *without Notice of the Truſt*, that *B.* ſhould have had it, becauſe there *a legal Eſtate had been veſted in him without Notice*; but this Caſe, as was inſiſted, differed from that, becauſe *by the Aſſignment of a Bond nothing paſſes at Law but an equitable Right*, which is *rebutted by the prior Equity in* J. S. And ſo it was ſaid it was held in the Caſe of *Sir Edward Abney* by the *Lord Chancellor*. But his *Honour* was of Opinion in this Caſe, that *B.* ſhould have it; but *Abney*'s Caſe being cited to be in the very Point, he deſired to ſee that Caſe before he would give any Opinion. *Eaſt.* 1697. *Penn* and *Brown et al'*, 2 *Freem. Rep.* 214.

His *Honour* ſaid it is a ſtanding Rule here, that if I truſt a Scrivener with my Bond, and the Obligor pay him the Money and take up the Bond, that I ſhall have no Remedy againſt the Obligor; but if the Obligor compounds with the Scrivener for leſs than is due, it is an Evidence of Fraud, and then it may be the Obligor may pay the Money again. *Ibid.*

3. *A.* having 1000 *l.* out at Intereſt, *deſired it might be paid in to J. S.* and *that he would get her a Security for it.* Accordingly the Money was paid in to *J. S.* and he, *without any farther Directions from* A. *or without acquainting her at all of the Matter*, lent it out on a Mortgage made by *B.* to *C.* for ſecuring 250 *l.* which afterwards was increaſed to 1100 *l.* and was by him aſſigned to *D.* for ſecuring that Sum; and the Aſſignment was taken in the Name of *A.* and ſhe had ſome of the Title Deeds delivered to her, and received 68 *l.* of the Intereſt from *B.* but it fell out that the Security was *pre-incumbred*, and would not anſwer the Money. *A.* brought her Bill to have the Money made good to her either by *J. S.*'s Executors or by *D.* who had the Security before upon a Re-aſſignment; and had long before brought a Bill againſt *B.* to have the Redemption foreclоſed, and a Decree had been obtained for Sale of the Eſtate, and *H.* had been allowed the beſt Purchaſor for 600 *l.* Whereupon *D.* arreſted *B.* upon his Bond, who, to procure his Enlargement, paid *D.* 600 *l.* and there remained due to *D.* at the Time of his Aſſignment only 643 *l.* for Principal, Intereſt and Coſts, and yet the Aſſignment is made in Conſideration of 1000 *l.* mentioned to be paid to him, and he received the 1000 *l.* which was a Fraud in him, and he concealed all theſe Matters from *J. S.* and aſſigned this as a good Security. Lord Keep. *Wright* ſaid, he did not think that either *J. S.* or *D.* had done altogether what in natural Juſtice they ought to have done, yet that there was no ſufficient Foundation to charge either of them in Equity. Diſmiſſed the Bill, but without Coſts. *Hil.* 1700. *Luke and Bridges* and *Chriſty*, *MS. Rep.* Decree affirmed *in Dom. Proc'*. *Ibid.*

Prec. in Chan. 146. S. C. *accord*, and ſays *Lord Keeper* cited the Caſe of *Sir John Fouch* the Scrivener upon the Mortgage of Mr. *Jervis*, where, tho' Sir *John* had Notice of Declarations in Ejectment, delivered on a *prior* Mortgage before he lent his Client's Money, yet could not be charged to make good to his Client the Money he afterwards lent upon it. *Ibid.* 149.

4. *M.* having 4700 *l. per Annum* granted to her and her Heirs by King *Charles* the Second out of the Exciſe or Cuſtoms, and wanting to borrow Money, *B.* procured the ſame of *C.* a Scrivener, who was employed to lend out Money for the Executors of *D.* and gave him 100 *l.* for Procuration; the Security given for it was out of this 4700 *l. per Annum*, a Proportion whereof was ſet apart to be yearly applied towards this Debt 'till the whole Principal and Intereſt was diſcharged. *C.* had received 2900 *l.* for the Uſe of the Executors, and gave his Receipts accordingly, and had accounted to the Executors for about 1700 *l.* but about 1100 *l.* remained in his Hands unaccounted for, and he died inſolvent. And the only Queſtion was, Whether this Loſs

And his *Honour* took this Diſtinction which he ſaid had always been allowed, that if a Bond be left with a Scrivener, that is ſufficient for him to receive the *Principal and Intereſt*, and the Delivery up of the Bond is a ſufficient Diſcharge to him that pays it——But if a Mortgage were left with a Scrivener, this is a ſufficient Authority to him to receive the *Intereſt* but *not the Principal*, and the Delivery up of the Mortgage by him is no

Loſs ſhould fall upon *M.* or the Executors? And it appearing that *C.* was Agent for *D.*'s Executors not only in this but in other Affairs, and that he tranſacted this Matter on their Behalfs, ſaw the Writings executed, and paid the Money lent, and the Money was appointed to be paid at his Houſe, and the Writings being left with him, and for all that appeared continued at his Houſe, the *Lord Keeper* and his *Honour* were of Opinion, that the Loſs ought to fall upon the Executors and not upon *M.* who ſeems to have been an utter Stranger to *C.* before the borrowing of this Money. *Hil.* 1700. *Dutcheſs of Cleaveland* and *The Executors of Sir George Daſhwood*, 2 *Freem. Rep.* 249.

no ſufficient Diſcharge to the Mortgagor, becauſe the Eſtate ought to be re-aſſigned, which cannot be done but by the Party himſelf.—— But *Lord Keeper* ſaid, he ſaw no Reaſon for this Difference, but that in Equity it would be all one, the Money being really paid to the Perſon who had the Deeds in his Cuſtody. But his *Honour* ſeemed to be of a contrary Opinion. But however, in the *principal* Caſe, the Money was to be paid by Inſtallments, Principal and Intereſt together, and it was plain *C.* had accounted for Part to *D.*'s Executors, and no Countermand had ever been given, and therefore thought it reaſonable that what was paid to *C.* ſhould be allowed to *M.* on account, her Bill being to redeem. *Ibid.* 250.

5. *J. S.* having borrowed 100 *l.* of *A.* upon Bond which was procured by *B.* a Scrivener, when the Bond was ſealed it was delivered to the Obligee. *J. S.* paid ſeveral Years Intereſt to *B.* and 50 *l.* Part of the Principal, which *B.* paid to the Obligee, but the laſt 50 *l.* being paid to *B.* he broke before he paid it to the Obligee. And the Queſtion was, Whether *J. S.* was to loſe the Money or the Obligee? And *per* his *Honour*, Altho' *B.* had received the *Intereſt* and *Part of the Principal*, and paid it to the Obligee, yet that did not imply that he had any Authority to receive it, but as long as he had paid it over, all was well, and any one elſe might have carried it to the Party as well as he; and *J. S.* not proving that *B.* had any Authority from the Obligee to receive it, he was forced to pay the laſt 50 *l.* again, altho' his *Honour* declared, that he thought it a very hard Caſe. *Mich.* 1705. *Sir John Wolſtenholm* and *Davies*, 2 *Freem. Rep.* 289.

His *Honour* ſaid that it was the conſtant Rule of this Court, that if the Party to whom the Surety was made truſted his Security in the Hands of the Scrivener, that Payment to the Scrivener was good Payment; but if he took the Security into his own keeping, Payment to the Scrivener would not be good Payment, unleſs it could be proved that the Scrivener had Authority from the Party to receive it. *Ibid.*

CAP. XCIX.

Sequeſtration.

(A) Sequeſtration, its Force;——In what Caſes granted,——and againſt what Perſons.
(B) Sequeſtrators, their Power.
(C) Of reviving a Sequeſtration.

(A) Sequeſtration, its Force;—In what Caſes granted,—and againſt what Perſons.

1. THE Queſtion was, Whether the Court of Exchequer ſhould grant a Sequeſtration after a Decree for a perſonal Duty? It was admitted that in Proceſs for Appearance a Sequeſtration was always grantable by this Court, but for a perſonal Duty, after a Decree there were many Inſtances in Lord Chief Juſtice *Hale*'s Time, and in the Lord *Montague*'s Time, where it had been denied; and theſe Precedents that had been produced for it, were moſt of them where it was the Suit of the King, which was admitted on all Hands, that where the King was Plaintiff it might be granted. But by the Opinion of *Jenner*, *Heath* and *Powell*, Barons, it ought to be granted. *Trin.* 1687. *Guavers* and *Fountain*, *in Scac'*, 2 *Freem. Rep.* 99.

For *Jenner*, *Heath* and *Powell*, Barons, thought that if it might be granted in Meſne Proceſs, where it did not appear whether there was any Duty or not; *a fortiori* after a Decree, where the Duty was adjudged and aſcertained; and it being always the Practice of the Chancery, it ought much more in this Court, where the Plaintiff was ſuppoſed to be a Debtor to the King; and they thought that the Juriſdiction of the Court of Equity would be to little Purpoſe, if the Court had not ſufficient Authority to ſee their Decrees executed. The Lord Chief Baron doubted, becauſe Lord Chief Baron *Hale* could never be prevailed upon to grant it, nor the Lord *Montague*, to whoſe Learning, he ſaid, he muſt greatly ſubſcribe. But by the Opinion of the other three it was granted.

2. No Sequeſtration can regularly iſſue to ſequeſter the Eſtate of any Perſon who cannot be found, but upon the *Return non eſt inventus* of the Serjeant at Arms (*a*). *Per Lord Chancellor*, 13 *May*, 7 *Geo.* 1. *Ex parte Jephſon Serjeant at Arms*, *Prec. in Chan.* 553.

(*a*) *Vide* Tit. *Serjeant at Arms*, P. *Ca.*

3. A Sequeſtration was ordered *Niſi* both againſt the Counteſs Dowager of *Shaftſbury* and the Counteſs of *Gainſborough* for their Contempt in contriving and effecting the Marriage of the Earl of *Shaftſbury* an Infant with the Counteſs of *Gainſborough*'s Daughter without Conſent of his Guardian named by his Father's Will, and without applying to the Court. *Per* Lord Chan. *Macclesfield*, *Hil.* 1722. *Eyre* and *The Counteſs of Shaftſbury*, 2 *Will. Rep.* 110.

On 15 *May* following the three Lords Commiſſioners, *Jekyll* Maſter of the Rolls, *Gilbert* Baron, and Mr Juſtice *Raymond*, after ſolemn Debate were of Opinion, that the Sequeſtration againſt the Counteſs of *Shaftſbury* ought to be *abſolute*; but foraſmuch as the Infant's Guardian has not complained of, or prayed any Relief againſt Lady *Gainſborough*, the Court would do nothing againſt her, but diſcharged the Order of Sequeſtration with reſpect to her. *Ibid.* 110, 117.——*Gilb. Rep. in Eq.* 172, 178. *Eaſt.* 8 *Geo.* 1. *Earl of Shaftſbury* and *Shaftſbury*, S. C. ſays, upon this Matter coming before the Lords Commiſſioners, it was obſerved that this Contempt was not ſworn upon the Lady *Gainſborough*, whereas *an Order for a Sequeſtration in the Caſe of a Peer is a judicial Act of the Court*, and *therefore muſt be upon a proper Affidavit*, as Lord Commiſſioner *Gilbert* apprehended; and ſaid, that the Order is the Judgment of the Court, and the Sequeſtration is the Execution of it; and therefore the Judgment ought not to be founded on Conjecture only, for if ſhe be examined upon ſubſequent Interrogatories, this will not make good the Determination of the Court by a Matter *ex poſt facto*.

4. Upon a Motion for a Sequeſtration againſt the Defendant's *real* and *perſonal* Eſtate in *Ireland*, (for a Contempt of this Court) Lord Chan. *Macclesfield* ſaid, the Plaintiff ought at leaſt firſt to take out a Sequeſtration *here*, and upon *Nulla bona* returned he ſaid he would grant a Sequeſtration, which ſhall affect the Defendant's Lands in *Ireland*. *Mich.* 1724. *Sir John Fryar* and *Barnard*, 2 *Will. Rep.* 261.

His *Lordſhip* ſaid, the Courts of Juſtice *here* have a ſuper-intendant Power (*a*) over thoſe in *Ireland*, and therefore

Writs of Error lie in *B. R.* in *England* to reverſe Judgments in *B. R.* in *Ireland*. *Ibid.* 262. But Mr. *P. Williams* makes a Queſtion to whom the Sequeſtration againſt the Eſtate in *Ireland* is to be directed, and if it ſhould not be by an Order from *Lord Chancellor*, reciting the Proceedings *here*, and directing the *Chancellor* of *Ireland* to iſſue out a Sequeſtration there for the Benefit of the Plaintiff, and towards Satisfaction of his Demands. *Ibid.* 262. In this Caſe was cited *arg*' that of *Lord Arglaſs* and *Muſchamp*, 1 *Vern.* 135. where the Court granted a Sequeſtration into *Ireland*; nay, that ſuch Proceſs had been awarded to the Governor of *North Carolina*. But *per* Lord Chan. *Macclesfield*, As to the Sequeſtration mentioned to have been directed to *North Carolina*, or any other of the Plantations, his *Lordſhip* doubted much whether ſuch Sequeſtration ſhould not be directed by the King in Council, where alone an Appeal lies from the Decrees in the Plantations, for which Reaſon it ſeemed that in ſuch Caſe the Plaintiff ought to make his Application to the King in Council, and not to this Court. *Ibid.*——2 *Mod. Caſes in Law and Eq.* 124. *Hil.* 11 *Geo.* 1. *Sir John Fryar* and *Vernon*, ſays, on a Motion for a Sequeſtration of the Defendant's Lands in *Ireland* for a Contempt to this Court, his *Honour* was of Opinion, that ſuch Sequeſtration could *not* be granted, or at leaſt that he would be well adviſed before he would grant it; for that the Proceſs of this Court could not affect any Lands in *Ireland*, the Practice in ſuch Caſes being to make Affidavit, that the Perſon ſtanding in Contempt *here* in *England*, and being afterwards taken upon Proceſs, the Court will oblige him to give Bail to abide and perform their Decree.——*Select Caſes in Chan. Hil.* 1724. S. C. ſays, a Motion was made for a *particular* Sequeſtration on Defendant's Lands in *Ireland*, ſhe having ſtood out the Proceſs of Contempt here, and relied on the Caſe of *Hamilton* and *Pollard* in *July* or *October* laſt, where, on like Motion for a *particular* Sequeſtration to *North Carolina*, the *Chancellor* ſaid it might be right, but the Method ſhould be well conſidered, as it's being to be a Precedent, and inclined it ſhould be to Sequeſtrators. But the *Regiſter* on being aſked, ſaid, that Sequeſtration never went. His *Honour* ſaid, that what led them into this Notion was the Caſe of the *Earl of Arglas* and *Muſchamp*, 1 *Vern.* 75. where it was denied by the Court, but after Application was made to the King, and a Letter was ſent to the Governor of *Ireland*, but he never heard of any Thing elſe of that Sort, and it would be very odd that the Proceſs of this Court ſhould have any Thing to aſſiſt it. He ſaid he remembered that a Bill was brought into Parliament to extend Judgments to the Plantations, but it was rejected; but as to the Plantations it is particularly odd, as it affects the King's Sovereignty in Council over them. But what makes it clear to a Demonſtration that it ſhould not go, is this, where a Defendant to a Bill, whoſe uſual Reſidence is in *Ireland* happens to be here, he is obliged to give Security, which makes it plain he is not amenable to this Court, for if he was that Precaution would be unneceſſary. So a *particular* Sequeſtration was denied, but a *general* one of courſe granted.

(*a*) *Vide* 1 *Will. Rep.* 348. *Dean and Chapter of Dublin* and *Dowgatt.*

5. In the Caſe of *a Peer* or *Member of the Houſe of Commons*, it is an Hardſhip upon them that a Sequeſtration, which in ſome Reſpects is in Nature of an Execution, is the firſt Proceſs; ſo when a Sequeſtration is granted againſt a Peer *Niſi* for want of an Anſwer, it is good Cauſe againſt the Order *Niſi* to ſhew that the Anſwer is put in, which muſt be allowed for the Cauſe, and when that Anſwer is reported *inſufficient*, the Plaintiff muſt move again *de novo* for a Sequeſtration *Niſi*. *Per* his *Honour*. Which the *Regiſter* ſaid was the Courſe of the Court. *Mich.* 1726. *Lord Clifford's Caſe*, 2 *Will. Rep.* 385.

6. On a Bill for a *perſonal* Duty, a Decree was againſt *A.* who ſtood out in Contempt, but before a Sequeſtration againſt her, *ſhe being Tenant for Life*, Remainder to —— by Feoffment, dated 28 *Sept.* 1735. infeoffed Truſtees, in Conſideration of 5*s.* and alſo in Conſideration of 400*l.* Part of a conſiderable Sum recited to be due to her Daughters, and thereby conveyed her Eſtate for Life to ſaid Truſtees, In Truſt for her Daughters, and their Heirs. Afterwards a Sequeſtration was taken out againſt *A.* the Mother, and thereon this Eſtate was ſeiſed by the Sequeſtrators; but by Order it was referred to the Deputy to examine into the Conveyance, and ſee *what Intereſt the Mother and Daughters had in the Eſtate*, who reported that the Daughters had not made out a ſufficient Title whereby to impeach or affect the Plaintiff's Seizure of the Eſtate by virtue of the Sequeſtration. On Exception to the Report it was inſiſted, that the Decree does not bind, nor is any Lien upon it, but only binds the Perſon. And that his *Honour* in the Caſe of *Bligh et al'* and *The Earl of Darnley* ſaid, that a Decree for a Debt does not bind the

real

real Eſtate, acting only *in perſonam* not *in rem*, and the Remedy to affect the Land is only by Sequeſtration for a Contempt, and a Decree for a Debt never affects the Lands in the Hands of the Heir. The following Caſes were alſo cited, *i. e.* 27 *Hen.* 8. 15. 1 *Rol.* 373. 1 *Rol. Rep.* 36.—*Hil.* 32 & 33 *Car.* 2. *Chan. Ca.* 43. *Golſton* and *Gardiner.*—2 *Chan. Ca.* 48. *Squib* and *Snelling*—*Eaſt.* 34 *Car.* 2. *Harding* and *Edge.*—*Vern.* 459. in *Self* and *Maddox*, *Goldſton* and *Gardiner ſupra* was cited and allowed.—*Finch* and *Howcham*, 2 *Vern.* 217.——But what was farther done in the principal Caſe does not appear. *Mich.* 13 *Geo.* 2. *in Scac'*, *Cook* and *Cook*, *Comyns's Rep.* 712.

Sequeſtrations were firſt introduced in the Lord *Bacon*'s Time, and then but ſparingly uſed in Proceſs, and after a Decree to ſequeſter the Thing in Demand only.

7. The Remedy upon a Decree to affect the Land is only for a Contempt, whereupon the Party proceeds to a Sequeſtration, which Proceſs is not of very long ſtanding; and that a Sequeſtration is but a *perſonal* Proceſs, appears by its falling and abating by the Death of the Party, which an Extent does not. A Sequeſtration the Plaintiff takes the whole Profits. *Trin.* 1731. *Per* his *Honour*, in the Caſe of *Bligh* and *Lord Darnley*, 2 *Will. Rep.* 621.

Said *arg' in Caſu Earl of Kildare* and *Sir Maurice Euſtace*, *Vern.* 421. ——A Sequeſtration out of Chancery is more effectual than an Execution by *Fieri Facias*, for a Sequeſtration may be againſt the Goods, tho' the Party is in Cuſtody upon the Attachment; whereas in Law if a *Capias ad ſatisfaciendum* is executed, there can no *Fieri Facias* iſſue. *Mich.* 1736. *Per* Lord Chan. *Talbot*, in the Caſe of *Morrice* and *The Bank of England*, *Caſes in Eq. Temp. Lord Talbot* 222.

(B) Sequeſtrators, their Power.

1. IT was moved, that the *Irregularity* of a Sequeſtration might be referred to the Deputy, which was taken out againſt the Defendant for not appearing, by reaſon of it's being taken out ſooner than by the Couſe of the Court it could; and yet the Sequeſtrators had taken the Goods off the Premiſſes, and threatened to ſell them. The *Chief Baron* ſaid, that as to the carrying the Goods off the Premiſſes it was clear the Sequeſtrators could do that, becauſe a Sequeſtration upon *Meſne* Proceſs anſwers to a *Diſtringas* at Law. But however, as to the ſelling them, the Court agreed in the preſent Caſe it could not be lawful, and ſaid, it had been ſettled lately upon Debate; and obſerved farther, that Courts of Equity could not authorize Sequeſtrators to ſell Goods even upon a Decree 'till Lord *Stamford*'s Act, which *makes Decrees in this Reſpect equivalent to Judgments:* And even now the *Counſel* ſaid, Sequeſtrators cannot ſell but upon Leave of the Court. However the Court ſaid, this was a Matter proper for them to conſider upon another Occaſion; and therefore only referred the *Irregularity* of the Sequeſtration as to the Point of Time to the Deputy. *Mich.* 1729. *in Scac'*, *Deſbrough* and *Crumbey*, *Barnard. Rep. in B. R.* 212.

(C) Of reviving a Sequeſtration.

1. AN *Ejectment* having been brought of Lands which Sequeſtrators had got Poſſeſſion of, a Bill was brought to revive the Sequeſtration, and likewiſe an Injunction was prayed to ſtay Proceedings in the Ejectment. Counſel moved that the Sequeſtration might be revived; he allowed that it was taken partly upon *Copyhold* Lands and partly upon *Freehold*, and that the *Defendant* in the *original* Suit

Suit was dead, but yet that the Sequeſtration was proper to be revived, in the Hands of the Heir, as to the whole Lands, he confeſſed that this was a Sequeſtration on a Decree, and that ſuch Sequeſtrations were but of late Date; they began in Lord *Nottingham*'s Time *in the Court of Chancery*, and *not allowed in this Court* 'till the 14 *June* 1687 in the Caſe of *Fountain* and *Wavers*; he confeſſed that it did abate by the Party's Death, but as to the *Freehold*, *it was certain it might be revived*; and as to the *Copyhold* he ſubmitted the Law was the ſame, for it is well known, that *this Proceſs runs upon theſe Lands, tho' the Common Law Proceſs of* Elegit *does not.* The Court ſaid, that tho' it was true *Sequeſtrations run upon Copyhold*, yet it was to be doubted whether *it could be revived in the Hands of the Heir to ſuch Lands*, for if it ſhould, the Heir would not take up thoſe Lands, and then the Lord would be without a Tenant; for which Reaſon they ordered the Injunction to continue only as to the Freehold Lands, and diſſolved it as to the *Copyhold*, with Liberty to apply to the Court again. *Hil.* 1730. *Whitehead* and *Harriſon*, 1 *Barnard. Rep. in B. R.* 431.

CAP. C.

Serjeant at Arms.

1. ORDERED (*per Lord Chancellor* 13 *May* 7 *Geo.* 1. *Ex parte Servient' ad Arma*) "That from henceforth where any "Perſon is in Contempt, either for want of an Appearance "or Anſwer, or for not yielding Obedience to any Order of this "Court (unleſs it be for contemptuous Language, or the beating and "abuſing any Perſon in the Service of the Proceſs of this Court, or "other Contempts of the like Nature) the Serjeant at Arms attending "this Court do apprehend and bring the Contemner to the Bar of "this Court, to anſwer to ſuch Contempt; but if the Contemner "cannot be found, then to return *non eſt inventus*, to the End a Se-"queſtration may *regularly* iſſue according to the ancient Rules and "Practice of this Court, and that Proceſs do for the future iſſue ac-"cordingly; and that it may be made a Part of all Orders for giving "Time to anſwer, or for doing any other Act upon the Party's en-"tering his Appearance with the Regiſter, that the Party, when he "enters ſuch Appearance, do likewiſe conſent that a Serjeant at Arms "to go againſt him, as upon a Commiſſion of Rebellion returned "*non eſt inventus*, in the Caſe of Noncompliance; and that this "Order be hung up in the *Regiſter*'s and *Six Clerks* Offices of this "Court, that all Perſons may take Notice thereof, and yield Obedi-"ence to the ſame. *Prec. in Chan.* 553, 554.

CAP. CI.

Settlements.

(A) In what Caſes Marriage Settlements, without Articles or Agreements precedent, are good.

(B) What Limitations a Court of Equity will direct to be made in Settlements, &c.

(C) Of Variance between Articles and Settlements (*a*).

(D) Where Money is agreed or directed to be laid out in Land and ſettled, &c. in what Caſes a Court of Equity will decree the Payment, or force the laying it out; — And here where Money is agreed to be ſo laid out, &c. in what Caſes Equity will conſider the Land (ſo to be purchaſed and ſettled) as Money, or the Money (ſo to be laid out) as Land.

(*a*) *Vide* Tit. *Articles*, &c. (E) *P.* 38.

(A) In what Caſes Marriage Settlements, without Articles or Agreements precedent, are good.

1. A *SECOND* Marriage Settlement is recited to be made in Conſideration that the Wife had parted with the *former* Settlement, which appeared to be made after the Marriage; but was recited to be made in Conſideration of a Marriage Portion ſecured, but no Proof of any *previous* Agreement for ſuch Settlement; yet the Court preſumed it, and ſo the ſecond not voluntary againſt Bond Creditors. *Mich.* 1699. *Anon. Prec. in Chan.* 101.

The Reaſon of this Decree was, that his *Lordſhip* took the Deed of 1678 to be only in Nature of Articles for a Settlement; and that if a Bill had been brought to have carried it into Execution, the Settlement would have been ſo as to have made both the Son and Daughter Purchaſors of

2. *J. S.* married *M.* an Orphan of the City of *London*. *J. S. after* Marriage (in Conſideration of 1700 *l.* which was her Portion, and was but *then* paid him) by Indenture of 1678 covenanted with the Chamberlain of *London* and *A.* to levy a Fine of his *Freehold* Eſtate (whereof he was ſeiſed in Fee) *to the Uſe of himſelf for Life*, Remainder *to his Wife for Life*, for her Jointure, Remainder *to the Heirs Male of their two Bodies*, Remainder *to his own right Heirs*; and alſo covenants to ſurrender his *Copyhold* Lands to the ſame Uſes. *J. S.* died without levying a Fine or ſurrendering the Copyhold, leaving *B.* a Son, and *N.* his only Daughter, (now Plaintiff's Wife). After *J. S.*'s Death *M.* his Widow brought a Bill, and had a Decree to hold and enjoy the Eſtate during her Life. *B.* being indebted to the Value of 1400 *l.* by Deed of 1714, covenanted with his Creditors to levy a Fine of his *Freehold* Eſtate *to the Uſe of ſaid* M. *his Mother for Life*, Remainder *to the Defendants* (who were his Sureties for Payment of the

the reſpective Remainders; and as to the *Copyhold*, that being to be intailed by the ſaid Indenture of 1678, could not afterwards by a bare Surrender be defeated, without a particular Cuſtom had been found to have warranted it. On an Appeal to Lord Chan. *Cowper*, his *Lordſhip* ſaid, that if the Indenture of 1678 were to be looked upon only in Nature of Articles, then if a Bill had been brought to have carried it into Execution in the Father's Life-time, the Court would have decreed the Limitation to have been *to the firſt Son* and *the Heirs Male of his Body*, with Remainders *to the Daughters* and *the Heirs of their Bodies begotten*, the Remainder *to the Heir of the*

the 1400 *l.*) *for for five hundred Years*, Remainder *to himſelf in Fee*; and the Truſt of the Term was declared to be for Payment of 1400 *l.* and Intereſt, with a Covenant for farther Aſſurance, and at the ſame Time *B.* ſurrenders the Copyhold Lands to the ſame Uſes. Then *B. deviſes all his Freehold and Copyhold* Lands to Defendants, for the better indemnifying them againſt the ſaid 1400 *l.* and Intereſt, and makes them Executors, and dies without Iſſue, and *without* levying a Fine, leaving *D.* his Widow; and ſaid *M.* being dead, *N.* and her Huſband brought this Bill for a Diſcovery of Writings, and an Account of the Rents and Profits of the *real* Eſtate as belonging to *N.* and that Defendants might be obliged to ſurrender back the Copyhold Eſtate as belonging to *N.* And Lord *Harcourt* decreed accordingly, ſaving only Defendant *D.*'s Dower out of the Freehold Eſtate. *Mich.* 1715. *White* and *Thornborough*, *Prec. in Chan.* 425.

Body of the Father; and in ſuch Caſe, tho' the Son by a *Common Recovery might have barred the Remainder to the Daughters*; yet they would have a Chance for it in Caſe no ſuch Recovery had been, which ſhews the Reaſonableneſs of purſuing ſtrictly the Intents of ſuch Agreements; for the *Tenant in Tail* thro' Ignorance or Forgetfulneſs may omit to ſuffer ſuch Recovery, or he may be prevented by Death before he has compleated it, and then the *Remainder will take Place*; but his *Lordſhip* thought in *this* Caſe from the Circumſtance of paying the Portion at the ſame Time; and the *Chamberlain* of *London* being a Party, that it was more than Articles, and ought to be looked on as a Settlement, tho' he ſaid it was a very infirm and imperfect one; but taking it as a Settlement then by the Limitations thereof, as they now ſtand, tho' the Son would have had both Eſtates in him, and might by a Fine have barred them, yet his Covenant to levy a Fine only cannot affect the Plaintiff, who now *derives her Title not under the Son*, but *as Heir of the Body of her Father* per formam doni, and *is in Paramount the Eſtate in Tail Male which the Son took*. But as to the *Copyhold* Eſtate his *Lordſhip* ſaid, that could not be looked upon as a Fee-ſimple Conditional, (which Plaintiff's Counſel contended for, not being able to ſupport it as an Intail) and that the Son could not alien it before the Condition performed by having of Iſſue, for that every Body knew *Copyholds* were at firſt but a *Kind* of *Tenure in Villenage*, and in reſpect of the *baſe* Nature determinable at the Will of the Lord, tho' *now* indeed they have been *improved*, and *hardened by Time*; but *prima facie*, it muſt be taken that a Surrender by ſuch *Tenant in Tail will bind his Iſſue*, unleſs a particular Cuſtom were found that there ought to have been a Common Recovery; and that not appearing in the Caſe, his *Lordſhip* thought the Defendants had a good Title to the Copyholds, and therefore reverſed the former Decree as to *that*, but affirmed it as to the *Freehold*. *Ibid.* 428, 429. The *Reporter* by way of Note ſays, that ſeveral at the Bar were diſſatisfied with *this* and the *former* Decree as to the *Freehold*, and thought that the *Defendants having the Eſtate in Law in them by the Deviſe*, and *being juſt Creditors*, ought not to have had this Eſtate taken from them by the Aſſiſtance of a Court of Equity, and thought the *Diſtinction of an infirm Settlement* unintelligible. *Ibid.* 429.——*Note*; And that in this Caſe the Defendants themſelves had by their Anſwer plainly confeſſed, that they had Notice of the firſt Deed at the Time they became *Sureties*, and took the Son's Covenant to levy a Fine. *Ibid.*——*Gilb. Rep. in Eq.* 107. S. C. *in totidem verbis.*

3. *A. after* his Marriage, in Conſideration of an additional Portion of 100 *l.* paid by his Wife's Mother, (a Receipt whereof was indorſed on the Deed) ſettled an Eſtate of 100 *l.* a Year *upon himſelf for Life*, Remainder *to his firſt and other Sons*, &c. And *A.*'s Mother, who had an Intereſt in the Land, joined with him in the Conveyance. *A.* thirteen Years after mortgages this Eſtate with the uſual Covenants, and dies. Mortgagee brought a Bill to foreclоſe. Lord Chan. *Talbot* thought it would be very hard to call this a fraudulent Settlement, it being in Conſideration of a Marriage had, and of an additional Proviſion of 100 *l.* paid by the Wife's Relations, which cannot be called *voluntary* againſt a Creditor who lends his Money thirteen Years after. That the Indorſement was plain Proof that 100 *l.* was paid, and tho' for the Conſideration of 100 *l. per* Year, yet *in Marriage Settlements Things are not to be conſtrued ſo ſtrictly*, there *being Room for Bounty*; and every Man is bound to provide for his Wife and Family. Beſides, the Eſtate that moved from the Huſband's Mother (Defendant's Grandmother) may make him to be conſidered, in ſome Reſpect, as a Purchaſor of the Limitations to her Grandchildren. *Hil.* 1734. *Jones* and *Marſh*, *Caſes in Eq. Temp. Talbot* 64.

(B) What (a) Limitations a Court of Equity will direct to be made in Settlements, &c.

(a) *A. before* Marriage covenants in Conſideration of 2000 *l.* Portion, to ſettle Lands *on himſelf* and *his Wife for Life*, for her Jointure, *Remainder to their firſt*, &c. *Sons in Tail*, Remainder *to the Daughters in Tail*, Remainder *to himſelf in Fee*, with *a Power of Revocation to the Wife's Father*, then beyond Sea. *A.* died without making any Settlement, leaving his Wife and no Son, but two Daughters. *A.* by Will gives 200 *l.* to the Daughters, and if either died before twenty-one or Marriage, the Survivor to have the whole, and deviſes all the Lands to his Wife and her Heirs, and gives the Surplus of his perſonal Eſtate after Debts paid to his Wife, and makes her Executrix. Lord Keep. *Wright* decreed a Settlement to be made with Power of Revocation by the *Wife*'s Father, but his *Lordſhip* would not decree the Legacies to be a Satisfaction of the Settlement, but that the ſame ſhould be put out ſubject to the Contingencies in the Will. *Mich.* 1701. *Jaggard* and *Jaggard*, *Prec. in Chan.* 175.

Prec. in Chan. 421. S. C. *accord'.*

1 *Will. Rep.* 290. *Mich.* 1715. S. C. but takes no Notice of any real Eſtate, but that *J. S.* deviſed that all his Money in the Government Funds ſhould be laid out in a Purchaſe of Lands of 300 *l.* or 400 *l.* a Year, and ſettled on his eldeſt Son *A. and the Heirs Male of his Body*, Remainder *to his ſecond Son* B. *and the Heirs Male of his Body*, &c. and bequeathed the reſt of his perſonal Eſtate to *A.* and the Heirs Male of his Body, Remainder over in the ſame Manner. And *per Lord Chancellor*, It is clear the perſonal Eſtate cannot be intailed, but the whole Property thereof veſts in *A.* As to the other Deviſe he ſaid he would conſtrue it in the moſt liberal Senſe;

1. *J. S.* ſeiſed of a good real Eſtate, and alſo poſſeſſed of a conſiderable perſonal Eſtate, and having an Intention to ſettle and ſecure both in his Name and Family, by Will (after ſeveral Legacies given) gives and deviſes *all the reſt and Reſidue of his real and perſonal Eſtate to* A. *the Plaintiff and the Heirs Male of his Body, to be begotten for ever*, and *for want of ſuch Iſſue* to the Defendant, *and the Heirs Male of his Body* to be begotten *for ever*, with like Remainders over to ſeveral others of the ſame Name, and makes the Defendant his Executor, and dies. And now this Bill was brought to have an Account of the perſonal Eſtate, and that the Plaintiff might enjoy the ſame to his own Uſe abſolutely, the Remainder over being void. And the Defendant brought a Croſs-Bill, upon Pretence that there were no Directions in the Will to have the whole perſonal Eſtate inveſted in the Purchaſe of Lands to be ſettled in the Manner above mentioned. But upon reading of the Will, *Lord Chancellor* was clear of Opinion, that thoſe Directions tended only to ſuch Part of the perſonal Eſtate as was out upon Government Securities, (which was about 8000 *l.* or 9000 *l.*) and for the Reſidue (which amounted to 14,000 *l.* or 15,000 *l.*) that was plainly taken no other Notice of than in the Deviſe of *all the reſt and Reſidue of the real and perſonal Eſtate*. And for the Plaintiff it was inſiſted that the Deviſes over were abſolutely void, and the whole veſted in the Plaintiff as not capable of bearing any farther Limitation; and this Point the Defendant's Counſel gave up; but then they inſiſted that the Teſtator's Intent appearing to be to continue the real Eſtate, and the Lands to be purchaſed in his Name, this Court would order that the Settlement ſhould be made in ſuch Manner that the Plaintiff might not have Power to defeat the Remainders, and therefore that the Plaintiff ſhould be made *but Tenant for Life*, with Remainder *to his firſt and other Sons in Tail Male*, and *ſo for the others in Remainder*; and the *Attorney General* ſaid, the Houſe of Lords had made the like Proviſion for the Benefit of the Iſſue, that they might not be defeated by the Father. But *Lord Chancellor* ſaid, that was in Caſe of Marriage Articles, where the Intent was plain to provide for the Iſſue of the Marriage; but *here* the Teſtator has expreſsly given it to the Plaintiff in Tail Male, and therefore he thought this Court could not vary the Limitation; beſides that the Defendant has a Chance for the Remainder if the Plaintiff ſhould die without Iſſue before any Recovery ſuffered, and mentioned a Caſe where ſuch Remainder took Place by the Death of the Tenant in Tail without

and it being directed that Lands of 300 *l.* or 400 *l. per Annum* ſhould be purchaſed, it ſhall be 400 *l. per Annum*. That in Marriage Articles the Children are conſidered as Purchaſors (*b*), but in the Caſe of Wills (as this was) where the Teſtator expreſſes his Intent to give an Eſtate-tail, a Court of Equity ought not to abridge the Bounty directed by the Teſtator. *Ibid.* 291.

(*b*) In Marriage Articles the

without Iſſue before he could compleat a Recovery. Decreed that a Settlement in this Caſe to be made in the like Manner, and the Deeds and Writing to be brought before the *Maſter* for that Purpoſe. *Trin.* 1 *Geo.* 1. 1715. *Seale* and *Seale*, *Gilb. Rep. in Eq.* 105.

the Iſſue are particularly conſidered and looked upon as Purchaſors; and

for which Reaſon the Court has reſtrained the general Expreſſions made Uſe of by the Parties, for it cannot reaſonably be ſuppoſed that a valuable Conſideration would be given for the Settlement of an Eſtate, which, as ſoon as ſettled, the Huſband might deſtroy. *Per Lord Keeper, Eaſt.* 1711. in the Caſe of *Bale* and *Coleman*, 1 *Will. Rep.* 145.

2. In the Caſe of Marriage Articles for Settlement of an Eſtate *on the Huſband and the Heirs Male of his Body*, yet when they come into this Court for a *ſpecifick* Execution, the Court models the Settlement ſo as to make it effectual, and will *give the Huſband but an Eſtate for Life*. *Per* Lord Chan. *Cowper*, *Mich.* 1716. in the Caſe of *Brown* and *Barkham*, *Prec. in Chan.* 448.

Vide 2 *Vern.* 671. *Eaſt.* 1711. S. P. admitted *per* Lord Chan. *Cowper* in *Baile* and *Coleman*.—— *Prec. in Chan.*

422. *Mich.* 1715. *Seal* and *Seal.*——*Lucas's Rep.* 437. *Trin.* 5 *Geo.* 1. Lord Chan. *Parker* ſaid it was very common in Chancery to decree (tho' not according to the *Words* of the Articles, yet according to the *Intent* of them) that the *Huſband ſhould be only Tenant for Life*, and ſo not have it in his Power to defeat the *Intention* of the Settlement.

3. 10,000 *l.* being given in Marriage by the Father of the Huſband and the Father of the Wife, was agreed to be inveſted in a Purchaſe, and ſettled *on the Huſband for Life*, Remainder *to the Wife for Life as to Part*, *being* 300 l. per Annum, Remainder *as to the whole to the firſt*, &c. *Son in Tail Male*, Remainder *to the Huſband in Fee*; and in the mean Time to be placed out on Securities, the Intereſt to go as the Profits of the Land when purchaſed. This 10,000 *l.* was by Conſent of the Parents and Truſtees laid out in *South-Sea* Stock, and by the late Riſe of that Stock improved to above 30,000 *l.* and it being of a fluctuating Nature as to the Value, the Huſband and Wife who had two Sons brought their Bill againſt the Truſtees and the two Fathers and the Infant Sons, praying that the Stock might be ſold, and the Money laid out in Land and ſettled, and that in regard of the great Increaſe the Huſband might have 6000 *l.* of the Money to buy himſelf a Place. Decreed firſt by his *Honour*, and afterwards by Lord Chan. *Parker*, that as, if the Stock had fallen the Truſt muſt have ſuffered, ſo it's accidental Riſe or Improvement muſt be for the Benefit of the Truſt; and *Lord Chancellor* decreed that the Stock ſhould be ſold, and out of the Money produced thereby 18,000 *l.* ſhould be taken, of which the Huſband to have 6000 *l.* to his own Uſe, on *his quitting his Eſtate for Life in the* 12,000 l. which being the remaining two Thirds of the 18,000 *l.* ſhould go immediately to the Children and for their Benefit, out of which the Huſband to have an Allowance for the Maintenance of them, and in the Settlement of the Land to be bought with the 12,000 *l.* the Huſband's Eſtate for Life to be omitted; and to prevent the Son's ſuffering a Recovery on his coming of Age to bar his Brother in his Father's Life-time, and alſo the Father's Remainder in Fee, the Lands were directed to be limited to the *Father for Life*, with Remainder as to the Land to be bought with this 12,000 *l. to the firſt*, &c. *Son of the Marriage*, and the Father *to make a Leaſe for ninety-nine Years if he ſhould ſo long live*, In Truſt *for the immediate Benefit of the eldeſt Son*, by which Means the Freehold in the Father would prevent the Son's ſuffering a Recovery in the Father's Life-time; and the Reſidue of the Money ariſing by Sale of the Stock was directed to be inveſted in Land and ſettled *on the Huſband for Life*, &c. according to the Agreement. *Eaſt.* 1720. *Anon.* (Cauſe by Conſent) 1 *Will. Rep.* 648.

By the Regiſter's Book the Name of this Caſe appears to be *Hubert* and *Fetherſton*, and was decreed the 5 *April* 1720 *Ibid.* 650.—— In this Caſe the Remainder to the firſt Son, tho' but an Eſtate-tail to an Infant, and ſo unalienable during ſuch Infancy, was valued at two Thirds like a Remainder in Fee, and notwithſtanding Mr. *P. Williams* mentioned to the Court that the Life Eſtate (eſpecially in Caſe where the Tenant for Life had the Remainder in Fee) might be valued at two Fifths, which had been done in ſome Caſes (*a*), yet the Court ſaid, how equitable ſoever this might be, it was not the Practice, for

which Reaſon it would be dangerous and create Uncertainty to go out of the Rule; and the Regiſter ſaid he had never known a Life valued at more than one Third. *Ibid.* 650. (*a*) *Vide* 2 *Vern.* 267. *Prec. in Chan.* 21, 44.

But the Father being dead, the eldeſt Son having ſuffered a Recovery of the Lands, his *Honour* directed the Remainder in Fee of thoſe Lands ſubſequent to the Term for Years to be limited to the eldeſt Son in Fee, but with reſpect to the other Lands in Jointure, of which the Recovery had been ſuffered, he directed a new Settlement thereof to be made to the Son in Tail ſubſequent to the Term of five hundred Years for raiſing the Portions. *Ibid.* 154.

4. In a Marriage Settlement Lands were charged with Portions for younger Children, but the *Term raiſed for ſecuring the Portions was placed in the Settlement ſubſequent to the Eſtate to the firſt*, &c. *Sons*, which was helped in Equity. *Trin.* 1723. *Uvedale* and *Halfpenny*, 2 *Will. Rep.* 151.

As to the Queſtion, What Eſtate *D.* ſhould take, his *Lordſhip* ſaid, that conſidering it as a *legal* Deviſe executed, it is plain that the firſt Limitation with the Power [*of Impeachment of Waſte*] and Reſtriction [*of voluntary Waſte in Houſes excepted*] carries an Eſtate for Life only, ſo likewiſe of the Remainder to the Huſband; but then come the Words, *Remainder to the Iſſue of her Body*; the Word *(Iſſue)* does *ex vi termini* comprehend *all* the Iſſue; but ſometimes a Teſtator may not intend it in ſo large a Senſe; as where there are Children alive, *&c.*

5. *J. S.* deviſed all his real Eſtate to his Siſter *B.* and *C.* and *their Heirs and Aſſigns*, On Truſt *to receive the Rents*, &c. *'till his Granddaughter* D. *ſhould marry or die*, and *out of the Profits to pay her* 100*l. a Year for her Maintenance, the Reſidue to pay his Debts and Legacies*; and after Payment thereof, In Truſt for ſaid *D.* and upon further Truſt, *that if ſhe married a Proteſtant of the Church of* England, *and ſhe be then twenty-one or upwards*, or *if under twenty-one ſuch Marriage be with the Conſent of ſaid* B. *then to convey the Eſtate* with all convenient Speed after ſuch Marriage *to the Uſe of the ſaid* D. *for Life, without Impeachment of Waſte*, voluntary Waſte in Houſes only excepted, Remainder *after her Death to her Huſband for Life*, Remainder *to the Iſſue of her Body*, with ſeveral Remainders over; and upon further Truſt that if the ſaid *D.* died unmarried, then to the Uſe of the ſaid *B.* for Life, Remainder to the Son of his other Grandaughter *E.* in Tail, Remainder to the Defendant *C.* Remainder to his firſt, *&c.* Son, Remainder to *J. S.*'s right Heirs; and upon further Truſt that if *D.* married not as by the Will directed, then upon ſuch Marriage to convey to Truſtees *as to one Moiety to the Uſe of* D. *for Life*, Remainder *to Truſtees for preſerving contingent Remainders*, Remainder *to the firſt*, &c. *Son of* D. being a Proteſtant, Remainders over; and as to the other Moiety to the Son of his Grandaughter *E.* in like Manner. *J. S.* died. Soon after *D.* attained twenty-one, and about ſix Years afterwards applied to the Truſtees (ſhe being then upon a Treaty of Marriage with *F.*) for a Conveyance of the Eſtate *to herſelf for Life*, Remainder *to her intended Huſband for Life*, Remainder *to the Iſſue of her Body*. One Truſtee executed ſuch Conveyance, but the other refuſed. As to this *Lord Chancellor* ſaid, that the Truſtee who executed the Conveyance had done wrong, for nothing was to veſt 'till after *D.*'s marrying a Proteſtant; and therefore the Truſtee by conveying and enabling *D.* to ſuffer a Common Recovery (as ſhe has actually done) has done wrong; and his *Lordſhip* decreed *an Eſtate for Life only to* D. Remainder *to her Huſband*

That it may be a Word *of Purchaſe*, is clear from the Caſe of *Backhouſe* and *Wells*, and *of Limitation* by that of *King* and *Melling*, but it has not nor can be proved that *it may be both in the ſame Will*. As the Caſe of *King* and *Melling* has never been ſhaken, and that of *Shaw* and *Weigh*, or *Sparrow* and *Shaw*, which went up to the Houſe of Lords, was ſtronger, his *Lordſhip* ſaid he did not think that Courts of Equity ought to go otherwiſe than the Courts of Law. The Word *(Heirs)* is *naturally a Word of Limitation*, and when ſome other Words, expreſſing the Teſtator's Intent, are added, it may be looked on *as a Word both of Limitation* and *Purchaſe in the ſame Will*; but ſhould the Word *(Iſſue)* be looked upon as *both in the ſame Will*, what a Confuſion would it breed? For the *Moment any Iſſue was born*, or *any Iſſue of that Iſſue, they would all take*. The Queſtion then will be, Whether *J. S.* intended *D.*'s Iſſue to take by *Deſcent* or by *Purchaſe?* If by *Purchaſe, they can take but for Life*, and ſo *every Iſſue of that Iſſue will take for Life*; which will make a Succeſſion *ad infinitum* a Perpetuity of Eſtate for Life. This Inconvenience was the Reaſon that Lord *Hale* in *King* and *Melling*'s Caſe was of Opinion, *that the Limitation there created an Eſtate-tail.*——Reſtraint from Waſte has been annexed to Eſtates for Life, which have afterwards been conſtrued to be Eſtates-tail.——Where an expreſs Eſtate-tail is deviſed, the annexing a Power *inconſiſtent* with the Eſtate-tail will *not* defeat it, but the Power ſhall be void. Here the Power is annexed to the Eſtate for Life, which *D.* took firſt, and therefore his *Lordſhip* was rather inclined to think it ſtronger than *King* and *Melling*'s Caſe, where there was no *mediate* Eſtate, as here is, to the Huſband. There was an *immediate* Deviſe, here a *mediate* one; and ſo the applying this Power to the Eſtate for Life carries no *Incongruity* with it, and therefore his *Lordſhip* ſaid he was inclinable to think it an Eſtate-tail, as it would be at Law. But as to the Queſtion, How far in Caſes of Truſts executory, as this is, the Teſtator's Intent is to prevail over the Strength and *legal* Signification of the Words, his *Lordſhip* ſaid he thought that *in the Caſe of Truſts executed*, or *immediate Deviſes*, the *Conſtructions of the Courts of* Law *and*

Huſband (ſhe being married to the Plaintiff a Proteſtant) *for Life*, Remainder *to their firſt*, &c. *Son*, Remainder *to Daughters*. *Mich.* 1733. *Lord Glenorchy* and *Boſville*, *Caſes in Eq. Temp. Lord Talbot* 3. Equity *ought to be the ſame*; for there the Teſtator doth not ſuppoſe any other Conveyance will be made; but *in executory Truſts* he leaves ſomewhat to be done, *viz.* to be executed in a more *careful* and *accurate* Manner; and his *Lordſhip* ſaid, that the Caſe of *Leonard* and *The Earl of Suſſex*, if it had been *by Act executed, would have been an Eſtate-tail, and the Reſtraint had been void*, but being an *executory Truſt*, the Court *decreed according to the Intent as it was found expreſſed in the Will*, which muſt *govern* the *Conſtruction* in the *preſent Caſe*; and therefore decreed *ut ſupra*. *Ibid.*

(C) Of Variance between Articles and Settlements (*a*).

(*a*) *Vide* Tit. *Articles*, &c. (E) *P.* 38.

1. BY Marriage Articles the eldeſt Son was made Tenant in Tail, Proviſo, that the Father might ſell the Lands by the Conſent of the Truſtees, and purchaſe other Lands, and ſettle them to the like Uſes. The Father ſells the Lands, and with the Money purchaſed other Lands, but by this Settlement the eldeſt Son was made only Tenant for Life; yet held good. And *per Cur'*, The eldeſt Son being now made Tenant for Life only, ſhall not be at Liberty to incumber any Part of the Lands. *Hil.* 11 *Geo.* 1. *Reeves* and *Reeves*, 2 *Mod. Caſes in Law and Eq.* 128 to 132.

2. Where Articles are entered into *before* Marriage, and the Settlement is made *after* Marriage different from thoſe Articles, as if by the Articles the Eſtate was *to be in ſtrict Settlement*, and by the Settlement the *Huſband is made Tenant in Tail*, whereby he has it in his Power to bar the Iſſue, this Court will ſet up the *Articles* againſt the *Settlement*; but where both *Articles* and *Settlement* are *previous* to the Marriage at a Time when all Parties are at Liberty, the *Settlement differing from the Articles* ſhall be taken as a *new* Agreement between them, and will controul the Articles; and tho' in the Caſe of *Weſt* and *Erriſley* (*b*), *Mich.* 1726. *in Scac'*, and in the Houſe of Lords in 1727. the Articles were made to controul the Settlement made before Marriage, yet that Reſolution no ways contradicts the general Rule, for in that Caſe the Settlement was expreſsly mentioned *to be made in Purſuance and Performance of the Marriage Articles*, whereby the Intent appeared to be ſtill the ſame as it was at the making the Articles. *Vide Caſes in Eq. Temp. Talbot* 20. Cited by way of Note as ſaid by Lord Chan. *Talbot*, *Nov.* 10, 1736. in the Caſe of *Legg* and *Goldwire*.

(*b*) *Vide P.* 38. *Ca.* 2.

(D) Where

(D) Where Money is agreed or directed to be laid out in Land and ſettled, &c. in what Caſes a Court of Equity will decree the Payment, or force the laying it out;—And here where Money is agreed to be ſo laid out, &c. in what Caſes Equity will conſider the Land (ſo to be purchaſed and ſettled) as Money, or the Money (ſo to be laid out) as Land.

1. *J. S.* on his Marriage with *M.* ſettles Lands In Truſt *for himſelf for Life*, Remainder *to Truſtees to ſupport*, &c. Remainder *to* M. *for Life*, Remainder *to the firſt*, &c. *Son of the Marriage in Tail Male ſucceſſively*, Remainder *to the Daughters in Tail*, Remainder *to himſelf in Fee*; and having aſſigned over his Annuities (which were Banker's Aſſignments, and eſtabliſhed by Act of Parliament, and made a *perpetual* Annuity redeemable by Parliament, and are thereby to go to the Executors) to the ſame Truſtees, In Truſt *to pay the ſaid yearly Annuities to ſuch Perſons as ſhould be intitled to the Profits of the Land ſo ſettled as aforeſaid*; and *in Caſe the Principal ſhould be paid in, then* the Truſtees *ſhould lay out the Monies in the Purchaſe of Lands to be ſettled to the ſame Uſes. J. S.* died without Iſſue, leaving no Will but what he had made before his Marriage, in which he had given ſeveral Legacies and Bequeſts, (all which Deviſes were revoked by his ſubſequent Settlement) and had made *B.* Executor. The Brother and Heir of *J. S.* brought a Bill againſt the Teſtator's Widow and *B.* Decreed *per* Lord Keep. *Harcourt*, that theſe Annuities being redeemable by Parliament, were as a Mortgage aſſigned to Truſtees, and directed, when paid in, to be inveſted in a Purchaſe, and ſettled as the Fee-ſimple Lands were above ſettled; and therefore, tho' the Wife was to have an Eſtate for Life in the Annuities by her Jointure Deed, yet, after her Death, the Annuities ſhould not be looked upon as *perſonal* Eſtate, a Moiety of which, on ſuch Conſtruction, would by the Cuſtom of *London* belong to her Repreſentatives, but as Money directed to be laid out in Lands, and to be as a real Eſtate, which, after *M.*'s Death, would go to the Plaintiff as Heir at Law of *J. S. Trin.* 1712. *Diſher* and *Diſher*, 1 *Will. Rep.* 204.

2. 2000 *l.* (whereof 1500 *l.* were the Wife's Portion, and 500 *l.* the Huſband's Money) were agreed by Articles *before* Marriage to be inveſted in Lands *to be ſettled upon the Huſband and Wife for their Lives*, Remainder *to the Heirs of the Body of the Wife by the Huſband*, Remainder *to the Heirs of the Huſband.* The Huſband receives the 2000 *l.* The Wife dies, leaving a Son and three Daughters; then the Huſband dies inteſtate, and his *eldeſt* Daughter adminiſters to him; the Son brings a Bill againſt his Siſter (the Adminiſtratrix) to have the Money paid to him, he electing not to have it laid out in Lands. Decreed accordingly, and the Adminiſtratrix indemnified. *Mich.* 1710. *Benſon* and *Benſon* (*a*), 1 *Will. Rep.* 130 (*b*).

3. *J. S.* deviſed 1000 *l.* to be laid out in a Purchaſe of Land in Fee, to be ſettled upon *A. B.* and *C.* and their Heirs, *equally to be divided*;

For it is in vain to lay out this Money in Land for *B.* and *C.* when the next Moment they may turn it into Money; and Equity, *like Nature*, will do nothing in vain. *Per Lord Chancellor, ibid.*——But as to the Share of the Infant, that muſt be brought before the *Maſter*

(*a*) *Vide P.* 41. (F) *Ca.* 1. and the Notes there.

(*b*) This Caſe is miſplaced in Point of Time.

divided; *A.* dies, leaving an Infant Heir; and *B.* and *C.* together with the Infant Heir, bring a Bill for this 1000 *l.* And *per* Lord Chan. *Cowper*, The Money being directed to be laid out in Land for *A. B.* and *C.* equally, (which makes them Tenants in Common) and *B.* and *C.* electing to have their two Thirds in Money, he ordered it to be paid to them. *Mich.* 1717. *Seeley* and *Jago*, 1 *Will. Rep.* 389.

Maſter, and put out for his Benefit, who, by reaſon of his Infancy, is *incapable* of making an Election.

Beſides, that ſuch Election might, were he to die during his Infancy, be prejudicial to his Heir. *Per* his *Lordſhip*, *ibid.*

4. *J. S.* the Plaintiff's Father on his Marriage with *M.* the Plaintiff's Mother (in Conſideration of 3000 *l.* Portion) ſettled Lands, and alſo covenanted to lay out 2000 *l.* (then in the Hands of Truſtees) in the Purchaſe of Lands, to be ſettled on himſelf and his Heirs. The Marriage took Effect; *J. S.* died inteſtate, leaving Iſſue one Daughter only the Plaintiff, but in his Life-time he had received 1350 *l.* Part of the 2000 *l.* and laid it out in the Purchaſe of an Office for his Life. *M.* his Widow adminiſtered to him, and the Plaintiff as the only Iſſue and Heir of *J. S.* brought this Bill to have the Covenant in the Marriage Settlement performed in Specie, and alſo for two Thirds of her Father's perſonal Eſtate under the Statute of Diſtribution. And his *Honour* held, that the remaining 650 *l.* ought to be taken as Land, and go to the Plaintiff as (*a*) Heir, and decreed that the 650 *l.* ſhould be brought before a *Maſter* for the Plaintiff's Benefit, (being an Infant) but would not decree it to be laid out in Land, becauſe if the Plaintiff ſhould die before ſuch Diſpoſition, it would go to her Heir of Courſe. *Mich.* 1718. *Chaplin* and *Horner et Ux'*, 1 *Will. Rep.* 483.

His *Honour* obſerved that the Diſpute in *this* Caſe was not betwixt the Party himſelf, the Father, and the Party who was to pay the Money, but betwixt the Heir and Executor[Adminiſtrator] who became intitled to this Money ſubject to the Covenant; and it was the rather to be deemed a *real* Eſtate,

becauſe this was Part of the Marriage Agreement; and the Covenant was made in Conſideration of a Marriage and a Marriage Portion. *Ibid.* 486.——In the Caſe of and *Marſh*, *Eaſt.* 1723. at the *Rolls*, where Money was articled to be laid out in Land, and ſettled on the firſt, *&c.* Son in Tail, the Court, in order to preſerve the Chance to the *ſecond* Son, would not decree the Money to the *eldeſt* Son, but ordered the ſame to be inveſted in a Purchaſe purſuant to the Articles; the *eldeſt Son got one to lend him a Purchaſe*; and to ſettle it with an Intention forthwith to ſuffer a Recovery, and to reconvey the Eſtate back to the Seller; and tho' all this appeared by the *Maſter*'s Report, yet his *Honour* (after ſome Heſitation) allowed it. *Ibid.* 485. by way of *Note*. The Reporter adds a *Quære*, Whether the Money might not better have been paid to the eldeſt Son? *Ibid.*

(*a*) *Vide* the Caſe of *Scudamore* and *Scudamore*, *Prec. in Chan.* 544. the like Determination by Lord Chan. *Parker*.

5. *J. S.* a Freeman of *London*, on his Intermarriage with *M.* agrees with Truſtees to add 1500 *l.* to the Wife's Portion, which was alſo 1500 *l.* to be laid out within two Years after the Marriage in a Purchaſe of Lands *to be ſettled on* J. S. *for Life*, Remainder *to* M. *for Life* in Lieu and Bar of her Dower and Jointure, Remainder *to their Iſſue*. Lord *Macclesfield* was clear of Opinion, that from the Time of the Articles the Money was a Debt which *J. S.* was obliged to pay; that it was no Part of his *perſonal* Eſtate from that Time, but muſt be looked on as Land, and then it could be no Bar of *M.*'s cuſtomary Part of the perſonal Eſtate; that the *Cuſtom did not operate at all 'till the Party's Death*, and then whatever *perſonal* Eſtate was left was to go according to it. *Mich.* 1718. *Babington* and *Greenwood et Ux'*, *Prec. in Chan.* 505.

6. Truſt Money is directed to be laid out in Land *to be ſettled on* A. *for Life*, Remainder *to her firſt*, &c. *Son in Tail*, Remainder *to ſuch Son in Fee*; and until a Purchaſe the Money to be put out at Intereſt, and the Intereſt to go as the Profits of the Land, *&c.* *A.* the Mother and *B.* (her only Son) came to an Agreement that a third Part

On hearing the Cauſe by Conſent, *Lord Chancellor* determined that if a *Remainder* Man had but a Chance for the Eſtate or

the Money, which could not be barred without a Recovery, there in regard the Tenant in Tail might die before ſuch Recovery ſuffered, or might die in Vacation when a Recovery could not be ſuffered, a Court of Equity,

whoſe Buſineſs it is to aid the Intent of the Party, ought not, in Violence of ſuch Intent, to decree the Payment of the Money to the Tenant in Tail, but ought to decree it to be laid out in the Purchaſe of Lands to be ſettled according to the Direction of the Party, in order that the Chance which was intended the *Remainder Man* might be preſerved, and when the Settlement was made, the Tenant in Tail might, if he thought fit, ſuffer a Recovery, which Matter was ſo decreed by Lord *Cowper* in the Caſe of *Colwell* and *Dr. Shadwell* (*b*); but in the *principal* Caſe, where the Mother *was Tenant for Life*, Remainder *to the ſame Son in Fee*, ſo that the Son might by Fine (*c*) only, bar theſe Limitations, and which Fine might be levied in Vacation as well as Term, it would be in vain for Equity to decree a Settlement, which, the ſame Moment that it was made, might be cut off. *Per Lord Chancellor, ibid.* 471.—It ſeems that if the Son had been an Infant (*d*) the Court would not have ordered the Payment of the Money; for during the Infancy no Fine could have been levied. *Ibid.*

Part of this Money ſhould be paid to *A.* and two Thirds to *B.* and bring a Bill againſt the Truſtees to pay it, who ſubmit, being indemnified. Lord Chan. *Parker* directed the Truſtees to pay the Money accordingly, and to be indemnified, but ſaid, that if there had been two Sons, or any Perſon in Remainder, he would not have decreed the Payment of this Money. *Trin.* 1718. *Short* and *Wood* (*a*), 1 *Will. Rep.* 470.

(*a*) *Vide* 2 *Will. Rep.* 173. S. C. cited *arg'* *Trin.* 1723. and admitted by Lord *Macclesfield* in the Caſe of *Edwards* and *Lady Warwick*.
(*b*) See the S. C. cited *arg'* in the Caſe of *Chaplin* and *Horner*, 1 *Will. Rep.* 483.
(*c*) *Vide Benſon* and *Benſon*, *P. Ca.* and 2 *Vern.* 551.
(*d*) *Vide Legate* and *Sewell*, 1 *Will. Rep.* 87.

CAP. CII.

Ship (Maſter of a).

1. IN a Voyage the Maſter of a Ship is the Owners Servant, and his Duty requires him to provide Neceſſaries for the Ship, and it is the Owners Intereſt that they ſhould be provided; therefore what the Maſter *neceſſarily* takes up (tho' not upon Bottomry) and employs for that Purpoſe, the Owners muſt pay. 27 *Mar.* 1710. *Cary* and *White*, *Vin. Abr.* Tit. *Maſter of a Ship*, (B. 2.) *Ca.* 4. *P.* 384.

Vide P. Ca. this Caſe more fully abridged.

2. The Maſter of a Ship goes upon a Trading Voyage and dies; the ſucceeding Maſter opens publickly the Effects of the Deceaſed, and then ſends a Letter with a Bond incloſed to the Widow to anſwer to her the Sum of 300 *l.* if the Ship arrived ſafe, the Sum the Deceaſed left being 200 *l.* which was the Rate of *Reſpondentia* Bonds there. Decreed by Lord Keep. *Harcourt* that the Succeſſor was a Truſtee, and ſhould be anſwerable for what he actually made of the Money. *Eaſt.* 10 *An. Brown* and *Litton*, *Lucas's Rep.* 20.

3. A Maſter of a Ship takes upon him to ſell the Ship at an *under Value* to the Agent of the *Eaſt-India* Company. This is a Breach of Truſt in the Maſter; and decreed that the *Eaſt-India* Company ſhould anſwer for the real Value of the Ship and Cargo, but not for Poſſibility of Gain. 1 *Dec.* 1718. *Eaſt-India Company* and *Ekins*, *Vin. Abr.* Tit. *Maſter of a Ship*, (B) *Ca.* 26. *P.* 348.

CAP. CIII.

Solicitor in Chancery (a),

(a) By the Stat. 5 *Geo.* 2. *cap.* 30. *S.* 46. all Bills of Fees or Diſburſements demanded by any Solicitor employed under any Commiſſion of Bankrupts ſhall be ſettled by one of the Maſters in Chancery, and the Maſter who ſhall ſettle ſuch Bill ſhall have for his Care in ſettling the ſame, as alſo for his Certificate thereof, 20 *s.*

1. UPON the *Solicitor*'s appearing to have been guilty of a groſs Neglect, the Court ordered him to pay Coſts. *Per Parker* C. *Mich.* 1719. in the Caſe of *Fawkes* and *Pratty*, 1 *Will. Rep.* 593. *Vide P. Ca. S. C.* more fully abridged.

2. The Court will commit a Solicitor for obtaining an Order in an undue Manner, upon 5 *Geo.* 2. *Barnard. Rep. in Chan.* 403.

3. *J. S.* a Client in the Country employs *A.* a Solicitor in the Country in a Cauſe in Chancery. *A.* employs *E.* as a Clerk in Court. *J. S.* pays *A.* but *E.*'s bill is unpaid. *J. S.* is not bound to pay *E.* but if *E.* has any Papers in his Hands, he may retain them 'till paid. Decreed *per* Lord Chan. *King*, *Eaſt.* 1728. *Farewell* and *Coker*, 2 *Will. Rep.* 460. And his *Lordſhip* ſaid, that if any thing remained due from *J. S.* to *A.* he would ſtop it, and it ſhould be paid to *E.* the Clerk in Court. And here being ſome Proofs by Affidavits of *J. S.*'s retaining *E.* to take Care of the Cauſe, his *Lordſhip* ordered that to be tried in an Action at Law to be brought by *E.* againſt *J. S.* *Ibid.* 461 —*J. S.* employed *B* a Solicitor, who employed *S.* a Clerk in this Court. *S.* had an Order for taxing the Bill of Coſts due to him from *B.* On Taxation a *ſmall* Sum was taken off the Bill; thereupon *S.* had an Order for Payment of the Coſts incurred by ſuch Taxation, and proſecuted *B.* to a Commiſſion of Rebellion, but being not likely to recover any Thing from *B.* he petitioned that he might detain *J. S.*'s Papers, not only 'till the Coſts reported to be due were paid him by the *firſt* Order, but alſo 'till thoſe Coſts were paid him by the former Taxation. And *Lord Chancellor* was of Opinion that *S.* might detain the Papers 'till the Coſts reported to be due to him by the *firſt* Order, but not 'till the Coſts incurred by the Taxation, were paid him. *Mich.* 1740. *Cockerel* and *Barnard. Rep. in Chan.* 264, 265.

4. *J. S.* was *W.*'s Solicitor; an Order was obtained for taxing his Bill, and that *W.* ſhould pay the Money due on the Taxation, *and* J. S. *was to be examined on Interrogatories.* Afterwards *J. S.* being under Proſecution for Forgery, abſconded, but he aſſigned the Benefit of his Bill of Coſts *to* H. *for a valuable Conſideration.* *H.* petitioned that he might be allowed to ſtand in *J. S.*'s Place, and that the Money due on the Bill might be paid him, and *Lord Chancellor* was of Opinion that he ought, but inclined to think that he could have no Order for the Payment of any Part of this Bill 'till he could get *J. S.* to be examined on Interrogatories. 1740. *Wilſon* and *Williams*, *Barnard. Rep. in Chan.* 263, 264.

5. Equity will not order a Solicitor's Bill to be retaxed without undertaking to pay what ſhall appear due on ſuch Retaxation. *Mich.* 1740. *Murſy* and *Balderſton*, *Barnard. Rep. in Chan.* 266. Tho' it is not neceſſary for a Solicitor to take out a *Subpœna* for his Coſts, yet he muſt ſerve his Client with the Order for taxing his Bill of Coſts, and with the Maſter's Report, whereby ſuch Coſts are aſcertained, before he can take out an Attachment for them. *Ibid.*

CAP. CIV.

South-Sea (a) Subſcriptions.

(a) One of the late Directors of the *South-Sea* Company owes Money, which is recovered againſt him at Law; tho' all his Eſtate taken from him by the late Act of 7 *Geo.* 1. *c.* 27. and Proviſion made for his Creditors out of his Eſtate, yet Lord Chan. *Parker* denied an Injunction. *Eaſt.* 1721. *Holditch* and *Miſt*, 1 *Will. Rep.* 695.

That this Subſcription by the Executors was to be looked upon as of equal Force with a Subſcription made by Guardians, which will bind an Infant; but then it being done without the Widow's Conſent, the ſame ſhould

1. M. HAD 200 *l.* Exchequer Annuities, which were aſſigned by *J. S.* her *intended* Huſband to her Truſtees, *In Truſt for herſelf for her Jointure.* About ten Years after the Marriage the Huſband died, and his Executors ſubſcribed the Annuities unto the *South-Sea* without the Wife's Privity, but ſhe having Notice thereof, and when the Company were in Proſperity, inſiſted upon having a Proportion of the Benefit of that Subſcription. And Lord *Macclesfield* held the Wife to be bound by the Subſcription of theſe Annuities into the *South-Sea*; the ſame being done by the Executors, who had the *legal* Eſtate; and the *Aſſignment* of the Annuities upon *M.*'s Marriage had never been regiſtered *in Scac'*, and conſequently were void. Coſts ordered to *M.* out of *J. S.*'s Aſſets. *Mich.* 1722. *Powell and Hankey* and *Cox*, 2 *Will. Rep.* 82, 85.

be made good out of *J. S.*'s *perſonal* Eſtate, and if that ſhould prove deficient, out of his *real* Eſtate, he having *covenanted for himſelf and his Heirs to make good theſe Annuities to his Wife*; and this was ſo ordered, notwithſtanding ſhe was repreſented as having inſiſted afterwards upon receiving the imaginary Benefit of this Subſcription, for that that looked rather like looſe Diſcourſe than any Thing elſe; at leaſt, it would be too hard, for that Reaſon, to deprive her of the Proviſion which was ſtipulated for her on her Marriage. *Per Lord Chancellor*, who admitted there was a Clauſe in the Act of 6 *Geo.* 1. *c.* 4. *ſect.* 23. for making *good all Subſcriptions made by Truſtees, Executors* or *Guardians*, but he ſaid this was for the *Benefit, Quiet* and *Security* of the *South-Sea* Company, which this Decree would not break into; on the other Hand the Executors offering by their Anſwer to make this good to *M.* (notwithſtanding that *two of the reſiduary Legatees* in *J. S.*'s Will *were Infants*, and ſo could *not be bound by the Executors Conſent*) ſhewed plain enough what was the Intention of all the Parties touching the Subſcription *(viz.)* that the Wife ſhould not be deprived of the Benefit of her Settlement who did not ſeem to have had any Means of compelling the Executors to let her into the Benefit of the Subſcription of theſe Annuities, had there been any. *Per Lord Chancellor, ibid.* 85, 86.

His *Honour* laid great Streſs upon a Decree which he himſelf had made about a Year ſince when he ſat at *Weſtminſter* for *Lord Chancellor* in the Caſe of *Bluck* and *Nichols*, and which, he ſaid, was not ſo ſtrong for the Defendant as the *principal* Caſe; for there Lottery Tickets payable to the Bearer, and

2. Plaintiff *M.* the Siſter of Plaintiff *T.* had Money in *A.* a Goldſmith's Hands, for which ſhe had *A.*'s Note. Plaintiff *T.* by Letter ordered *A.* to inveſt the Money in Lottery Tickets, but did not direct in whoſe Name thoſe Lottery Orders ſhould be taken. *A.* inveſted the Money accordingly, and took the Orders in his own Name, and afterwards *ſubſcribed the Lottery Orders* (with other Orders of his own and Cuſtomers) into the *South-Sea*, but gave no Notice 'till two Months after the Subſcription made. On a Bill by *T.* and *M.* to compel *A.* to procure for them Lottery Orders to the Amount of thoſe which he *without their Conſent* had ſubſcribed into the *South-Sea*, his *Honour* thought that by the Words of the Act of 6 *Geo.* 1. *c.* 4. *ſ.* 23. impowering all *Truſtees, Guardians, Executors* and *Adminiſtrators*, to ſubſcribe Lottery Tickets into the *South-Sea*, tho' the *Ceſtuy que Truſt* had in this Caſe expreſsly forbid the Truſtee to ſubſcribe, yet by Virtue of the expreſs Authority given to Truſtees, *&c.* to ſubſcribe, (in which

which were left with the Banker or Goldſmith only for ſafe Cuſtody, were ſubſcribed by him into the *South-Sea*, upon which the *Proprietor* who left them brought a Bill againſt the Banker, and his *Honour* diſmiſſed

which Authority given by Parliament the *Conſent of every Proprietor* and *Ceſtui que Truſt* is intended notwithſtanding ſuch Prohibition) the ſubſequent Words would be good, and the Truſtees juſtified; and that it would be a very unjuſt Thing in the Parliament, if it were to be conſtrued that the Act had made the Subſcription good, and yet the Truſtee liable to be ſued, and to be anſwerable for the ſame to the *Ceſtui que Truſt:* But that the *principal* Caſe does not go ſo, for here was no Prohibition from the *Ceſtui que Truſt.* That from the Time of *A.*'s taking the Orders in his own Name he became a Truſtee. And his *Honour* diſmiſſed the Bill *with Coſts* general as to both the Plaintiffs, but that if Plaintiff *T.* would apply, the Court would on Petition order that the other Plaintiff the *Ceſtui que Truſt* ſhould pay *all the Coſts* (*a*). *Trin.* 1723. *Trenchard and Ippiſley* and *Wanley*, 2 *Will. Rep.* 166.

miſſed it, for that it was a hard Caſe that the Banker, who was but a Truſtee, ſhould ſuffer for doing what was then thought to be for the beſt; and if the Plaintiff was wronged, he was at Liberty to take his Remedy at Law; which Decree

the Court had the greater Regard to, as the Parties acquieſced under it, and brought no Appeal. Cited *per* his *Honour*, *ibid.* 169. (*a*) The ſame Point was determined by Lord *Macclesfield* in the following Term in the Caſe of *Weaver* and *Fowler*. *Ibid.* 170. in a Note by the Editor.

CAP. CV.

Stocks.

1. MORTGAGEE of *South-Sea* Stock ſells Part; he was liable to account. *May* 1727. *Harriſon* and *Franks*, *MS. Rep.*

2. *J. S.* purchaſed 1000 *l. South-Sea* Stock, and accepted the ſame in the *South-Sea* Books. Afterwards another of the *ſame Name*, but not known by the ſame Deſcription, (and who at the ſame Time was Owner of ſome *South-Sea* Stock) by ſome Means or other got the 1000 *l.* Stock belonging to the firſt *J. S.* placed to his Account in the *South-Sea* Books, and ſome Years after transferred the ſame to *R.* his Broker in order to ſell it, and *R.* accordingly did ſell it. Both the *J. S.*'s died. On a Bill brought by the Repreſentative of the firſt *J. S.* *Lord Chancellor* was of Opinion, that the Plaintiff might elect either to have this ſpecifick Quantity of Stock now bought for her, or elſe to have a Satisfaction for it at the Time it was ſold out, and thereby a Converſion made of it. *Hil.* 1740. *Harriſon* and *Pryſe*, *Barnard. Rep. in Chan.* 324.

And his *Lordſhip* ſeemed inclined to think, that the Company might be liable in Caſe there ſhould be no Sufficiency of Aſſets in the Hands of the Repreſentative of the laſt *J. S.* becauſe they muſt be conſidered as Truſtees for

the firſt *J. S.* at the Time he purchaſed this Stock, and as the ſame was transferred without his Privity, they muſt be conſidered as continuing his Truſtees, but his *Lordſhip* ſaid it would be ſoon enough to determine this Point when an Account is taken of the Aſſets. *Ibid.* 326.

3. If Stock belonging to a Teſtator is given by his Will ſubject to a Contingency, the Court does not preſume that the Stock will always remain in the ſame Plight, and if it is converted into other Stock, the Stock into which it is ſo converted ſhall be ſubject to the ſame Contingency. *Per Lord Chancellor*, *Hil.* 1740. in the Caſe of *Batten* and *Whorewood*, *Barnard. Rep. in Chan.* 422.

CAP. CVI.

Supplicavit (a),

(a) This Writ is not much in Uſe at this Day.
1 *Hawk. Pl. C.* 128. *c.* 60. *ſ.* 10.

1. UPON a Motion for a Supplicavit at the Suit of *J. S.* a Barriſter at Law, upon Articles filed on Oath *of Aſſault and Battery againſt* C. *and that he went in Fear of his Life*, *Lord Chancellor* granted the Writ, which commanded *C.* to find Sureties for the Peace for twelve Months, and ordered it to be indorſed for 4000 *l.* which the Party and his Sureties ſhould be bound in. *Mich.* 1723. *Mr. Clavering's Caſe*, 2 *Will. Rep.* 202.

Afterwards a Motion was made to diſcharge the Order, or at leaſt to leſſen the Sum, *C.* being only Tenant for Life of his Eſtate, and mentioned the Stat. 21 *Jac. c.* 8. which gives Coſts in Caſe of a groundleſs and vexatious Complaint of this Nature; but Lord Chan. *Macclesfield* would not diſcharge the Order, for then *C.* may kill *J. S.* and his *Lordſhip* ſaid, the Court interpoſes in this Caſe to prevent Miſchief and to ſave Life, and it is an Order of Courſe; if *C.* complains of Vexation, he comes too ſoon; let him ſtay 'till the Year is out, and behave himſelf quietly all that Time; it ſeems *C.* is a Man of a turbulent and dangerous Spirit, that his Friends are afraid to be bound for his quiet Behaviour, and if the Sum be too great for his Circumſtances, there ought to be an Affidavit to prove this, and ſo his *Lordſhip* denied the Motion. *Ibid.* 203.——It ſeems his *Honour* generally refuſed to grant this Writ, directing the Party aggrieved to apply to the Juſtices of the Peace. *Ibid.*——After an Impriſonment for fifteen Months upon a *Supplicavit*, and no Proſecution commenced againſt the Defendant in all that Time, the Party was diſcharged on very ſlender Security. *Eaſt.* 4 *Geo.* 2. *Groſvenor* and *Edwards in B. R. Fitz-Gibb.* 268.

CAP. CVII.

Survivor.

1. DEVISE of Lands *to Huſband and Wife for their Lives*, and *after the Deceaſe of the Wife* then *to the Child or Children*; upon the Death of the Wife the Huſband's Eſtate determines. *Per* his *Honour*, *Mich.* 1734. *Cowper* and *Cowper*, 2 *Will. Rep.* 652, 671, 672.

But a Limitation to them *for their natural Lives* will undoubtedly carry an Eſtate for *both their Lives* during the Life of the Survivor, *per* his *Honour*, *ibid.* 671. Cites *Brudenell's* Caſe, 5 *Rep.* 9. And his *Honour* ſaid, that this is the *legal* as well as *literal* and *grammatical* Conſtruction of a Limitation to *A.* and *B.* for the Term of their Lives; for the Term of their Lives being *plural* muſt comprehend both and join them together; which is the *legal* Conſtruction too, where there is no particular Reaſon to vary from it; as where an Office is granted to two *pro termino vitarum ſuarum*, this was held in Auditor *Curl's* Caſe, 11 *Rep.* 3 *b.* to be determined upon the Death of one; but in a Limitation of Lands, it is otherwiſe; and the Reaſon of the Difference is this: A *Jointenancy of Lands may be ſevered*, and if it be not, the Intereſt muſt conſequently ſurvive, which is otherwiſe in an Office; and that it is ſo in Lands, is not from the Import of the Words of that Limitation, but from the *Inſtitution* or *Operation of Law*; for, if the Words imported a *Survivorſhip*, it would be ſo in both Caſes; beſides, upon a *Severance of the Jointenancy in Land, the Eſtate does not continue during the Life of each Donee*, but *determines upon the Death of one for his Moiety, and of the other for his.* And cited *Dy.* 67. *a.* and 1 *Inſt.* (191.) 197. *a.* *Ibid.* 672.

CAP. CVIII.

Tenant by the Curteſy.

(A) Tenant by the Curteſy, in what Caſes, et econt'.—And of what.

1. BY Stat. 3 *Jac.* 1. *cap.* 5. a Popiſh Recuſant Convict who is married otherwiſe than in open Church, and by a lawful Miniſter according to the Orders of the Church of *England*, ſhall not be Tenant by the Curteſy.

2. *A.* ſeiſed in Fee had Iſſue two Daughters *L.* and *M.* and deviſed his Land to Truſtees in Fee, In Truſt to pay his Debts, and to convey the Surplus to his Daughters equally. *M.* married and died, leaving an Infant a Son and her Huſband ſurviving. On a Bill for Partition by *L.* the Huſband of *M.* in his Anſwer had ſworn that he married *M.* upon a Preſumption that ſhe was ſeiſed in Fee of a legal Eſtate in the Moiety, and that at the Time of the Marriage ſhe was in the actual Receipt of the Profits of ſuch Moiety; and it was admitted that this Truſt was not diſcovered 'till after *M.*'s Death, nor until it was agreed that a Partition ſhould be made. Decreed *per* Lord Chan. *Cowper* that an Eſtate for Life in a Moiety in Severalty ſhould be conveyed by the Truſtees to the Huſband, with Remainder in Fee to his Son. *Hil.* 1708. *Watts* and *Ball* (*a*), 1 *Will. Rep.* 108.

And his *Lordſhip* ſaid, that Truſt Eſtates were to be governed by the ſame Rules, and were within the ſame Reaſon, as legal Eſtates; and as the Huſband in the principal Caſe ſhould have been Tenant by the Curteſy had it been a legal Eſtate, ſo ſhould he be

of this Truſt Eſtate; and if there were not the ſame Rules of Property in all Courts, all Things would be as it were *at Sea*, and under the greateſt Incertainty. And his *Lordſhip* added that this being a Caſe of ſome Difficulty, he could have wiſhed it had not come before him as a Cauſe by Conſent, but was of Opinion that the Huſband ought to be Tenant by the Curteſy, the rather becauſe it appeared, that he upon his Marriage did preſume his Wife to be ſeiſed of a legal Eſtate in the Moiety, and had Reaſon to think ſo, ſhe being in Poſſeſſion thereof. *Ibid.* 109. (*a*) 2 *Vern.* 680. S. C. cited, 2 *Will. Rep.* 645. S. C. cited *per* his *Honour*, *Hil.* 1732. *in Caſu Sutton* and *Sutton*.

3. *J. S.* deviſed his Lands to *A.* his Siſter (who was his Heir at Law) *for her Life, and that if ſhe married and had Iſſue Male of her Body living at the Time of her Death, then to ſuch Iſſue Male, and to his Heirs Male for ever, but if ſhe died, leaving no Iſſue Male at the Time of her Death, then to* B. *and his Heirs for ever.* *J. S.* dies, and *A.* married Defendant *C.* by whom ſhe had Iſſue a Son and a Daughter; then *A.* died, and afterwards the Daughter died, and the Son ſurvived, who afterwards died. Upon the Death of the Wife the contingent Eſtate-tail to her Iſſue began, ſo that at that Time the Eſtate was to commence in Poſſeſſion and be conſummate, becauſe her Eſtate for Life by which it was to be ſupported was gone, ſo that the Inheritance being never veſted in her during her Life, for that Reaſon her

It doth not appear that the Teſtator had any Manner of Intention that *A.* his Siſter ſhould have any Benefit of the Inheritance; if he had, then certainly he having the whole Dominion over his Eſtate, and who could have molded

it as he thought proper, would have ſhewed that he intended ſhe ſhould have the Inheritance; but there is not the leaſt Sign or Badge of any ſuch Intention; and if it ſhould be otherwiſe intended by Operation of Law, that would be an Injury done to the Intention of the Teſtator. *Per Cur'*, *ibid.* 150.——Wherever the Eſtate is to be determined by expreſs Limitation or Condition on the Death of the Wife, there the Huſband ſhall *not* be Tenant by the Curteſy, as where an Eſtate for Life is limited to a Woman, Remainder to her firſt and every other Son in Tail Male, Remainder to the Heirs of her Body, Remainder to her right Heirs; here it is plain ſhe is ſeiſed of the Inheritance; yet if ſhe has a Son, the Huſband ſhall *not* be Tenant by the Curteſy, becauſe the

the contingent Eſtate which is to ariſe on her Death intervenes between her Eſtate for Life and the Inheritance. her Huſband *cannot* be Tenant by the Curteſy. *Per* Lords Commiſſioners *Raymond* and *Gilbert*, *Trin.* 11 *Geo.* 1. *Boothby* and *Vernon*, 2 *Mod. Caſes in Law and Eq.* 147. *Per Cur'*, in S. C. *ibid.* 150.——*Vide* the Year Book, 1 *Ed.* 3. 14, 15.—45 *Ed.* 3. 16.

4. Huſband may be Tenant by the Cuſtom of a Truſt, tho' the Wife cannot have Dower thereof. Said by *Lord Chancellor* as a ſettled Rule. *Hil.* 1733. in the Caſe of *Chaplin* and *Chaplin*, 3 *Will. Rep.* 234.

5. The Reaſon of the Difference why a Wife in Caſe of an Elopement with an Adulterer forfeits her Dower, and yet the Huſband leaving his Wife, and living with another Woman, does *not* forfeit his Tenancy by the Curteſy, is, becauſe the Statute of *Weſtminſter* 2. *cap.* 34. does by expreſs Words, under theſe Circumſtances, create a Forfeiture of Dower; but there is no Act inflicting in the other Caſe the Forfeiture of a Tenancy by the Curteſy. *Per* Lord Chan. *Talbot*, *Eaſt.* 1734. *in Caſu Sidney* and *Sidney* (*a*), 3 *Will. Rep.* 269, 276.

(*a*) *Vide P. Ca.*

His *Lordſhip* obſerved that this Caſe depended on two Conſiderations, Firſt, *What Kind of Intereſt an Equity of Redemption is conſidered to be in the Eye of this Court?* Secondly, *What is requiſite to intitle the Huſband to be Tenant by the Curteſy?* As to the *Firſt* his *Lordſhip* ſaid, *an Equity of Redemption has always been conſidered in this Court as an Eſtate in the Land; it is ſuch an Intereſt in the Land as will deſcend from Anceſtor to Heir*, and *may be granted, intailed, deviſed* or *mortgaged*, and *that equitable Intereſt may be barred by a Common Recovery*, which proves that an Equity of Redemption is not conſidered barely as a mere Right, but ſuch an Eſtate whereof in Conſideration of this Court there may be a Seiſin, or a Deviſe of it could not be good. The Perſon who is intitled to the Equity of Redemption is in this Court conſidered as Owner of the Land, and the Mortgagee to retain the Land as a Pledge or Depoſit. And for this Reaſon it is, that a *Mortgage in Fee is conſidered as a perſonal Eſtate*, notwithſtanding the *legal* Eſtate veſts in the Heir in Point of Law. The *Huſband of a Mortgagee in Fee ſhall never be Tenant by the Curteſy of the mortgaged Eſtate, unleſs there be a Foreclоſure*, or that ſuch Mortgage has ſubſiſted for ſo great a Length of Time as the Court thinks ſufficient to induce them not to grant a Redemption. A *Mortgage in Fee will not paſs under a Deviſe of all my Lands, Tenements and Hereditaments*; decreed in *Litton* and *Faulkland*, 2 *Vern.* 625. There ſaid, if it was a Releaſe of an Equity of Redemption or Foreclоſure, it is now Part of the real Eſtate in the Land. 1 *Vern.* 401. *Barnet* and *Kinaſton*, a Mortgage in Fee in Right of the Wife on the Huſband's dying and not diſpoſing thereof was decreed to be a *Choſe en Action*, and ſurvived to the Wife, from whence it follows that the Perſon that is intitled to the Equity of Redemption is Owner of the Land; for if a Mortgage in Fee in Right of the Wife is on the Death of the Huſband decreed to be but a *Choſe en Action*, if the Ownerſhip of the Land is not in the Mortgagor, it is in nobody; and if this Matter of Mortgagees is not an Intereſt in Equity only, but properly a real Eſtate, then the real Property will be ſunk and veſt no where, if not in the Mortgagee. If a Man by Will deviſes Lands, and afterwards mortgages in Fee thoſe Lands, *at Law* it is conſidered as a *Revocation of the total Deviſe*, but *in Equity* only *a Revocation pro tanto*, amounting to the ſame Thing as letting in a Charge upon the Land, and when the Mortgage is paid the Deviſe takes Place. The Ownerſhip of the Land does always veſt in the Mortgagor or Mortgagee. That an Equity of Redemption is no otherwiſe a *Right of Action* than every Truſt; and as there can be no Benefit had of an Equity of Redemption but by *Subpœna* out of this Court, ſo in the Caſe of every *mere* Truſt in Land, which is conſidered as a real Eſtate in this Court, but cannot be come at without a *Subpœna*. To ſay that it is a mere *Right of Action* is by Conſequence to ſay that the Eſtate in the Land is in nobody, and this determines the Queſtion; for if a Mortgage is but a *Choſe en Action*, this affirms that the Equity of Redemption is the real Ownerſhip of the Eſtate, and this will determine the Point between them. It is true that a Mortgagee is not barely a Truſtee for the Mortgagor, but it is ſufficient for the preſent Purpoſe if he is *in Part* a Truſtee for the Mortgagor, and it is moſt certain that as to the real Eſtate in the Land the Mortgagee is only a Truſtee for the Mortgagor

6. *T. C.* Plaintiff's Father, and alſo Father of the Wife of Defendant *J. S.* by Virtue of a Marriage Settlement being ſeiſed of *ſome Lands in Tail*, and of *other Lands in Fee-ſimple*, had Iſſue three Daughters. *Part* of the Land of which he was ſeiſed in Fee he ſettled on *himſelf for Life*, Remainder to *Anne* his eldeſt Daughter *in Fee*, and the *other Part* of ſuch Lands he deviſed *to the ſaid* Anne *and her Heirs*, ſubject to the Payment unto her two Siſters of 200 *l.* apiece. *Anne* after her Father's Death by Leaſe and Releaſe of 24 and 25 *June* 1728 mortgages *Part* of the Fee-ſimple Lands to Defendant *Scarf in Fee*, Proviſo, to be void on Payment of 900 *l.* and Intereſt. On 6 *Aug.* 1729 *Anne* intermarried with Defendant *J. S.* and in 1731 ſhe died, leaving Iſſue by him a Son, who died without Iſſue; and on his Death his two Aunts the Plaintiffs became his Heirs at Law and intitled to that Inheritance, and in *Trin.* 1733 brought their Bill againſt the Mortgagee (*b*) *Scarf* and *J. S.* (*int' al'*) for a Redemption of the mortgaged Premiſſes

(*b*) The Mortgagee came into Poſſeſſion in 1731.

Premiſſes, and to have an Account of the Rents and Profits of the real Eſtate which belonged to the *Plaintiff*'s (*a*) (Defendant *J. S.*'s) Wife, that deſcended to his Son, from the Time of the Death of ſuch Son, as Heir at Law to both of them. Defendant *J. S.* inſiſted to be intitled to the mortgaged Premiſſes for his Life, as Tenant by the Curteſy of the mortgaged Eſtate, but his *Honour* (8 *May* 1735) held that he was not; and ſo was decreed to account for the Rents, *&c.* thereof from his Son's Death. On an Appeal, *Lord Chancellor* (on great Conſideration) was of Opinion that *J. S.* was intitled to be Tenant by the Curteſy

Mortgagor 'till Foreclоſure. Mortgagee is only Owner as a Charge or Incumbrance, and intitled to hold as a Pledge, and as to the Inheritance deſcended,

and real Eſtate in the Land, the Mortgagee is a Truſtee for the Mortgagor 'till the Equity of Redemption is foreclоſed. *Secondly*, What is requiſite to intitle the Huſband to be Tenant by the Curteſy. And his *Lordſhip* ſaid at Law four Things are neceſſary to make a Tenantcy by the Curteſy, *viz.* Marriage, having Iſſue that may inherit, Death of the Wife, and Seiſin of the Wife. *Co. Litt.* 30. *a.* Here it is admitted that the three firſt did concur, but the Objection that is relied on is, that there was no actual Seiſin of the Wife during the Coverture, which is contended to be as neceſſary in reſpect to an *equitable* Eſtate, as of a *legal* Eſtate; and it is admitted that the Wife had no actual Seiſin of the *legal* Eſtate, either in Fact or in Law. Here is no Diſpute whether actual Seiſin in Conſideration of Law, but all that is beſide the preſent Queſtion, for the Proceedings are upon a Suppoſition, as no ſuch Thing as Tenant by the Curteſy. But the true Queſtion upon this Point is, Whether there was not ſuch a Seiſin or Poſſeſſion in the Wife of the equitable Eſtate in the Land, as in Conſideration of Equity is equivalent to an actual Seiſin of a *legal* Eſtate at Common Law? And his *Lordſhip* ſaid, that in Conſideration of this Court he was of Opinion there was ſuch a Seiſin of the Wife in the preſent Caſe of the Equity of Redemption; and ſaid he had ſhewn that a Perſon intitled to the Equity of Redemption is Owner of the Land of the *legal* Eſtate, and if ſo, there muſt be a Seiſin of the *legal* Eſtate, and what other Seiſin could there be than what *J. S.* and his Wife had in the preſent Caſe? For here is a Mortgage in 1728 by *Anne*, who in 1729 married *J. S.* and in 1731 died, leaving Iſſue a Son, and the Wife was all along in Poſſeſſion 'till her Death, and the Mortgagee did not come into Poſſeſſion 'till after her Death, and there is not any Foreclоſure; and tho' the Poſſeſſion of the Wife was but as Tenant at Will to the Mortgagee, yet it was, in Equity, a Poſſeſſion of the real Owner of the Land, ſubject only to a pecuniary Charge on it, and from thence his *Lordſhip* thought it clearly followed that there cannot be a higher Seiſin of an equitable Eſtate. That the Huſband might be Tenant by the Curteſy of this equitable Eſtate of the Wife, his *Lordſhip* cited *Williams* and *Wray*, 2 *Vern.* 680. and *Sweetapple* and *Bindon*, 2 *Vern.* 536. and his *Lordſhip* obſerved that there had been two Objections made by the Plaintiffs, Firſt, That the Huſband had it in his Power to have had Seiſin in his Wife's Life-time, for he might have paid off the Mortgage, and therefore it was his own Laches that he did not. Secondly, That a Wife ſhall not be endowed with an Equity of Redemption. As to the Laches in *J. S.* it is compared to the Huſband's not making an Entry at Law, but his *Lordſhip* ſaid the Compariſon will not hold, for it is not ſo eaſy to pay off the Principal and Intereſt due on a Mortgage as it is to make an Entry at Law, nor is it to be done ſo ſpeedily, for a Mortgage in moſt Caſes is allowed ſix Months Notice to be paid; and his *Lordſhip* ſaid in the Caſe of *Sweetapple* the Huſband might have brought his Bill in his Wife's Life-time to compel the laying out the Money in the Purchaſe of Land, but tho' he omitted ſo to do 'till after the Wife's Death, yet that was not objected to him as Laches. And it being ſaid that this would encourage the Huſband to let the Intereſt run on the mortgaged Premiſſes, which would perhaps ſwallow up the whole Eſtate, his *Lordſhip* ſaid he could not find the Force of this Ground, for if he is Owner of the Eſtate, ſhe was Owner of the Fee. That if by this is meant the Intereſt that became due in the Wife's Life-time, the Huſband has nothing to do with it, becauſe the Intereſt that he claims does not ariſe 'till the Wife's Death, and he therefore is not to pay Intereſt that was due before his Title accrued. But by this is only meant the Intereſt from the Wife's Death: During the Tenancy by the Curteſy the Heir will have the ſame Remedy as in Caſe of a Tenancy for Life of an incumbered Eſtate; for in all ſuch Caſes the Tenant for Life keeps down the Intereſt. As to the Objection of the Wife's not being endowed of an Equity of Redemption on a Mortgagee in Fee, and that therefore an Huſband ought not to be Tenant by the Curteſy of an Equity of Redemption, his *Lordſhip* ſaid that this proves too much, for it has been determined that a *Wife ſhall not be endowed of a Truſt Eſtate*, yet *that the Huſband ſhall be Tenant by the Curteſy of a Truſt Eſtate*. That the Argument from *Dower* to *Curteſy* fails in this Caſe, perhaps it may be hard to find out a ſufficient Reaſon how it came to be ſo determined in one Caſe and not the other; but that it was ſafe to follow former Precedents, and what are ſettled and eſtabliſhed, and if ſuch Precedents ſhould be departed from, his *Lordſhip* held it fit rather that the Wife ſhould be allowed her Dower of a Truſt Eſtate, and not that a Tenancy by Curteſy of a Truſt Eſtate ſhould be taken away; and ſaid it may be refuſing to allow the Wife Dower of a *Truſt* Eſtate was becauſe ſhe could not have it at Law, and that it was *founded* on the *Maxim* of *Æquitas ſequitur legem*; but whatever the Reaſon of ſuch a Refuſal was, the *Huſband is allowed to have a Tenancy by the Curteſy of a Truſt Eſtate*, nay even *of Money directed to be laid out in Land, tho' not actually laid out*, as in the Caſe of *Sweetapple*. Upon a Mortgage for Years, a Wife ſhall have Aid of Equity of Redemption, which ſhe could not have of a Truſt Eſtate. If Tenant by the Curteſy of Money to be laid out in Land, by *Analogy*, it ought to be ſo of an Equity of Redemption, eſpecially where the Wife continues in Poſſeſſion of the mortgaged Lands all her Life-time.——

There was a Caſe put for the Plaintiffs by way of Illuſtration, *viz.* Suppoſe that a *Feme Sole conveys Lands to* J. S. *in Fee, upon Condition that if at ſuch a Day ſhe paid ſuch a Sum of Money to him or his Heir, that then ſhe might re-enter*. She afterwards marries, and has Iſſue, but before the Day on which the Condition was to be performed ſhe dies, and after her Death her Heir pays the Money. Whether the Huſband would be Tenant by the Curteſy? And *per* his *Lordſhip*, if this *is meant as a Mortgage to make a Security*, then *it is the ſame as the preſent Caſe*, but *if it is meant of a mere Purchaſe, ſubject to a Re-entry at Common Law on Payment*, undoubtedly the Huſband would not be Tenant by the Curteſy, for that were to make him Tenant by the Curteſy of a Condition; *for taking it as a Purchaſe*, the *Wife had*, in that Caſe, no Eſtate or Seiſin *in re* or Right *ad rem*, 'till the Performance of the Condition. As to a Condition or Power of Revocation, theſe ſtand upon different Reaſons. And for theſe Reaſons, upon the beſt Conſideration, his *Lordſhip* decreed as above. *Ibid.*——

(*a*) *Plaintiff* in the Original.

Curteſy of the equitable Eſtate of the Wife, and ſo *reverſed* the Decree *at the Rolls* as to this Point. *Hil. Vac.* 11 *Geo.* 2. *Caſhborn and Ingliſh* and *Scarf*, *Vin. Abr.* Tit. *Curteſy*, (E) *Ca.* 23. *P.* 156.

The great *Learning* that appears in the *above* Caſe, and my being deſirous to make this Work as uſeful as I can, are the Reaſons of *it's* being *here* ſo fully ſtated. I think I have ſeen a MS. Rep. of this Caſe to the ſame Effect.

7. *A.* died, leaving a Wife, a Son and a Daughter; the *Widow* entered upon the Eſtate, and was *ſeiſed as Tenant in Dower of one Part*, and *as Tenant in Common with her Son of another Part*, and *of a third Part as Guardian in Socage to her Son.* The Son died beyond Sea, *under Age*, whereby the Daughter became intitled, who, during her Infancy, married Plaintiff, and they applied to the Mother to be let into Poſſeſſion of the Son's Part, which the Mother refuſed, imagining the Son was ſtill alive, and thereupon to hold the Land for him. Upon this they brought a Bill for an Account, which was directed; then the Daughter dies, and upon the Huſband's Application to the Court, one Queſtion was, Whether the Seiſin of the Mother (after the Son's Death) being Tenant in Common with the Daughter, was the Seiſin of the Daughter ſufficient to make the Huſband Tenant by the Curteſy of her Part? And *Lord Chancellor* held it was, for the Entry and Poſſeſſion of one Tenant in Common, *&c.* is the Entry and Poſſeſſion of the other. Decreed for the Huſband, 25 *Feb.* 1739. *Sterling* and *Penlington*, *Vin. Abr.* Tit. *Curteſy*, (A) *Ca.* 11. *P.* 149.—*Vin. Abr.* Tit. *Jointenants*, (P.a.) *Ca.* 5. *P.* 512. S.C. *accord'*.

Where one enters, claiming the whole for himſelf in Excluſion of his Companion, this may not ſerve as the Entry of his Companion, being made directly againſt him; but that is *not* this Caſe, for the Mother's keeping Poſſeſſion of the whole againſt the Daughter and her Huſband was entirely owing to a Miſtake in imagining her Son was ſtill living, and not with an Intent to exclude the Daughter from her Right, and therefore no Inference can be drawn from it. *Per Lord Chancellor*, in S.C. *ibid.*

CAP. CIX.

Timber Trees.

(A) What Trees are accounted Timber Trees.

1. *F. S.* articled to ſell Land to *A.* for 20,718 *l.* and the Timber to be valued and paid for by *A.* beſides the Purchaſe Money. On a Bill by *A.* for a ſpecifick Performance of the Articles, it was accordingly decreed, and the Timber was ordered to be valued by two indifferent Perſons, to be appointed by the *Maſter*. The *Maſter* made his Report, and eſtimated ſome thouſands of *Saplings* at 12 *d.* or 18 *d.* apiece, as alſo *Pollards*, ſome of which were rotten, or contained no Timber, the ſame of *Walnut Trees*, which were not Timber, altho' ſome of them were worth 20 *l.* and others 40 *l.* a Tree; alſo *Yew*, *Cherry*, *Crab*, *Lime*, and *Horſe Cheſnut Trees*, were valued as Timber in the Report. And on Exceptions (*int' al'*) to this Part of the Report, Lord Chan. *King* ſaid that it is the *Cuſtom* of the Country that makes ſome Trees Timber, which in their Nature generally ſpeaking are

His *Lordſhip* ſaid, that if a Timber Tree which may not be worth 3 *l.* or 4 *l.* ſhall be valued or paid for in the Purchaſe, why not *Walnut* Trees, ſome of which may be worth 10 *l.* 20 *l.* or even 50 *l.* apiece? However, as theſe Trees ſeem to be of conſiderable Value, unleſs the Parties can agree amongſt themſelves to lump the Valuation, and as it is the Cuſtom of the Country which aſcertains what are Timber Trees, making ſome to be eſteemed ſuch which in their Nature generally ſpeaking

are not ſo, as *Horſe Cheſnut* and *Lime Trees*, ſo of *Birch*, *Beach*, and *Aſp*; and as to *Pollards*, notwithſtanding what is ſaid in *Plow.* 470. in the Caſe of *Soby* and *Molyns* that theſe are not Timber, and that Tithes are not to be paid of their Loppings, (which could not be if *Pollards* were Timber) yet if the Bodies of them be found and good, his *Lordſhip* inclined to think them Timber; *ſecus* if not ſound, they being then fit for nothing but Fuel. *Trin.* 1731. *Duke of Chandos* and *Talbot*, 2 *Will. Rep.* 603, 606.

ſpeaking are not, eſpecially in Countries where Timber is ſcarce, he ſaid he would direct an Iſſue to try whether any and which of theſe Trees

are by the Cuſtom of the Country to be accounted Timber. *Ibid.* 606, 607.

CAP. CX.

Tithes.

(A) Caſes in general relating to the Payment, &c. of Tithes.
(B) Of a Modus.

(A) Caſes in general relating to the Payment, &c. of Tithes (*a*).

(*a*) Tho' Turnips and Clover are

the Effect of Labour, and not the natural Produce of the Land, (tho' 'tis an uſual Way of manuring Land with them) yet they are tithable. *MS. Notes.*——A Man may be bound by Cuſtom to give Notice when he ſets out his Tithes. *Bever* and *Spratley* (*b*), *MS. Notes.* (*b*) *Quære* Term and Year.

1. A BILL was exhibited for Tithes, and the Juriſdiction of the Court demurred to, but the Demurrer over-ruled, and the Defendant ordered to anſwer. *Trin.* 1674. *Anon.* 1 *Freem. Rep.* 303. *Ca.* 371. *in Canc'.*

And it was ſaid *per Finch* Lord Keeper, that the Court of Exchequer did not hold

Pleas by *Engliſh* Bill until the Stat. of 33 *H.* 8. *c.* 39. *Ibid.*

2. *A.* being Rector of the Portions of *Pitt* and *Tidcomb* of the Rectory and Pariſh Church of *T.* in *Com' Devon*, and an *Horſe Mill for the grinding of Malt* being erected within the ſaid Portions by the Corporation of the ſaid Borough, who in 1699 had leaſed the ſame to the Appellants for three Years at 30 *l. per Annum*, *A.* preferred his Bill *in Scac'*, and (after Time taken to conſider of it) the Court were unanimouſly of Opinion, that *Tithes were due for this new erected Mill*, and

From this Decree the Defendants *in Scac'* appealed to the Houſe of Lords, Firſt, Becauſe the Tithe of an Horſe Malt Mill was a

perſonal Tithe, for there was no natural Increaſe from it, but only a Profit ariſing from the Invention of a Machine and the Labour of a Man and Horſe, and if it were perſonal the ſame could only be for the Tenth of the neat Profits, deducting all Charges. Secondly, If a perſonal Tithe was due for ſuch Mill, it was only due where perſonal Tithes have been by Cuſtom paid for forty Years before the Stat. of *E.* 6. Thirdly, The Appellants only took 2 *d. per* Buſhel for grinding, and the Reſpondents did not prove any Cuſtom, nor the Value of the tenth Toll Diſh, nor any other Toll to be taken by the Appellant. Fourthly, That the tenth Toll Diſh would be more ſometimes than the whole Proprietors Gains, conſidering the Expence of erecting and maintaining this Mill. Fifthly, That the Corn will pay Tithes twice, for that moſt of the Corn that was ſo ground was grown within the ſame Pariſh, and ſo the Tenth paid to the Reſpondents in the Field; and if any was ground that grew elſewhere, the ſame did in like Manner pay the Tenth to the Incumbent where it grew. Sixthly, This Decree will produce a new Sort of Tithe, and will affect a great many People in *London*, where there are many ſuch Mills, and ſome Thouſands of them are in other Parts of the Kingdom; and if this Decree be affirmed, they muſt all pay Tithes. On the Reſpondents Part it was inſiſted, Firſt, That Tithes were due both by the *Common* and *Statute Law*, for new erected Mills; that Tithes were by the Canons due for *all* Mills, and by

Art.

Art. Cler. c. 5. for new erected Mills, which expreſsly *provides that no Prohibition ſhall lie in ſuch a Caſe.*

and *that ſuch Tithe was the tenth Toll Diſh*; and decreed the Appellants to account with the Reſpondent accordingly, and to pay Coſts. 22 *April* 1706. *Newte* and *Chamberlaine et al'*, *Vin. Abr.* Tit. *Diſmes*, (M. a.) *Ca.* 5. *P.* 39.

Secondly, That there had been from Time to Time ſeveral Reſolutions and Decrees for Tithes of Mills. Thirdly, That the reſt of the Mills within the Reſpondents Portions had all along paid, and did ſtill pay Tithes on a Compoſition for the ſame, and every *Modus* for a Mill proves Tithes to be due if they were not diſcharged by ſuch *Modus*. Fourthly, That it was predial Tithes, and the tenth Toll Diſh payable for the ſame, and ſo was both the *Canon*, and *Cuſtom* and *Uſage* of this Kingdom. Fifthly, That it was not a double Tithe, for it was paid by different Perſons, and for different Purpoſes, *viz.* in the firſt Caſe *by the Owner of the Corn*, and in the ſecond Caſe *by the Owner of the Mill*. This Cauſe was heard *in Dom. Proc'* 20 *Jan.* 1706-7, and upon ſome Debate the Conſideration of Tithes predial, mixt, or perſonal were due for ſuch a Mill, and if any due, in what Manner payable, was referred to the Judges, who after ſeveral Adjournments attended the Houſe 17 *Feb.* 1706, and *all* the Judges of *B. R.* and *C. B.* (except *Powel*) were of Opinion *unanimouſly*, That the *Tithe due for a new erected Malt Mill was a perſonal Tithe only*; and Chief Juſtice *Holt* and Chief Juſtice *Trevor* held *that there was no Tithe due at all for ſuch Mill*, becauſe *a perſonal Tithe was due only where it had been paid within forty Years before*, according to the Stat. 2 & 3 *E.* 6. *c.* 13. *ſ.* 7. Upon which the Lords reverſed the Decree of the Exchequer; but Ordered, That *A.* do recover his Tithes of the ſaid Mill *in the Nature of a perſonal Tithe only*, viz. *the tenth Part of the clear Profits ariſing from Corn ground in the ſaid Mill, over and above all incident Charges*, and to that End that an Account be taken of the Profits of the ſaid Mill, and Charges for the Time paſt within the Time of the Demand of *A.*'s Bill in the Exchequer and ſince, and that the ſaid Tithes do ſo continue to be paid for the future; and alſo ordered that the ſaid Court of Exchequer do cauſe the ſaid Account to be taken, and what ſhould be found due thereon paid accordingly. *Ibid.*——2 *Will. Rep.* 463. *Trin* 1728. S. C. cited by the Name of *Chamberlain* and *Kneate in Dom. Proc'*, upon an Appeal from a Decree of the Court of Exchequer, where the Bill was brought *for the Tithes of a Malt Mill* in *T.* in *Devon*, and where the Lords determined, with the Aſſiſtance of eight Judges (whereof *Holt* C. J. was one) that Mills were tithable, but that the ſame was a *perſonal Tithe*, and ſo ought to be paid out of the clear Gain, after all Manner of Charges and Expences deducted. Upon this Authority his *Honour* in the Caſe of *Carleton* and *Brightwell*, *Trin.* 1728. decreed a *Corn Mill* to pay Tithes, but that they ſhould be paid only as a perſonal Tithe. *Ibid.*——1 *Vol. Abr. Eq.* 366. *Ca. Newt* and *Chamberlain*, S. C. but not ſo fully ſtated as in Mr. *Viner*'s Abridgment.——Tithe for a *Malt Mill* is only *perſonal*, for it is not natural Increaſe, being only Profit ariſing from the Invention of a Machine, and the Labour of a Man and Horſe, and *perſonal can only be for the Tithes of the neat Profits*, deducting all Charges. *Jan.* 20, 1706. *Chamberlayn* and *Plymton*, *Vin. Abr.* Tit. *Diſmes*, (M. a.) in a Note at the Bottom of *P.* 40.

3. Bill brought by the Rector of *S. for Tithes of Beaſts fed upon a Common.* Defendant by Anſwer inſiſts, that the *Common extends into ſeveral Pariſhes*, and *that the Cuſtom was that every Farmer ſhould pay Tithes to the Rector where he lived*; and that he lived in another Pariſh, and he paid the Tithes to that Rector; but *there being Proof that the Cattle were driven upon that Part of the Common that lies in* S. there was a Decree for the Rector of *S.* But *reverſed*, becauſe the *Cuſtom was good, there being no Incloſures. Jan.* 1710. *Micleburgh* and *Criſp*, *Vin. Abr.* Tit. *Diſmes*, (P. a.) *Ca.* 6. *P.* 43.

4. Bill for a Diſcovery of Tithes of *Furze*, and Payment thereof. Defendant by Anſwer inſiſts that *Furze ſpent upon the Premiſſes is not titheable*, and alſo that *Underwood* and Furze generally are not titheable in that Pariſh, *&c.* Plaintiff admits that no Tithes are due for Underwood or Furze ſpent upon the Premiſſes, but inſiſts upon Tithes of Furze made into Faggots, and ſold by the Defendant. Cites *Moor* 909. that Underwood or Furze ſpent for Firing or Fencing of the Premiſſes is not titheable, but Underwood or Furze ſold is titheable. In the Proofs of the Cauſe, there was ſome Evidence of 1 *d. per Annum* paid called Smoak Money, in Lieu of Tithes or (of) Furze, but that not being inſiſted on by the Anſwer, but a general *Non Decimando* for Underwood and Furze, Lord Cha. *Harcourt* decreed Defendant to account for Tithes of Furze made into Faggots and ſold, but not for Furze burnt or uſed upon the Premiſſes, and Defendant to pay Coſts. *Mich.* 12 *An. Roffe* and *Harding*, *Vin. Abr.* Tit. *Diſmes*, (Z) *Ca.* 31. *P.* 591.

5. *J. S.* being Rector of the Pariſh of *H.* in *Devon*, brought a Bill for Agiſtment Tithes againſt the Agiſter. The Caſe appeared to be thus: Defendant's Father lived in the Pariſh and rented a Farm there; Defendant lived with him, and he being a Butcher, and renting a Farm in an adjacent Pariſh, frequently brought Cattle and put them

in his Father's Grounds for two or three Nights, and ſometimes killed ſome of them off, but generally ſent them to his own Farm. The Queſtion was, Whether the Owner of the Land or the Owner of the Cattle ſhould pay Agiſtment Tithes? The Chief Baron and the other Barons agreed that the Demand ought to have been againſt the Occupier of the Land for the Agiſtment Tithes, if any had been due, but they thought in this Caſe nothing appeared due; and Baron *Page* ſaid, that as to what had been ſaid that the Demand might be either againſt the Occupier or Agiſter, that could not be, for *the ſame Duty could not ariſe in two different Perſons at the ſame Time.* *Fiſher* and *Lemen* (*a*), *Vin. Abr.* Tit. *Diſmes*, (L. a.) *Ca.* 7. *P.* 38.

(*a*) Mr. *Viner* does not mention the Term and Year.

6. Abbot ſeiſed in Right of his Abbey of a Rectory, with all Tithes, *&c.* The Abbey is diſſolved, and the Crown grants the Tithes, *&c.* The Parſon diſputes the Tithes with the Patentee, but Bill diſmiſſed. *Mar.* 21, 1715. *Turner* and *Wray*, *Vin. Abr.* Tit. *Diſmes*, (Y. a.) *Ca.* 14. *P.* 55.

7. *Unity* of Poſſeſſion of a *Manor* and *Rectory* will not exempt the *Demeſne* Lands from Payment of Tithes when they come to be ſevered. *Eaſt.* 8 *Geo. Fox* and *Bardwell*, *in Scac'*, *Comyns's Rep.* 498.

8. Tithe Hay muſt be paid in Graſs Cocks. *Per Cur'*, *Mich.* 11 *Geo.* in the Caſe of *Smithſon et al'* and *Dodſon in Canc'*, 2 *Mod. Caſes in Law and Eq.* 117.

9. The Bill demanded Tithe for the depaſturing of Sheep on Turnips remaining on the Ground unſevered. Defendant ſaid the Sheep did pay the Tithe Wool, and that Tithes ought not to be paid twice. It appeared that after Sheering Time Defendant fed his Sheep with Turnips, whereby they were better 5 *s. per* Sheep; that they went about five Months on the Turnips, and then were ſold to the Butcher, and the Defendant brought in a large Quantity of new Sheep before Sheering Time came again, ſo that Plaintiff always had Tithe Wool of the full Number. It was ſtrongly inſiſted that this was a double Tithing, but the Court agreed that it was a new Increaſe; and decreed that the Defendant ſhould go to an Account. *Eaſt.* 12 *Geo.* 1. *in Scac'*, *Coleman, Impropriator of, &c.* and *Baker*, *Gilb. Rep. in Eq.* 231.

A Demand was of Tithe for Paſturage of Sheep from the Time of Sheering 'till they were ſold. The Defendant inſiſted that by the Sheeps depaſturing on the Land it was improved, and the Plaintiff's Tithe bettered thereby. But the Court decreed an Account, and ſaid that it was no Bar to the Plaintiff's Demand. Decree affirmed on a Rehearing. *Hil.* 1 *W. & M. Dummer* and *Wingfield in Scac'*, cited *arg'*. *Ibid.* 231.

10. Tithes being demanded of *Turkies*, it was objected that in *Moor* 599. (*Hugton* and *Prince*) it was ſaid that *Turkies* were Things *Feræ Naturæ* and not titheable, any more than *Partridges*, and that Turkies were not brought hither from beyond Sea before Queen *Elizabeth*'s Time. But *per* his *Honour*, Turkies are Birds as tame as Hens or other Poultry, and therefore muſt pay Tithes; but if Tithes be once paid of the Eggs, then no more to be paid for the Chickens hatched afterwards. *Trin.* 1728. *Carleton* and *Brightwell*, 2 *Will. Rep.* 462.

In this Caſe it was ſaid and admitted that in a Bill brought by a Parſon for Tithes in the Exchequer, tho' the Right be ever ſo plain, yet *in Scac'* the *Decree is not that the Defendant ſhall pay Tithes for the future*, but *that he ſhall account for and pay what Tithe is due to the Time of bringing the Bill*; but in *Chancery it is to the Time of bringing the Decree* (*b*). *Ibid.* 463. (*b*) The *Editor* adds a *Quære*, If this be the eſtabliſhed Practice of *Chancery*, or done only of late in ſome few Inſtances. *Ibid.*

(B) Of a Modus (*a*).

(*a*) A *Modus* for Hay extends to Clover. 2 *Lut.* 1074. ——The Time of Payment of any *Modus* muſt be fixed, but there is a Difference between a Bill to eſtabliſh a *Modus* and a Bill for Tithes, where a *Modus* is inſiſted on; in the former the Time of Payment muſt be ſet forth, tho' not in the latter; but an Iſſue may be directed, and Order given to *indorſe* the Time of Payment (*b*). *MS. Notes.* ——As a Layman cannot preſcribe *in Non Decimando*, ſo if he pleads, or a Jury find that the Lands he holds belonged to an Abbey, and were immediately diſcharged, yet unleſs the Lands came to the Crown by 31 *H.* 8. it ſhall not be intended that ſuch Preſcription was founded upon any real Compoſition that runs with the Land, but in ſome perſonal Diſcharge that ceaſed on the Diſſolution of the Houſe. *Corporation of Bury* and *Evans* (*c*), *MS. Notes.* ——A Cuſtom to render at the Place of Milking the whole Milk of every tenth Day, both Morning and Evening, between *March* and *September*, bad, for this is to preſcribe *in Non Decimando* the reſt of the Year. But if the Cuſtom was to deliver it at the Parſon's Houſe, it ſeems good. *Salk.* 656. ——A Cuſtom to deliver Tithe Lambs in Kind on St. *Mark*'s Day, good; for tho' ſome may be very young, yet others may be perfectly reared, by which the Parſon has a Benefit (*d*). *MS. Notes.*

(*b*) *Quære* Caſe, Term and Year.
(*c*) *Quære* Term and Year.
(*d*) *Quære* Caſe, Term and Year.

1. OBjection was made to a *Modus*, that it was too great, and too near the Value of Tithes in Kind; Preſcriptions had their Beginning before *R.* 1. when it is probable that 12*d.* or 8*d.* (*per* Acre) might have been the Value of the Inheritance; therefore decreed *in Scac'* to be a Compoſition and not a *Modus*, but *reverſed*, for Churches might have been endowed with more than the Value of the Tithes. *Mar.* 5, 1707. *Pole* and *Gardener*, *Vin. Abr.* Tit. *Diſmes*, [or *Tithes*] *Ca.* 47. *P.* 18.

2. A *Cuſtom* was for the Vicar to have Tithes of *all Peas and Beans ſet, drilled* or *ſowed in Rows in Gardens*, or like Manner; afterwards *a new Improvement was found to uſe a Plough inſtead of a Spade*, yet ſuch Peas and Beans ſhall pay Tithes. *Jan.* 23, 1717. *Auſtin* and *Nicholas*, *Vin. Abr.* Tit. *Diſmes*, [or *Tithes*] (G. a.) *Ca.* 3. *P.* 22.

3. Bill was brought to eſtabliſh a *Modus*, which was laid thus: *For Payment of ſuch a Sum of Money*, but *if in the Hands of any other Perſon, to pay tithe in Kind*, or the Money, at the Election of the Parſon. And Lord Chan. *King* ſaid he would never eſtabliſh a *Modus* againſt a Parſon without a Trial at Law, if he deſires it; but this *Modus* is clearly ill, for a *Modus cannot be deſultory*. *Nov.* 15, 1725. *Webber* and *Taylor*, *Select Caſes in Chan.* 52.

4. In a Bill for Tithe *in Kind* Defendant inſiſted that the Inhabitants of ſuch a Tenement, with the Lands uſually enjoyed therewith, had been accuſtomed to pay a *Modus* for Tithe Corn. His *Honour* held this quite *uncertain*; the Houſe may fall down, or be uninhabited, and then no *Modus* will be payable; alſo that nothing can be more uncertain than Lands uſually enjoyed with the Tenement, ſince the Lands lett with a Farm Houſe may probably be often ſhifted. *Trin.* 1728. *Carlton* and *Brightwell*, 2 *Will. Rep.* 462.

His *Lordſhip* ſaid that this might be a good Cuſtom or *Modus* to excuſe the Occupier of the ſame Land wherein the Pariſhioner made Graſs into Hay from paying Tithes for the

5. The Bill was brought to eſtabliſh a *Modus* in Favour of the Inhabitants of the Pariſh of *S.* The *Modus* was *in Conſideration that after the Graſs was cut the Pariſhioners at their own Expence did make the Tithe Graſs into Hay, by ſtrewing the Graſs upon the Ground, and afterwards gathering it into Week and Wind-rows, therefore the Perſons that inhabited within this Pariſh (which Pariſh appeared to be the greateſt Part thereof Meadow Land) were to pay no Tithes for the Herbage of dry and unprofitable Cattle.* But it was proved that tho' the Pariſhioners paid no Tithes for the Herbage of dry and unprofitable Cattle

After-Herbage, but that it could be no good *Modus* to excuſe the Herbage Tithe of other Land, for at that Rate a Man might mow and make into Hay only a ſmall Parcel of Ground, (about a Quarter of an Acre) and by this Means be excuſed from the Tithe Herbage of one hundred Head of Cattle. *Ibid.* 521. —— A *Modus* in relation to the Tithes due to the *Parſon* may be a good Bar to the Payment of *ſmall Tithes due*

Time out of Mind, yet there was no Evidence that ſuch Nonpayment was in Conſideration of the Pariſhioners making Tithe Graſs into Hay. On the other Hand it was proved that Foreigners, thoſe who lived out of the Town, made the Tithe Graſs into Hay, as well as the Inhabitants, and yet paid Tithe Herbage. And Lord Chan. *King* thought this a material Objection againſt the Cuſtom, and made it look as if it was the Uſage of that Pariſh for the Pariſhioners to make their Graſs into Hay of Courſe; and alſo (as it was proved) that in this Pariſh the Pariſhioners, when they cut down the Graſs, did not divide it into ten Parts until they had made it into Hay, ſo that the Parſon could not have any Opportunity of making his Tithe Graſs into Hay himſelf. Bill diſmiſſed with Coſts, but without Prejudice as to any Litigation that may be made touching the ſame at Law. *Eaſt.* 1729. *Fox* and *Ayde*, 2 *Will. Rep.* 521.——*Fitz-Gibb. Rep.* 52. *Eaſt.* 2 *Geo.* 2. S. C. the *Modus* held to be void, and Bill diſmiſſed with Coſts.

to the Vicar, becauſe *originally* and of *common Right* the *Parſon was intitled to all the Tithes, as well ſmall as great*, during which Time he might agree to a *Modus*; and when afterwards a *Vicarage was derived out of the Parſonage*, and the *Parſon* (by

Conſent of the *Patron* and *Ordinary*) endoweth the *Vicar* with the *ſmall* Tithes, this ſhall not prejudice the Pariſhioners, or deprive them of the Benefit of enjoying their *Modus*, which they before were intitled to. *Per* Lord Chan. *King*, *ibid.* 522.——Pariſhioners are only bound to cut down the Graſs and divide it into ten Parts, after which the Parſon (*a*) is to make it into Hay. *Per* Lord Chan. *King*, *ibid.* 523.

(*a*) See 1 *Rol. Abr.* 644. *accord*'. But ſee alſo 1 *Rol.* 172. *cont*'. And *Note*; The Tithes are called the Tithes of *Hay*, and not of Graſs. 2 *Will. Rep.* 523. in a Note.

6. A *Modus* was laid to be *that every Perſon* not inhabiting within the Pariſh of *B. occupying any Meadow and Paſture Land* (which was chiefly Marſh Lands) *within the Pariſh of* B. *had Time out of Mind paid to the Appropriator of the Pariſh*, his Farmer or Tenant, on every *Good Friday*, or as ſoon after as demanded, 4*d. per Acre yearly*, as a *Modus* in Satisfaction for all Tithes, and ſo proportionably for every greater

Lord Chancellor and the *Judges* admitted *that every* Modus *muſt be certain*, otherwiſe *no Length of Time will make it good.*

And *Forteſcue* J. cited 2 *Rol. Abr.* 265. where a Preſcription to pay 1*d. or thereabouts for every Acre of Arable Land was held void for the Uncertainty*; but he alſo cited a Caſe in the Exchequer in 1726, where there was a *Modus* to pay 12*d.* an Acre for *Upland*, and 6*d.* for *Marſh Land*, and held good. *Ibid.* 572. The Court admitted that every *Modus* muſt be ſuppoſed to have had a reaſonable Commencement; but as to the Neceſſity of ſhewing *now* that the *Modus* is reaſonable, that ſeemed not to be ſo clear, for theſe *Modus's* having been from Time *immemorial*, none can know but that there were ſuch Circumſtances in thoſe ancient Times as might have made ſuch a Compoſition reaſonable; tho' at preſent they may not be diſcoverable; that it was enough to ſatisfy us at this Time of Day that the Parſon, Patron and Ordinary, before the reſtrictive Statutes might bind the Revenues of the Parſon, and that all theſe *Modus's* muſt have had their Commencement from an Inſtrument ſigned by the Parſon, Patron and Ordinary; but there could be no Colour to ſay, that becauſe ſuch *Inſtrument* in ſo great a Length of Time had been loſt, therefore the *Modus* ſhould be loſt alſo; indeed, ſo far the Law went in Favour of the Church, as that if the *Inſtrument* which the Parſon, Patron and Ordinary, had given to a *Layman*, to diſcharge his Farm of all Tithes (tho' this would be good while the Inſtrument could be ſhewn) ſhould be once loſt, this being a Privilege *in Non Decimando*, the Privilege would be loſt by the Loſs of the Deed; but that in the preſent Caſe of *Chapman* and *Monſon* there was no Ground to inſiſt on the Cuſtom's being unreaſonable, for the Tithes are the Reward for the Trouble and Care which the Parſon takes of the Souls of his Pariſhioners, in which Caſe the *Labourer is worthy of his Hire*; but then, as the Parſon is not bound to go out of his Pariſh to viſit thoſe who only occupy Land *within* the Pariſh, ſo it is but reaſonable that they who have not the Benefit of the Parſon's Care, ſhould anſwer the leſs Duty to him, and may well be excuſed for a *Modus* of 4*d. per* Acre, which the Parſon cannot ſay is too little, eſpecially in this Caſe, when Part of his Proof is that a whole Acre was lett for 12*d.* or 8*d.* an Acre in the Time of *Edward* the Firſt and Second; a Reaſon for avoiding this *Modus*, as being originally too much. *Ibid.* 573, 574.——1 *Barnard. Rep. in B. R.* 292. *Hil.* 3 *Geo.* 2. ——— and *Munſon*, S. C. ſtates it thus: The Bill ſet forth that there was a *Cuſtom* in the Pariſh of *B. that all Perſons occupying Paſture and Meadow there, ſhould be diſcharged of Tithes in Kind, by paying* 4 d. per *Acre*, unleſs *they were Inhabitants of that Pariſh or the Pariſh of* ———. The Plaintiffs were Occupiers of Paſture and Meadow Ground in *B.* but Inhabitants of the Pariſh of *W.* And whether this *Modus* was good or not was the Queſtion? *Reynolds* and *Forteſcue* J. and *Lord Chancellor* all unanimouſly agreed that *Modus's were real Compoſitions by Parſon, Patron* and *Ordinary*, the written Evidence of which is loſt; but the Law preſumes there was ſuch by the long uninterrupted Uſages. Undoubtedly, they ſaid, there would have been no Diſpute about this *Modus*, if it had been without Reſtrictions; and as the Reſtriction is for the Benefit of the Parſon, they thought the Reſtriction could make no Difference. They all allowed, however, that ſomething muſt be due from the *Modus*, and that too every Year, for as *no Preſcription can be in a* Non Decimando *generally and at all Times, ſo neither can it be for ſo long a Time as a Year together.* They ſeemed to allow too *that a* Modus *could not be good where it depends upon the Will of the Occupier whether it ſhould be more or leſs.* But here they ſaid the Rule for the Payment of this *Modus* is as certain as the Rule for Payment of any other *Modus* can poſſibly be; the only Variation is as to the Perſons paying the *Modus*, and that they ſaid was never in Objection; accordingly *Lord Chancellor* was going to decree for the *Modus*, but tho' the Proof was very clear to ſupport it, he gave the Defendant's Counſel a Day to talk with his Client whether they would have the *Modus* tried or not, as it did concern the Inheritance.——*Fitz-Gibb. Rep.* 119. *Hil.* 3 *Geo.*

Geo. 2. *Monſon* and *Chapman*, S. C. ſtates it, that the Bill was greater or leſſer Quantity. And this was held by *King* C. aſſiſted by *Reynolds* and *Forteſcue* J. to be a good *Modus*, and certain enough. *Hil.* 1729. *Chapman* and *Monſon*, 2 *Will. Rep.* 565.

to eſtabliſh a *Modus* within the Pariſhes of *B.* and *W.* which was ſet out and proved to be that *every one occupying Meadow* or *Paſture, not ſown within thoſe Pariſhes, and not inhabiting within the ſame, ſhould pay* 4 d. per *Acre yearly on* Good Friday *in Lieu of the Tithes of Hay and Herbage.* And *Lord Chancellor*, and *Reynolds* and *Forteſcue*, J. held this to be a good *Modus:* That *Modus's are real Compoſitions run out into Preſcription*, and ſo a good Foundation muſt be preſumed from the Length of Time: To which *Forteſcue* J. cited 8 *E.* 4. 13 *b.* that it was in the Power of all Parties in Intereſt to make this a current *Modus* within thoſe Pariſhes, and that reſtraining it to *Foreigners* made it only narrower, and ſo the leſs detrimental to the Parſon: Then this is a certain Duty to be paid in Lieu of the Tithes, and not like the Caſe in 2 *Rol.* 265. of a Payment of 1 *s. aut eò circiter*, which is an *Uncertainty* in the very Duty which comes in Lieu of the Tithes in Kind. The Caſe in 1 *Lev.* 116. and 1 *Keble* 602. was denied, and the *Modus* was decreed to be eſtabliſhed. *Ibid.* 121.

7. In the above Caſe of *Chapman* and *Monſon*, the Court *unanimouſly* agreed that the *ſame* Land may at one Time pay Tithe *in Kind*, and at another Time a *Modus*, where there are different Circumſtances; the only Thing eſſential to a *Modus* is, that the ſame Land ſhould not pay Tithe *in Kind* and a *Modus* both, where there are the ſame Circumſtances. 1729. *Barnard. Rep. in B. R.* 293.

CAP. CXI.

Trial (a).

(a) *Ideocy* ſhall be tried by *Inſpection*; for that may be diſcerned, but ſo cannot *Lunacy*. *Per* Lord Chan. *Nottingham*, *Mich.* 32 *Car.* 2. *B. R.* in *Fragier*'s Caſe, *Skin. Rep.* 5.

(A) In what Caſes a new Trial will be granted on an Iſſue directed out of Chancery, et econt'.

If an Iſſue be directed out of Chancery to be tried, and the Plaintiff in the Iſſue gives Notice of Trial, and does not countermand it in Time, on Motion the Court of Chancery will give Coſts. *Trin.* 1722. *Anon.* 2 *Will. Rep.* 68.——So after ſuch Iſſue made up, it is proper to move in *Chancery* for a ſpecial Jury, (if neceſſary) which the Court will grant, as they did in the Caſe of *The Attorney General* and *Snow*. *Ibid.*

In the Caſe of *Soan* and *Danvers*, *June* 5, 1725, *Lord Chancellor* declared he would never grant a new Trial

1. IN this Caſe the Court declared, they would not receive Account of a Trial by *Affidavits*; it has been done on *Affidavits*, but very improperly, for it is only hearing on one Side; and that for the future they would not grant new Trials without Certificate of the Judge, that he was diſſatisfied with the Verdict. *May* 3, 1725. *Hill* and *Hill*, *Select Caſes in Chan.* 13.

without the Judge's Opinion; and that he ſhould have greater Regard to the Judge and Jury than to *Affidavits*, on which, he ſaid, he would never examine into the Trial. *Ibid.* 20.——But *Feb.* 16, 1726, a *new Trial was directed*, altho' *there was no Judge's Certificate*, nor *no Evidence but what was in the Parties Power at the Time of the* firſt *Trial*; but *one Part of the Order directed that the former Verdict ſhould not be given in Evidence upon the new Trial.* Reverſed *Vin. Abr.* Tit. *Trial*, (Z. g.) *P.* 488. in a Note to *Ca.* 5.

His *Honour* ſaid, the only Objection to the new Trial appeared to be the

2. An Iſſue was directed to be tried at the Aſſizes, Whether by the general Words of the Deed in Queſtion the Lands in Queſtion were intended to paſs. A Verdict paſſed for the *Plaintiff*. Upon a Motion for

Death of the Witneſs. But he was of Opinion, that the Witneſs being dead, his Depoſitions might be read; that as the Teſtimony which the Witneſs had given at the *former* Trial, might be read again in Evidence againſt

for a *new* Trial (it being ſent to the Judge to certify whether this was proper to be tried again) *Price* J. certified, " *That Evidence was* " *given on both Sides, and that he ſhould have thought this Caſe proper* " *to be tried again, but that one of the Witneſſes examined for the* " *Plaintiff was ſince dead, by Means whereof the Plaintiff might ſuffer* " *on ſuch new Trial, and that therefore he rather inclined againſt ſuch new* " *Trial.*" But *King* C. (on adviſing with his *Honour*) ordered a new Trial at the Bar of *C. B.* where a Verdict paſſed for the Defendant. Then a new Trial was again moved for, upon which it being ſent to the Judges of *C. B.* to know if this Cauſe was proper to be tried again, the *Chief Juſtice* acquainted the *Lord Chancellor* that *there had been very ſtrong Evidence given on each Side, inſomuch that he could not have blamed the Verdict, on which Side ſoever it had been given; and that he could not ſay this Verdict was againſt Evidence.* But Lord Chan. *King*, aſſiſted by his *Honour*, denied a new Trial. *Hil.* 1729. *Coker* and *Farewell*, 2 *Will. Rep.* 563.

againſt the ſame Parties, he thought that the other Side had ſuffered by the Witneſs's Death, ſince they had thereby loſt the Advantage of Croſs-examining. *Ibid.* 563, 564.—Upon a ſecond Application for a *new* Trial after the Trial at Bar, it was inſiſted, that this Matter relating to an Inheritance, it would be very hard to have the Right determined by one Trial, tho' even at Bar; and divers Caſes were cited, where new Trials were granted after a Trial at Bar (*a*); and this ought rather to be done in the preſent Caſe, where there had been Verdict againſt Verdict, and conſequently the Matter ſeemed to be left at large. But the Court denied a new Trial, (as above mentioned) ſaying, otherwiſe there would be no End of Suits; that a Trial *at Bar*, where more Time might be allowed, and the Party was put to more Expence, was of greater Weight than one by *Niſi Prius*; that the Court's Intent of ſending the Cauſe to be tried at Bar, was that it might be *final*; but that this Caſe was the ſtronger, *as the Iſſue to be tried related only to the Intention of the Parties*, and *not to any legal Title*; which Queſtion might have been determined at the Hearing, without ſending it to a Trial; and here being a Trial *at Bar*, this might juſtly claim a Preference to one by *Niſi Prius*, and was ſufficient to ſatisfy the Conſcience of the Court; but if the Party, againſt whom the Decree was, thought he had a *legal* Title, the Court did not debar him of that. *Ibid.* 564, 565.

(*a*) See the Caſe of *Leighton* and *Leighton*, 1 *Will. Rep.* 671.

3. Bill by the *Deviſee* of the Land againſt the *Heir* at Law to eſtabliſh Teſtator's Will. Upon the Hearing, the Iſſue *Deviſavit vel non* was directed to be tried at Law, and upon the Trial there was a Verdict for the Will. Then Defendant moved for a *new* Trial, *without any Certificate from the Judge*, or *Affidavit relating to the Trial*, but inſiſted it was a doubtful Caſe, and Evidence both Ways, and that by the Rule of the Court *the Inheritance of an Heir at Law ſhall not be finally bound and concluded by one Trial.* Lord Chan. *King* ſaid he knew no ſuch Rule, and ſaw no Reaſon for it, and denied the Motion; but gave the Defendant Leave to apply to the *Judge*, and if *he* was not ſatisfied with the Verdict, they might move it again upon ſuch Certificate. *Mich.* 4 *Geo.* 2. *Durant* and *Durant*, *Vin. Abr.* Tit. *Trial*, (Z. g.) *Ca.* 6. *P.* 488.

4. An Iſſue was directed to try the Validity and Operation of a Deed, and the Verdict being againſt the Deed in favour of Mr. *Arderne*, Mr. *Willes*, who tried the Cauſe at *Cheſter*, certified that he was ſatisfied with the Verdict; yet *there being a Remainder limited to Infants*, and *the Eſtate being* 300 l. *a Year*, Lord Chancellor granted a *new* Trial, tho' he ſaid Lord *Cowper* had often bound the Inheritance by one Trial. *Arderne* and *Crew*, *Paſ.* 6 *Geo.* 2. *MS. Rep.*

The Reaſon why one Trial in *Ejectment* will not bind the Inheritance, is from the Nature of the Action, and not from any Rule in Law, that *one* Trial ſhall not bind the Inheritance; for it would in a proper Action; but a Decree in Chancery is final, therefore *one* Trial upon an Iſſue directed may ſettle the Right. 1721. *Lomax* and *Rider*, *Vin. Abr.* Tit. *Trial*, (O. g.) *Ca.* 4. *P.* 476.——Upon an Iſſue *Deviſavit vel non*, which was found againſt the Heir at Law, it was urged for a new Trial, that it was the Rule of the Court *not to bind the Inheritance without two Trials* at leaſt; and in the Caſe of an Ejectment at Law, the Party is at Liberty to try his Fortune *toties quoties*, *&c.* But *Lord Chancellor* ſaid, he knew of no ſuch Rule; and as to the Caſe of Ejectment at Law, he ſaid the ancient Courſe of Law was otherwiſe; for in a real Action, as *Aſſize*, *&c.* Recovery therein was always a Bar to a new Aſſize, and the Party grieved was put to a Writ of an higher Nature, *&c.* and the trying *toties quoties* upon Ejectment is owing to the *new* Practice of trying Titles that Way, wherein the Parties being fictitious, one Trial cannot be made uſe of as a Bar to another. And a *new* Trial was denied, *no Affidavit or Certificate of the Judge being produced. Mich.* 4 *Geo.* 2. *in Canc'. Vin. Abr.* Tit. *Trial*, (O. g.) by way of Note to *Ca.* 4. *P.* 476.

CAP. CXII.

Truſt (a) and Truſtees.

(a) *Truſts* are to be governed by the ſame Law, and are within the ſame Reaſon as *legal* Eſtates, and this is a *Maxim* which has obtained univerſally; it is ſo in the Rules of Deſcent, as in *Gavelkind*, and *Borough Engliſh* Lands, there is a (b) *Poſſeſſio Fratris* of a Truſt as well as of a legal Eſtate; the like Rule in Limitations, and alſo of barring Intails of Truſts, as of legal Eſtates. *Per* Sir *Joſeph Jekyll* Maſter of the Rolls, who ſaid he thought there was no Exception out of this general Rule, nor is there any Reaſon that there ſhould; and that it would be impoſſible to fix the Boundaries, and ſhew how far, and no farther, it ought to go; and that perhaps in early Times, the Neceſſity of keeping thereto was not ſeen, or thoroughly conſidered. *Hil.* 1732. in the Caſe of *Sutton* and *Sutton*, 2 *Will. Rep.* 645.

(b) 1 *Inſt.* 18. *b.* 1 *Co.* 121. *b.*———Chancery may *decree an Executor* or *Truſtee to purchaſe Lands for an Infant*, and *whatſoever this Court can command to be done, without Doubt it can approve when done. Per Lord Chancellor, Gilb. Eq. Rep.* 11.

(A) Who ſhall be deemed to be a Truſtee, and for whom; ——And here of the Power of a Truſtee.

(B) Truſtee in what Caſes favoured;——And in what Caſes decreed to account.

(C) Truſtees, how far anſwerable for each other.

(D) What ſhall be a Truſt, et econt';——What a ſufficient Declaration of a Truſt;——And here of carrying a Truſt into Execution;——And what Eſtate is to be conveyed by Truſtees (when the Truſt remains to be executed) and to whom.

(E) Of a reſulting Truſt.

(F) What Acts of a Truſtee ſhall be a Breach of Truſt, &c.

(G) Acts of Truſtees and Ceſtui que Truſt as to deſtroying contingent Remainders, &c.

(H) Caſes relating to Ceſtui que Truſt;——And in what Caſes Equity will compel Truſtees to join in a Recovery, &c. with Ceſtui que Truſt.

(A) Who ſhall be deemed to be a Truſtee, and for whom;—And here of the Power of a Truſtee.

Guardians by Statute are only Truſtees. *Per* Lord *Macclesfield*, *Trin.* 1721. 1 *Will. Rep.* 704.

1. A MAN is Guardian or Truſtee for an Infant to whom Lands are deſcended or deviſed, but the Title is *revèra* in a third Perſon; but if the Truſtee or Guardian buys in the Title of this third Perſon, this ſhall not be taken to be a Truſt for the Infant, for he is at Liberty to purchaſe it as well as any Body elſe; and ſo it was held in the Caſe of *Combes* and *Throckmorton*. *Per Lord Chancellor. Leſley's Caſe, at the Rolls. Eaſt.* 1680. 2 *Freem. Rep.* 52.

2. Equity of Redemption was conveyed to *A.* In Truſt for Payment of Debts, and the Surplus to *B.* *A.* agrees with the Mortgagee to turn Intereſt into Principal. This Agreement of the Truſtee's ſhall bind *B.* tho' he was no Party to it. *Jan.* 19, 1711. *Conway* and *Shrimpton*, *Vin. Abr.* Tit. *Truſt*, (Q) *Ca.* 6. *P.* 512.

3. Maſter of a Ship goes a trading Voyage, and dies; the ſucceeding Maſter publickly opens the Effects of the Deceaſed, and then ſends a Letter incloſed with a Bond to the Widow to be anſwerable for Intereſt at the Rate of *Reſpondentia* Bonds. Lord Keep. *Harcourt* decreed that the Succeſſor was a Truſtee, and ſhould be anſwerable for what he actually made of the Money. *Eaſt.* 10 *Ann. Lucas's Rep.* 20.

4. *D.* having more than 3000 *l. per Annum*, married *M.* (the Plaintiff) who had 10,000 *l.* Portion, and ſettled 1000 *l. per Annum* upon her for her Jointure, and the greateſt Part of *D.*'s Eſtate was ſettled upon the firſt and every other Son in Tail Male ſucceſſively, as uſual in Marriage Settlements. *D.* run greatly in Debt; and *J.* his eldeſt Son being of full Age, *D.* upon a Calculation of his Debts, and the Value of his Eſtate for Life, with Impeachment of Waſte, agreed with *J.* to convey all his Eſtate to him, and *J.* covenants to pay all *D.*'s Debts, and to allow him 500 *l. per Annum* Rent-charge for his Life; and *further* (upon which the Queſtion aroſe) *that* J. *ſhall indemnify* D. *from all Debts, Charges and Expences for the Maintenance of ſaid* M. *being then ſeparated by Conſent.* *M.* brings a Bill againſt *D.* and *J.* to have an Allowance for her Maintenance, *&c.* Lord Chan. *Cowper* ordered *M.* to be allowed 200 *l. per Annum.* *Trin.* 1 *Geo.* 1. *Dutton* and *Dutton*, *Vin. Abr.* Tit. *Truſt*, (P) *Ca.* 9. *P.* 511.

His *Lordſhip* ſaid, that by this Covenant to indemnify *D.* from maintaining *M.* his Wife, *J.* has taken upon himſelf the Charge of maintaining her, and as to this Purpoſe ſtands in *D.*'s Place, who is bound to give his Wife an Allowance,

if he voluntarily ſeparates from her; and his *Lordſhip* ſaid he took *J.* in this Caſe *to be in Nature of a Truſtee for the Wife, ſo far as a reaſonable Allowance for her Maintenance*; and tho' *J.* doth offer to maintain her at his own Houſe, yet his *Lordſhip* did not think ſhe is bound to accept that Offer; for tho' *J.* ſtands in *D.*'s Place as to her Maintenance, and a Huſband is not bound to allow any Thing to his Wife for Maintenance if he offers to take her Home, yet in this Caſe here lies no ſuch Obligation upon the Wife to live with the Son; and tho' ſhe refuſes, ſhe ought to have a reaſonable Allowance. *Ibid.*

5. A Copyhold was granted to *A.* and *B.* Huſband and Wife, and *J. S.* for their ſeveral Lives *ſucceſſively*. By the Copy it appeared that the Fine paid was the Money of *A.* and *B.* *Per* Lord *Macclesfield*, *J. S.* is in Equity to be intended but as a Truſtee for *A.* and *B.* and the Survivor of them. *Hil.* 1721. *Benger* and *Drew*, 1 *Will. Rep.* 781.

It being mentioned in the Copy that the Fine was paid by *A.* and *B.* is ſtrong Evidence of the

Fact being ſo, which Thought the Court will not look upon as concluſive, yet any Evidence given to contradict it, ought, in order to prevail, to be very clear and full. *Per* his *Lordſhip*, *ibid.*

6. *A.* deviſes Lands to Truſtees, *to ſell for ſuch a Price as they ſhould think fit.* And *per* Lord Chan. *Macclesfield*, there can be no Doubt but this Court, at the Deſire of any ſingle Creditor, might and would interpoſe, and order the Eſtate *not* to be ſold as the Truſtees ſhould think fit, but for the beſt Price before the *Maſter*. *Trin.* 1721. in the Caſe of *The Duke of Beaufort* and *Berty*, 1 *Will. Rep.* 704.

7. The Mother gave a Bond to her Son, conditioned to ſurrender a Copyhold Eſtate to him, of which ſhe was Heir. Decreed that ſhe was a Truſtee for her Son. *Mich.* 10 *Geo.* 1. *Aliſon's Caſe*, 2 *Mod. Caſes in Law and Eq.* 62.

8. *A.* had a long Exchequer Annuity for ninety-nine Years, which was ſettled *on himſelf for Life*, Remainder *to his Wife for Life*, Remainder *for Proviſion for Children*, and had Liberty by Decree of the Court, to borrow 300 *l.* upon it, which was done, and this placed in *B.* the Lender's Hand as a Security 'till Payment, with Intereſt. *B.* ſubſcribes it into the *South-Sea* Stock in 1720. *A.* brings his Bill for a Reconveyance. *King* C. held, that *B.* could *not* be conſidered as a Truſtee, as he had it only for a particular Purpoſe, and had no Authority to tranſcribe. So decreed to account for the Profits, and to reconvey on Payment of Principal, Intereſt and Coſts. 9 *Nov.* 1725. *Thomas* and *Puddleſbury*, *Select Caſes in Chan.* 51.

9. A Perſon deemed a Truſtee, if he takes an Inheritance after Notice of Articles to ſettle the Eſtate. *Vide Comyns's Rep.* 700. *Mich.* 13 *Geo.* 2. *Skirne* and *Meyrick, in Scac'.*

(B) Truſtee in what Caſes favoured (*a*);—And in what Caſes decreed to account.

(*a*) Truſtee ought not to pay Coſts where there is no Default in him. *Per* Lord Keep. *Wright, Mich.* 13 *W.* 3. *Anon. Caſes in B. R. Temp. W.* 3. *P.* 560.

So in Caſe of Money to be laid out at Intereſt. *Per Lord Keeper, ibid.*

1. IF one deviſe to Truſtees, and by an expreſs Clauſe therein gives them Power to appoint *Agents* to manage the Land, and they appoint one *then ſolvent*, and good, tho' *after* he prove *inſolvent*, they ſhall *not* anſwer for him; *ſecus* if he were not ſolvent at the Time of Nomination. But if there were no ſuch Direction *or* Power in the Will, the Truſtees are bound to anſwer for their Agents at all Events. *Per* Lord Keep. *Wright, Mich.* 13 *W.* 3. *Anon. Caſes in B. R. Temp. W.* 3. *P.* 560.

2. Defendant had Stock in the *Eaſt-India* Company, *In Truſt* for Plaintiff, and a Bond in his own Name from the Company, but *In Truſt* for Plaintiff. Plaintiff being beyond Seas, drew a Bill on Defendant, and promiſed to ſend him Effects wherewith to pay it. Defendant accepted the Bill, and before the Day of Payment the Plaintiff fails. Afterwards Defendant ſold the Stock and Bond at the then current Price (but at great Diſcount) to raiſe Money to pay the Bill. Two Years after the Plaintiff comes to Defendant to ſell and reimburſe himſelf; the Stock and Bond roſe in Value. And on a Bill brought for an Account, the Queſtion was, If the Defendant ſhould account according to the Value he ſold then at, or according to the then current Value? And *per* Lord Keep. *Wright*, the Want of Effects was ſufficient to juſtify the Sale without Orders, for ſo much as was neceſſary to pay the Bill; but the Stock alone appearing ſufficient for that Purpoſe, without the Bond, the Defendant muſt anſwer the Value of that, as it was when the Plaintiff gave Directions for the Sale; And decreed accordingly. *Mich.* 1702. *Henriques* and *Franchiſe*, *Prec. in Chan.* 205.

3. If a Truſtee impowered to put Money to Intereſt, lets the Money lie by him, he ſhall be accountable for Intereſt. *Per Harcourt* Lord Keep. *Eaſt.* 10 *Ann. in Caſu Brown* and *Littton* (*b*), *Lucas's Rep.* 21.

(*b*) *Vide P. Ca.*

4. *A.* is Truſtee for *B.* as to an Eighth of the Proprietorſhip of the Province of *Carolina*, and was at great Trouble and Charges in relation to the Affairs of the Province, after which *B.* aſſigned his Intereſt to *C.* *A.* brought a Bill againſt *C.* for the Money expended by him, *&c.* And *C.* brought his Croſs Bill againſt *A.* in order to compel him to convey over the Truſt Eſtate. And *per* Lord Chan. *Macclesfield*, *C.* can be in no better Condition than *B.* under whom he claims; wherefore as *B.* would not have been aſſiſted without paying for the Charges and Trouble which *A.* had been at in relation to the Truſt, ſo by Parity of Reaſon *C.* as claiming under *B.* muſt do the ſame Thing. *Hil.* 1721. *Trott* and *Dawſon, et econt'*, 1 *Will. Rep.* 780.

5. Stock was inveſted in Truſtees by Will. The Truſtees ordered their Agent to ſell the Stock, ſo that he did not ſell for leſs than 2500 *l.* and whatever he ſold for more ſhould be for his own Trouble. The Agent agrees for Sale of this Stock for 3400 *l.* and afterwards purchaſes the Stock from the Truſtees for 2800 *l.* who allow him

100 *l.*

100 *l.* for his Trouble in buying, ſo that he got 600 *l.* by the Stock, beſides the 100 *l.* allowed for his Trouble. A Bill was brought for the Overplus, which was decreed, the Court declaring, that no Truſtee, nor any Perſon acting under a Truſtee, can ever be a Purchaſor in this Court, on Account of the great Inlet to Fraud. *Eaſt.* 11 *Geo.* 1. *Whitackre* (or *Whitacre*) and *Whitackre* (or *Whitacre*), *Select Caſes in Chan.* 13.

6. The Truſtees of the Charity of St. *Mary Overees* in *Southwark* made a Leaſe of nine Houſes under the Rent of 5 *l. per Annum* for ſixty-one Years to the Nephew of their Clerk, and the Nephew covenanted to rebuild five of them. The Nephew afterwards aſſigned over his Intereſt to the Clerk for 100 *l.* proved to be paid. The Clerk makes a Leaſe of five of the Houſes for forty Years, under the yearly Rent of 5 *l.* with Covenant from the Tenant to rebuild five of them, and the Clerk alſo received a Fine of 20 *l.* ſo that he had four of the Houſes for nothing immediately, and a Reverſion for twenty-one Years of the other five Houſes, after the Expiration of the Leaſe he had made. Lord Chan. *King* decreed the Leaſe to the Clerk to be ſet aſide as fraudulent, but the Leaſe made to the Undertenant to continue, and the Rent to be paid to the Truſtees. 5 *July*, 1725. *Pugh* and *Ryall*, *Select Caſes in Chan.* 40.

But it appearing that the Clerk had rebuilt one of the four remaining Houſes, the Court by Conſent ſet the 20 *l.* received, and the Profits he had made, againſt his Expences; otherwiſe would have ordered an Account of his Receipts and Payments, and the Eſtate to ſtand as a Security for what he had laid out. *Ibid.*

7. A Leaſe of the Profits of a Market was deviſed to a Truſtee, In Truſt for an Infant; before the Expiration of the Term the Truſtee applied to the Leſſor for a Renewal for the Infant's Benefit, which he refuſed, in regard that it being only of the Profits of a Market, there could be no Diſtreſs, and muſt reſt ſingly in Covenant, which the Infant cannot do; there was clear Proof of the Refuſal; and on which the Truſtee gets a Leaſe to himſelf. Decreed by Lord Chan. *King*, that the Leaſe ſhould be aſſigned to the Infant, and that the Truſtee ſhould be indemnified from the Covenants in the Leaſe, and the Truſtee to account for the Profits *ſince the Renewal*. *Oct.* 31, 1726. *Keech* and *Sandford*, *Select Caſes in Chan.* 61.

His *Lordſhip* ſaid he muſt conſider this as a Truſt for the Infant, for if a Truſt on Refuſal to renew might have a Leaſe to himſelf, few Truſt Eſtates would be renewed to *Ceſtui que Uſe*: That the Truſtee ſhould rather have let it run out, than to have had the Leaſe to himſelf: That it may ſeem hard that the Truſtee is the only Perſon of all Mankind who might not have the Leaſe; but it is very proper that Rule ſhould be ſtrictly purſued, and not in the leaſt relaxed, for it is very obvious what would be the Conſequence of letting Truſtees have the Leaſe, on Refuſal to renew to *Ceſtui que Truſt*. *Ibid.* 62.

8. It is a *Rule* that the *Ceſtui que Truſt* ought to ſave the Truſtee harmleſs, as to all Damages relating to the Truſt, and it is within the Reaſon of that Rule, that where the Truſtee has honeſtly and fairly, without any Poſſibility of being a Gainer, laid down Money, by which the *Ceſtui que Truſt* is diſcharged from being liable for a greater Sum lent, or from a plain and great Hazard of being ſo, the Truſtee ought to be paid. *Per* Lord Chan. *King*, *Eaſt.* 1728. *Balſh* and *Hyham*, 2 *Will. Rep.* 453, 455.

(C) Truſtees; how far anſwerable for each other.

Lord Chancellor ſaid, that it could not be expected that all the Truſtees ſhould meet together to receive the Money, but if they had, either one muſt have had the Cuſtody of the whole, or it muſt be divided into Shares. Suppoſe all the Money had been lodged in a Banker's Hands *bona fide*, and he had failed, ſhould the Truſtees have been anſwerable, *&c.* And if they intruſt one of themſelves for *Convenience* or *Neceſſity*, at a Time when he is ſolvent, which is no more than making him their Banker, ſhall Equity puniſh where there is no Default, and this is the very Caſe of *Churchill* and *Hapſon*; and to charge Truſtees in ſuch a Caſe, would make the Caſe of Truſtees very perilous, which are neceſſary for the common Good and Convenience of Families, *&c.* and his *Lordſhip* ſaid, he ſaw no Reaſon why Truſtees may not make one of themſelves their Caſhier, where there is no Fraud. That this was a reaſonable Thing, at that Time *R.* was the only Truſtee, who lived in *London*, where the Money was paid, *&c.* And as to an Objection made as to the letting the Money lie ſo long in *R.*'s Hands, he ſaid the Caſe of *R.* differs from the Caſe of a common Banker, where the Money may be drawn out at Pleaſure; but here *R.* had as good a Right to the keeping it as the others, and all paid out to about one Third, and he was intruſted by the Teſtatrix as much as the other. *Ibid.*———If *one Truſtee directs the Payment of the Truſt Money over to the other*, and *joins in the Deed*, he charges and makes himſelf liable for the Default of the other. Said to have been ſo lately held in Chancery in the Caſe of Serjeant *Webb*'s Will. *Ibid. Ca.* 8. *P.* 534.

1. *J. S.* by Will in 1724 gave 650*l.* to *R.* and two other Truſtees, *In Truſt* to build and endow an Alms-houſe in *Cornwall* for Maintenance of five poor Women, and made *M.* and *N.* Executors, and appointed the 650*l.* to be paid within ſix Months after her Death, with Intereſt. *R.* lived in *London*, and the other Truſtees in *Cornwall*. *R.* called on the Executors for the Money, who refuſed to pay it, unleſs the two other Truſtees would join in a Receipt. *R.* procures a Receipt, and received all the Money, and paid at Times by Directions of the other Truſtees for building, *&c.* 400*l.* and about four Years after the Money firſt received fails, and is now inſolvent. On a Bill for an Account againſt all three Truſtees, *Lord Chancellor* decreed *R.* only to be chargeable. *Trin. Vac.* 1734. *Attorney General* and *Randall et al'*, *Vin. Abr.* Tit. *Truſt*, (N. a.) *Ca.* 9. *P.* 534.

(D) What ſhall be a Truſt, et eont'; —What a ſufficient Declaration of a Truſt; —And here of carrying a Truſt into Execution; ——And What Eſtate is to be conveyed by Truſtees (When the Truſt remains to be executed) and to Whom.

A Bill exhibited for the Execution of a Truſt. The Defendant pleads a former Bill exhibited in the Exchequer, and a Decree for the Execution of the Truſt. Ordered to proceed upon the Exchequer Decree; with this further Direction, that the Truſtees ſhould be examined upon Interrogatories, as to what Intereſt they had made ſince the Suit in the Exchequer. In this Caſe the Plaintiff was an Infant, and ſued in the Exchequer by his *Prochein Amy*, who, the Plaintiff ſaid, was careleſs and remiſs; and therefore deſired he might change his *Prochein Amy* in the Exchequer. Ordered to be referred to the *Maſter*, whether he is fit to be continued, and as that comes out, to be changed or not. *Mich.* 8 *Ann. MS. Rep.*———*A.* by Will appoints two Truſtees, to whom and their Heirs, Executors and Aſſigns, he deviſes his real and perſonal Eſtate on ſeveral Truſts; and in Caſe one die, then the other to execute the ſame. During their joint Lives if one refuſe to act, the other cannot act without him; but the Truſt devolves upon the Court. *Doily et al'* and *Sherratt*, *Mich.* 9 *Geo.* 2. at the Rolls, *MS. Rep.*———It is not neceſſary for a *Truſt* that relates to the *Perſonalty* to be in *Writing*, by the Stat. 29 *Car.* 2. *Per* Lord Chan. *Parker*, *Lucas's Rep.* 405.———Mortgage in Fee for 700*l.* paid by *A.* but *Half of the Money was B.'s.* but *there was no Declaration in Writing*. *Powel* J. admitted the Proof of it to be read, for tho' *at Law* it is *not* to be *allowed*, where a Jury may be inveigled by that which is not proper Evidence, yet *here* is no ſuch Danger; but he would not decree the Truſt. *Mich.* 1699. *Newton* and *Preſton et al'*, *Prec. in Chan.* 103.

1. A MAN is a Guardian or *Truſtee* for an Infant, to whom Lands are deſcended or deviſed, but the Title is *revera* in a third Perſon. If the Truſtee or Guardian buy in the Title of this third Perſon, this ſhall not be taken to be a Truſt for the Infant, for he is at Liberty to purchaſe it as well as any body elſe. And ſo it was held *in Caſu Combes* and *Throckmorton*, *per Lord Chancellor*, *Eaſt.* 1680. 2 *Freem. Rep.* 52.

2. *J. S.*

2. *J. S.* deviſed 10,000 *l.* together with his Houſe at *K. to be ſettled upon* D. *and her Iſſue, in ſuch Manner as his Executor ſhould think fit, with* D.*'s Approbation.* D. *has eight Children by* C. *and there is a Proviſion for the eldeſt Son by the Marriage Settlement.* Bill was brought for the Directions of the Court for the Execution of this Truſt. *Cowper* C. ſaid, this Truſt in the Will being executory, muſt be ſo carried into Execution in a Court of Equity as to ſecure the 10,000 *l.* to *D.*'s Children; and tho' there is no expreſs Direction to lay it out in Land, yet being directed to be ſettled together with an Houſe which is a Fee-ſimple, it is proper for the Executor to lay it out in Land, and then make a *ſtrict* Settlement *to* D. *for Life*, with Remainder *to the Children* in ſuch Proportion as the Executor, with *D.*'s Approbation, ſhall think fit; but if they cannot agree about the Proportion, then to be referred to a *Maſter* for his Direction therein. *Mich.* 4 *Geo. Clark et Ux'* and *Fellows*, *Vin. Abr.* Tit. *Truſt*, (H) *Ca.* 3. *P.* 505.

Mr. *Vernon* propoſed 4000 *l. to the eldeſt Son*, and 6000 *l.* amongſt the other Children, which *Lord Chancellor* ſeemed to think a reaſonable Proportion. *Ibid.*

3. *J. S.* deviſed Land *to Truſtees and their Heirs*, for Payment of Debts, and after the Debts ſatisfied to convey the ſame to *B. for her Life*, without Impeachment of Waſte, (voluntary Waſte in Deſtruction of Houſes and Buildings excepted) Remainder *to ſuch Perſon as ſhe ſhould marry for his Life*, Remainder *to the Iſſue of her Body*, and *for want of ſuch Iſſue*, Remainder *over*. Plaintiffs brought their Bill againſt the Truſtees to have an Eſtate-tail conveyed to them. *Sed per Cur'*, All is executory, and we are bound to purſue the Intent of the Teſtator, which is to give the Lady only an Eſtate for Life; and altho', if this were a Deviſe of the Land itſelf, an Eſtate-tail would paſs, or otherwiſe the Iſſue, if Purchaſers, would take only for Life; yet, as a Conveyance is to be made, we can only limit an Eſtate-tail to all the Lady's Children. So the Plaintiffs had their Choice to have ſuch a Conveyance, and if they refuſed, then the Bill to be diſmiſſed. *Lord and Lady Glenorchy* and *Boſvill*, *Eaſt.* 6 *Geo.* 2. *MS. Rep.*

4. *A.* being in Poſſeſſion of the Office of Clerk of the Crown, *&c.* in *B. R.* in which *B.* has alſo an Eſtate for Life, procures *B.* to ſurrender, and ſolicits a Patent for himſelf and *C.* and takes a Note from *C.* promiſing to declare a Truſt for *A.* The Patent afterwards is obtained; *A.* dies in Debt, and without calling for a Declaration of this Truſt; this Note was held to be a ſufficient Declaration of Truſt. *Trin.* 9 *Geo.* 2. *Bellamy* and *Burrow*, *Caſes in Eq. Temp. Talbot* 97.

(E) Of a reſulting Truſt (*c*).

(*c*) If an Infant has a Freehold or a Chattel Leaſe, and a Guardian or Truſtee alters the Nature of the Intereſt, or takes a new Leaſe of the ſame Sort, it ſeems that the new Leaſe ſhall reſult, and go as the old one would have done, or at leaſt for ſo much of the Time as was unexpired of the original Leaſe. *Pearſon* and *Pym* (*d*), *MS. Notes.*
(*d*) *Quære* Term and Year.

1. *J. S.* a Truſtee, purchaſes Lands out of the Profits received out of the Truſt Eſtate, and takes the Conveyance in his own Name; tho' poſſible, if he be unable to make other Satisfaction for the Profits ſo miſapplied, thoſe Lands may be ſequeſtred; yet they cannot be decreed to be a Truſt for the *Ceſtuy que Truſt* no more than if *A.* borrows Money of *B.* and therewith purchaſes Lands, theſe purchaſed Lands are no Truſt for *B.* for it is not a Truſt in Writing; and a *reſulting* Truſt it cannot be, becauſe that would be to contradict the Deed by parol Proof directly againſt the Statute of Frauds; but if the Purchaſe had been recited to have been made with the Profits of the Truſt Eſtate, this appearing in Writing, might ground a *reſulting* Truſt

Truſt. Decreed *per Lord Chancellor*, with the Aſſiſtance of *Powel* J. and his *Honour*, *Mich.* 1697. *Kirk* and *Webb*, *Prec. in Chan.* 84. Affirmed on Appeal to the Lords 7 *March* 1699.

Lord Keeper ſaid, that this was not ſo ſtrong a Caſe as *Kirk* and *Webb*, for there was a *Defect of perſonal Eſtate* to anſwer the Demand, which in this Caſe there is not. *Ibid.*

2. *J. S.* made *A.* and others his Executors in Truſt, and died. *A.* managed the perſonal Eſtate, and kept on the Ledger and Journal of *J. S.* and made all the Entries in his own Hand; and therein entered the perſonal Eſtate Debtor to Lands bought, naming them particularly, and dies, having made *B.* and *C.* his Executors: The only Queſtion was, Whether theſe purchaſed Lands ſhould be a Truſt for thoſe who were to have the Benefit of *A.*'s perſonal Eſtate? And Lord Keep. *Wright* decreed that they ſhould not. *Eaſt.* 1701. *Heron* and *Heron*, *Prec. in Chan.* 163.

3. *J. S.* left *A.* his Son and Heir, an Infant, and by Will impowered *B.* his Executor, if he thought fit, to lay out the perſonal Eſtate in Land, and ſettle it on *A.* and his Heirs. *B.* being about to ſell Part of the perſonal Eſtate, told *A.*'s Mother of it, and that he was about to buy an Eſtate for the Infant, and aſked her Conſent, which ſhe gave. *B.* took the Conveyance in his own Name, and *no Truſt in Writing was declared for* A. but it was proved that *B.* had ſeveral Times declared that it muſt be ſold to make *A.* Satisfaction. And afterwards *B.* died inteſtate and inſolvent. Tho' his *Honour* at firſt was very inclinable to help *A.* yet afterwards he diſmiſſed the Bill as to the purchaſed Eſtate, and declared he could not help *A.* becauſe *there was no expreſs Proof of the Application of the Truſt Money*. *Trin.* 1701. *Halcott* and *Markant*, *Prec. in Chan.* 168.

4. *A.* dies inteſtate, leaving a Wife and two Infant Daughters, intitled to his perſonal Eſtate in Thirds, which amounted to 900 *l.* The Widow adminiſters, and lays out 500 *l.* (Part of the Money found in the Houſe, as was proved) in Lands, and takes the Conveyance in her own Name. The Daughters married (*a*) and died; and *B.* the Huſband of the ſurviving Daughter, took out Adminiſtration to his Wife and her Siſter. His *Honour* (on a Bill brought by *B.* againſt the Heir of the Widow and Adminiſtratrix) decreed two Thirds of the 500 *l.* to *B.* and if not paid, the Land to be ſold. But Lord Keep. *Wright* reverſed this Decree, as *contrary* to the Caſe of *Kirk* and *Webb*. *Mich.* 1701. *Kinder* and *Miller*, *Prec. in Chan.* 171.

(*a*) The *Original* ſays that the Daughters *both* married and died.

5. Truſt *reſults to the Party from whom the Conſideration moves*. *March* 4, 1706. *Pelly* and *Maddin*, *Vin. Abr.* Tit. *Truſt*, (E) *Ca.* 15. *P.* 498.

6. Ruled by Lord Chan. *Cowper*, that the Statute of Frauds, *ſ.* 20. which ſays, "*that all Conveyances where Truſts and Confidences "ſhall ariſe or reſult by Implication of Law, ſhall be as if that Act "had never been*," muſt relate to *Truſts* and *equitable Intereſts*, and cannot relate to an *Uſe* which is a *legal Eſtate*. *Mich.* 1709. in the Caſe of *Lamplugh* and *Lamplugh*, 1 *Will. Rep.* 112, 113.

So a Deviſe to *A.* upon *ſpecial* Truſt and Confidence *that he ſhould pay all the Teſtator's juſt Debts*, is a *reſulting* Truſt to the Heir after Debts paid.

7. Deviſe of a Rent-charge to his Wife, *In Truſt, nevertheleſs for Payment of Debts and Legacies for thirteen Years*, and then he gives his Wife other Lands in Augmentation of her Jointure. The *Surplus* of the Rent-charge after Debts and Legacies paid is *not* a *beneficial* Truſt for the Wife, but a *reſulting* Truſt to the Heir. *May* 25, 1712. *Wych* and *Packington*, *Vin. Abr.* Tit. *Truſt*, (E) *Ca.* 18. *P.* 499.

March 11, 1727. *Kirrick* and *Bramſbey*, *ibid.*

8. Where it plainly appears, upon the Evidence on both Sides, that the Conſideration Money paid on a Purchaſe was the proper Money of *A.* (tho' mentioned in the Conveyance to be paid by *B.*) in ſuch Caſe had it not been for the Statute of Frauds, this would have made a *reſulting* Truſt; and *B.* after *A.*'s Death executing a Declaration of Truſt, this plainly took it out of the Statute. *Per* Lord Chan. *Cowper*, *Trin.* 1716. in the Caſe of *Ambroſe* and *Ambroſe*, 1 *Will. Rep.* 323.

9. *A.* agrees for a Leaſe for ninety-nine Years. *B.* advances the Money, and the Leaſe is taken in *A.*'s Name. This is a *reſulting* Truſt, and out of the Statute of Frauds, *A. having by Letter acknowledged the Truſt. Feb.* 12, 1717. *O Hara* and *O Neil*, *Vin. Abr.* Tit. *Truſt*, (E) in a Note to *Ca.* 6. *P.* 497.

10. Deviſe of perſonal Eſtate for Payment of Debts and Legacies, and the Overplus to be diſpoſed as Teſtator ſhould by Codicil direct; and further deviſed Part of his real Eſtate to be ſold for Payment of particular Debts, and the Reſidue as he ſhould by Codicil direct; and by Codicil he directs that the *Overplus* of ſuch *real* Eſtate ſhall go to his Executors for Performance of his Will, and then adds, I hope I have made a ſufficient Proviſion for Performance of my Will; and if there be any Overplus of my *perſonal* Eſtate after full Performance, I give it to *J. S.* Adjudged that the Surplus of ſuch *real* Eſtate ſhall go to *J. S.* and not reſult to the Heir. *March* 11, 1717. *Tyrwith* and *Trottman*, *Vin. Abr.* Tit. *Truſt*, (E) *Ca.* 20. *P.* 499.

11. No *Rule* is more certain than that if a Man makes a Conveyance *in Truſt* for ſuch Perſons, and ſuch Eſtates as he ſhall appoint, and makes no Appointment, the *reſulting* Truſt muſt be to him and his Heirs. The *Truſt* in Equity muſt follow the Rules of *Law* in the Caſe of an *Uſe*, and that it would be ſo in the Caſe of an Uſe is undoubtedly true, and that was Sir *Edward Cleer*'s Caſe in 6 *Rep.* *Per Lord Chancellor*, *Hil.* 4 *Geo.* 2. in the Caſe of *Fitzgerald* and *Lord Fauconbridge*, *Fitz-Gibb. Rep.* 223.

12. If a Woman has a Power out of a Truſt Eſtate, notwithſtanding her Coverture, to limit 1500 *l.* by Deed after her Deceaſe, and by Deed duly executed limits ſuch a Sum to a Truſtee, to be paid to *A. B.* at twenty-one or Marriage, and dies during the Infancy of *A. B.* as this ariſes from a Power which when executed draws the Money out of the Truſt as if it had never been compriſed in it, and Money is not in Law ſuppoſed to produce any Profit, there cannot be a reſulting Truſt of the Intereſt to the Huſband 'till the Day of Payment, but it ſhall be raiſed immediately after the Wife's Deceaſe. *Munſell et al'* and *Price*, *Trin.* 9 *Geo.* 2. *MS. Rep.*

13. Truſts ariſing by *Operation* of Law have been but of *two* Kinds, (Firſt) either where the Conveyance has been taken in the Name of one Man and the Purchaſe Money paid by another, *or* (Secondly) where the Owner of an Eſtate has made a voluntary Conveyance of it, and made a Declaration of the Truſt with regard to one Part of the Eſtate, and has been ſilent with regard to the other Part of it. *Per Lord Chancellor*, *Hil.* 1740. in the Caſe of *Lloyd* and *Spillitt*, *Barnard. Rep. in Chan.* 388.

The Reaſon why this Court has allowed a Truſt by *Operation* of Law to ariſe in the *latter* Caſe, has been, that the Party by declaring Part of the Truſt to be for another, and by ſaying nothing with regard to the other Part of it, ſhews his Intention to be that the other was to have only one Part of the Truſt, and conſequently he himſelf ought to have the Benefit of the other Part of it. Theſe have been the only two Inſtances of Truſts allowed of, to ariſe by Operation of Law, ſince the Statute of Frauds, unleſs there has been a *plain* or *expreſs* Fraud Where there has been a *Fraud*, in gaining a Conveyance from another, that may be a Reaſon for making the Grantee in that Conveyance to be conſidered merely as a Truſtee. *Per Lord Chancellor*, *ibid.*

(F) What Acts of a Truſtee ſhall be a Breach of Truſt, &c.

1. A TERM (in a Marriage Settlement) was for raiſing 3000*l.* for Daughters Portions, with a Power to the Father, *with Conſent of Truſtees, to revoke all the Uſes.* The Wife died leaving a Daughter, who married without her Father's Conſent. On a Bill brought by the Daughter and her Huſband, for raiſing the 3000*l.* it was inſiſted that it would be a Breach of Truſt in the Truſtees to join (with the Father) in a Revocation. But Lord Chan. *Macclesfield* thought it not only *juſtifiable* but *commendable* in the Truſtees, under *ſome* Circumſtances, to conſent to ſuch Revocation (*a*). *Hil.* 1722. *Rereſby* and *Newland*, 2 *Will. Rep.* 93, 102.

(*a*) As if the Daughter ſhould be drawn in to marry ſome *unworthy* Man, who ſhould uſe her in a moſt barbarous Manner, and ſhe ſhould afterwards die without Iſſue, upon which the Huſband ſhould ſue for the Portion; in this Caſe it would be very reaſonable for the Truſtees to join with the Father to revoke the Uſes. So if ſhe ſhould leave Children, the Truſtees might reaſonably conſent to a Revocation, in order to carry the Portion from ſuch Huſband to the Children. *Per Lord Chancellor, ibid.* 102.

2. *P.* applied to *A.* a Broker, to help him to 850*l.* upon 1200*l.* *South-Sea* Stock. *A.* procured the Money, and took a Transfer of the Stock to himſelf; but *P.* gave a Bond for Payment of the Money borrowed to *B.* and alſo took a Defeazance from *B.* for the Stock; and a few Days after the Stock was transferred, and before the Time of Redemption, *A.* ſold and transferred the Stock by Order of *B.* who proved inſolvent; and the Plaintiff prayed by his Bill to have a Satisfaction againſt *A.* for the Stock, upon Payment of Principal and Intereſt, *A.* having ſold the Stock and received the Money. Lord Chan. *Macclesfield* held, that *A.* was a Truſtee for both Parties, and was guilty of a Breach of Truſt in ſelling the Stock before the Time expired for Redemption. *Hil.* 8 *Geo. Philpot* and *Helbert et al'*, *Vin. Abr.* Tit. *Truſt*, (P) *Ca.* 10. *P.* 511.

3. *J. S.* buys a Copyhold Eſtate in the Name of *A.* who gave a Bond in 200*l.* Penalty to ſurrender the Copyhold upon Requeſt to ſuch Perſon and Uſes as *J. S.* the *Ceſtuy que Truſt*, or his Executors or Adminiſtrators, ſhould direct. *J. S.* dies, and the Adminiſtrator brings an Action on the Bond (*b*), and recovered the Penalty, and received it; and after brings a Bill againſt the Truſtee to compel a Surrender. Lord Chan. *King* thought it not reaſonable that he ſhould have both the 200*l.* on the Bond and the Copyhold alſo, but that *A.* being a plain Truſtee, and continuing ſo until he has performed the Truſt, muſt account for the Profits to the Plaintiff, who has in Equity a ſpecifick Right to the Land, but the 200*l.* and Intereſt muſt be deducted, and *A.* to have an Allowance for the ſame. *Mich.* 1725. *Moorecroft* and *Dowding*, 2 *Will. Rep.* 314.

(*b*) It ſeems by the Caſe (tho' not ſtated) that *A.* did not ſurrender according to the Condition of the Bond.

4. Truſtee, tho' he acts, not to be charged as a Mortgagee for what he had or might have received, but only for his actual Receipts; for he might have moved for a Receiver. *Nov.* 17, 1725. *Howard* and *Webſter*, *Select Caſes in Chan.* 53.

5. *J. S.* ſeiſed in Fee of Lands, deviſed the ſame to Truſtees *B. C.* and *D.* for five hundred Years, *In Truſt* to pay Debts, and for a Charity. *B.* one of the Truſtees of the Term, and alſo *Receiver* appointed by the Court, purchaſed the Reverſion of *E. J. S.*'s Heir at Law, and with Conſent of *C.* another Truſtee, cut down Timber worth 1800*l.* (*Note*; The Term was *not* without Impeachment of

Waſte.) Lord Chan. *King* held this Conſent of *C.* to be a Breach of Truſt in him. *Mich.* 1726. *Bays* and *Bird*, 2 *Will. Rep.* 397.

6. *J. S.* ſeiſed in Fee of Lands, in 1683 deviſed the ſame to *A.* and *B.* and their Heirs, *to the Uſe of* D. *his Siſter for Life*, Remainder *to* A. *and* B. *and their Heirs during the Life of* D. *In Truſt to preſerve contingent Remainders*, Remainder *to the Uſe of the firſt*, &c. *Sons of* D. *in Tail Male ſucceſſively*, Remainder *to the Uſe of* E. M. *in Fee.* Teſtator dying *D.* entered, and married *C.* Afterwards *C.* and *D.* his Wife, and *E. M.* the Remainder Man in Fee, *join in a Feoffment to* (*New*) *Truſtees to the Uſe of* C. *and his Heirs*, and *covenant to levy a Fine to the* (*New*) *Truſtees to the ſame Uſes*; (and a Fine, as *it ſeems*, tho' not ſtated in the Caſe) was accordingly levied. Afterwards *A.* and *B.* (the Truſtees for preſerving, *&c.* in the Will) by Leaſe and Releaſe convey the Lands to *C.* in Fee, *D.* being then *enſient* of a Son, which was ſoon afterwards born, and named *G.* and *D.* had afterwards ſeveral other Children; ſubſequent to which *C.* the Father deviſed all his Lands in general Words to ſaid *G. for Life*, Remainder *to his firſt*, &c. *Sons in Tail Male ſucceſſively*, Remainder *to his* (C.) *the Teſtator's ſecond Son by* D. *for Life*, Remainder *to his firſt*, &c. *Sons in Tail Male ſucceſſively*, and died, leaving ſeveral Sons. *D.* alſo died. On a Bill by *G.* it was reſolved by *King* C. aſſiſted by Lord Chief Juſtice *Raymond* and Chief Baron *Reynolds*, that the joining of the Truſtees to deſtroy the contingent Remainders was a plain Breach of Truſt, and that tho' this had *not* been before judicially determined, yet it ſeemed to the Court in Common Senſe, Reaſon and Juſtice, to be capable of no other Conſtruction. And all Parties were decreed to join in making ſuch an Eſtate to *G.* as he would have been intitled to under the Will of *J. S.* if theſe contingent Remainders had not been deſtroyed, *i. e.* an Eſtate in Tail Male, *&c. Mich.* 1732. *Manſell* and *Manſell*, 2 *Will. Rep.* 610, 617.—— *Caſes in Eq. Temp. Talbot* 252, S. C.

When Truſtees are appointed to preſerve an Eſtate in a Family, and for no other Purpoſe, and they, inſtead of preſerving it, do a wilful Act with an Intent to deſtroy it, how can this be otherwiſe than a plain Breach of Truſt? Should the Court hold it *no* Breach, or paſs it by with *Impunity*, it would be making Proclamation that the Truſtees in all the great Settlements in *England* were at Liberty to deſtroy what they had been intruſted only to preſerve. Indeed, where an Eſtate is limited *to* A. *for Life*, Remainder *to his firſt*, &c. *Sons in Tail*, tho' it be a plain Wrong and Tort in him to do any Act which will deſtroy thoſe contingent Remainders before the Birth of a Son, notwithſtanding his *legal* Power of doing ſo, yet as in this Caſe there is no Truſtee, there can be no Truſt, nor conſequently any Breach of Truſt, and therefore *this* Court can have no Cognizance of ſuch a Caſe, nor Handle for Relief, the Matter being left purely to the *Common* Law. But to prevent this Inconvenience, has the Remedy of appointing Truſtees been invented, on Purpoſe to *diſable the Tenant for Life* from doing ſuch Injury to his Iſſue, which is not a very old Invention. *Per* Lord Chan. *King*, aſſiſted *ut ſupra*. *Ibid.* 612, 613.

7. *A.* deviſes Lands to *B.* (his Siſter) and *C. and their Heirs and Aſſigns*, Upon Truſt *that until* his Grandaughter *D. ſhould marry* or *die*, *to receive the Profits*, and *thereout to pay her* 100 l. per Annum *for her Maintenance*; the Reſidue to pay Debts and Legacies; after Payment thereof, In Truſt *for the ſaid* D. And upon further Truſt, *that if ſhe married a Proteſtant of the Church of* England, *and ſhe be then twenty-one or upwards, or if under twenty-one, ſuch Marriage be with the Conſent of the ſaid* B. then *to convey the Premiſſes with all convenient Speed after ſuch Marriage to the Uſe of the ſaid* D. *for Life* ſans *Waſte, voluntary Waſte in Houſes excepted*, Remainder *to her Huſband for Life*, Remainder *to the Iſſue of her Body*, with ſeveral Remainders over; and upon further Truſt, that if *D.* died unmarried, then *to the Uſe of* B. *for Life*, Remainder *to the Son of his other Grandaughter* E. *in Tail*, Remainder *to the Defendant* C. Remainder *to his firſt*, &c. *Sons*, Remainder *to* A.'s *right Heirs*; and *upon further Truſt*, that *if* D. *marry not according to the Will*, then *upon ſuch Marriage to convey to Truſtees as to one Moiety, to the Uſe of* D. *for Life*, Remainder *to Truſtees to preſerve*, &c. Remainder

to

to her firſt and every other Son, being a Proteſtant, with ſeveral Remainders over; and as to the other Moiety to the Son of ſaid *E.* in like Manner. *A.* dies. *D.* attains her Age of twenty-one; and about ſix Years after, upon a *Treaty* of Marriage with *F.* (which was afterwards ſolemnized) applies to *B.* and *C.* for a Conveyance *to herſelf for Life*, Remainder *to her intended Huſband for Life*, Remainder *to the Iſſue of her Body*. *B.* executes ſuch Conveyance, but *C.* refuſes. *Lord Chancellor* ſaid, that nothing was to veſt 'till *after* her marrying a Proteſtant, and therefore *B.* by conveying and enabling her to ſuffer a Recovery, which has been done accordingly, has done Wrong. *Mich.* 1733. *Lord Glenorchy* and *Boſwill*, *Caſes in Eq. Temp. Lord Talbot* 3, 17.

(G) Acts of Truſtees and Ceſtui que Truſt as to deſtroying contingent Remainders, &c.

1. *J. S.* after Marriage made a voluntary Settlement of his Lands *to himſelf for Life*, Remainder *to Truſtees to ſupport*, &c. Remainder *to his firſt*, &c. *Son in Tail ſucceſſively*, Remainder *to himſelf in Fee*; and contracting Debt, he afterwards makes a Conveyance of his Eſtate to other Truſtees for Payment of theſe Debts. The Creditors bring a Bill, and (*inter alia*) inſiſt that the Truſtees in the firſt Settlement ſhould join in the Sale to deſtroy the contingent Remainders. And his *Honour*, upon ſhewing a Precedent of a like Decree, decreed that the Truſtees ſhould join to deſtroy the contingent Remainders, and be indemnified, it being at the Suit of Creditors, and for raiſing of Money for the Payment of Debts. *Trin.* 1717. *Baſſet* and *Clapham*, 1 *Will. Rep.* 358.

2. *J. S.* ſeiſed in Fee of Lands, deviſed the ſame to *A.* and *B.* and their Heirs, In Truſt *to the Uſe of* D. *his Siſter for Life*, Remainder *to* A. *and* B. *and their Heirs*, In Truſt *to preſerve*, &c. *during* D.'*s Life*, Remainder *to the Uſe of the firſt*, &c. *Sons of* D. *in Tail Male ſucceſſively*, Remainder *to* E. M. *in Fee*. *D.* married *C.* *C.* and *D.* and *E. M.* the Remainder Man in Fee, join in a Feoffment to (new) Truſtees to the Uſe of *C.* and his Heirs, and covenant to levy a *Fine* (*a*) to the ſame Truſtees and to the ſame Uſes. Afterwards *A.* and *B.* (the Truſtees in the Will) by Leaſe and Releaſe conveyed the Premiſſes to *C.* in Fee, *D.* at that Time being *enſient* of a Son born ſoon afterwards and named *G.* Reſolved by Lord Chan. *King*, aſſiſted by *Raymond* C. J. and *Reynolds* C. B. that when the Truſtees joined in the Leaſe and Releaſe to *C.* and his Heirs, this *deſtroyed* the contingent Remainders. *Mich.* 1732. *Manſell* and *Manſell*, 2 *Will. Rep.* 610, 612.

Note; It was alſo reſolved in this Caſe that the Feoffment and Fine by *C.* and *D.* his Wife *did not deſtroy* the contingent Remainders to the firſt, &c. Sons of *D.* but that the Right to the Freehold in the Truſtees did ſupport it; but that their joining in the Leaſe and Releaſe was a plain Breach of Truſt.

Ibid.——As to the Breach of Truſt, *vide P.* 747. *Ca.* 6.

(*a*) Which as it ſeems, tho' not mentioned in the State of the Caſe, was accordingly levied.

(H) Caſes

(H) Caſes relating to Ceſtui que Truſt; ---- And in what Caſes Equity will decree Truſtees to join in a Recovery, &c. with Ceſtui que Truſt.

It is a conſtant Rule in Chancery, that *Ceſtui que Truſt* ſhall have the Benefit of the Thing, if he be to have it, to all Intents, but to forfeit. *Per Wright* Lord Keep. *Hil.* 1702. *in Caſu Attorney General* at the relation of *Hindley* verſus *Sudell et al'*, *Prec. in Chan.* 215.

1. IN a Marriage Settlement the *Huſband was made Tenant for ninety-nine Years, if he ſhould ſo long live*, Remainder *to Truſtees during his Life*, Remainder *to the firſt*, &c. *Son of that Marriage in Tail Male ſucceſſively*, Remainder *to the firſt*, &c. *Son of any other Marriage*, Remainder *over*. A Son is born and of Age, and the Wife is dead. The Truſt for preſerving contingent Remainders deſcends to an *Infant*; if for the Benefit of the Family, Equity will decree the Infant Truſtee to join in a *Recovery, in order to make a new Marriage Settlement*. *Trin.* 1719. *Winnington* and *Foley*, 2 *Will. Rep.* 536.

2 *Will. Rep.* 380. *Mich.* 1726. S. C. cited *arg'* (*a*). ——2 *Will. Rep.* 615. *Mich.* 1732. S. C cited *per Cur'*, in *Manſell* and *Manſell*. (*a*) *Vide P. Ca.*

2. *Ceſtui que Truſt* in Tail under a Deviſe of Lands charged with Annuities, brings a Bill againſt the Truſtees, to the Intent they ſhould join in a Recovery. This is not proper, but it is proper to pray, that the Truſtees may convey the Premiſſes to *Ceſtui que Truſt* in Tail, who may then ſuffer a Recovery; tho' if the Truſtees are alſo Truſtees for an Annuity ſubſiſting, they are not compellable to part with the *legal* Eſtate out of them to the *Ceſtui que Truſt* in Tail. *Eaſt.* 1723. *Carteret* and *Carteret*, 2 *Will. Rep.* 132, 134.

3. *J. S.* makes his Will, and appoints *B.* Executor, and orders certain Money to be laid out on Land Security for the Benefit of *C.* The Executor calls in the Money, and therewith purchaſes Lands, which, he ſays, was done in Purſuance of the Will. *B.* dies, not leaving Aſſets to pay his own Debts. The Lands thus purchaſed ſhall be for the Uſe of *C.* At the Rolls, *Trin.* 11 *Geo.* 1. *Anon. Select Caſes in Chan.* 57.

4. On Marriage, Lands are limited to the Uſe of *A. for ninety-nine Years, if he ſhould ſo long live*, Remainder *to* B. *and other Truſtees* (of which *B.* was the Survivor) *and their Heirs during* A.'s *Life, to preſerve*, &c. Remainder *to* A.'s *Wife for Life*, Remainder *to the firſt*, &c. *Sons of the Marriage in Tail Male ſucceſſively*, Remainders *over*. The Wife dies, leaving Iſſue of the Marriage only two Sons, *C.* and *D.* *A.* having mortgaged the Premiſſes, he and his Son *C.* (*C.* being then of Age) covenant to ſuffer a Recovery, and to procure *B.* the ſurviving Truſtee to join therein, but *B.* refuſing to join in making a Tenant to the *Præcipe*, the Mortgagee prayed a ſpecifick Performance of the Covenant, and that *B.* might join in ſuffering the Recovery. *B.* by Anſwer ſubmits to the Court, but *D.* the younger Son refuſing to conſent, Lord Chan. *King* ſaid that then he would not decree the Truſtee to join, for that he would not take away any Man's Right. So diſmiſſed the Bill as to *B.* and *D.* with Coſts, but decreed *A.* and *C.* ſpecifically to perform the Covenant. *Mich.* 1726. *Townſend* and *Lawſon*, 2 *Will. Rep.* 379.

Select Caſes in Chan. 71. *Townſend* and *Lawton*, S. C. ſays, *Lord Chancellor* ſaid that he would not take away the Remainder Man's Choice, but left the Truſtee to do it, or let it alone.

CAP. CXIII.

Veſtry.

1. LANDS of 8 *l. per Annum* purchaſed in the fifth Year of *Edward* the Eighth by a Pariſh, in Truſt for Charitable Uſes, were improved by Building to 450 *l. per Annum.* And the Truſtees, by Order of the *Veſtry*, for 1000 *l.* paid for the Uſe of the Pariſh, make this Eſtate a Security for 100 *l. per Annum* Annuity to *A.* for her Life. The Pariſhioners brought a Bill to ſet aſide this Deed of Annuity, as being in Breach of the Charity; and ſo already decreed by the *Commiſſioners of Charitable Uſes*, and by *them* ſet aſide. Lord Keep. *Wright* ſeemed clear to diſmiſs the Bill; but the Plaintiff ſubmitting to pay the Arrears and growing Payments, it was ſo decreed, and Coſts ſpared. *Trin.* 1703. *Attorney General* at the relation of the *Pariſhioners of St. Clement Deans* and *Lady Hart et al'*, *Prec. in Chan.* 225.

2. The Plaintiff's Houſe being ſo near the Church that the Five o'Clock Bell rung in the Morning diſturbing her; ſhe came to an Agreement in Writing with the Churchwardens and Inhabitants at a *Veſtry*, that ſhe would erect a Cupolo and Clock at the Church, and in Conſideration thereof the Five o'Clock Bell was not to be rung in the Morning. This is a good Agreement, and decreed to be binding in Equity. *Hil.* 1724. *Martin* and *Nutkin et al'* (*a*), 2 *Will. Rep.* 266.

(*a*) *Vide P. Ca.*

3. At a *Veſtry* it was agreed to build a Pariſh Workhouſe, and to lay out 300 *l.* in building the ſame, which was to be borrowed; and it was agreed that whoever was bound for the 300 *l.* ſhould be indemnified by the Pariſh. And by another Veſtry Order this Order was confirmed, and both Orders were ſigned by the Vicar, and ſeveral Inhabitants of the Pariſh. The 300 *l.* was borrowed of *J. S.* and *A.* together with *B.* (who died inſolvent) gave a Bond for the Payment thereof, with Intereſt. An Order of *Veſtry* was made for raiſing the Money, but upon Appeal to the Quarter-Seſſions by ſome new Pariſhioners, the Order was quaſhed. The 300 *l.* not being paid, *J. S.* put the Bond in Suit againſt *A.* who paid it, and brought a Bill againſt ſuch of the Inhabitants as were living, and againſt the *preſent* Vicar, Churchwardens and Overſeers, to be relieved. His *Honour* decreed him his Principal, Intereſt and Coſts, at Law and in this Court, and that the Vicar, *&c.* do call a Veſtry to make a Rate for the Payment thereof; and if any of the Inhabitants refuſe paying the Rate, *A.* to be at Liberty to apply to the Court. *Trin.* 1731. *Blackbourn* and *Webſter et al'*, 2 *Will. Rep.* 632.

His *Honour* ſaid he did not ſee why the Court might not as well compel thoſe who are not Parties to pay the Rate, as order Tenants tho' not Parties, to pay their Rents. The Defendants (in the principal Caſe) having put in a fair Anſwer, their Coſts were decreed to be raiſed by the ſame Rate; but his *Honour* ſaid, that if thoſe who had appealed to the Quarter-Seſſions had been before the Court, they ſhould have paid all the Coſts. *Ibid.* 634.

CAP. CXIV.

Viſitors.

1. KING *Edward* the Sixth founded a School, and endowed it, and by Letters Patent appointed perpetual Governors thereof, who were thereby enabled to make Laws and Ordinances for the better Government of the ſaid School, but by the Patent no expreſs Viſitors were appointed, and the legal Eſtate of the Endowment was veſted in theſe Governors. Afterwards a Commiſſion iſſued (*a*) to inſpect the Management of the Governors. And it was reſolved by *King* C. aſſiſted by Lord Chief Juſtice *Eyre*, and *Gilbert* Chief Baron, that the Commiſſion to viſit, *&c.* was good. *Hil.* 1725. *Eden* and *Foſter*, 2 *Will. Rep.* 325.

Gilb. Rep. in Eq. 178. S. C. by the Name of *The Caſe of Birmingham School*, with Lord Chief Baron *Gilbert*'s Opinion at large.—— *Select Caſes in Chan.* 36. S. C.—— 2 *Will. Rep.* 326. in S. C.

it was laid down *(per Cur')* Firſt, As a Rule, that where the *King* is *Founder*, in that Caſe his Majeſty and his Succeſſors are Viſitors; but where a *private Perſon* is Founder, there ſuch *private Perſon* and his Heirs, are, by Implication of Law, Viſitors.——Secondly, That tho' this viſitorial Power did reſult to the Founder and his Heirs, yet the Founder might veſt or ſubſtitute ſuch viſitorial Right in any other Perſon, or his Heirs.—— Thirdly, The Court conceived it to be *unreaſonable*, and of miſchievous Conſequence, that where Governors are appointed, theſe, by Conſtruction of Law, and without any more, ſhould be Viſitors, and ſhould have an abſolute Power, and remain exempt from being viſited themſelves.———And therefore, Fourthly, That in thoſe Caſes where the *Governors* or *Viſitors* are ſaid *not to be accountable*, it muſt be intended where they have the Power of Government only, and not where they have the *legal* Eſtate (*b*), and are intruſted with the Receipt of the Rents and Profits, (as in the *preſent* Caſe) for it would be of the moſt pernicious Conſequence imaginable that any Perſon intruſted with the Receipt of Rents and Profits, and eſpecially for a Charity, tho' they miſapply never ſo much theſe Rents, *&c.* ſhould yet be *unaccountable* for their Receipts; this would be ſuch a a Privilege as might of itſelf be a Temptation to a Breach of Truſt.——Fifthly, That the Word [*Governor*] did not of itſelf imply *Viſitor*; and to make ſuch a Conſtruction of the Word againſt the common and natural Meaning of it, and when ſuch a ſtrained Conſtruction could not be for the Benefit, but rather to the great Prejudice of the Charity, would be very unreaſonable; beſides, it would be making the King's Charter operate to a double Intent, which ought not to be.——Sixthly, That the Power given to theſe *Commiſſioners* for the making of By-Laws, muſt be intended for the better regulating and preſerving the Charities given, and not for the perverting or overturning of them; and if the Letters of Commiſſion [or Letters Patent] gave any larger Power, they would be void only *pro tanto*; tho' it was obſerved with regard to the Powers given by the *preſent* Commiſſion that they did not differ from ſeveral Precedents of the like Nature, as in the Caſes of *Winbourne*, *Baſingſtoke* and *Plymouth* Schools, in all which Governors were appointed, but yet theſe Schools are, and have been viſited. *Ibid.* 326, 327.

(*a*) 28 *Nov.* 9 *Geo.* 1. *vide Gilb. Rep.* 179.

(*b*) *Vide Duke's Charitable Uſes* 68. *cap.* 6. the Caſe of *The Hoſpital of Sutton Coldfield*, and the like Determination in the Caſe of *Hynſhaw and Pedwers* ver. *The Mayor and Corporation of Morpeth. Ibid.* 69. And which the *Chancellor* and *Chief Baron* cited on this Occaſion, and affirmed to be Law. *Vide* 2 *Will. Rep.* 326.

CAP. CXV.

Voluntary Conveyances.

1. T. Sold to *C.* an Eſtate which he claimed as Heir to his Father by Virtue of a Marriage Settlement upon the Marriage of his Father with *M.* his Mother-in-Law, being the Lands of ſaid *M.*—*B.* as Heir under that Settlement brought a Bill to diſcover the Title of *T.* and *C.* and alſo to compel the ſurviving Truſtee in a former Settlement

Settlement in the Family, to convey to *B.* as Heir under the Settlement. *Cowper* C. declared he would not decree the Truſtee to convey the *legal* Eſtate to the *Ceſtui que Truſt* to compel him to ſuffer the *Ceſtui que Truſt* to bring an Ejectment in his Name againſt *C.* becauſe he was a Purchaſer without Notice of this former Settlement, and the *Ceſtui que Truſt* was a Volunteer, and ſaid it was a conſtant Rule in Equity *never to aid any Perſon who claims by a voluntary Settlement againſt a fair Purchaſer without Notice* As in Caſe of a Diſſeiſor (as it now appeared that it was) who conveys away the Lands upon a valuable Conſideration, this Court will not compel the Truſtee to convey the *legal* Eſtate to the *Ceſtui que Truſt*, to enable him to recover the Poſſeſſion at Law againſt the Purchaſer, but the Truſtee may do it himſelf if he thinks fit; but this Court will not compel him to it. Tho' Sir *Joſeph Jekyll* and Mr. *Vernon* inſiſted ſtrongly for it, and ſaid the Poſſeſſion of the Truſtee was the Poſſeſſion of the *Ceſtui que Truſt*, and that it was a Breach of Truſt in the Truſtee not to convey at any Time to the *Ceſtui que Truſt* upon Requeſt. But in this Caſe *Lord Chancellor* decreed that *T.* ſhould account for the Profits of the Eſtate from his Entry to the Time of the Conveyance to *C.* for he was a Diſſeiſor, tho' *T.* had two Verdicts for him in Ejectment, but this old Settlement was diſcovered after thoſe Trials. *Eaſt.* 1 *Geo. Turner* and *Buck et al'*, *et econtra*, *Vin. Abr.* Tit. *Voluntary Conveyances*, *P.* 21. *Ca.* 5.

2. *B.* and *C.* two Brothers.—Lands are conveyed to *C.* and his Heirs, In Truſt *for* J. S. *a Stranger*, *for Life*, Remainder *to* B. *in Tail*, Remainder *to* C. *in Fee*. During the Life of *J. S.* (the Tenant for Life) *C.* in Conſideration of 5 *s.* conveys the Reverſion to *B.* and his Heirs in Fee. *B.* ſuppoſing he had an abſolute Fee in him, deviſes the Lands to his Executors to be ſold for Payment of Debts and Legacies, and makes his Brother *C.* and another Perſon Executors, and dies without Iſſue. *C.* ſells the Lands to the Defendant, who had Notice of all theſe Tranſactions, *&c.* The Queſtion was, If the Defendant, being a Purchaſer for a valuable Conſideration, ſhould avoid the Conveyance from *C.* to *B.* of the Reverſion in Fee (being voluntary) it being, at the Time of the Conveyance, a dry Reverſion in Fee expectant upon an Eſtate-tail, and of no Conſideration in the Eye of the Law. *Cowper* C. was of Opinion, that the Conveyance of the Reverſion in Fee from *C.* to *B.* cannot be avoided as fraudulent by a ſubſequent Purchaſer, becauſe, at the Time of the Conveyance, it was of no Value, being barrable by the Tenant in Tail by a Recovery, with Conſent of the Tenant for Life; yet he granted a Trial at Law, upon the Importunity of Counſel. *Trin.* 2 *Geo. Buckley* and *Arnold*, *Vin. Abr.* Tit. *Voluntary Conveyances*, *P.* 20. *Ca.* 10.

CAP. CXVI.

Uſes.

1. A. Seiſed in Fee of *Blackacre* and *Whiteacre*, had two Siſters *E.* and *F.* and had *B.* a Son by a former Wife, and on his Marriage with *M.* a ſecond Wife, he conveyed the whole to *W. R.* and *W. S.* and their Heirs to the *Uſes* following, (*viz.*) *Blackacre to* A. *himſelf for ninety-nine Years, if he ſo long live*, and *after the Expiration to the Uſe of the ſaid* M. *for a Jointure, and after her Death to the Uſe of the Heirs Male of the Body of the ſaid* A. Remainder *to* A.*'s right Heirs*; and as to *Whiteacre* to the Uſe *of* A. *for ninety-nine Years, if*, &c. and after to the Truſtees and their Executors for two hundred Years, In Truſt *to raiſe Portions for his Children by* M. Remainder *to the Heirs Male of the Body of* A. Remainder *to his right Heirs.* The Marriage took Effect; and after *A.* died, leaving *B.* his Son by his *firſt* Wife, and *H.* and *I.* Daughters by *M.* his ſecond Wife. *M.* entered into *Blackacre. B.* entered into *Whiteacre*, and cauſed Part of the Rents to be paid to the Truſtees towards raiſing Portions purſuant to the Settlement, and granted Leaſes, *&c.* and died without Iſſue in *M.*'s Life. Afterwards *M.* died. His *Honour* was of Opinion that the Limitation of *Whiteacre* was void. *Mich.* 8 *&* 11 *Ann. Rawley* and *Holland, Vin. Abr.* Tit. *Uſes*, (F) *Ca.* 11. *P.* 189.

And as to what had been urged, that an *Uſe aroſe by Operation* and *Conſtruction* of Law, his *Honour* ſaid, that to talk of *raiſing an Uſe by Implication* was a Myſtery in Law which he did not underſtand, and would have decreed *Whiteacre* to the Siſters of *B.* But upon the Importunity of the Defendant's Counſel a Caſe was ſtated and ſent to the Judges of *C. B.* who certified *Nov.* 26, 1712, That as to *Blackacre* nothing but a Reverſion expectant on *M.*'s Eſtate for Life deſcended to *B.* ſo that by her enjoying the Land, and ſurviving *B.* there was no *poſſeſſio fratris* to exclude *H.* and *I.* the Siſters by the ſecond *Venter*, from inheriting as Heirs to *A.* their Father; but as to *Whiteacre* they held the *Limitation to the Heirs Male of the Body of* A. *void, no Freehold being limited to any Perſon precedent to that Eſtate*; and that *no Eſtate of Freehold could reſult to* A. *for his Life by Implication*, becauſe another Eſtate, *viz.* for ninety nine Years, if, *&c.* was expreſly limited to him, which would be inconſiſtent with a Freehold in him by Implication; and that *a Freehold either expreſſed* or *implied was neceſſary to ſupport ſuch Limitation*, and conſequently the Freehold and Inheritance in Fee ſimple of *Whiteacre* deſcended to *B.* expectant only on a Term for Years to the Truſtees of which there was ſuch a *poſſeſſio fratris* as intitles *E.* and *F.* the Plaintiffs Aunts, and Heirs of the whole Blood to *B.* the Son, to that Land. *Ibid.*

2. A Conveyance was to ſuch Uſes as ſhall be by Will directed. The Uſes declared by the Will was, *that the Truſtees ſhall convey to the Uſe of* A. *'till* B. *comes of Age*, or *be married*, and *after ſuch Age or Marriage*, one *Moiety to* A. *for Life*; and *if* B. *ſhall die during his Minority, then all the Eſtate to* A. *but if* B. *ſhall attain ſuch Age, or marry*, then *one Moiety in Poſſeſſion* and *the Reverſion of the other to* B. *and his Heirs.* The Queſtion was, Whether this be an Uſe executed by the Statute? And it was ſent to the Judges for their Opinion. *Feb.* 9, 1727. *Rich* and *Beaumond, Vin. Abr.* Tit. *Uſes*, (X. a.) *Ca.* 47. *P.* 277.

3. *A.* by voluntary Deed *covenants with* B. *and* C. (Strangers) *to ſtand ſeiſed to the Uſe of himſelf for Life*, Remainder *to the Uſe of* B. *and* C. *during the Life of* E. *the Daughter of* A. (his Heir at Law) Upon Truſt *to apply the Profits*, &c. *for the Benefit of* E. *and after her Death to* B. *and* C. *and their Heirs during the Life of the eldeſt Son of* E. Upon Truſt *to raiſe Portions for younger Children*, and *then to convey to the eldeſt Son*, &c. with Remainders over, *&c.* Objected, That the Plaintiff who claimed as the eldeſt Son of *E.* can have no Benefit

In this Caſe it was objected for the Plaintiff, That there may be a *Difference where the Eſtate, Truſt or Uſe in the Truſtees is limited for the Benefit of the Blood and Family of the Covenantor*, and *where for collateral or other Purpoſes*, as was Lord *Pagett*'s Caſe, the *Truſt Term there being for Payment of Debts*, &c. but *here the Truſt is for the Benefit of the Blood of the Covenantor*, viz. *his Grandſon*, &c. *Sed non allocatur. Ibid.*

under this Settlement, for that the *Truſtees being Strangers to the Conſideration of Blood, no Uſe thereby ariſes to them*, according to the Lord *Pagett*'s Caſe; and *Lord Chancellor* was of the ſame Opinion. Bill diſmiſſed. *Mich.* 4 *Geo.* 2. *Nugent* and *Hancock*, *Vin. Abr.* Tit. *Uſes*, (H) *Ca.* 13. *P.* 196.

CAP. CXVII.

Wards.

The Right of *Wardſhip* is determinable in the Court of Chancery.

Gilb. Rep. in Eq. 172, 173. At Common Law, before the Stat. 32 *Hen.* 8. *c.* 46. by which the Court of *Wards* and *Liveries* was erected, the *Lord Chancellor* was the ſole Judge of *Wardſhips*; but with this Difference, that where they were *lucrative to the Crown*, there the *Lord Treaſurer* acted, who had a concurrent Juriſdiction with the *Chancellor*; but where *Wardſhips were not lucrative to the Crown*, but only for the Benefit of the *Ward*, there the *Chancellor* alone had the Diſpoſition and Management of the Ward; therefore, as the Law now ſtands, the *Onera feudorum* being extinct, and the Court of Wards aboliſhed, and all the *old Tenures* being turned into free and *common Socage*, all *Wardſhips* which are beneficial for the *Wards* muſt return to this Court as to their original Fountain. *Per Weſt* C. in *Ireland*, *Eaſt.* 11 *Geo.* in the Caſe of *Morgan* and *Dillon*, 2 *Mod. Caſes in Law and Eq.* 139.———Since the Statute, which took away the Court of Wards, the Juriſdiction of *Wardſhip* returns to the Court of Chancery; and it appears by the Regiſter 21 *b.* 198. that a Writ may iſſue out of this Court to remove the Guardian of an Infant, and to put another in his Stead. *Per Lords Commiſſioners*, *Hil.* 1722. *in Caſu Eyre* and *Counteſs of Shafſbury*, 2 *Will. Rep.* 119.

(A) Caſes relating to Wards.

3 *Will. Rep.* 117. cited *arg*' and ſays, that they were long in Cuſtody.——— S. C. cited by Lord Chan. *Talbot*, *Mich.* 1734. in Lord *Raymond*'s Caſe, and ſays, that all the Parties were committed, it being held a Contempt of the Court to marry a Ward of the Court without its Direction. *Vide Caſes in Eq. Temp. Lord Talbot* 59.—And the ſame would have been done in the Caſe of *Hughes* and *Science et al'*, *Hil. Vac.* 1740. but that it did *not* appear in that Cauſe that *Williams* the Clergyman who married the Infant to *Science* was at all a Party to the Contrivance, and ſo had not incurred the Cenſure of the Court; whereas had he been privy thereto, the Licence would *not* have protected him. *Vin. Abr.* Tit. *Guardian*, *P.* 205. Note to *Ca.* 3.

1. AN Infant was inveigled from *B.* her Guardian and married to *W.* Tho' the Infant was not taken from a Guardian aſſigned by the Court, yet both *W.* and the Parſon and the Agents were all committed by the *Maſter of the Rolls*. And the Order was afterwards confirmed by Lord Chan. *Harcourt*. Cited by Lord Commiſſioner *Jekyll*, 2 *Will. Rep.* 112.—This was the Caſe of *Hannes* v. *Waugh*, 22 *May*, 12 *Ann*. *Vide ibid.* in the *Margin*.

But in this Caſe the *Committee* being a Perſon of good Eſtate, the Court ordered his own *ſingle* Recognizance to be taken.———And upon the Doctor's Petition to alter the Form of the Recognizance, becauſe as the Form is, an honeſt *Committee* without any Default in him might forfeit his Recognizance and be undone by a raſh Infant's ſtealing a Marriage, Lord Chan. *Parker* conſented, tho' he ſaid he would be very tender of altering the ſettled Forms of the Court to ſatisfy a capricious Humour; but that this Caſe differing in it's Circumſtances from the common one, his *Lordſhip* directed the Form of the Recognizance to be thus, *viz.* "That the Infant ſhall not be married without Leave of the Court, by the Conſent, Privity or "Connivance of the Committee;" and his *Lordſhip* ſaid he had before made the like Alteration in the Form of the Recognizance in Favour of Mr. *Lacy*, to whom he had lately committed an Infant Heireſs. *Ibid.* 699.

2. Where the Cuſtody of an Infant Heir is committed, the Courſe is for the Committee to enter into a Recognizance with *two* Sureties, *not to ſuffer the Infant to marry without Conſent of the Court*. *Eaſt.* 1721. in Dr. *Davis*'s Caſe, 1 *Will. Rep.* 698.

The Editor ſays, the *Lord Chancellor* made the like Determination in *Kiffin* and *Kiffin*, where a young Girl of great Fortune was committed to the Care of a Tradeſman in *London*, a Linen Draper, after which a younger Son of the Committee married her, and a Woman who had been one of the moſt active Inſtruments

3. Plaintiff having married a young Lady without the Privity of *A.* the Committee, to whom ſhe had been committed by Order of Court, *Parker* C. held that this Offence or Contempt ending only in the Puniſhment of the Party offending, and not in relieving or redreſſing

dreſſing the Proſecutor, was pardoned by the general Act of Pardon 7 *Geo.* 1. *cap.* 29. *ſ.* 23. made afterwards, tho' with an Exception " of all Contempts and Offences for which any Proſecution was then " depending, and which had been proſecuted at the Charge of any " private Perſon or Perſons." *Eaſt.* 1721. *Phipps* and *Earl of Angleſea*, 1 *Will. Rep.* 696.

Inſtruments in bringing about this Marriage being big with Child, and near her Time, the

Hearing of the Complaint was put off until ſhe was delivered, and in the mean Time came out an Act of general Pardon, which was held to extend to this Offence.——S. P. determined in Dr. *Yeldon*'s Caſe in the Affair of the Infant Duke of *Beauford*'s going from his Committees. *Ibid.*

4. If there be only an Apprehenſion that the Infant will be married *unequally*, either by the Guardian, or by his Neglect, a Court of Equity will interpoſe, and ſend for the Infant, and commit him to the Cuſtody of a proper Perſon, or Relation, in order to prevent ſuch Danger; *per Lords Commiſſioners*, in the Caſe of *Eyre* and *Counteſs of Shaftſbury*, *Hil.* 1722. and their *Lordſhips* ſaid it was ſo done by Lord Chan. *Harcourt* in the Caſe of the Infant Lady *Catherine Anneſley*.—— And *per* Lord *Macclesfield* in Mr. *Vernon*'s Caſe. 2 *Will. Rep.* 112.

So where an Infant Heir was but ſeventeen, and was about to contract Matrimony, tho' there appeared no *Inequality* of Fortune or

Family, yet upon Application the Court of Chancery aſſiſted the Teſtamentary Guardian to prevent the Marriage, as improper by reaſon of the Age. *Mich.* 1734. *Lord Raymond's Caſe*. *Vide Caſes Temp. Lord Talbot* 58. ——And tho' a Marriage be to one of *equal* Degree and Fortune, yet the Marriage being without Conſent of the Guardian, *this* conſtitutes the Offence, and the *Equality* of Degree, &c. can at moſt tend but to extenuate. *Per Lords Commiſſioners*, in the Caſe of *Eyre* (Juſtice) and *The Counteſs of Shaftſbury*, *Hil.* 1722. 2 *Will. Rep.* 114.——S. C. cited *per* Lord *Talbot*, in Lord *Raymond*'s Caſe, *Mich.* 1734. *Vide Caſes in Eq. Temp. Talbot* 58.——S. C. cited *per Cur'*, 20 *Mar.* 1740. in the Caſe of *Hughes* and *Science et al'*, and that the Marriage being by Contrivance of the Infant's Mother pending a Suit in Chancery, the Court committed the Parties to the Contrivance, and ordered a Sequeſtration againſt the Lady *Shaftſbury*. *Vin. Abr.* Tit. [*Guardian and*] *Ward*, *P.* 205. in a Note to *Ca.* 5.

5. Marriage of the *Ward* without Conſent of the Guardian, is a Raviſhment of the *Ward*. *Per Lords Commiſſioners*, in the Caſe of *Eyre* and *Counteſs of Shaftſbury*, *Hil.* 1722. 2 *Will. Rep.* 110.

Cites 2 *Inſt.* 440. and it is aggravated in this Reſpect, that after ſuch

Raviſhment by Marriage, the Ward cannot be reſtored to ſuch Condition as he was in before, it being rendered impoſſible by the Wrong of the Raviſher. *Per Lords Commiſſioners*, *ibid.*

6. Tho' the Infant himſelf cannot bring Account againſt his Guardian 'till of Age, yet a third Perſon may bring a Bill for an Account againſt the Guardian, even during the Minority. *Per Lords Commiſſioners*, in the Caſe of *Eyre* and *Counteſs of Shaftſbury*, *Hil.* 1722. 2 *Will. Rep.* 119, 120.

7. A Perſon having married an Infant, (and as it ſeems a Ward under Care of the Court) was committed, and the Commitment followed by an Act of Parliament to diſſolve the Marriage. *Hil.* 1722. cited *per Lords Commiſſioners* as done in Lord *Somers*'s Time in the Caſe of *Goodwin* and *Mrs. Knight*, 2 *Will. Rep.* 112.

8. Tho' an Order of Chancery has no Words " *prohibiting the mar-* " *rying an Infant without Conſent of the Guardian*," yet ſuch Prohibition is implied, and ſo are theſe Words, " *That no Perſon ſhall take* " *away or raviſh a Ward from the Guardian*;" and ſuch negative Words are never inſerted in the Order. *Per Lords Commiſſioners*, *Hil.* 1722. in the Caſe of *Eyre* and *Counteſs of Shaftſbury*, 2 *Will. Rep.* 113.

9. The Lords *Selkirk* and *Orkney*, Guardians of the Infant Duke of *Hamilton*, petitioned againſt the Dutcheſs of *Hamilton* for taking away the Infant Duke out of their Cuſtody, and their Complaint was received; upon which the Court would have proceeded againſt the Mother, but the Guardians could not make out their Right of Guardianſhip, by reaſon of ſome Defect in the Inſtrument under which they claimed. Cited *per Lords Commiſſioners*, *Hil.* 1722. 2 *Will. Rep.* 115.

10. A Teſtamentary Guardian of an Infant Girl of about nine Years and three Months old takes her from a Boarding School and marries her to his own Son, an Apprentice to a *Peruke Maker*, and who had no Eſtate. *King* C. on Motion ordered this Guardian to bring the Infant into Court, and that he and his Son attend, which they did, and then his *Lordſhip* committed her to the other Guardian appointed by the Will, ordering an Information to be brought by the *Attorney General* againſt this *knaviſh* Guardian, and the Guardian to be bound over with Sureties to be taken by the *Maſter*, to anſwer ſuch Information; but held this to be no Contempt, the Ward not being under the immediate Care of the Court. *Mich.* 1729. *Goodall* and *Harris*, 2 *Will. Rep.* 561.

11. Three Perſons being appointed Guardians by her Father's Will of a young Woman, one of them gets her (ſhe being nine Years old) married to his own Son, who was ſeventeen. It was moved for an *Homine Replegiando* againſt the Father and Son, that they ſhould ſtand committed, and for an Injunction to their receiving the Rents of her Eſtate. Lord Chan. *King* thought every Part of the Motion reaſonable, but as to the firſt Part ordered a ſpeedier Way, by bringing her Body into Court by a Time certain, by an Order to be made on the Defendants for that Purpoſe. *Mich.* 3 *Geo.* 2. *Anon. Fitz-Gibb. Rep.* 106.

And this (as it ſeems) tho' the Infant be above fourteen, or want ever ſo little of twenty-one; and the ſerving of the Infant is not good, for *non conſtat*, but the Infant might be in his Cradle; or ſhould it appear by the Bill that he is near twenty-one, yet, being not able to defend himſelf, the Service muſt be on the Perſon appointed by the Court to defend him. *Ibid.*

12. Where an Infant is Defendant, the Service of the *Subpœna* to hear Judgment muſt be on the Guardian, and not on the Infant. *Mich.* 1731. *Taylor* and *Atwood*, 2 *Will. Rep.* 643.

13. Marrying an Infant a Ward of the Court is a Contempt, tho' the Parties concerned in ſuch Marriage had no Notice that the Infant was a Ward of the Court. *Trin.* 1731. *Herbert's Caſe*, 3 *Will. Rep.* 116.

In this Caſe, an Exception being taken that *here* was no *Lis pendens*, no Anſwer being put in, the ſame was over-ruled; and held that an Infant is always conſidered under the Care of the Court, if a Suit be depending, and that after ſuch Bill filed, 'tis a Contempt to marry an Infant without the Conſent of this Court; and in this Caſe there was not only a Bill filed, but an Attachment alſo for want of an Anſwer. *Ibid.*

14. *A.* poſſeſſed of a conſiderable perſonal Eſtate, died inteſtate, leaving *M.* his Wife, and *B.* a Daughter an Infant, his only Child. *M.* the Mother died, leaving *J. S.* her Executor and Truſtee for *B.* her Infant Daughter, who at *M.*'s Death was under the Care of *J. S.* his Wife, who kept a Boarding School. The Wife of *J. S.* died, and afterwards a Bill by *H.* an Uncle of *B.* was filed againſt *J. S.* for an Account of *B.*'s Eſtate, ſuggeſting that he had waſted it, but *J. S.* not putting in his Anſwer, an Attachment iſſued, and then *J. S.* and *W. R.* who was his Counſel, and a Juſtice of the Peace, went to *Doctors Commons*, where *W. R.* procured himſelf to be admitted Guardian to conſent to the Marriage of *B.* to *J. S.* and a Licence was granted and a Marriage had, *B.* being ſixteen Years old, and *J. S.* ſixty. *H.* petitioned againſt *J. S.* for marrying *B. after Suit commenced in this Court, without Leave of the Court*, and againſt *W. R.* as Party, and that they ſtand committed. Ordered, That *J. S.* and *W. R.* ſtand committed to the *Fleet*, and not to have the Benefit of the Rules; and that *W. R.* be removed from being Juſtice of the Peace; and (to the End that the Eſtate of the Infant be ſecured, in order to make a Settlement on, or a Proviſion for her) that *J. S.* be reſtrained from aliening, transferring or tranſpoſing any Part of the real or perſonal Eſtate of the Infant, or from receiving any Part thereof, without Leave of the Court, 'till further Order; and that *J. S.* do bring before the Court all Mortgages, Bonds and other Securities belonging to the Eſtate of the Infant, upon Oath, ſubject to the further Order of the Court. 20 *March* 1740. *Hughes* and *Science*, *Mitchel et al*, *Vin. Abr.* Tit. *Guardian and Ward*, (D. c.) *P.* 203.

15. The

15. The Pendency of a Bill in Chancery relating to an Infant's Eſtate is Notice to all the World of the Infant's being a Ward of this Court, ſo as to make Perſons concerned in the Marriage of ſuch Ward, without Leave of the Court, guilty of a Contempt, tho' they had not any actual Knowledge of her being ſuch a Ward. *April* 6, 1741. *Moor* and *Moor*, *Barnard. Rep. in Chan.* 407.

CAP. CXVIII.

Waſte (a).

(a) The Clauſe of *without Impeachment of Waſte*, never was extended to allow the very Deſtruction of the Eſtate itſelf, but only to excuſe for *permiſſive* Waſte; and therefore ſuch a Clauſe would not give Leave to fell and cut down Trees *ornamental* or *ſheltering of an Houſe*, much leſs to deſtroy or demoliſh the Houſe itſelf. *Hil.* 2 *Geo.* 1. in Lord *Bernard*'s Caſe, *Gilb. Rep. in Eq.* 127.—*Prec. in Chan.* 454. S. C. and P.—Where one that by Law might do Waſte, commits that which goes to the Deſtruction of the Thing he enjoys, he that has the Inheritance may have an *Injunction* to ſtay his committing ſuch Waſte. But if a Tenant ſhould do Waſte by converting an Houſe into a Mill, or ſuch other Thing foreign from a Manſion Houſe, *Quære* If a Court of Equity will order him to reſtore it? *Elders* and *Verden* (*b*), *MS. Notes.*

(*b*) *Quære* Term and Year.

(A) Waſte, in What Caſes reſtrained in Equity; —— And in What Caſes Equity Will give Relief.

1. *A.* Upon his Marriage ſettled Lands to *the Uſe of himſelf and his Wife*, and *the Heirs of their two Bodies*. Afterwards *A.* died *ſans* Iſſue. *M.* married *D.* (the Defendant) being then Tenant in Tail after Poſſibility of Iſſue extinct, and *M.* and *D.* having felled ſome Trees in a Grove that grew near, and was an Ornament to the Manſion Houſe, and having an Intention to fell the reſt, the Plaintiff, to whom the Lands did belong in Remainder, brought his Bill to reſtrain *M.* from felling thoſe Trees, and to have an Injunction to ſtay the committing of Waſte. This Cauſe was referred, and if the Parties could not agree, then to be ſet down again. But Lord Chan. *Nottingham* diſcovered his Inclination *fortiter* for granting an Injunction. *Eaſt.* 1680. *Abraham* and *Bubb*, 2 *Freem. Rep.* 53.

His *Lordſhip* ſaid, if there be Tenant for Life *without* Impeachment of Waſte, and he goes to pull down Houſes, *&c.* to do Waſte *maliciouſly*, this Court will *reſtrain*, altho' he hath *expreſs Power by the Act of the Party to commit Waſte*; for this Court will moderate the Exerciſe of that Power, and will reſtrain extravagant humorous Waſte, becauſe it is *pro bono publico* to reſtrain it; and he ſaid, he never knew an Injunction denied to ſtay the pulling down of Houſes by Tenant for Life *without* Impeachment of Waſte, unleſs it were to Serjeant *Peck* in Lord *Oxford*'s Caſe, and he ſaid he believed he ſhould never ſee this Court deny it again. *Ibid.* 54.——A Leaſe was made by a Biſhop for twenty-one Years, *without* Impeachment of Waſte, of Lands that had many Trees upon it. The Tenant cuts down none of the Trees 'till about half a Year before the Expiration of his Term, and then goes to felling down the Trees, and he was enjoined by this Court; for tho' he might have felled Trees every Year from the Beginning of his Term, and then they would have been growing up again gradually; yet it is unreaſonable that he ſhould let them grow 'till towards the End of his Term, and then ſweep them all away: for tho' he had a Power to commit Waſte, yet this Court will model the Exerciſe of that Power. Cited *per* Lord Chan. *Nottingham* in the Caſe of *Abraham* and *Bubb*, as the Caſe of *The Biſhop of Wincheſter*. *Ibid.* 55.——Tenant for Life, Remainder to the firſt Son for Life, *without* Impeachment of Waſte, with Remainders over; the firſt Son, by Leave of the Leſſee of Tenant for Life, comes upon the Land, and fells the Trees; altho' he could not in that Caſe be puniſhed by an Action of Waſte, yet he was enjoined by this Court. Cited *per* Lord Chan. *Nottingham* as the Caſe of *Lady Evelin*. *Ibid.* 55.

2. A Woman Tenant in Tail, after Poſſibility of Iſſue extinct, was reſtrained from committing Waſte in pulling down Houſes, or

in cutting down Trees, which ſtood in Defence of the Houſe, and Fruit Trees in the Garden, but for ſome Turrets of Trees which ſtood a Land's Length or two from the Houſe, the Court would grant no Injunction, becauſe ſhe had by Law Power to commit Waſte; and yet notwithſtanding ſhe was reſtrained in the Particulars aforeſaid, becauſe that ſeems to be malicious. *Hil.* 1701. *Anon.* 2 *Freem. Rep.* 278. *Ca.* 349.

3. A Bill was brought againſt the Executors of a Jointreſs, to have a Satisfaction out of Aſſets for permiſſive Waſte upon the Jointure of the Teſtatrix, *&c.* But Lord *Cowper* diſmiſſed (*a*) the Bill. 1 *Geo.* 1. *Turner* and *Buck*, *Vin. Abr.* Tit. *Waſte*, (S. a.) *Ca.* 9. *P.* 523.

(*a*) For *here* is no Covenant that the Jointreſs ſhall keep the Jointure in good Repair, and in the common Caſe, without ſome particular Circumſtances, there is no Remedy in Law or Equity for *permiſſive* Waſte after the Death of the particular Tenant. *Per Lord Chancellor, ibid.*

His *Lordſhip* ſaid, that before the Statute of *Glouceſter* Waſte did not lie againſt Leſſee for Years, and the being *without* Impeachment of Waſte ſeems originally intended only to mean that the Party ſhould be puniſhable by that Statute, and not to give a Property in the Trees or Materials of an Houſe pulled down by Leſſee for Years *ſans* Waſte; but he ſaid, that the Reſolutions having eſtabliſhed the Law to be otherwiſe, he would not ſhake it, much leſs carry it further, and that he took this Caſe, *The Biſhop of London* and *Webb*, to be within the Reaſon of Lord *Barnard*'s Caſe, where, as he was not permitted to deſtroy the Caſtle to the Prejudice of the Remainder Man, ſo neither ſhall the Leſſee in the preſent Caſe deſtroy this Field againſt the Biſhop, who has the Reverſion in Fee, to the Ruin of the Inheritance of the Church. *Ibid.* 528, 529. (*a*) *Earth.*

4. *B.* Biſhop of *London* in *Edward* the Sixth's Time, made a long Leaſe, of which there were about twenty Years to come, and the Leaſe was made *without Impeachment of Waſte*. *W.* in whom by ſeveral mean Aſſignments the Remainder of this Leaſe was veſted, articled with Brick Makers that they might dig and carry away the Soil of twenty Acres ſix Feet deep, provided they did not dig above two Acres in the Year, and levelled thoſe Acres before they dig up others. The (now) Biſhop of *London* having the Inheritance in Right of his Biſhoprick, brought a Bill to enjoin the Digging of the Ground for Brick. Lord Chan. *Parker* directed that *W.* might carry off the *Brick* (*a*) he had dug, but ordered an Injunction to ſtop further digging. *Hil.* 1718. *Biſhop of London* and *Webb*, 1 *Will. Rep.* 527.

5. Where there is an Arrear of a Charge upon a real Eſtate, an Injunction ſhall go to prevent cutting of Timber upon the Premiſſes chargeable. 27 *March* 1723. *Lord Blaney* and *Mahon*, *Vin. Abr.* Tit. *Waſte*, (R. a.) *Ca.* 27. *P.* 521.

And his *Lordſhip* ſaid, an *Injunction* was refuſed in Mr. *Saville*'s Caſe of *Yorkſhire*, who being an Infant, and Tenant in Tail in Poſſeſſion, and in a very bad State of Health, and not likely to live to full Age, cut down by his Guardian a great Quantity of Timber juſt before his Death to a very great Value; the Remainder Man applied *here* for an Injunction to reſtrain him, but could not prevail. *Ibid.*

6. Tenant in Tail may commit Waſte in Houſes as well as in all other Parts of the Eſtate, notwithſtanding any Reſtraint to the contrary, and no Inſtance can be ſhewn where a Tenant in Tail has been reſtrained from committing Waſte by Injunction of this Court. Said *arg' Mich.* 1733. in the Caſe of *Glenorchy* and *Boſville*, *Caſes in Eq. Temp. Lord Talbot* 16.

But as to Repairs his *Honour* ſaid the Court never interpoſes in Caſe of *permiſſive* Waſte, either to prohibit or give Satisfaction, as it does in Caſe of *wilful* Waſte; and where the Court having Juriſdiction of the *Principal, (viz.)* the prohibiting, it does in Conſequence give Relief for Waſte done, either by way of Account as for *Timber* felled, or by obliging the Party to

7. *A. Tenant for Life*, Remainder *to Truſtees to preſerve*, &c. Remainder to *C.* the Plaintiff *in Tail*, Remainder over, with *Power for A. with Conſent of Truſtees to fell Timber*, and *the Money ariſing to be inveſted in Lands*, and *to the ſame Uſes*, &c. *A.* felled Timber to the Value of 3000 *l. without Conſent of Truſtees*, who never intermeddled, and *A.* had ſuffered ſome of the Houſes to go out of Repair. *C.* by Bill prayed an Account, and an Injunction. His *Honour* ſaid, that the *Timber*

Timber may be conſidered under two Denominations, to wit, ſuch as was *thriving*, and not fit to be felled, and ſuch as was *unthriving*, and what a prudent Man and a good Huſband would fell, *&c.* And ordered the *Maſter* to take an Account *&c.* and the Value of the *former*, which was Waſte, and therefore belongs to the Plaintiff, who is next in Remainder of the Inheritance, is to go to the Plaintiff, and the Value of the other is to be laid out according to the Settlement, *&c.* *Mich. Vac.* 1733. *Lord Caſtlemaine* and *Lord Craven*, *Vin. Abr.* Tit. *Waſte*, (S. a.) *Ca.* 11. *P.* 523.

to rebuild, *&c.* as in Caſe of Houſes, *&c.* and his *Honour* mentioned Lord *Barnard*'s Caſe as to *Raby* Caſtle, 2 *Vern.* But as to the Repairs it was objected, That the Plaintiff

here had no Remedy at Law by reaſon of the Eſtate for Life to the Truſtees mean *between Plaintiff's Remainder in Tail* and *Defendant's Eſtate for Life*, and that therefore Equity ought to interpoſe, *&c.* And that this was a Point of Conſequence. *Sed non allocatur. Ibid.*

8. The Caſe in Effect was thus:—A very conſiderable real Eſtate was limited *to Mrs.* Rolt (who afterwards married the Defendant the Lord *Somerville*) *for Life, without Impeachment of Waſte*, Remainder *to the Plaintiff* Rolt *for Life, without Impeachment of Waſte, with ſeveral* Remainders *over*. The Defendant the Lord *Somerville*, to make the moſt of this Eſtate during the Life of his Wife, pulled down ſeveral Houſes and Out-Buildings upon the Eſtate, and ſold the ſame, and alſo took up Lead Water Pipes that were laid for the Conveyance of Water to the Capital Meſſuage, and diſpoſed thereof, and he alſo cut down ſeveral Groves of Trees that were planted for the Shelter or Ornament of the Capital Meſſuage. Upon this a Bill was brought by the Plaintiff to compel the Defendant to account for the Money raiſed by the Particulars before mentioned, and to put the Eſtate in the ſame Plight and Condition that it was before. To this the Defendant demurred, and thereby inſiſted that this Waſte was committed by Tenant for Life *without* Impeachment of Waſte, and therefore he was not liable to be called to an Account for what he had done either in Law or Equity, and if he was, yet the Plaintiff could not call him to an Account, becauſe he was not a Remainder Man of the Inheritance. Lord Chan. *Hardwicke*: Tho' an Action of Waſte will not lie at Law for what is done to Houſes, or Plantations for Ornament or Convenience, by Tenant for Life *without* Impeachment of Waſte, yet this Court hath ſet up a ſuperior Equity, and will reſtrain the doing ſuch Things on the Eſtate. In Lord *Bernard*'s Caſe the Court reſtrained him from going on, and ordered the Eſtate to be put in the ſame Condition. In Sir *Blundel Charleton*'s Caſe the *Maſter of the Rolls* decreed that no Trees ſhould be cut down that were for the Ornament of the Park; but Lord Chan. *King* reverſed that, and extended it only to Trees that were planted in Rows. My only Doubt is, as to the Trees that have been cut down, for if this Bill had been brought before ſuch Trees had been cut down as were for the Ornament or Shelter of the Eſtate, this Court would have interpoſed; but here the Miſchief is done, and it is impoſſible to reſtore it to the ſame Condition as to the Plantations, and therefore it can lie in Satisfaction only; and I cannot ſay the Plaintiff is intitled to a Satisfaction for the Timber which is a Damage to the Inheritance, yet as to the pulling down the Houſes and Buildings, and laying the Lead Pipes, they may be reſtored, or put in as good Condition again. In the Caſe of my Lord *Bernard* there were Directions for an Iſſue at Law to charge his Aſſets with the Value of the Damages, he not having performed the Decree in his Life-time. The Demurrer was allowed as to Satisfaction on account of the Timber, but over-ruled as to the reſt. *Trin.* Term 1737. *Rolt* and *Lord Somerville*, at *Lincoln's Inn Hall*, *MS. Rep.*

I have been informed that this Cauſe of *Rolt* and *Lord Somerville* was afterwards referred to two Friends, and *amicably* ſettled.

9. A Bill may be brought by a Patron againſt a Parſon, for an Injunction to reſtrain committing Waſte upon the Glebe. *Hil.* 1740. *Bradly* and *Stratchy*, *Barnard. Rep. in Chan.* 309.

CAP. CXIX.

Wills.

(A) What ſhall be eſtabliſhed as a good Will to paſs Lands; ——And what is a good Signing, Atteſtation, Publication, &c.

(B) In what Caſes a Deviſee, &c. ſhall be admitted a Witneſs to prove the Will.

(C) In what Caſes the Court will ſet aſide a Will for Fraud, &c.

(D) Of the Republication of a Will.

(E) Of Revocations, &c.

(F) Where the Probate differs from the original Will.

(A) What ſhall be eſtabliſhed as a good Will to paſs Lands;—And what is a good Signing, Atteſtation, Publication, &c.

A Will is a Declaration of the Mind (either by Word or Writing) in diſpoſing of an Eſtate, and to take Place after the Death of the Teſtator. *Trin.* 1 *W. & M. Lea* and *Libb*, in *B. R. Carth.* 38.——A Will ſhall have relation only to Teſtator's Death, and not to the making, for 'till his Death he is Maſter of his own Will, and therefore a Will of a Papiſt in *Ireland* was held to be avoided by a ſubſequent Statute made in that Kingdom, which enacts, that the Lands of Papiſts there ſhall not be deviſeable, but deſcend in Gavelkind. *Jan.* 28, 1717. *Burk* and *Morgan*, *Vin. Abr.* Tit. *Deviſe*, (G. b.) *P.* 273. *Ca.* 7.

1. IF a *Man draws up his own Will, and ſends it to Counſel to be adviſed of the Legality of it*, this is no Will, unleſs it has a Publication after he receives it back from his Counſel. If *after his Will came from Counſel, with Alterations made by Counſel, the Party puts his Seal to it, or ſubſcribes his Name, or writes upon it This is my Will*, tho' there be no Witneſſes to it, yet this is a good Publication, becauſe any of thoſe declare his Intent that that ſhould be his Will; and tho' it had no formal Beginning, but began *Alſo I give and bequeath*, and tho' there be *Blanks for the Names of ſuch Perſons as he ſaid he had made a Leaſe, or Feoffment to, to perform his Will*, and if there be ſuch Leaſe or Feoffment, this is a good Will, and ſhall direct thoſe Perſons, to whom ſuch Leaſe, *&c.* is made, to perform all Things according to the Directions of ſuch Will. Reſolved in *B. R. per tot' Cur'*, in an Iſſue out of *Canc'*. *Trin.* 15 *Car.* 2. *Bartlett* and *Ranſden et al'*, *Vin. Abr.* Tit. *Deviſe*, (N. 2.) *Ca.* 16. *P.* 119. cites it as a MS. Rep. ſaid to be Lord Chief Juſtice *Kelyng's*.

2. Will of Lands made *before* the Statute of *Frauds* had but *two* Witneſſes, and the Teſtator died *after* the Statute, without altering his Will. And his *Honour* thought it a good Will to paſs the Lands, but the other Side inſiſting to have it tried at Law, he directed it accordingly. *Trin.* 1697. *Serjeant* and *Puntis*, *Prec. in Chan.* 77.

3. Lord

3. Lord Keep. *Wright* held a Publication of a Will before *three* Witneſſes, tho' at *three* ſeveral Times, good within the Statute, and thought the writing the Will with the Teſtator's own Hand, a ſufficient Signing within the Statute, tho' not ſubſcribed nor ſealed by him; but doubted whether Owning the Subſcription to be his was ſufficient; but the Validity of the Will is a Queſtion at Law, and therefore ordered it to be tried. *Hil.* 1701. *Cook* and *Parſons*, *Prec. in Chan.* 185. 1 *Vol. Abr. Eq.* 280. *Ca.* 4. S. C. but *not* S. P.

4. Teſtator gave Inſtructions to make his Will of his real and perſonal Eſtate, and when it was brought to him he *made ſeveral Alterations*, and *then wrote the whole over as altered with his own Hand*; this found in his Study, tho' not *ſigned* or *ſealed*, was held a good Will. *Note*; The firſt Sentence was that he died inteſtate, but that was reverſed by the Delegates. 18 *July* 1704. *Comyns's Rep.* 453.

5. *A. B.* made a Will or Teſtamentary Schedule all of his own Hand Writing, as follows: "In the Name of God, Amen. I *A. B.* do make "this my laſt Will and Teſtament for fear of Mortality, 'till I can "ſettle it more at large. I do give and bequeath 1000*l.* unto *D. P.* "to be paid by my Executor (or) Adminiſtrator; and for ſure Pay- "ment thereof, I do charge all the real and perſonal Eſtate which I "have in the World, I being very deſirous to make a Proviſion for the "ſaid *D. P.* for ſeveral good Reaſons inducing me thereunto. In "Witneſs whereof I have hereunto ſet my Hand this preſent 7th Day "of *December* 1704. Signed *A. B.*" And delivered the ſame to the ſaid *D. P.* and about a Fortnight before his Death, *A. B.* did declare he had left with *D. P.* an unqueſtionable Security for 1000*l.* charged upon his real and perſonal Eſtate, and that he had done the ſame for fear of Mortality, 'till ſuch Time as he could make a full and compleat Will, which he declared he would do ſo ſoon as his Wife was brought to Bed, to ſee if it were Male or Female. He died ſuddenly 6 *Feb.* 1704, leaving his Wife, then lying-in of a Daughter. The Judge of the Prerogative Court gave Sentence againſt the Will, and pronounced that *A. B.* died inteſtate. On Appeal to the Delegates (among whom were *Holt* Ch. J. *Price* B. and Judge *Dormer*) the Sentence was reverſed, and they pronounced for the Will. *Eaſt.* 6 *Ann. Powell* and *Beresford*, 2 *Raym. Rep.* 1282.

It was inſiſted, that upon this Evidence it is apparent that the Codicil was wrote before the Execution of the Will, for otherwiſe there was no Reaſon that the Witneſſes ſhould write their Names at the Top of the firſt Side of the Will, and the Words wrote by the Teſtator's own Hand, as the Reaſon of it had been falſe if the Codicil had not then been upon that Paper, for there would have been ſufficient Room below the Will for the Witneſſes to atteſt it. The Witneſs alſo ſays, that the Execution was about twenty-ſeven or twenty-eight Years ago, which Time is ſubſequent to the Codicil. The Execution

6. *J. S.* before the Statute of 29 *Car.* 2. *viz.* in 1668-9, wrote his Will with his own Hand on a Sheet of Paper, and the Writing went to the Bottom of one Side, and half Way on the Back-ſide, which Will at the End of it had the Name and Seal of *J. S.* and Notice was taken in his own Hand of ſome Interlinations. At a very little Diſtance at the Back-ſide of the ſame Paper, a Codicil was written, which extended almoſt to the Bottom of the ſame Back-ſide of the Paper, and was dated 1679, which was after the Statute of Frauds, and had the Name of the Deviſor ſubſcribed, and his Seal affixed; in which Codicil a Legacy as to a Houſe was revoked, and the ſame was thereby deviſed to *A.* for Life, and after to his Brothers ſucceſſively, but Notice was not taken of the Names of his Brothers in the Codicil, but they *were* named in the Will. *At the Top of the Will was written, ſigned, ſealed and publiſhed, as my laſt Will and Teſtament, in the Preſence of the ſame, being written here for want of Room below*; this was likewiſe written by the Teſtator's own Hand, and then the Names of the three Witneſſes were ſubſcribed; two of thoſe Witneſſes were dead, and the third was produced at the Trial, who teſtified that he was Servant to the Teſtator for four Years, and about twenty-ſeven or twenty-

Execution is ſufficient within the Statute, for there is no Neceſſity that the Witneſſes ſee the Teſtator write his Name, and if he writes theſe Words, *ſigned, ſealed and publiſhed as his Will,* and *prays the Witneſſes to ſubſcribe their Names to that,* it will

twenty-eight Years ago, he and the other two Witneſſes were called up in the Night, and ſent for into the Teſtator's Chamber, who produced a Paper folded up, and deſired him and the others to ſet their Hands as Witneſſes to it, which they all three did in his Preſence, but they did not ſee any of the Writing, nor did the Teſtator tell them it was his Will, or ſay what it was, but he believes this to be the Paper, becauſe his Name is there, and the Names of the other Witneſſes, and he never witneſſed any other Deed or Paper for the Teſtator; and tho' the Teſtator did not ſet his Name or Seal to the Will in their Preſence, yet he had often ſeen him write, and believes the whole Will and Codicil to be of his Hand Writing. And Lord Chief Juſtice *Trevor* inclined that here was ſufficient Evidence to find the Codicil well executed, and the Jury found it accordingly. *Hil.* 8 *Ann.* in *C. B. Peate* and *Ougly*, *Comyns's Rep.* 197.

be a ſufficient Publication of his Will, tho' the Witneſſes do not hear him declare it to be his Will; and a Caſe was mentioned determined by Lord Chan. *Shaftſbury* before 29 *Car.* 2. where a Man wrote his Will with his own Hand, and alſo theſe Words, *(ſigned and publiſhed in the Preſence of)* and no Witneſſes had ſubſcribed it, it was held to be a ſufficient Publication. *Ibid.*

7. Upon an Iſſue directed out of Chancery, wherein the Queſtion was, Whether a Man was *Compos* or not at the Time of executing his Will, it was held by the *Chief Juſtice*, that it was not neceſſary that all the Witneſſes to the Will ſhould ſee it executed; if one of them ſaw it executed, and the others were preſent, he ſaid it would be ſufficient. *Trin.* 3 *Geo.* 2. in the Caſe of *Durrant* and *Durrant* in *B. R.* (*a*). *Barnard. Rep. in B. R.* 367.

(*a*) This Caſe is miſplaced in Point of Time.

8. A Will of *Land duly ſigned by Teſtatrix in the Preſence of* A. *and alſo publiſhed, which* A. *writ the Will*, but *is now dead*; *his Hand was proved.* After *this the Teſtatrix called in* B. *to be a Witneſs to the Will*; *ſhe told him it was her Will, and publiſhed it as ſuch*; after *this ſhe called in* C. *and did the ſame.* The Queſtion was, Whether theſe Witneſſes atteſting this Will at ſeveral Times, *tho' all in the Preſence of the Teſtatrix*, was according to the Statute of *Frauds* and *Perjuries?* Baron *Price* held it ill (*b*) at *Lent* Aſſizes at *Devon* 1717. *Vin. Abr.* Tit. *Deviſe*, (N. 10.) *Ca.* 3. *P.* 128.

(*b*) For the Intent was, that all the Witneſſes ſhould be together, that one might teſtify for the other, and this was a ready Way to let in Fraud and Perjury, for after the firſt Witneſs had atteſted it, there might be a Razure or Interlineation. *Per* Baron *Price, ibid.*

The proper Way of examining a Witneſs to prove a Will as to Lands, is, that the Witneſs ſhould not only prove the executing the Will by the Teſtator and his own ſubſcribing it in the Preſence of the Teſtator, but likewiſe that the reſt of the Witneſſes ſubſcribed their Names in the Teſtator's Preſence, and

9. A Witneſs proving a Will of Lands ſwears, that he ſubſcribed the Will as a Witneſs in the ſame Room, and at the Teſtatrix's Requeſt; two others ſwore that they ſaw the Will executed by the Teſtatrix, and that they ſubſcribed the ſame in the Teſtatrix's Preſence; a fourth Witneſs was gone beyond Sea, and therefore could not be examined. *Cowper* C. doubted as to the Proof of the Execution of this Will, but would declare no Opinion on the Point until further Application, ſaying, that the Heir at Law, then an Infant, might by that Time come of Age. Afterwards Lord *Macclesfield* held that the bare ſubſcribing by the Witneſſes in the ſame Room did not neceſſarily imply it to be in the Teſtator's Preſence, for it might be in a Corner of the Room, in a clandeſtine, fraudulent Way; and then it would not be a Subſcribing by the Witneſs in the Teſtator's *Preſence*, merely becauſe in the ſame Room, but that here it being ſworn by the Witneſs, that he ſubſcribed the Will at Teſtatrix's Requeſt, and in the ſame Room, this could not be fraudulent, and was therefore *well* enough. *Mich.* 1721. *Longford* and *Eyre*, 1 *Will. Rep.* 740.

then one Witneſs proves the full Execution of the Will, ſince he proves that the Teſtator executed it; and likewiſe that the three Witneſſes ſubſcribed it in his Preſence. *Per* Lord Chan. *Macclesfield, ibid.* 741.

10. *J. S.* poſſeſſed of a Term of five hundred Years in *Blackacre*, afterwards purchaſes the Fee-ſimple in *B.*'s Name, and deviſes *Blackacre* by Will (*all of his own Hand Writing*) to *C.* in Fee, but the Will was neither dated, ſubſcribed or atteſted. Decreed *per* his *Honour*, that as *this was a Term which would have attended the Inheritance*, and in Equity have gone to the Heir, and not to the Executor, in which Reſpect it was to be conſidered as Part of the Inheritance, ſo the Will which was *not atteſted by three Witneſſes*, as the Law required it to be when Land was to paſs, ſhould not carry this Term. *Trin.* 1724. *Whitchurch* and *Whitchurch*, 2 *Will. Rep.* 236. A Will not atteſted, &c. as in the preſent Caſe, will be ſufficient to paſs a Term in *Groſs*, but not a Truſt of a Term attendant on an Inheritance, nor conſequently the Term itſelf. *Per* his *Honour*, *ibid.* 238.——A Will not atteſted as the Statute of Frauds requires, ſhall not paſs any Eſtate of which the Heir, as Heir, would otherwiſe have had the Benefit. *Per* his *Honour*, *ibid.* ——*Gilb. Rep. in Eq.* 168. S. C. with the Argument of Lord Chief Baron *Gilbert.*——2 *Mod. Caſes in Law and Eq.* 124. S. C. decreed that the Term did not paſs by this Deviſe.

11. A Teſtator *ſigns his Will*, but *delivers it as his Act and Deed*, yet well, for this will be ſufficient Publication. *Hil.* 10 *Geo.* in Chan. *Vin. Abr.* Tit. *Deviſe*, (N. 7.) *Ca.* 13. *P.* 125.

12. *J. S.* ſeiſed of Lands in Fee, conveyed them by Leaſe and Releaſe to Truſtees to the Uſe of them and their Heirs, In Truſt that (after ſuch Monies raiſed as therein mentioned) the Truſtees ſhould convey to *A.* his Heirs and Aſſigns, or to ſuch Perſon or Perſons as he or they ſhould direct. The Monies were raiſed, and *A.* by Will atteſted only by *two* Witneſſes, deviſed the Premiſſes to *B.* Lord Chan. *Macclesfield* ſaid, there could be no Queſtion but that a *Truſt of an Inheritance* could *not* be deviſed otherwiſe than by a Will atteſted by three Witneſſes, in the ſame Manner as a *legal* Eſtate, for if the Law were otherwiſe, it would introduce the ſame Inconveniences as to Frauds and Perjuries, as were occaſioned before the Statute by a Deviſe of a legal Eſtate in Fee-ſimple. Decreed the Will void, and that the Truſtees ſhould convey the Premiſſes to the Teſtator's Heir at Law. *Mich.* 1724. *Wagſtaff* and *Wagſtaff*, 2 *Will. Rep.* 258. And his *Lordſhip* held, that as the Will did not refer to the Deed of Truſt, but *A.* had undertaken to deviſe the Land as Owner thereof, without any relation had to the pretended Power, this made it much ſtronger againſt the Will. *Ibid.* 260.——It was ſaid *arg*' that this Will, tho' not good by way of Deviſe, ſhould be ſo by way of Appointment, like a *Copyhold ſurrendered to the Uſe of a Will*, which may be *deviſed* by a Will atteſted by two Witneſſes, or one Witneſs only. But his *Lordſhip* ſaid, that the Copyhold *paſſes by the Surrender, and not by the Will*, and that if this Matter had not been ſettled, it might be more reaſonable to ſay, When I have ſurrendered my Copyhold to the Uſe of my Will, a Will of this Copyhold ſhall be ſo executed, and in ſuch a Manner as by the Act of Parliament a Will of Lands ought to be executed; but this Caſe having been ruled otherwiſe, he ſaid he would not ſhake it. *Ibid.* 258.——In *Hil. Vac.* 1727. his *Honour* admitted it to be ſettled, that where a Copyhold in Fee is ſurrendered to the Uſe of a Will, ſuch Will, tho' executed in the Preſence of *one* or *two* Witneſſes only, is good, *becauſe it paſſes by the Surrender, and not by the Will*, which is only a Declaration of the Uſe of the Surrender; but that if a *Copyholder* be ſeiſed only of the *Truſt* or *Equity of Redemption of the Copyhold*, and deviſes ſuch *Truſt* or *Equity of Redemption*, there *muſt be three Witneſſes to the Will*; for here can be no *precedent* Surrender to the Uſe of the Will to paſs this *Truſt*, and the *Truſt* and *Equity of Redemption of all Lands of Inheritance* are *within the Statute of Frauds*, otherwiſe great Inconvenience would ariſe therefrom; and it is no Prejudice to the Lord to compriſe the Truſt of a Copyhold *within* that Statute, becauſe the Perſon who has the *legal* Eſtate of the Copyhold is Tenant to the Lord, and liable to anſwer all the Services. *Ibid.* 261. *Anon.*——But in the Caſe of *Tuffnell* and *Page*, *Eaſt.* 1740. Lord *Hardwicke* was of Opinion, that the *Truſt of a Copyhold* would paſs by a Will *not* atteſted according to the Statute of Frauds, as a Copyhold ſurrendered to the Uſe of a Will would do; for that Equity ought to follow the Law, and make it at leaſt as eaſy to convey a *Truſt* as a *legal* Intereſt. And decreed accordingly. *Ibid.* at the Bottom of the *P.* 261.

13. A Surrender was made of a Copyhold Eſtate to Truſtees to the Uſe of the Will; a Will was made with only two Witneſſes to it. It was admitted, that a Will of a Copyhold Eſtate does not require three Witneſſes; but this is a Deviſe of a Truſt relating to Lands, ſo within the very Words of the Statute of Frauds; the Heir controverting the Surrender and the Will, this Point was not determined, but two *Ld. Chancellor* ſeemed to be of Opinion that the Deviſe of a Truſt muſt enſue the Nature of the Eſtate, and not make it be neceſſary to have three Witneſſes, as the *Copyhold might be deviſed without three Witneſſes*; but this may be a Queſtion to be determined when the Iſſues are tried. *Ibid.*——*Vin. Abr.* Tit. *Deviſe*, (N. 1.) *Ca.* 4. *P.* 129. S. C. ſtates it thus: A. *ſeiſed in Fee of Copyhold Lands*, makes a *Surrender to the Uſe of* B. *and* C. *and their Heirs, to the Uſe of his Will*, and *deviſes the Lands to* D. *Parker* C. was of Opinion, that the Circumſtances required

two Iſſues ordered. 12 *July* 1725. *Appleyard* and *Wood*, *Select Caſes in Chan.* 42.

required by the Stat. 29 *Car.* 2. of Frauds in Deviſes of Lands, ought to be obſerved in this Caſe, for by this Surrender the Fee of the Copyhold was in the Surrenderees, and only a Truſt deviſed by the Will, which cannot paſs by the Deviſe without the Circumſtances required by the Statute of Frauds, in relation to Deviſes of Lands to be duly obſerved. But the Counſel inſiſting that a Deviſe of Copyhold is *not* within the Statute, *Lord Chancellor* ſaid, that if the Surrender had been only to the Uſe of the Will, that might have been a Queſtion in this Caſe, but now it is not; however, he inclined to think it neceſſary in that Caſe, but would not determine that Point now, that not being the Caſe before him.

14. Will made beyond Sea of Lands in *England*, muſt be atteſted by *three* Witneſſes. *Vide* 2 *Will. Rep.* 293.

Lord Chan. *King* ſaid, that tho' he himſelf inclined to think the Will of the Lands good, if the Teſtator ſhould acknowledge the Name to be his, and the Witneſſes ſhould ſubſcribe in his Preſence, yet that Point ſhould be reſerved to the Defendant; and ſaid, that he took this Will to be a good one, and being ſo to be a good Charge, but referred, *&c.*

15. *J. S.* had a Power at any Time during the joint Lives of him and *M.* his Wife, by his laſt Will, or any Writing purporting to be his laſt Will, under his *Hand* and *Seal*, atteſted by three or more credible Witneſſes, (if he ſhould die before his Wife without any Iſſue between them then living) to charge Lands with any Sum or Sums of Money not exceeding 2000 *l.* to be paid to ſuch Perſons, and in ſuch Proportions as he ſhould appoint; with the like Remainder to *M.* if ſhe ſhould die without Iſſue in the Life of her Huſband *J. S.* There was no Iſſue of the Marriage, and *J. S.* by his laſt Will in Writing under his Hand, atteſted by three Witneſſes, *but not ſealed*, reciting his Power, *&c.* diſpoſed of the 2000 *l.* to the Plaintiffs (being his Relations) in the Proportions therein mentioned. There were three Witneſſes to the Will. Two of the Witneſſes ſwore, that the Will was ſigned by the Teſtator in the Preſence of all the three Witneſſes, but the third ſwore that the Teſtator having *written* and *ſigned the Will before*, called for the Witneſſes, and *declared that Writing to be his laſt Will*, and that all the three Witneſſes were then preſent, and *ſubſcribed their Names in his Preſence.* Lord Chan. *King* referred it to the Judges of *B. R.* who determined (on Argument) that the Will was void as a Charge for want of being *ſealed.* *Hil.* 1728. *Dormer et al'* and *Thurland et al'*, 2 *Will. Rep.* 506.

&c.——In the Caſe of *Stonehouſe* and *Evelyn*, *Eaſt.* 1734. in proving a Will diſpoſing of a *real* Eſtate, the Proof was full that the three ſubſcribing Witneſſes did ſubſcribe their Names in the Preſence of the Teſtatrix; but one of them ſaid, he did not ſee the Teſtatrix ſign, but that ſhe owned, at the ſame Time the Witneſſes ſubſcribed, that the Name ſigned to the Will was her own Hand Writing. Which Sir *Joſeph Jekyll* held without all Doubt to be ſufficient. 3 *Will. Rep.* 254. And *ibid.* the *Reporter* ſays, that on his mentioning his *Honour*'s Opinion above to Mr. Juſtice *Forteſcue Aland*, he ſaid it was the common Practice, and that he had twice or thrice ruled it ſo upon Evidence on the Circuit; and that it is ſufficient if one of the three ſubſcribing Witneſſes ſwears the Teſtator acknowledged the Signing to be his own Hand Writing. And it is remarkable that the Statute of Frauds does not ſay that the Teſtator ſhall ſign his Will in the Preſence of three Witneſſes, but requires theſe three Things: Firſt, That the Will ſhould be in Writing. Secondly, That it ſhould be ſigned by the Teſtator. And, Thirdly, That it ſhould be ſubſcribed by three Witneſſes in the Preſence of the Teſtator.

16. In Ejectment by the Heir at Law, the Queſtion for the Opinion of the Court was, Whether it ſhould be left to a Jury to determine, whether, the Witneſſes to a Will (*being all dead*) ſet their Names in the Preſence of the Teſtator, and this merely upon Circumſtances, without any poſitive Proof? *Per Cur'*, This is a Matter fit to be left to a Jury, which is all that is referred to the Court. The Witneſſes by the Statute of Frauds ought to ſet their Names as Witneſſes in the Preſence of the Teſtator, but it is not required by the Statute that this ſhould be taken Notice of in the Subſcription to the Will; and whether inſerted or not, it muſt be proved; if inſerted, it does not conclude but it may be proved *contra*, and the Verdict may find *contra*; then if not concluſive when inſerted, the *Omiſſion* does not conclude it was not ſo, and therefore muſt be proved by the beſt Proof the Nature of the Thing will admit.

In Caſe the Witneſſes be dead, there cannot probably be any expreſs Proof, ſince at the Execution of Wills few are preſent but Deviſor and Witneſſes; then, as in other Caſes, the Proof muſt be circumſtantial, and here are Circumſtances; Firſt, Three Witneſſes have ſet their Names, and it muſt be intended they did it regularly. Secondly, One Witneſs was an Attorney of good Character, and may be preſumed to underſtand what ought to be done, rather than the contrary. And there may be Circumſtances to induce a Jury to believe that the Witneſſes ſet their Hands in the Preſence of the Teſtator, rather than the contrary; and it being a Matter of Fact, was proper to be left to them; as, whether Livery was given on a Feoffment, when no Livery is indorſed; whether a Deed was executed when only a Counterpart was produced, *&c.* And the Court was of Opinion that the Plaintiff ought to be nonſuited. *Eaſt.* 9 *Geo.* 2. in *C. B. Hands* and *James*, *Comyns's Rep.* 531.

17. A Will ſhall not be read on Proof of a Witneſs's Hand, unleſs there be poſitive Proof that he is dead. *Hil.* 11 *Geo.* 2. *in Scac'*, *Biſhop* and *Burton*, *Comyns's Rep.* 614.

18. Upon a Trial at Bar concerning the Execution of a Will, it did not appear upon the Face of it, that the Atteſtation of the Witneſſes was made in the Preſence of the Teſtator, which being objected to, a Caſe was cited where Lord Chief Juſtice *Eyre* held it a Matter proper to be left to a Jury, whether they believed it to be ſo done or not; and Mr. Juſtice *Chappel* cited a Caſe to the ſame Purpoſe, *quod Curia conceſſit*, and held it not neceſſary it ſhould be inſerted in the Will, that the Atteſtation was in the Preſence of the Teſtator, tho' by the Statute it is neceſſary it ſhould in Fact be ſo atteſted. *Eaſt.* 12 *Geo.* 2. in *B. R. Croft* on the Demiſe of *Dalby*, and *Pawlet*, *Vin. Abr.* Tit. *Deviſe*, (N. 9.) *Ca.* 4. *P.* 128.

19. If a Copyholder, after Admittance, ſurrenders the Lands to the Uſe of his laſt Will, and by his laſt Will gives them to *A.* but the Will is *not* atteſted by any Witneſſes, yet *A.* is well intitled to the Lands. *Per Lord Chancellor*, *Eaſt.* 1740. *Tuffnell* and *Page*, *Barnard. Rep. in Chan.* 11, 12.

And his *Lordſhip* ſaid, that the Reaſon is, that the Party is in by the Surrender, and not by the Will, and therefore it is good, tho' there be no Witneſſes at all; but that it is neceſſary that the Will be in Writing, and if it be ſo, it is ſufficient, if it be ſigned by the Party; and ſo it is where a Perſon is intitled to the Truſt of a Copyhold, tho' there were no Surrender at all to the Uſe of the Will, nor the Will atteſted by any Witneſs, yet it is ſufficient to give the Truſt of a Copyhold Eſtate. *Per* his *Lordſhip*, *ibid.* 11, 12.

(B) In what Caſes a Deviſee, &c. ſhall be admitted a Witneſs to prove the Will.

1. BY the Act of the 25 *Geo.* 2. for avoiding and putting an End to certain Doubts and Queſtions, relating to the Atteſtation of Wills and Codicils, concerning real Eſtates, in that Part of *Great Britain* called *England*, and in his Majeſty's Colonies and Plantations in *America*, it is enacted, That if any Perſon ſhall atteſt the Execution of any Will or Codicil, which ſhall be made after the 24 *June* 1752, to whom any beneficial Deviſe, Legacy, Eſtate, Intereſt, Gift, or Appointment of, or affecting any real or perſonal Eſtate, other than and except Charges on Lands, Tenements, or Hereditaments, for Payment of any Debt

And it is alſo enacted, That in caſe by any Will or Codicil made, or to be made, any Lands, Tenements, or Hereditaments, are, or ſhall be charged with Debts; and any Creditor, whoſe Debt is ſo charged, hath atteſted, or ſhall atteſt the Execution of ſuch Will or Codicil, ſuch Creditor ſhall be admitted as a Witneſs to the Execution of ſuch Will or Codicil, within the Intent of the ſaid Act. That if any Perſon hath atteſted the Execution of any Will already made, or ſhall atteſt the Execution of any Will, *&c.* made on or before the 24 *June* 1752, to whom any Legacy is or ſhall be thereby given, whether charged upon Lands,

Lands, Tenements, or Hereditaments, or not; and ſuch Perſon, before he ſhall give his Teſtimony concerning the

Debt or Debts, ſhall be thereby given or made, ſuch Deviſe, *&c.* or Appointment, ſhall, ſo far only as concerns ſuch Perſon atteſting the Execution of ſuch Will or Codicil, or any Perſon claiming under him, be utterly null and void; and ſuch Perſon ſhall be admitted as a Witneſs to the Execution of ſuch Will or Codicil, within the Intent of the Act of the 29 *Car.* 2. notwithſtanding ſuch Deviſe, *&c.*

Execution of ſuch Will, *&c.* ſhall have been paid, or have accepted or releaſed, or ſhall have refuſed to accept ſuch Legacy or Bequeſt, upon Tender made thereof; ſuch Perſon ſhall be admitted as a Witneſs to the Execution of ſuch Will, *&c* within the Intent of the ſaid Act. Provided, That in caſe of Tender and Refuſal, ſuch Legatee ſhall in no wiſe be intitled to ſuch Legacy, but ſhall be barred from his Legacy; and in caſe of Acceptance, ſuch Legatee ſhall retain his Legacy which ſhall have been ſo paid, ſatisfied, or accepted, notwithſtanding ſuch Will or Codicil ſhall afterwards be adjudged to be void. That in caſe a Legatee, *&c.* who hath atteſted the Execution already made, or which ſhall be made on or before 24 *June* 1752, ſhall die in the Teſtator's Life-time, or before he ſhall have received or releaſed, or refuſed (on Tender) his Legacy, ſuch Legatee ſhall be a legal Witneſs to the Execution of ſuch Will, *&c.* within the Intent of the ſaid Act of 29 *Car.* 2. Proviſo, That the Credit of every ſuch Witneſs, ſo atteſting, *&c.* and all Circumſtances relating thereto, ſhall be ſubject to the Conſideration and Determination of the Court, and the Jury, before whom any ſuch Witneſs ſhall be examined, or his Teſtimony or Atteſtation made uſe of; or of the Court of Equity, in which his Teſtimony or Atteſtation ſhall be made uſe of; in like Manner, as the Credit of Witneſſes in other Caſes ought to be conſidered of, and determined. No Perſon, to whom any beneficial Eſtate, Intereſt, Gift, or Appointment, ſhall be given or made, which is thereby enacted to be null and void, or who ſhall have refuſed to receive any ſuch Legacy, on Tender as aforeſaid, and who ſhall have been examined as a Witneſs concerning the Execution of ſuch Will or Codicil, ſhall, after he ſhall have been ſo examined, demand or take Poſſeſſion of, or receive, any Profits or Benefit of or from any ſuch Eſtate, *&c.* given by any ſuch Will or Codicil; or demand, receive, or accept from any Perſon, any ſuch Legacy or Bequeſt, or any Satisfaction or Compenſation for the ſame, in any Manner, or under any Colour or Pretence whatſoever. This Act not to extend to the Caſe of any Heir at Law, or of any Deviſee in a prior Will or Codicil of the ſame Teſtator, executed and atteſted according to the Act of the 29 *Car.* 2. or any Perſon claiming under them reſpectively, who has been in quiet Poſſeſſion for two Years next preceding the 6th of *May* 1751, as to ſuch Lands, Tenements, and Hereditaments, whereof he has been in quiet Poſſeſſion as aforeſaid. This Act not to extend to any Will or Codicil, the Validity or due Execution whereof hath been conteſted in Law or Equity by the Heir of ſuch Deviſor, or the Deviſee in any ſuch prior Will or Codicil, for recovering the Lands, *&c.* mentioned to be deviſed in any Will or Codicil ſo conteſted, or any Part thereof, or for obtaining any other Judgment or Decree relative thereto, on or before the ſaid 6th of *May* 1751, and which has been already determined in favour of ſuch Heir at Law, or Deviſee in ſuch prior Will or Codicil, or any Perſon claiming under them reſpectively, or which is ſtill depending, and has been proſecuted with due Diligence; but the Validity of every ſuch Will or Codicil, and the Competency of the Witneſſes thereto, ſhall be adjudged and determined in the ſame Manner as if this Act had never been made. No Poſſeſſion of any Heir at Law, or Deviſee in ſuch prior Will or Codicil as aforeſaid, or of any Perſon claiming under them reſpectively, which is conſiſtent with, or may be warranted by or under, any Will or Codicil atteſted according to the Intent of this Act, or where the Eſtate deſcended or might have deſcended, to ſuch Heir at Law, till a future or executory Deviſe, by Virtue of any Will or Codicil atteſted according to this Act, ſhould or might take Effect, ſhall be deemed to be a Poſſeſſion within the Intent of the Clauſe herein laſt contained. This Act ſhall extend to ſuch of the *Britiſh* Colonies in *America* where the 29 *Car.* 2. is by Act of Aſſembly made, or by Uſage received as Law, or where by Act of Aſſembly or Uſage, the Atteſtation and Subſcription of a Witneſs or Witneſſes are made neceſſary to Deviſes of Lands, *&c.* and ſhall have the ſame Force and Effect in the Conſtruction of, or for the avoiding of Doubts upon, the ſaid Acts of Aſſembly, and Laws of the ſaid Colonies, as the ſame ought to have in the Conſtruction of, or for the avoiding of Doubts upon the ſaid Act in *England.* Provided always, That as to Caſes ariſing in any of the ſaid Colonies, no ſuch Deviſe, Legacy, or Bequeſt as aforeſaid, ſhall be made null and void, by Virtue of this Act, unleſs the Will or Codicil whereby ſuch Deviſe, *&c.* ſhall be given, ſhall be made after 1 *March* 1753.——*Note*; The above was intended to have been inſerted as *Matter*, and not by way of *Note.*

(C) In what Caſes the Court will ſet aſide a Will for Fraud, (*a*) &c.

(*a*) *Jekyll* Ld. Commiſſioner took a Difference between a Will and a Deed gained upon a weak Man, and upon a Miſrepreſentation or Fraud; for if a Will be gained from ſuch by falſe Miſrepreſentation, this is not Reaſon ſufficient to ſet it aſide in Equity, as was determined in the late Duke of *Newcaſtle*'s Will betwixt Lord *Thanet* and Lord *Clare*, and in the Caſe of *Bodvil* and *Roberts*; but where a Deed, which is not revocable as a Will is, is ſo gained from ſuch a Perſon, and without any valuable Conſideration, the ſame ought to be ſet aſide in Equity. 2 *Will. Rep.* 270. *Eaſt.* 1725. in the Caſe of *James* and *Greaves.*

1. WILL obtained *in Extremis*, and upon Importunity of Teſtator's Wife, his Hand being guided in the Writing of his Name, ſet aſide. 15 *May* 1711. *Moneypenny* and *Brown*, *Vin. Abr.* Tit. *Deviſe*, (Z. 2.) *Ca.* 7. *P.* 167.

2. *A.* by Will had deviſed his Lands to *M.* his Mother in Fee; *M.* was afterwards told by *J. S.* that this Will would not be good, but ought to be *guarded* (as he called it) and that he would make another Will for *A.* which he would take Care ſhould be *ſufficiently guarded*. *J. S.* afterwards drew a Will, by which *A.* thereby gave the Land to *M. for Life only*, Remainder *to* J. S. *in Fee*. Upon a Bill to eſtabliſh the *firſt* Will, becauſe of the ill Practices uſed in obtaining the *After-Will*, Lord Chan. *Cowper* directed an Iſſue in *Middleſex*, where the Will was made, (tho' the Lands lay in *Shropſhire*) to try whether the Will by which the Lands in Fee were deviſed to *M.* was the laſt Will of *A.* *Mich.* 1715. *Goſs* and *Tracy*, 1 *Will. Rep.* 287, 289.

If A. had deviſed his Lands to *M.* in Fee, and afterwards *J. S.* had told *A.* and not *M.* that the Will was void for want of its being well guarded; and that he would make another Will for *A.* that ſhould be

effectually guarded, and accordingly he had made another Will for *A.* whereby the Eſtate had been deviſed to *M. for Life only*, Remainder *to* J. S. *in Fee*, this would be a good Will in Law, if atteſted purſuant to the Statute of Frauds, but would be ſet aſide in Equity for the Fraud; but as to the Evidence of the Teſtator's being *non Compos* when he made his ſecond Will, that is to be tried at Law. *Per Lord Chancellor, ibid.* 288.—A Will, tho' good at Law, may yet be ſet aſide in Equity for Fraud (*a*); as if *A.* ſhould agree to give *B.* Bank Bills to the Amount of 1000 *l.* in Conſideration that *B.* would make his Will, and thereby deviſe his Land to *A.* and accordingly *B.* does make his Will, and *A.* gives *B.* the Bank Bills, which prove to be forged; this, tho' a good Will at Law, ſhall nevertheleſs be avoided in Equity by *A.*'s Heir for a Fraud. *Per Lord Chancellor, ibid.*—2 *Vern. Rep.* 699.

(*a*) See in 1 *Chan. Rep.* 12, 66. Inſtances of a Will of Land being ſet aſide in Equity for Fraud.

3. A Will ſhall have Relation only *to the Teſtator's Death, and not to the Making*, for 'till his Death he is Maſter of his own Will, and therefore *a Will of a Papiſt* in *Ireland* was held to be *avoided by a ſubſequent Statute* made in that Kingdom, which enacts, that the Lands of Papiſts there ſhall not be deviſeable, but deſcend in Gavelkind. *Jan.* 28, 1717. *Burk* and *Morgan*, *Vin. Abr.* Tit. *Deviſe*, (H. b.) *Ca.* 7. *P.* 273.

4. Bill to be relieved againſt a Will obtained by Fraud and Impoſition, upon this Caſe. The Plaintiff's Son had made a Will in *Jan.* 1716, and thereby *deviſed all his real and perſonal Eſtate to Plaintiff his Father*, but falling *ill ſoon after at a great Diſtance from his Father* of a Conſumption, of which he died, *Defendant perſuaded him to make a new Will*, ſome ſhort Time before his Death, whereby he deviſed all *his real and perſonal* Eſtate to Defendant, (being *his Kinſman*) Upon Truſt *to pay his Debts and Legacies, but ſays nothing of the* Reſiduum, but there is the general Clauſe of revoking all former Wills, *&c.* There were *ſeveral Witneſſes to prove an Impoſition and Contrivance*, and *falſe Suggeſtions to induce the Teſtator to make this new Will*, ſufficient to ſatisfy the Court that it was unfairly obtained, but the *Will was regularly ſigned, ſealed and publiſhed*, according to the Statute 29 *Car.* 2. and ſo a good Will at Law. Lord Chan. *Parker*, after having taken Time to conſider of it, decreed (as Mr. *Viner* ſays he heard) Defendant to account for the *perſonal* Eſtate, having juſt Allowances, *&c.* and to convey the *real* Eſtate to Plaintiff, ſubject to the Payment of the Teſtator's Debts, as a Truſtee for the Plaintiff. *Mich.* 5 *Geo.* 1. *Branſby* and *Keridge et al'*, *in Canc'*, *Vin. Abr.* Tit. *Deviſe*, (Z. 2.) *Ca.* 11. *P.* 167.

5. A Bill was brought to ſet aſide a Will of a *perſonal* Eſtate, and to ſtay the Probate, upon a Suggeſtion of its being obtained by Fraud, and the Defendant demurred to the Juriſdiction of the Chancery, whereupon an Injunction was moved for, inſiſting that the Demurrer confeſſed the Fraud, and that Fraud was cognizable in Equity as well as in the Spiritual Court; but Injunction denied. *Trin.* 1725. *Stephenton* and *Gardiner*, 2 *Will. Rep.* 286.

And *per Cur'*, The Spiritual Court has Juriſdiction of Fraud, relating to a Will of *perſonal* Eſtate, and can examine the Parties by

way of Allegation touching the ſame, and if the Will was falſly read to the Teſtatrix, then it was not her Will. *Ibid.*

6. Where

Will *ſet aſide after forty Years Poſſeſſion* under it, upon account of the *Inſanity of the Deviſor*, and

6. Where a Bill is brought to prove a Will of Land, the *Sanity* of the Teſtator muſt be proved; otherwiſe in Caſe of a Deed of Truſt to ſell for Payment of Debts. *Hil.* 1730. *Harris* and *Ingledew*, 3 *Will. Rep.* 93.

altho' in Prejudice of a Purchaſor. Feb. 24, 1726. *Squire* and *Perſhall*, *Vin. Abr.* Tit. *Deviſe*, (Z. 2.) *Ca.* 13.

(D) Of the Republication of a Will.

J. S. by Will, dated 25 *Mar.* 1700, deviſed all his Lands to *A.* his Nephew and his Heirs, and directed that he ſhould take the Surname of *Lytton*, and his perſonal Eſtate he deviſed to Dame —— *Ruſſel* his Siſter, and ſaid *A.* and made them Executors. Afterwards *J. S.* purchaſed the Equity of Redemption of ſome Mortgages in Fee, which were mortgaged to him before he made his Will, and 13 *Jan.* 1704 by a Codicil atteſted by three Witneſſes, he ſays, *I make this Codicil, which I will ſhall be added to, and be Part of my laſt Will which I have formerly made.*

1. *J. S.* by Will, dated 17 *Jan.* 1711, deviſed to *M.* his Wife 1000 *l. per Annum* for her Life, to iſſue out of his real Eſtate, his Capital Meſſuage in *H. &c.* To his Siſter *E.* 200 *l. per Annum* for her Life; and 1000 *l.* to *L.* her Daughter for her Portion; and after other Legacies, he deviſed the Reſidue of his real and perſonal Eſtate to *A. B. C. D.* and *F.* and their Heirs, Executors and Adminiſtrators, *On Truſt* to *veſt the Reſidue of his perſonal Eſtate in Lands of Inheritance*, and that his *Truſtees ſhould ſtand ſeiſed and poſſeſſed of his real* and *perſonal Eſtate* to *the Uſes of his Will during his Wife's Life*, and *after her Deceaſe, if he ſhould die without Iſſue, to the Intent that his Freehold and Leaſehold Eſtate*, and the *Lands to be purchaſed* ſhould be ſettled *to the Uſe of the Defendant* G. *for ninety-nine Years.* Then *to his firſt and other Sons in Tail Male*, &c. *J. S.* purchaſed ſeveral Fee-farm Rents, Aſſart Rents and other Lands and Tenements; and then by a Codicil 2 *Feb.* 1720, being two Days before his Death, he recites, That he made a Will, dated 17 *Jan.* 1711, and then ſays, *I hereby ratify and confirm the ſaid Will, except in the Alterations hereafter mentioned. The Portion to my Niece* L. *ſhall be made up* 6000 l. *and what I have given to my Siſter and Niece ſhall be accepted by them in Satisfaction of all they may claim out of my real and perſonal Eſtate, and on Condition they releaſe all Right*, &c. *to my Executors and Truſtees in my Will named; and thus having provided for my Siſter and Niece, I deviſe all the Lands by me purchaſed ſince my Will to my Truſtees and Executors in my Will named, to the ſame Uſes and ſubject to the ſame Truſts to which I have mentioned to deviſe the Manor of* H. *and the Bulk of my Eſtate; and I revoke that Part of my Will whereby I appoint* A. B. *and* C. *three of my Truſtees in my Will, and I deſire* K. *and* N. *to be two of my Truſtees, and deviſe my ſaid real Eſtate to them accordingly.* Lord Chan. *Macclesfield* 20 *Nov.* 1723 decreed that the Will was confirmed by the Codicil; that *J. S.* ſigning and publiſhing his Codicil in the Preſence of three Witneſſes was a *Republication*

And Lord Chan. *Cowper*, aſſiſted by Sir *John Trevor* Maſter of the Rolls, and Lord Chief Juſtice *Trevor*, and *Tracy* J. 16 *June* 1708, decreed that this was *not* a Republication; for ſince the Statute 29 *Car.* 2. there can be no Deviſe of Lands by an implied Republication, for the Paper in which a Deviſe of Lands is contained, ought to be re-executed in the Preſence of three Witneſſes. Cited *arg'* in the Caſe of *Acherly* and *Vernon*, as the Caſe of *Lytton* and *Viſcounteſs Falkland*, *vide Comyns's Rep.* 383. ——— *A.* by Will dated 11 *Oct.* 1684 *only* executed, took Notice that his Lands were ſettled upon his Sons *B.* and *C.* in Tail Male, and then deviſed in theſe Words: "In Caſe my Sons ſhall have no Iſſue Male, then, for the Preſervation of my Name and Family, I deviſe "my ſaid Lands unto my Brother *G.* and the Heirs Male of his Body iſſuing." *G.* died in the Life of the Teſtator, having Iſſue a Son, then Lord *Lanſdown*, by which the Deviſe to *G.* in Tail Male lapſed. 15 *Aug.* 1701 the Teſtator ſent for ſeven Perſons, and ſaid, "I ſent for you to be Witneſſes to my Will, and ſome-"times to be Witneſſes to the *Republication* of my Will;" and then took a Codicil dated ſame Day in one Hand, and the Will in the other, and ſaid, "This is my Will whereby I have ſettled my Eſtate, and I publiſh "this Codicil as Part thereof;" and then ſigned the Codicil which lay upon the Table with the Will in the Preſence of the Witneſſes, who ſubſcribed it in his Preſence. By this Codicil he deviſed in theſe Words: "Whereas I heretofore made my Will, dated 11 *Oct.* 1684, which I do not intend wholly to revoke, but in "regard to the many Accidents and Alterations to my Family and Eſtate, I by this Codicil, which I appoint "to be taken as Part of my Will, deviſe as follows;" and then deviſed ſeveral Manors, *&c.* to his Son *B.* in Fee, and 100 *l. per Annum* to his Nephew, then Lord *Lanſdown*, for Life. He then put the Will and Codicil together in

Republication of his Will, and both together made but one (*a*) Will; and by the ſaid Will and Codicil his Fee-farm Rents, Aſſart Rents and Lands, contracted to be purchaſed, and all his real and perſonal Eſtate (except the Copyhold purchaſed before his Will) did well paſs. On Appeal to the Lords, the Decree was affirmed. *Acherly* and *Vernon*, *Comyns's Rep.* 381.

in a Sheet of Paper, and ſealed them up in the Preſence of the ſame Witneſſes; but the Will was not unfolded in their Preſence, nor did any of them write their Names as Witneſſes, on or under the Will, or on the ſame Paper, but on the Codicil only. And *Parker* Ch. J. and the whole Court held this no Republication, for ſince the Statute 29 *Car.* 2. there ſhall be no Republication by Implication, but the Will muſt be re-executed, otherwiſe a Deviſe of Lands ſhall not be good. *Hil.* 11 *Ann.* cites it as the Caſe of *Penphraſe* and *Lord Lanſdown et al'*, *Comyns's Rep.* 384. *Vide Lucas's Rep.* 96.——Since the 29 *Car.* 2. the ſame Forms are neceſſary to the *republiſhing* a Will as to the *firſt* making. Reſolved *per* Lord Chan. *Cowper*, *Trevor* Ch. J. and *Tracy* J. *Vide Lucas's Rep.* 98.

(*a*) *Vide Forteſcue's Rep.* 192, 193.

(E) Of Revocations, &c.

In every Revocation three Things are required, Firſt, That the Deviſor ſhould expreſsly declare his Mind that his Will ſhould be revoked. Secondly, That the Eſtate deviſed ought to be altered, which is an implied Revocation. Thirdly, That the Thing deviſed be altered. *Mich.* 4 *Ann.* in *C. B. Sir Richard Templeman's Caſe*, *MS. Rep.*——If the latter Part of a Will is inconſiſtent with the former Part of it, it ſuperſedes and revokes it. *Per Reynolds* C. B. and *Comyns* and *Thompſon*, Barons, *in Scac'*, *Hil.* 4 *Geo.* 2. *obiter. Fitz-Gibb.* 195.

1. DEfendant's Teſtator by his Will gave his four Daughters 600 *l.* apiece, and afterwards married his eldeſt Daughter to the Plaintiff, and gave her 700 *l.* Portion; after that he makes a *Codicil*, and gives 100 *l.* apiece to his unmarried Daughters, and *thereby ratifies and confirms his Will*, and dies. Plaintiff preferred his Bill for the Legacy of 600 *l.* given to his Wife by the ſaid Will. And his *Honour* held, that the Portion given by the Teſtator in his Life-time ſhould be intended in Satisfaction of the Legacy. *Mich.* 1698. *Irod* and *Hurſt*, 2 *Freem. Rep.* 224.

It was agreed to be the conſtant Rule of this Court, that where a Legacy was given to a Child, who afterwards, upon Marriage or otherwiſe, had the like or greater Sum, it ſhould be intended in Satisfaction of the Legacy, unleſs the Teſtator ſhould declare his Intent to be otherwiſe; and it was ſaid *the Words of ratifying and confirming* do not alter the Caſe, tho' they amount to a *new Publication*, being only Words of Form, and declare nothing of the Teſtator's Intent in this Matter. *Ibid.*

2. *J. S.* had four Daughters, *A. B. C.* and *D.* and by his Will deviſed to *A.* 1000 *l.* and by the ſame Will deviſed to them 1500 *l.* apiece for their Portions, which laſt Sums of 1500 *l.* were to be raiſed out of a real Eſtate deviſed by his Will for that Purpoſe. *A.* marries in *J. S.*'s Life-time, and *J. S.* gave her 4000 *l.* Portion. And *per* Lord Keep. *Wright*, This 4000 *l.* Portion muſt be taken to be a Satisfaction of the 1500 *l.* given *A.* by the Will for her Portion, and a Revocation of the Will *pro tanto*, but as to the 1000 *l.* that being a general Legacy, *A.* muſt have that notwithſtanding the 4000 *l.* given her for her Portion. *Hil.* 1701. *Ward* and *Lant*, *Prec. in Chan.* 183.

3. *J. S.* deviſed Lands in *S.* to *A.* his Son for ninety-nine Years, determinable upon three Lives, and by his Will charges the ſaid Lands with an Annuity of 40 *l.* *per Annum* to his Daughter *M.* and afterwards deviſes the ſame Lands for ninety-nine Years, determinable upon three other Lives, reſerving 50 *l.* a Year Rent; this is, during the Continuance of the Leaſe, a Revocation, but it is no Revocation as to the 40 *l.* *per Annum* Annuity, there being Rent enough reſerved to ſatisfy that. *Feb.* 14, 1706. *Parker* and *Lamb*, *Vin. Abr.* Tit. *Deviſe*, (R. 2.) *Ca.* 16. *P.* 140.

4. *J. S.* by Will (*int' al'*) deviſes to *B.* his younger Son 750 *l.* and afterwards buys him a *Cornet of Horſe*'s Commiſſion, and paid 650 *l.* for it, and it was proved he intended this 650 *l.* ſhould be diſcounted out of the Legacy, and that he would ſtrike ſo much out of the

Will, as ſoon as the Accounts came to *London* to him, but died before they came, without altering his Will. Decreed that the Money paid for the ſaid Commiſſion ſhall go in Diminution of the Legacy, and be taken in Payment and Satisfaction of ſo much. *Mich.* 1706. *Hoſkins* and *Hoſkins*, *Prec. in Chan.* 263.

5. If a Man deviſes Lands, and afterwards mortgages the ſame for Years, and then levies a Fine *ſur Conuſance de Droit come ceo*, *&c.* and *not* a Fine *ſur Conceſſit*, this will be a Revocation; but if there had been a Fine *ſur Conceſſit*, it had revoked only *pro tanto*. *Per Cowper* C. *Eaſt.* 6 *Ann. Vin. Abr.* Tit. *Deviſe*, (P) *Ca.* 10. *P.* 136.

His *Honour* mentioned the Caſe of Lord *Guernſey*, who married a Daughter of Sir *John Banks*, with whom he had a conſiderable Fortune in Land. Afterwards Sir *John* builds a Houſe upon the Land, and being a Merchant, makes an Entry, *Lord* Guernſey *Debtor ſo much for building the Houſe*, and then makes his Will, and deviſes the Reſidue of his Eſtate to his two Daughters; and yet it was held that this Houſe ſhould fall into the Lump of the Fortune given to the Lady *Guernſey*. *Ibid.*

6. *A.* by Will gives his Children ſeveral Legacies, and to his eldeſt Son 2000 *l.* Afterwards he gives him 400 *l.* to go to *Italy*, and being a Merchant, enters on the Debtor Side of his Book, *my Son Debtor* 400 l. Then by a *Codicil*, having taken an Account of his Eſtate, and finding it would not anſwer all the Legacies, he retrenches 400 *l.* out of each of the younger Children's Legacies, without taking any Notice of the eldeſt Son or his 400 *l.* His *Honour* decreed the whole 2000 *l.* to the eldeſt Son. *Trin.* 1710. *Bird* and *Hooper*, *Prec. in Chan.* 298.

7. *A.* in *Dec.* 1715 makes his Will, and ſigns, ſeals and publiſhes it in the Preſence of four Witneſſes, who atteſt and ſubſcribe the ſame in his Preſence, and thereby gives to *H. P.* his Son, and to his Heirs and Aſſigns for ever, his Lands, *&c.* The 2d of *Jan.* following he orders one *O.* to make an Alteration in his Will, and *interlines* theſe Words: *I give unto my Wife* A. P. *and her Aſſigns*, *my Lands in* W. *for her Life*, and *after her Deceaſe to my Son* H. *and his Heirs*. The Will is *read to the Teſtator*, and *he approves of it*, with the Interlineation. He *put his Seal upon the Wax in the Preſence of three of the ſame Witneſſes*, but *does not write his Name* de Novo, *neither do the Witneſſes ſubſcribe theirs* de Novo. *Quære*, Whether this was a good Deviſe to *A. P.* for her Life? The Doubt was chiefly upon the 29 *Car.* 2. whether this Alteration was not a Revocation within the Statute. Every Bequeſt is to continue in Force until the ſame be burnt, *&c.* by the Teſtator or his Direction, in his Preſence, or unleſs the ſame be altered by ſome other Will or other Writing of the Deviſor, ſigned in the Preſence of three or four Witneſſes, declaring the ſame. If the Will be ſigned it may be in any Part; and *per Parker* and *Eyre*, the putting a Seal is a good Signing; for *per Parker* Ch. J. the Intention of the Parties ſigning it, and the Witneſſes atteſting, is only that the Witneſſes may know it again. This Act is fully penned, and is not to be expounded away. *Per Powis*, Here is no Danger of *Fraud* or *Perjury*; here is a new Deviſe, and not only an Alteration. *Per Eyre*, Every Thing is right, ſave the new Subſcribing by the Witneſſes; the Caſe of *Lee* and *Libb*, in *Show.* 68, 69. is right; no Body can ſay this new Bequeſt was ſigned in the Preſence of the Teſtator. *Per Eyre* and *Parker*, There muſt be more than a bare Revocation. It muſt be ſigned in the Preſence of (three) Witneſſes. The Altering a Will muſt be underſtood of a Revoking, *i. e.* an Alteration by Revocation. The latter implies of the whole Will, the former of any Part, otherwiſe this Altering will claſh with the former Clauſe; ſo that if the Teſtator revokes the Whole or Part, it ſhall be by Will or Writing ſigned in the Preſence of Witneſſes, but *they are not obliged to ſubſcribe*. *Per Eyre*, Is (if) *H. P.* had been here found Heir at Law, then *A.* the Leſſor

of the Plaintiff might have been helped; for if this be an Alteration, ſo as *H.* is not to have the Lands 'till after *A.*'s Death, ſhe will have an Eſtate by Operation and Implication of Law. *Eaſt.* 10 *Ann. Townſend* and *Pearce*, *Vin. Abr.* Tit. *Deviſe*, (R. 4.) *Ca.* 3. *P.* 142.

8. Deviſe of Lands to *A.* and afterwards the Deviſor deviſes the ſame Lands to *B.* who was a Papiſt; both Deviſes are void; for tho' the laſt is void as a Will, yet it is good as a Revocation. *July* 11, 1713. *Roper* and *Conſtable*, *Vin. Abr.* Tit. *Deviſe*, (R. 3.) Note to *Ca.* 2. *P.* 141.

9. A ſubſequent Deviſe to a Perſon *incapable* of taking is a Revocation of a precedent Deviſe to a Perſon capable. This was approved by the Counſel on both Sides as good Law. *Eaſt.* 13 *Ann. in Dom. Proc'*, in the Caſe of *Roper* and *Radcliffe*, *Lucas's Rep.* 233.

10. Deviſe of a Term carved out of an Inheritance for ninety-nine Years before the Statute of 3 & 4 *W. & M. cap.* 14. of fraudulent Deviſes, *In Truſt to pay* 14l. per Annum *to his Grand Daughter for Life*; and after the making this Will, the *Deviſor mortgaged this Land for five hundred Years*, (which is a Revocation in Law for the Term, but the Deviſee has an Equity to redeem the Mortgage); the Mortgagee aſſigns over the Mortgage to the Plaintiff, who was a Creditor by Bond to the Teſtator, and the Reverſion in Fee deſcended to the Teſtator's Heir at Law. *Per Cowper* C. The Mortgage is a Revocation *pro tanto* of the Deviſe of the Annuity, and ſhe muſt keep down the Intereſt, or pay a third Part of the Redemption; but being a Deviſee, ſhe may redeem the Mortgage without paying the Bond. *Eaſt.* 2 *Geo. Saunders* and *Hawkins*, *Vin. Abr.* Tit. *Deviſe*, (Y) *Ca.* 2.

11. *A.* deviſes Lands *to an Executor for Payment of Debts*, and *recites that a particular Schedule of them was annexed to the Will*, Remainder over. Afterwards *he mortgages Part of the ſame Lands*, and *pays moſt of the Schedule Debts with the Money.* Decreed that this Mortgage is *not* a Revocation neither in all nor Part, and that the *Will ought to extend to all the Debts that ſhould be owing at the Time of his Death*, and *not to the Schedule Debts only*; and that the Mortgage was only a Security, and not an Appointment how it ſhould be made. But this Decree was reverſed, but without Prejudice to the Heir at Law. 21 *May* 1717. *Bernardiſton* and *Carter*, *Vin. Abr.* Tit. *Deviſe*, (R. 6.) *Ca.* 25. *P.* 147.

12. *J. S.* having four Daughters, *A. B. C.* and *D.* in 1705 by Will deviſes ſeveral Parcels of his Eſtate ſeverally to his four Daughters, and *int' al'* he deviſes to Truſtees all his Lands, Tenements and Hereditaments in *E.* and *F.* or either of them, or near thereto adjoining, *In Truſt for* A. *until her Marriage or Death*, and *in Caſe ſhe marries with the Conſent of her Truſtees, then for her and her Heirs, or for ſuch Perſon as ſhe ſhould appoint*, &c. *but in Caſe ſhe ſhould marry without Conſent of her Truſtees*, and forfeit her Eſtate, *then to her other Siſters equally between them*, &c. In 1708 the Plaintiff *Clarke* married *A. with the Conſent* of *J. S.* and he ſettles upon the Marriage (his Wife joining with him, who had theſe Lands in Jointure) *Part of theſe Lands deviſed to her* by his Will after the Death of her Mother, *and alſo* 7l. per Annum *in Fee-Farm Rent*, which was doubtful if it paſſed by the Will or not. In 1709 *J. S.* died, without altering the Will. (*Note*; *J. S.* in a Letter to *Clarke* upon the Treaty of Marriage, declares, what he will give him with his Daughter *in Preſent*, and

For *per Lord Chancellor*, Conditions of this Kind, be the Conditions *precedent* or *ſubſequent*, are in Nature of Penalties and Forfeitures, and if the ſubſtantial Part and Intent be performed, Equity ſhould ſupply ſmall Defects, and favour the Deviſee; and his *Lordſhip* obſerved that it was admitted that here was no Forfeiture, and ſaid, ſhould he take away the Eſtate from the firſt Deviſee, when it cannot go to the Deviſee over, only to let it deſcend to the Heirs at Law, which certainly was never the Intent of the Teſtator? The ſecond Queſtion

Queſtion in this Caſe was, If the Father giving and ſettling upon *A.*'s Marriage Part of the Lands deviſed to her by the Will *precedent*

and that ſhe will be a better Fortune at his Death.) *Quære*, If this Deviſe to *A.* in Fee upon Condition of marrying with the Conſent of the Truſtees be diſpenſed with or performed by her marrying in *J. S.*'s Life-time, and with his Conſent? And *Cowper* C. was of Opinion, that by the Marriage with the Conſent of the Father the Condition is diſpenſed with, and the Deviſe become abſolute. *Mich.* 3 *Geo.* 1. *Clarke et Ux'* and *Lucas et al'*, *Vin. Abr.* Tit. *Deviſe*, (U) *Ca.* 11. *P.* 154.

to the Marriage, be a Revocation of the whole Deviſe to her, or only *pro tanto* as was ſettled on her upon the Marriage? And *Lord Chancellor* held that the Lands ſettled by the Father upon the Marriage of *A.* is a Revocation only *pro tanto* of the Lands deviſed to her, and not of the whole Deviſe; for implied Revocations ought to be plain and certain, and the Inconſiſtency moſt apparent, which is not ſo in this Caſe; for why may not the Father give his Daughter all theſe Lands at his Death, tho' it was not proper for him to part with them all in his Life-time; tho' he gave Part by Deed, why may he not give her the reſt by Will? Decreed for Plaintiff the Wife for all the Lands deviſed to her by the Will. *Ibid.*——2 *Vern.* 720. *Clarke* and *Berkley et al'*, S. C. decreed *accord'*, and the Father's Conſent more to be regarded than any Conſent of the Truſtees to whom the Father had *delegated* a Power to conſent in Caſe of Marriage after his Deceaſe.

13. Lands deviſed to one in Fee, and afterwards mortgaged to the ſame Deviſee, is a Revocation *in toto*, being inconſiſtent with the Deviſe; tho' agreed, if the Mortgage had been to a Stranger, it had been a Revocation *quoad* the Mortgage only. Decreed *per* Lord *Macclesfield*, *Eaſt.* 1719. *Harkneſs* and *Bayley*, *Prec. in Chan.* 514.

Prec. in Chan. 541. S. C. ſtates it thus: *J. S.* by Will gave 300 *l.* Portion to *M.* his Daughter, *if ſhe married with her Mother's Conſent*, but if not, then 200 *l.* only; *M.* afterwards in the *Life-time of her Father*

14. *J. S.* by Will gives his Daughter 500 *l.* for her Portion, and afterwards marries her to *A.* and gives her 300 *l.* for her Portion in Marriage, and lived four Years after without revoking his Will. Afterwards the Huſband is a Bankrupt, and the Aſſignees brought a Bill againſt the Father's Executor for the 500 *l.* or at leaſt to recover 200 *l.* to make up the Portion *tantamount* to the 500 *l.* Legacy. Lord Chan. *Parker* with great Clearneſs held, that giving a Daughter a Portion by Will, and afterwards a Portion in Marriage, is by the Law of all other Nations as well as *Great Britain*, a *Revocation* of the Portion given by the Will; and diſmiſſed the Bill with Coſts. *Mich.* 1720. *Hartop* and *Whitmore*, 1 *Will. Rep.* 681.

and *Mother*, married *without* the Conſent of either of them; but the Father was afterwards prevailed on to give her 200 *l.* and died *without* altering his Will. *M.*'s Huſband afterwards becoming a Bankrupt, his Aſſignees brought a Bill to have the 300 *l.* or at leaſt the 200 *l.* given *M.* by her Father's Will; but the Bill was diſmiſſed, for that the 200 *l.* given by the Father in his Life-time was a Satisfaction of the Legacy, and a *Revocation* of the Will as to that Portion, and the 300 *l.* was to take Place on her marrying with her Mother's Conſent, which could only be intended after the Father's Death, and conſequently the Legacy never became due at all.

15. Teſtatrix having three Daughters, *A. E.* and *M.* by Will *deviſed* 1000 l. *to* A. 800 l. *to* E. *and* 500 l. *to* M. After this Will was made, Plaintiff courted *A.* and upon a Treaty of Marriage, *Teſtatrix gave a Note for* 500 l. *payable within ſix Months after the Marriage to Plaintiff, in Augmentation of her Daughter's Portion left her by her Father*; and *the next Day the Marriage was had*; and *upon the ſame Day the Teſtatrix was taken ill, and died ſix Days after, without altering or making a new Will*; but *ſhe did declare, that ſhe did intend that her Daughter* A. *ſhould have but* 1000 l. *from her, and that now ſince ſhe had given her this* 500 l. *ſhe muſt alter her Will*; and ſent for an Attorney to do it, but when he came ſhe was light-headed, and died ſoon after. And it was ſaid by the Defendants the Executors, that the Teſtatrix's Aſſets were not ſufficient to pay Plaintiff the 500 *l.* upon the Note and the 1000 *l.* Legacy, and likewiſe the Legacy left to the two other Daughters. And two Points were made; Firſt, If this 500 *l.* Note ſhall be taken in Part of Satisfaction of the 1000 *l.* Legacy. Secondly, If *parol* Evidence ſhall be admitted to prove the Intent of the Teſtatrix? And *per* Lord Chan. *Parker:* Circumſtances of the Teſtatrix and her Family may be given in Evidence to expound the Will, but not any *parol* Declarations

Declarations to explain the Words of the Will, or controul it: That in this Caſe there is no Doubt upon the Words of the Will, but the Queſtion is, If the Teſtatrix has not advanced Part of the Legacy in her Life-time upon the Marriage of her Daughter? And the Evidence is only as to the Satisfaction; and thereupon his *Lordſhip* admitted the Evidence to be read. The *Maſter* to ſee if Aſſets ſufficient to pay all the Legacies, and upon Report the Court to determine as to the *Quantum* due to the Plaintiff. *Hil.* 9 *Geo. Pepper et Ux'* and *Winyeve et al'*, *Vin. Abr.* Tit. *Deviſe*, (Y. 2.) *Ca.* 10. *P.* 158.

16. *J. S.* deviſed to *M.* his Wife ſix Houſes in Bar of Dower, and ſubject to his Legacies he deviſed [the reſt of] his real and perſonal Eſtate to his two Daughters, and their Heirs, in Moieties; and afterwards in Conſideration of the Marriage of *A.* his eldeſt Daughter with *B. J. S.* by Marriage Articles covenants to ſettle one Moiety of his real Eſtate *to the Uſe of himſelf for Life*, Remainder *to the Uſe of ſaid* B. *and* A. *his intended Wife for their Lives*, Remainder *to the younger Children of the Marriage in Tail general*, Remainder *to ſaid* B. *in Fee*; and alſo covenanted that he would ſtand poſſeſſed of one Moiety of all ſuch perſonal Eſtate as he ſhould leave at his Death, (ſubject only to his Debts and ſuch Legacies as ſhould amount to 5000 *l.*) In Truſt for *B.* and his ſaid intended Wife for their Lives, and afterwards to be paid to their younger Children. Lord Chan. *King* held that tho' this was but a Covenant, and therefore at Law *no* Revocation of the Will by which the Teſtator had diſpoſed of his real Eſtate, yet that the ſame being for a *valuable Conſideration*, was in Equity *tantamount* to a Conveyance, and conſequently in Equity a Revocation of the Will as to the Moiety of the ſix Houſes deviſed to the Teſtator's Wife, ſo that *B.* was intitled to one clear Moiety of the real Eſtate, and to an Account of the Rents, *&c.* thereof from *J. S.*'s Death; but as to the ſix Houſes deviſed to the *Teſtator*'s Wife, it being his Intent that ſhe ſhould have them, the Court held that ſhe ſhould have a Satisfaction out of the remaining Moiety, and that the Wife ſhould not ſuffer by the Marriage Articles, there being enough out of the *other* Moiety to ſupply and ſatisfy the Deviſe of the ſix Houſes to her. Therefore as to the other Moiety of the *real* Eſtate, it was decreed that the Teſtator's Widow was to have for her Life ſix Houſes, Part thereof, and the Reſidue of ſuch Moiety ſubject to the Wife's Eſtate for Life in the ſix Houſes, to be divided between the two Daughters equally. *Hil.* 1725. *Rider* and *Wager*, 2 *Will. Rep.* 328.

And his *Lordſhip* thought this Caſe the ſtronger, becauſe *after the Marriage Articles* entred into, *J. S.* had executed a *Codicil* confirming his Will ſubject to the Articles, which Confirmation was a *Republication* of his Will, and as if he had wrote it over again, or had afterwards, for a valuable Conſideration, aſſigned over a Moiety of his real and perſonal Eſtate to his eldeſt Daughter by which the ſaid Moiety thus diſpoſed of did no longer continue any Part of *J. S.*'s Eſtate, ſo that the Teſtator afterwards by deviſing a Moiety of his *real* and *perſonal* Eſtate, muſt be intended to have meant the remaining Moiety only, and to have divided that Moiety into Moieties. *Ibid.* 334. *Note*; After the making of the *Will* and Codicil, the Teſtator and his Wife by Leaſe and Releaſe and Fine mortgaged the Premiſſes, and it was urged that this was a *Revocation of the Will*; but *per Lord Chancellor*, It can only be a Revocation *pro tanto*. *Ibid.* 334.

17. *J. S.* on his Marriage with *F.*'s Daughter, ſettled 500 *l. per Annum* on her; he after ſurrendered ſome Copyhold Eſtates to the Uſe of his Will which he made, and gave the Copyhold to his Wife. Afterwards *J. S.* (on the Death of his Wife's Father) became intitled to 1500 *l.* in right of his Wife; then *J. S.* levied a Fine, and made a new Settlement, and increaſed her Jointure 300 *l. per Annum*, but never altered his Will. And *per Lord Chancellor*, The Settlement is a Revocation of the Will, for ſuch Lands as are not compriſed in it; but the *Copyhold* is not, and therefore paſſes by the Will. *Trin.* 1725. *Lannoy* and *Lannoy*, *Select Caſes in Chan.* 48.

18. *J. S.* in 1699 leaves to *A.* 8784 *l.* In Truſt to be by her inveſted in Lands, and to ſettle the ſame on herſelf for Life, Remainder to the Heirs of *B.* A Decree was had againſt *A.* to lay out the Money in Lands, and to ſettle the ſame according to *J. S.*'s Will.

A. purchaſes Land to the Value of 3300 *l.* and deviſes thoſe Lands to *C.* (who was Heir at Law to *B.*) and her Heirs, and gives ſeveral Legacies, which could not be paid if the Deviſe were not to be taken as Part Satisfaction; and for that Reaſon it was ſo decreed. *Per* Lord Chan. *King*, *Mich.* 1726. *Gibſon* and *Scudamore*, *Select Caſes in Chan.* 63.

3 *Will. Rep.* 169. by way of Note, cites S.C. and ſays, the Judge's Certificate appears to be ſo by the Regiſter's Book; with which Lord Chan. *King* concurred, and ordered that the ſeveral Truſts in *A.*'s Will ſhould be eſtabliſhed; but adds, that if *A.* deviſes Lands and levies a Fine, and the Caption and Deed of Uſes are *before* the Will, but the Writ of Covenant is returnable after the Will, this ſeems a Revocation; becauſe a *Fine operates as ſuch from the Return of the Writ of Covenant, and not from the Caption.*——See *Salk.* 341. *Lloyd* and *The Lord Say and Seal*; and yet this an hard Caſe, ſince by the Caption the Party Conuſor does all his Part, and the reſt is only the Act of the Clerk or his Attorney, without any particular Inſtructions from the Party.

19. *A.* and *B.* were Tenants in Common of Lands in Fee. *A.* by Will dated 25 *Jan.* 1719. *deviſes her Moiety of the ſaid Lands unto Truſtees and their Heirs*, Upon Truſt *to ſell the ſame* for the Purpoſes therein mentioned; afterwards *A.* and *B.* made Partition by Deed, dated 16 *May* 1722, and a Fine was levied, and the Uſes were declared to be as to one Moiety in Severalty to *A.* in Fee, and as to the other Moiety in Severalty to *B.* in Fee. In 1724 *A.* died without revoking or altering her ſaid Will, leaving *J. S.* her only Son. *Lord Chancellor* declared that the Will was well proved, but referred it to the Judges of *B. R.* whether the Deed of 16 *May* 1722 and the Fine levied purſuant thereto was not a Revocation of the Will. And *Raymond* Ch. J. *Page*, *Probyn* and *Lee* Juſtices, certified their Opinions to be, that the Will was not revoked by *this* Deed and Fine, and that *A.*'s Share of the Lands contained in *this* Deed and Fine do paſs by the Will. *April* (9th) 1730. *Luther* and *Kirby*, *Vin. Abr.* Tit. *Deviſe*, (R. 6.) *Ca.* 30. *P.* 148.

Fitz-Gibb. Rep. 207. S.C. And as to the *Interlineation*, *Lord Chancellor* ſaid, that the Party that put it in, thought it would be of ſome Uſe or other, and it could be of no Uſe but to give *A.* an unlimited Power over the Eſtate; and as *A.*'s Intention was to reſerve ſuch a Power, his *Lordſhip* ſaid he would not abridge it. *Ibid.* 223.

20. *A.* being ſeiſed in Fee ſettled his Eſtate by Leaſe and Releaſe in 1712 to the Uſes therein after ſpecified, *with Liberty nevertheleſs at his Will* and Pleaſure *to diſpoſe of, change, or alienate the ſaid Eſtate, or any Part thereof, for any Eſtate or Eſtates whatſoever as he ſhould think fit, and to revoke all and every the Uſes thereby limited*, and then *declares the Uſes to himſelf for Life*, with *ſeveral other Remainders*, and a Remainder *to* D. *in* (*Fee*) *Tail.* The ſaid Deed contains the following Powers; Firſt, *A Power for* A. *by any Deed or Writing ſigned, ſealed and delivered in the Preſence of two or more Witneſſes, to demiſe, leaſe, limit or appoint the ſaid Premiſſes to any Perſon whatſoever for any Term or Terms whatſoever, and for ſo much yearly Rent as he ſhould think fit.* And *that it ſhall and may be lawful to and for the ſaid* A. *at any Time during his natural Life, at his Will and Pleaſure, to grant, ſell or demiſe the ſaid Premiſſes, or any Part thereof; or by any Deed or Writing under his Hand and Seal, or by his laſt Will*, &c. *in Writing, ſigned, ſealed, delivered and publiſhed in the Preſence of three or more Witneſſes, to revoke, repeal and make void, all and every, or any the Uſe and Uſes, Eſtate and Eſtates, Truſts and Limitations before raiſed, and to declare or limit the ſame or ſuch new Uſes as ſhould ſeem moſt meet to him; and then and from thenceforth the Eſtates before limited and ſo revoked, to ceaſe*, &c. *And that the ſaid* A. *may diſpoſe of the ſame Premiſſes, and every Part thereof, to ſuch other Perſon and Uſes as he ſhall think fit; any Thing*, &c. *to the contrary notwithſtanding.* The firſt Part of this Proviſo, *viz. to grant, ſell or demiſe*, appears inſerted by *Interlineation.*——In 1715 *A.* by *Leaſe and Releaſe*, reciting *that he was indebted as ſpecified in a Schedule* annexed, *conveyed his Eſtate to* W. R. *and* W. S. *and their Heirs*, In Truſt *to pay the ſaid Debts by the annual Profits, or Mortgage or Sale of the Premiſſes, and after Payment thereof, to pay the Overplus, if any, and reconvey ſuch Parts of the Premiſſes as ſhould remain unſold to the ſaid* A. *or to ſuch Perſon and Perſons and to ſuch Uſes*, &c. *as* A. *by any Deed or Writing under his Hand and Seal, atteſted*

by two or more credible Witneſſes, ſhould limit, &c. This Releaſe was atteſted by two Witneſſes only. *A.* died without Iſſue. *Lord Chancellor*, aſſiſted by Lord Chief Baron *Reynolds* and the *Maſter of the Rolls*, was of Opinion that *A.* intended to reſerve an abſolute Power over this Eſtate, and either to revoke it by an expreſs Revocation, or by a Conveyance to different Uſes, which are the two Kinds of Revocation, as is evident as well from the Preamble which is interwoven with the Conſideration of the Deed, as from the Proviſo; and in Conſequence of that Intention, it is reaſonable to ſuppoſe he meant to have a Power to defeat it without taking any Notice of it, and if no Power had been reſerved in the Body of the Deed, then would the Preamble have given a general Power. That a Conveyance to different Uſes would have been a Revocation as effectual as an expreſs Revocation, and that he thought any other Conſtruction would be forced and unnatural. That if *A.* had ſtopped with the firſt Words of the Proviſo, *viz. to grant, ſell or demiſe*, he had reſerved an abſolute Power. Then come the Words, *or by any Deed or Writing*. *Or* is plainly a Disjunctive, introductory of a different Sentence, and a different Power, which is plain by the Words immediately following, *viz. and then the Uſes ſo revoked and repealed*, refer to the expreſs Power of Revocation. That if the ſecond Part of the Clauſe, *or by any Deed or Writing*, &c. had been dropped, [and it had been] *or to repeal*, &c. it is plain they would be diſtinct Powers; and his *Lordſhip* aſked, why thoſe Words ſhould alter the Caſe? That the Circumſtance *of three Witneſſes*, is only applicable to the expreſs Revocation, but it neither goes to the firſt Power, nor to the general Power of Diſpoſing at the End of the Clauſe, *viz. and that the ſaid* A. *ſhall and may diſpoſe*, &c. which is as much a diſtinct Power as can be, and is larger than the firſt, for by this he might give his Eſtate (Tail) by Will. That the expreſs Power of Revocation could not by this Conſtruction be thought *Nugatory*, for within the firſt Power he could not be reinſtated in his former Eſtate without a Conveyance and Reconveyance; nor could he have deviſed it. But admitting it to be ſo, he thought a general Intention is not to be ſuperſeded becauſe a ſubſequent Part of the Deed is Surpluſage, and that the whole legal Eſtate paſſed to the Truſtees by the Deed of 1715. Decreed 12 *June* 1730. *Fitzgerald* and *Lord Fauconberge*, *Lilly's Pract. Conv.* 390, 400. Affirmed *in Dom. Proc'*, 27 *Feb.* 1730.—1 *Ibid.* 402.

21. Tho' a Covenant or Articles do not *at Law* revoke a Will, yet if entered into for a *valuable Conſideration*, amounting *in Equity* to (*a*) a Conveyance, they muſt conſequently be an *equitable* Revocation of a Will, or of any Writing in Nature thereof. A Woman's Marriage is (*b*) alone a Revocation of her Will. *Per* Lord Chan. *King*, *Trin.* 1731. *in Caſu Cotton* and *Layer*, 2 *Will. Rep.* 624.

(*a*) See the ſame reſolved in the Caſe of *Sir Barnham Ryder* and *Sir Charles Wager*. *Ibid.* 332.

(*b*) 4 *Rep.* 61.

22. Tenant in Tail Remainder to himſelf in Fee, deviſes his Lands to *A.* and then ſuffers a Recovery to the *Uſe of himſelf in Fee*, and *dies without Iſſue Male*; this is a *Revocation* of the Will. *Hil.* 1732. *Marwood* and *Turner*, 3 *Will. Rep.* 163.

23. *J. S.* ſeiſed of a Leaſe for Lives, deviſes it; and afterwards *J. S.* ſurrenders the old Leaſe, and takes a new one to him and his Heirs for three Lives. Decreed by Lord Chan. *King*, that this *Renewal* of the Leaſe was a Revocation of the Will as to this Particular. *Hil.* 1732. *Marwood* and *Turner*, 3 *Will. Rep.* 166, 170.

For by the Surrender of the old Leaſe, *J. S.* the Teſtator had put all out of him, had deveſted himſelf of the whole Intereſt; ſo that there being nothing left for the Deviſe to work upon, the Will muſt fall, and the new Purchaſe being of a Freehold deſcendible, could not paſs by a Will made before ſuch Purchaſe. *Per* his *Lordſhip*, who wondered, that this Caſe, which he ſaid muſt have often happened, had not been before determined. *Ibid.* 171.

24. *A.*

24. *A.* 23d *June* 1729 made his Will, and *executed two Duplicates thereof before three Witneſſes*, and made *B.* and *C.* (ſince deceaſed) Executors, and *one of the Duplicates was delivered to* B. *A.* died 2 *Oct.* 1730, and *about three Weeks before his Death he made ſeveral Alterations and Obliterations with his own Hand in the Duplicate remaining in his own Cuſtody, making a new Deviſe of his real Eſtate,* and *a new reſiduary Legatee* and *a new Executor, entirely ſtriking out the Names of the firſt Deviſees, reſiduary Legatee and Executors,* and *altered ſeveral of the former Legacies,* and *inſerted* or *interlined new Legacies*; and *ſoon after wrote another Will with his own Hand,* agreeable in a great Meaſure, but not altogether to the Will or Duplicate ſo altered, with Concluſion in theſe Words: "*In Witneſs whereof I* "*the ſaid Teſtator have to each Sheet ſet my Hand, and to the Top where* "*the Sheets are fixed together, my Hand and Seal, and to the laſt thereof* "*my Hand and Seal, and to a Duplicate of the ſame Tenor and Date,* "*this Day of* 1730." But there was *no Signing or Fixing together.* Teſtator ſoon after began to write another Will, Word for Word with the laſt, ſo far as it goes, but went no farther than deviſing his Lands. Teſtator lived ſix Days after, and was in good Health, and might have finiſhed and executed both or either of the latter Wills if he had thought fit. Teſtator never ſent or called upon *B.* for the Duplicate of the firſt Will in his Hands, tho' *B.* lived in Town. After the Death of Teſtator, all the Teſtamentary Papers or Schedules were found lying all in looſe and ſeparate Papers upon a Table in his Cloſet, not ſigned or executed, and the Duplicate of the firſt Will was found on the ſame Table altered and obliterated, (*ut ſupra*) with his Name and Seal thereto whole, and uncancelled. Sentence was given in the Prerogative Court for the Duplicate of the firſt Will in *B.*'s Hands, and confirmed upon Appeal to the Delegates, *viz.* Lord *Raymond* Ch. J. and *Probyn* J. Dr. *Tindale* and Dr. *Brampſton*, (who were all the Delegates preſent) after four Days ſolemn Hearing; and upon a Commiſſion of Review (granted by Lord Chan. *King* upon the Petition of *Hyde* the Executor named in the new Will) was again affirmed by the Opinion of all the Delegates, (except Dr. *Pinfold*) *viz.* of the Judges *Reynolds* C. B. *Page* J. and *Comyns* B. and two Doctors of the Civil Law, chiefly on the Reaſon (as the *Reporter* ſays he heard) that the Teſtator did not intend an Inteſtacy, and by the Alterations and Obliterations in his own Duplicate of his firſt Will he appeared only to deſign a new Will, which as he never perfected, the firſt ought to ſtand, and Teſtator not calling for the Duplicate of the firſt Will in *B.*'s Hands, ſtrengthens the Preſumption of his Intent not abſolutely to deſtroy his firſt Will till he had perfected another, which he never did. 25 *Nov.* 1734. *Hide* and *Maſon*, *Vin. Abr.* Tit. *Deviſe*, (R. 2.) *Ca.* 17. *P.* 140.

3 *Will. Rep.* 344. S.C. and ſays, *Lord Chancellor* allowed Plaintiffs their Coſts, tho' it was prayed that they might come out of the Eſtate, (which Defendant the Truſtee urged would be the ſame Benefit to Plaintiffs) but the Court denied it, as tending to leſſen the Charity, and ſaid the Truſtee had made ſo ill a Defence as not to deſerve the leaſt Favour.——*Vin. Abr.* Tit. *Deviſe*, (R. 6.) *Ca.* 31. *P.* 149. S.C.

25. J. S. *deviſed all his real and perſonal Eſtate to Truſtees* A. B. *and* C. *their Heirs, Executors and Adminiſtrators*, In Truſt *to pay* 15*l.* per Ann. *to the Plaintiffs* (his two Siſters) *for their Lives*, and after ſeveral Legacies, the Surplus In Truſt *for the Diſſenting Miniſters at* Reading, &c. and gave 300 *l.* apiece to each Truſtee, and 20 *l. per Annum* to each, while they took Care in executing the Truſt. Afterwards by Leaſe and Releaſe of ſubſequent Date to the Will, the *Teſtator conveyed all his real Eſtate unto and to the Uſe of the ſaid* A. B. *and* C. *and their Heirs, with a* Proviſo *to be void on Payment of* 10 s. And *by another Deed of the ſame Date the Teſtator gave all his perſonal Eſtate to ſaid* A. B.

and

and C. Proviſo *to be alſo void on Payment of* 10 s. but *J. S.* kept both theſe Deeds in his Cuſtody, and ſoon after died, and the ſaid *A. B.* and *C.* obtained Adminiſtration *cum Teſtamento annexo* as Truſtees. The Truſtees for ſome Time paid the 15 *l. per Annum* apiece to each of the Teſtator's Siſters, but afterwards refuſed to continue the Payment thereof, and alſo refuſed to pay any of the Diſſenting Miniſters, but kept the Rents, *&c.* to their own Uſe. The two Siſters (the Heirs at Law) and their Huſbands, brought their Bill againſt the ſurviving Truſtee, inſiſting that the Deed of Conveyance of the *real* Eſtate and the Deed of Gift of the *perſonal* Eſtate had *revoked* the Will, and that there was a reſulting Truſt for them as Heirs at Law; or at leaſt that they (the Siſters) were intitled to their 15 *l. per Annum* Annuities. Defendant inſiſted on Plaintiff's having forfeited their Annuities by bringing their Bill, there being a Clauſe in the Will that if they (the Siſters) diſputed the Will, then they ſhould forfeit their Annuities. Lord Chan. *Talbot* decreed that the Annuities ſhould be paid to the two Siſters, with the Arrears and growing Payments thereof; but the Surplus was decreed to go to the Diſſenting Miniſters. *Mich.* 1734. *Lloyd et Ux' et al'* and *Spillet et al'*, *MS. Rep.*

26. Sir *John Wolryche* by Will in *Auguſt* 1722 deviſes his Eſtate to Truſtees for the Term of two hundred Years, for Payment of all his Debts. In *December* following he deviſed the ſame to other Truſtees for three hundred Years, In Truſt to pay ſome particular Debts by Specialty mentioned in the Deed, and all Incumbrances that affected his Eſtate. In *June* 1723 he died; and the Queſtion was, If the Deed in *December* was a total *Revocation* of the two hundred Years Term? And at the Rolls both Terms being held to be conſiſtent, the Plaintiff now brought a Bill of Review, and *Talbot* Lord Chan. was of Opinion, that the Deed in *December* was intended only as a collateral Security for Payment of the Debts therein mentioned, and ſuch others as were a Charge on the Eſtate, and that Sir *John* did not depart from his former Intention of paying all his Debts, but only to give Preference to thoſe compriſed in the three hundred Years Term, who by Law were preferred to the ſimple Contract Debts; and therefore he decreed that ſo much of the three hundred Years Term ſhould be ſold as would ſatisfy the Purpoſes of the Deed, and afterwards the two hundred Years Term ſhould commence. *Weld* and *Acton et al'*, *Mich.* 9 *Geo.* 2. *MS. Rep.*

(F) Where the Probate differs from the original Will.

1. A WILL is made in *French* and proved in *French*, and under it in the ſame Probate the Will was tranſlated into *Engliſh*, but it appeared to be *falſly* tranſlated. Objected, That the Tranſlation being Part of the Probate, and allowed in the *Spiritual* Court, it muſt bind; and the Application muſt be to that Court to correct the Miſtakes, which until then muſt be concluſive. But *per* his *Honour*, Nothing but the Original is Part of the Probate, neither hath the Spiritual Court Power to make any Tranſlation; and ſuppoſing the original Will was in *Latin*, (as was formerly very uſual) and there ſhould be a plain Miſtake in the Tranſlation of the *Latin* into *Engliſh*, ſurely the Court would determine according to what the Tranſlation ought to be. And ſo it was done in this Caſe. *Hil.* 1718. *L'Fit* and *L'Ratt*, 1 *Will. Rep.* 526.

CAP. CXX.

Writs.

(A) Of the Writ Homine Replegiando.
(B) Of the Writ Ne exeat Regnum.
(C) Of filing an original Writ Nunc pro tunc, &c.
(D) Of the Writ de Ventre Inſpiciendo.

(A) Of the Writ Homine Replegiando.

1. A WIFE cannot either by herſelf or *Prochein Amy*, bring an *Homine Replegiando* againſt her Huſband, for he has by Law a Right to the Cuſtody of her, and may, if he thinks fit, confine her; but he muſt not impriſon her, if he does, it will be good Cauſe for her to apply for a Divorce, *propter Sævitiam*; and the Nature and Proceedings in this Writ ſhew, that it cannot be maintained by the Wife againſt her Huſband. *Eaſt.* 1708. *Atwood* and *Atwood*, *Prec. in Chan.* 492.

(B) Of the Writ Ne exeat Regnum.

1. THE Defendant obtained an Order to have his Solicitor's Bill referred and taxed; upon the Taxation he was reported to be over-paid 60 *l.* thereupon Defendant moved for a *Ne exeat Regnum* againſt the Solicitor, on Affidavit that he was going beyond Sea with the Governor of *Jamaica*; and the Writ was granted by the *Maſter of the Rolls*, in the Abſence of *Lord Keeper*, tho' there was no Bill in Court whereon to ground this Writ. *Mich.* 1701. *Lloyd* and *Cardy*, *Prec. in Chan.* 171.

2. *Ne exeat Regnum* lies to prevent one's going to *Scotland*. *Trin.* 1714. *Done's Caſe*, 1 *Will. Rep.* 263.

Scotland being out of the Juriſdiction of this Court, and conſequently out of the Reach of the Proceſs thereof, the Defendant's going *there* is equally miſchievous to the Suitors *here*, as if he went actually out of the Kingdom; and tho' in this Caſe it was moved for one Defendant againſt another Defendant, yet it being in a Matter of Account, in which both Parties are Actors, and Money being ſworn due from the Party againſt whom the Writ is prayed, to the other, Lord Chan. *Harcourt* thought the Motion proper. *Ibid.*——Where the Party is to be reſtrained from going to *Scotland*, the Condition muſt be, not to go out of the Realm or to *Scotland*, for if it be only not to go out of the Realm, the Party's going to *Scotland* will not forfeit the Bond or Recognizance. *Ibid.* by way of Note.——Lord Chan. *Talbot* was moved that a *Ne exeat Regnum* might be ſo framed as to prevent the Defendant from going into *Scotland*, upon Affidavit of his going to reſide there; and that he had confeſſed that as a Truſtee for the Plaintiff under his Father's Will, he had received 10,000 *l.* An Order had been made at the Rolls for a *Ne exeat Regnum* to iſſue (upon Petition) and marked for 10,000 *l.* but it was apprehended that the *uſual* Writ (which only reſtrains a Merchant from going out of the Realm) would not reſtrain his going to *Scotland*, which by the Union is now the ſame Kingdom, and yet as effectually out of the Reach of the Proceſs of the Court as any Foreign Part out of the King's Allegiance. His *Lordſhip* aſked what Authority he had to alter an original Writ, eſpecially as this Writ was not originally intended to aid the Proceſs of the Court, but was a Mandatory Writ to prevent the King's Subjects from going into Foreign Countries, to practiſe Treaſon

with the King's Enemies; and ſeemed to think, that this Caſe muſt have happened ſince the *Union*; and yet he had never known or heard of any Attempt had been made to alter the Writ; and ſaid, that perhaps there was no Foundation for the Doubt whether the common Writ would not prevent the Defendant from going into *Scotland* as well as any of the King's other Dominions out of the Reach of the Proceſs of the Court. *Eaſt.* 1736. *Hunter* and *Meccray*, *Caſes in Eq. Temp. Talbot* 196.——Mr. *Hamilton* informed the Court that ſomething of this Kind had been moved in one *Mitchel*'s Caſe in the Lord *Cowper*'s Time, who ſeemed to think that the Writ extended to *Scotland*, notwithſtanding the *Union*, but did nothing in it. The *Regiſters* likewiſe ſaid, they never knew any other than the common Order made. His *Lordſhip* ſaid, it was dangerous to alter old eſtabliſhed Forms, and therefore would make no Order in it. *Ibid.* 197.

(C) Of filing an original Writ Nunc pro tunc, &c.

1. UPON a Petition to his *Honour* for Leave to file an Original after Error brought to reverſe the Judgment, his *Honour* (upon ſpeaking with an antient Officer of the Court) denied the doing it, and the rather, in the principal Caſe, becauſe the Action being on a Policy of Inſurance, the Plaintiff might bring a new Action, if this Judgment ſhould be reverſed. *Mich.* 1717. *Anon.* 1 *Will. Rep.* 411. *Secus* had it been in a *Quare Impedit*, or in an Action againſt the Hundred for a Robbery where the Suit muſt be commenced within a (*a*) limited Time, or if the Time had been ſo far elapſed as that the Statute of Limitations had been a Bar, if the Judgment ſhould be reverſed. *Ibid.* 412.

In Caſe of a Judgment by Confeſſion, Equity will give Leave to file an Original after a Writ of Error brought to reverſe the Judgment, becauſe in ſuch Caſe as the Defendant conſents that there ſhall be Judgment awarded againſt him, ſo does he likewiſe by Implication conſent to all thoſe Means without which the Judgment cannot be effectual; and conſequently that an Original ſhall at any Time be filed, eſpecially if ſuch Judgment was given as a Security for Money or other valuable Conſideration. *Ibid.* 411, 412. *Secus* where Judgment is given by Default or on Demurrer, *&c.* and there is alſo a Difference where the Omiſſion proceeds from the *Ignorance*, and where by the *Miſpriſion* of the Clerk, for in the former (*b*) Caſe it is not to be helped, and ſuch Leave to file an Original *(ut ſupra)* ought not to be given without very ſpecial Reaſon, for this would be a Wrong to the Crown and to the Officer, no Original being then likely to be filed, unleſs where the Party ſhould find himſelf in Danger of having his Judgment reverſed. *Per* his *Honour*, *ibid.* 412.—— But after, in *July* 1719, in another Cauſe, on a Petition for Leave to file an Original, upon Affidavit that *the Plaintiff's Attorney had been ill* and *diſordered in his Head*, by which Means an Original was omitted to be filed; and a Writ of Error being brought to reverſe the Judgment, and Bail given thereon, his *Honour* gave Leave to file the Original, paying the Coſts of the Error hitherto, and the Bail in Error to be diſcharged. *Ibid.* 412.

(*a*) *Vide* 3 *Lev.* 347. *Beachcroft* and *The Hundred of Burnham*, where for this Reaſon, *viz.* becauſe the Time for bringing the Action was elapſed, the Court gave Leave to amend after Iſſue was joined, and the Jury had appeared at the Bar. (*b*) *Vide Blackmore's Caſe*, 8 *Co.* 159. *a. b.*

2. Inſtructions for an Original againſt an Hundred for a Robbery committed on 16 *June* 1717, were brought to the Curſitor for an Original againſt the Hundred within the Year, but the Writ paſſed the Great Seal *after the Year*, tho' teſted within the Year, *viz.* when the Inſtructions were brought to the Curſitor. Lord *Parker* referred it to the Principals and Aſſiſtants of the Curſitors Office, to certify what had been the Uſage and Cuſtom in ſuch Caſes, who certified it to be the conſtant Practice of their Office to teſte original Writs againſt *Hundreds*, *Corporations*, *Heirs*, and in ſeveral other Caſes, the ſame Days the Writs are beſpoke; and that they never knew it otherwiſe, or that the Practice ever was conteſted before the preſent Caſe. Whereupon his *Lordſhip* ordered the Plaintiff to be at Liberty to proceed in this Hue and Cry, and that Defendants ſhould pay the Coſts in reſpect of the Reference. *Trin.* 1718. *Price* and *Cheweton Hundred in Com' Somerſet*, 1 *Will. Rep.* 437.

(D) Of

(D) Of the Writ de Ventre Inſpiciendo.

1. KING Lord C. held this Writ to be of common Right, and ſaid that it is in the *Regiſter*, tho' not in *F. N. B.* and is for the Security of the next Heir, to guard him or her againſt fraudulent or ſuppoſititious Births; and that it lies for a *Tenant in Tail*, becauſe at the Time it was firſt allowed *ſuch Eſtate* was a *qualified Fee*; and ſaid, that any Affidavit proving the Huſband to be in Poſſeſſion would induce him *primâ facie* to intend it a Fee-ſimple. And in the principal Caſe, the Widow being admitted to be with Child, the Court fixed a Place agreeable to *both* Parties, where ſhe might be 'till delivered, and where the Heir might from Time to Time, at proper Seaſons and on Notice ſend Women to ſee her, and to be preſent when the Child is born; and in ſuch Caſe no Need to execute the Writ in a ſtrict Manner. *Trin.* 1731. *Ex parte Aiſcough*, 2 *Will. Rep.* 593.

F I N I S.